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January 15, 1999

VIA HAND DELIVERY
Magalie Roman Salas
Secretary
Federal Communications Commission
TW-A325
445 - 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket Nos. 96-45 and 97-160

Dear Ms. Salas:

On behalf of GTE Service Corporation, attached herewith is an original and four (4) copies of GTE's Application for Review of the Common Carrier Bureau's Order Dated December 17, 1998, and Review of Freedom of Information Action in the above-referenced matter.

Kindly date-stamp the additional, marked copy of this cover letter and return it in the envelope provided.

Should you require any additional information, please contact the undersigned.

Sincerely,

Thomas W. Mitchell
Attorney for GTE SERVICE CORPORATION

TWM:djs

Enclosures

No. of Copies rec'd 0+4
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Forward-Looking Mechanism for High Cost Support for Non-Rural LEC's	)	CC Docket No. 97-160

GTE'S APPLICATION FOR REVIEW OF THE COMMON CARRIER BUREAU'S ORDER DATED DECEMBER 17, 1998, AND REVIEW OF FREEDOM OF INFORMATION ACTION

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January 15, 1999

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SUMMARY

The Common Carrier Bureau ("Bureau") erred when it denied GTE's Freedom of Information Act ("FOIA") requests and motion seeking information and documents relating to the FCC Model.

The Bureau denied many of GTE's requests by claiming that the requested documents were publicly available, even though most of the documents sought by GTE have never been public. GTE's experts need, but have never seen, a complete and operational version of the Model adopted by the Commission, all inputs, all geocoding data, all algorithms, all software interfaces, all documentation, and all output reports used by the Commission's staff to develop, test and modify the Model. Thus, the Bureau cannot refuse GTE's requests by arguing that GTE already has what was requested.

The Bureau also wrongly asserted that all withheld documents are privileged under 47 C.F.R. § 0.457(e), the "deliberative process" exemption. Many of the documents requested by GTE are not privileged because they are not pre-decisional; many others will simply embody or reflect the Commission's decisions in the Fifth Report and Order. In addition, GTE has requested factual documents that are not protected from disclosure by the "deliberative process" exemption.

Finally, the Bureau cannot withhold requested materials by claiming that the Commission did not rely on them in making its decisions in the Fifth Report and Order. The Bureau has cited no authority under the FOIA for its position that GTE must prove reliance by the Commission, or that an asserted lack of reliance can defeat GTE's right to obtain non-privileged documents.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Forward-Looking Mechanism for High Cost Support for Non-Rural LEC's	)	CC Docket No. 97-160

GTE'S APPLICATION FOR REVIEW OF THE COMMON CARRIER BUREAU'S ORDER DATED DECEMBER 17, 1998, AND REVIEW OF FREEDOM OF INFORMATION ACTION

GTE Service Corporation and its affiliated domestic telephone operating companies ("GTE"), pursuant to 47 C.F.R. §§ 0.461 and 1.115, request that the Federal Communications Commission (the "Commission") review and reverse the Common Carrier Bureau's denials of GTE's Freedom of Information Act Request ("FOIA Request") and Emergency Motion for Disclosure of Data and Information to Permit Public Review and Extension of Time ("Motion"), as reflected in the Bureau's Order dated December 17, 1998 (the "Order") in the above-captioned docket.[1/]

1/ In the Matter of Federal-State Joint Board on Universal Service, In the Matter of Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, CC Docket Nos. 96-45, 97-160, *Order*, DA-98-2567 (rel. Dec. 17, 1998) (the "Order"). The GTE affiliated domestic telephone operating companies are GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, GTE Midwest Incorporated, GTE North Incorporated, (continued...)

I. FACTUAL BACKGROUND

The documents at issue here relate to GTE's efforts to evaluate the cost model platform (the "FCC Model" or "Model") adopted by the Commission in its Fifth Report and Order dated October 28, 1998.[2/] The FCC Model is a new, so-called "synthesis" of elements from the Benchmark Cost Proxy Model ("BCPM"), the HAI Model ("HAI"), and the Hybrid Cost Proxy Model ("HCPM"). The Bureau's staff developed the FCC Model, and the Commission released a copy of it to the public for the first time on November 18, 1998, when the *Federal Register* published the Fifth Report and Order. The Commission did not, prior to the release and subsequent publication of the Fifth Report and Order, formally announce its intention to select the Model, make it available for inspection, or thereafter allow interested parties to comment upon it.

GTE attempted to analyze the FCC Model for the first time beginning in mid-November 1998, when considering whether to file a petition for reconsideration of the Fifth Report and Order. GTE's economic and engineering experts were unable to evaluate the Model for a variety of reasons, the most significant of which was that GTE did not have the necessary information, including critical components of the Model platform and its inputs. Thus, GTE made a FOIA Request and filed the Motion on November 30, 1998 -- less than

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1/ (...continued)
GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., GTE West Coast Incorporated, and Contel of the South, Inc.

2/ In the Matter of Federal-State Joint Board on Universal Service, In the Matter of Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, CC Docket Nos. 96-45, 97-160, *Fifth Report and Order*, FCC 98-279 (rel. Oct. 28, 1998) ("Fifth Report and Order").

two weeks after first seeing the Commission's new Model.[3/] GTE asked that the information be provided as soon as possible, so that it could be incorporated in a petition for reconsideration due December 18, 1998.

The Bureau granted, in part, and denied, in part, GTE's Motion and FOIA Request on December 17, one day before GTE's petition for reconsideration was due. GTE has yet to receive any of the information the Bureau agreed to produce. Moreover, GTE has learned that PNR is not prepared to release the most important data -- PNR's point data -- at this time.[4/]

The Bureau denied the vast majority of GTE's requests on three grounds. First, the Bureau claimed that what GTE needed to evaluate the Model was already available in the public record.[5/] More specifically, the Bureau claimed that the components of the synthesis platform and its interface software (but not the Model as a whole) have been publicly available for a long time.[6/] Second, the Bureau asserted that all documents requested but not produced were privileged and not subject to disclosure under 47 C.F.R. § 0.457(e).[7/] Third, the Bureau claimed that, even if none of the withheld information was privileged,

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3/ Although the Fifth Report and Order contained a lengthy description of the FCC Model, GTE could not analyze the Model itself until it was actually made available on the Commission's website on November 18, 1998. Thus, the implication in footnote 7 of the Bureau's Order that GTE delayed requesting the information for more than 30 days is wrong.

4/ Affidavit of Christian M. Dippon ("Dippon") at ¶ 10 (Attachment A).

5/ Order at ¶ 2.

6/ *Id.* at ¶ 3.

7/ *Id.* at ¶ 2.

GTE was still not entitled to any of it because the Commission did not rely on it "in reaching the decisions in the Fifth Report and Order."[8/] GTE filed its petition for reconsideration the next day, without any of the requested information.

The viability of the federal universal service mechanism proposed by the Commission depends on the cost estimates generated by the FCC Model.[9/] To date, no one knows whether the FCC Model produces reasonable and reliable results. The requested information bears directly on GTE's ability to perform a meaningful evaluation of the Model.[10/] The Bureau and the Commission should not be opposed to such an evaluation. GTE files this Review of Freedom of Information Action and Application for Review so that it can supplement its petition for reconsideration and submit other evidence based on the information that GTE needs to evaluate the Model.

8/ *Id.*

9/ GTE has and continues to oppose the use of cost proxy models because they, by definition, do not provide accurate calculations of a company's actual costs of providing universal service.

10/ Commissioner Furchtgott-Roth aptly summarized the consequences of the Bureau's failure to produce the requested documents in a statement accompanying the Order: "[I]t is impossible for GTE to determine whether or not the model that the Commission has selected is operating consistent with the findings and conclusions contained in the Commission's Order;" the Model uses a distribution scheme that is currently a "black box;" and it is "difficult if not impossible to determine whether the model complies with engineering design standards" or "assess whether the assumptions and algorithms are consistent from module to module." In the Matter of Federal-State Joint Board on Universal Service, In the Matter of Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, CC Docket Nos. 96-45, 97-160, *Statement of Commissioner Harold Furchtgott-Roth*, FCC 98-279 (rel. Dec. 17, 1998) ("Furchtgott-Roth Statement").

II. QUESTIONS PRESENTED

Did the Bureau err when it concluded that the documents needed and sought by GTE are already in the public record of this proceeding and thus need not be produced?

Did the Bureau err when it decided that documents requested by GTE, such as PNR's customer location data, the input values used by the Bureau's staff to develop, test and modify the Model, output reports reflecting the staff's runs of the Model, all design and engineering guidelines considered by the staff, and all other information "relied on, created, authored, electronically produced or otherwise used by the FCC or FCC staff," constitute privileged "interagency and intra-agency memorandums and letters" that may be withheld under 47 C.F.R. § 0.457(e)?

Did the Bureau err when it refused to disclose requested documents on the grounds that the Commission did not rely on such data when it selected the Model?

III. FACTORS WARRANTING COMMISSION REVIEW

Several of the factors set forth in 47 C.F.R. § 1.115(b)(2) warrant the Commission's review and reversal of the Bureau's actions denying GTE's FOIA Request and Motion.

First, the Bureau's actions conflict with applicable "statute, regulation . . . [and] established Commission policy."[11/] The Bureau's denials of GTE's FOIA Request and Motion violate 5 U.S.C. § 552 and 47 C.F.R. § 0.457 because the materials withheld by the Bureau are not pre-decisional, are factual, and thus do not qualify as privileged material. The FOIA also does not permit an agency to withhold non-privileged documents by claiming that it did not rely on them when making a decision. Moreover, in this rulemaking

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11/ 47 C.F.R. § 1.115(b)(2)(i).

proceeding, GTE is entitled to comment and submit evidence on the Model, a proposed new rule.[12/] The denial of GTE's Motion deprives GTE of the ability to submit its evidence concerning the Model.

Second, the Bureau's actions involve "a question of law or policy which has not previously been resolved by the Commission."[13/] The bulk of the record in this proceeding relates to the BCPM, HAI and HCPM models. The developers of those models had to open their files and make the models fully transparent, so that they could be understood by all interested parties. Having adopted a Model that is not transparent, the Commission's records relating to the development of the Model should be equally open for inspection so that the public can understand how the FCC Model works. The Commission has not previously addressed or resolved this issue.

Finally, the Bureau's actions reflect an "erroneous finding as to an important or material question of fact."[14/] One premise of the Bureau's decision was that the information that GTE needed to evaluate the Model was already in the public record. That finding is wrong. Thus, it should not be the reason that any information is withheld from GTE. Moreover, it is not proper to deny a FOIA request simply because the requested information is publicly available.

12/ 5 U.S.C. § 553; 47 C.F.R. § 1.411 *et seq.*

13/ 47 C.F.R. § 1.115(b)(2)(ii).

14/ 47 C.F.R. § 1.115(b)(2)(iv).

IV. ARGUMENT

A. Documents Needed To Evaluate The Model Are Not In The Public Record

GTE's FOIA Request described 21 categories of documents that it does not have and cannot obtain unless the Commission produces them.[15/] Contrary to what is suggested in the Bureau's Order, GTE did not file its FOIA Request or Motion simply to demand documents that it could readily obtain from the public record of this proceeding. Such a request would serve no useful purpose. GTE is not interested in wasting its or the Commission's time with such requests. Rather, as explained in its filings, GTE needs the requested information to evaluate thoroughly whether the FCC Model designs a plausible, forward-looking network, and generates reasonable and reliable cost estimates. GTE can do that only if the Commission produces the requested documents.

It cannot be seriously contended that the documents requested by GTE but withheld by the Bureau are already in the public record. The only public information relating *specifically* to the FCC Model as of November 30, 1998, was contained in (i) the language of Fifth Report and Order, and (ii) an incomplete and non-operational Model version on the Commission's website. GTE needs more information than is contained in those materials.

The Commission has still not released a fully operational version of the Model, even though the "components of the synthesis platform" come from other models.[16/] Because the "components" were not designed to work together, and GTE has yet to see in an

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15/ GTE's Motion contained 21 requests that were identical to those in the FOIA Request, and two new requests: Nos. 19 and 21. Motion at pp. 5-8.

16/ Affidavit of Francis J. Murphy ("Murphy") at ¶¶ 3, 10 (Attachment B).

operational version how the Model gets them to work together, GTE cannot evaluate it.[17/] The Commission has never disclosed the input values that it used to develop, approve and modify the Model, and thus are needed to evaluate it.[18/] The model descriptions of BCPM, HAI and HCPM referred to in the Fifth Report and Order are of little analytical use because the FCC Model alters the switching and expense modules that have been used. The Commission has still not released these modules "as modified."[19/] The Commission has not released the surrogate location placement algorithm, which is a critical part of the working Model.[20/] The Report and User Manual fail to provide enough data for a model expert to determine the sequential flow of the algorithms that are the foundation for the platform.[21/] Thus, the public data do not enable GTE's cost model experts to perform a meaningful analysis of the Model. One of GTE's experts, Mr. Francis J. Murphy, explained in detail on November 30, 1998, why the requested documents were needed to evaluate the Model, and that he did not have that information because it had never been made available.[22/] Significantly, the Bureau's Order does not dispute the substance of Mr.

17/ As Commissioner Furchtgott-Roth correctly noted, making the separate components available "is not a sufficient substitute for making the model fully available to all parties who are interested." Furchtgott-Roth Statement at p. 1.

18/ Murphy at ¶ 6.

19/ Murphy at ¶¶ 4-5.

20/ Murphy at ¶ 10.

21/ Murphy at ¶¶ 13-14.

22/ Affidavit of Francis J. Murphy on behalf of GTE Service Corporation at ¶¶ 4-14 ("Murphy") attached to the Motion.

Murphy's testimony.[23] GTE's experts have now explained in affidavits attached to this filing that, as of January 13, 1999, public documents still do not permit a meaningful analysis of the Model.[24]

Thus, the following types of documents cannot be legitimately withheld from GTE on the grounds that they are and have been publicly available:

- A complete and operational copy of the FCC Model in existence at the time the Commission adopted the Fifth Report and Order, and all subsequent revisions;
- All customer location data, databases, algorithms, software, and clustering routines used by the Commission;
- All input files containing values used by the Commission to develop, test and refine the Model;
- All algorithms and data relating to the Model's software interfaces and optimization routines;
- All output reports reflecting runs of the FCC Model, and all spreadsheets, worksheets, charts, and sensitivity analyses of the Model; and

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23/ The Order implies that GTE has exaggerated its "need" for the requested data: "[T]he information is not necessary for GTE or other parties to formulate petitions for reconsideration of that order." Order at ¶ 2. This is yet another instance where the Bureau overstated its authority under the FOIA. "The FOIA is largely indifferent to the intensity of a particular requestor's need" for information. *Petroleum Information Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1437 (D.C. Cir. 1992); *see E.P.A. v. Mink*, 410 U.S. 73, 86 (1973) (need and relevance play no role in a FOIA case). The only grounds for denying a FOIA request are contained in the statute, which makes no mention of a requestor's need. *See Ethyl Corp. v. E.P.A.*, 478 F.2d 47, 49 (4th Cir. 1973) (act denies agency right to refuse disclosure for any reason other than contained in its exclusionary section). Thus, GTE does not have to make a "persuasive showing" that it has a *bona fide* need for the requested information, and the Bureau's view that GTE does not need, for instance, input values to understand or evaluate the Model is clear error.

24/ Murphy at ¶¶ 3, 8, 10-11, 13-14; Dippon at ¶¶ 4-6, 9.

- All design, engineering and technical specifications used in developing and modifying the Model.[25/]

B. The Documents Withheld By The Bureau Are Not Privileged Under 47 C.F.R. § 0.457(e)

The Bureau acknowledges that it has withheld documents relating to the development and modification of the Model that GTE cannot obtain from public sources. The Bureau has withheld these documents on the grounds that they are privileged under 47 C.F.R. § 0.457(e).[26/] In fact, the Bureau argued that, except for the information referred to in the Fifth Report and Order, *all* other information "relied on, created, authored, electronically produced or otherwise used by the FCC or FCC Staff in the development of the Model" was privileged and would never be disclosed.[27/] This decision is based on an erroneous interpretation of the privilege exemption codified in Section 552(b)(5) the Freedom of Information Act ("Exemption 5") -- the statute on which 47 C.F.R. § 0.457(e) is based. Because the Bureau's reading of the FOIA would effectively gut the controlling statute's broad, mandatory disclosure requirements, the Commission should reverse the Bureau's action.

25/ *See* FOIA Request at ¶¶ 1-21. Even if some of this information is publicly available outside the record of this proceeding, as the Bureau asserts, the Commission still has to provide it. An agency is not relieved of its obligation to disclose "simply because the information is publicly available elsewhere." *Petroleum Information Corp.*, 976 F.2d at 1437 (agency must make draft database available under FOIA even though it merely compiles data available from several public sources).

26/ Order at ¶¶ 8, 9, 13, 20.

27/ Order at ¶ 19.

The FOIA establishes a strong presumption in favor of full disclosure.[28/] Requested materials must be disclosed unless they fall squarely within one of the nine exemptions carved out in the Act.[29/] The disclosure provisions of the Act are to be construed broadly, and its exemptions given narrow application.[30/]

Exemption 5 (and Section 0.457(e) of the Commission's rules) provide that interagency and intra-agency memorandums, letters and the workpapers *must* be made available for inspection and copying if such documents "would be routinely available to a private party through the discovery process in litigation with the Commission."[31/] The Bureau has the burden of proving that requested material is exempt from disclosure.[32/] Exemption 5 is intended to exempt from disclosure only those documents that would, in all instances, be privileged and not discoverable in litigation against the government.[33/] For

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28/ *Burka v. U.S. Dept. of Health and Human Services*, 87 F.3d 509, 515 (D.C. Cir. 1996).

29/ *Id.*

30/ *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 862, 868 (D.C. Cir. 1980); *Ethyl Corp. v. E.P.A.*, 478 F.2d at 49.

31/ 47 C.F.R. § 0.457(e); *see N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975) (Exemption 5 protects documents which a private party could not obtain in litigation with the agency).

32/ 5 U.S.C. § 552(a)(4)(B); *Maricopa Audubon Soc. v. U.S. Forest Service*, 108 F.3d 1089, 1092 (9th Cir. 1997).

33/ *Burka,*, 87 F.3d at 516 (if material is not available in discovery, it may be withheld under FOIA); *Verrazzano Trading Corp. v. United States*, 349 F. Supp. 1401, 1405 (Cust. Ct. 1972) (documents must not be available to *any* party in *any* litigation) (emphasis in original)

instance, attorney-client privilege material is exempt. In this case, the Bureau has asserted "deliberative process privilege."

Exemption 5's "deliberative process privilege" only protects (1) "pre-decisional" documents that (2) reveal the "deliberative process" of the agency.[34/] Unless the Bureau can prove that both prongs of this test are met, the privilege does not apply and the documents must be disclosed.

The first part of the analysis is essentially temporal. The privilege protects communications between subordinates and superiors that are antecedent to the adoption of an agency policy or decision.[35/] Communications that occur after a decision has been made are not privileged,[36/] nor are documents that merely embody the Commission's effective law or policy.[37/]

The second part focuses on the nature of the documents at issue. A document is "deliberative" only if it "reflects the give and take of the consultative process."[38/] Deliberative documents are the "*subjective* documents which reflect the *personal opinions* of the writer rather than the policy of the agency."[39/] Documents qualify only if they are "so candid or personal in nature that public discourse is likely in the future to stifle honest and

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34/ *Mink*, 410 U.S. at 87-92.

35/ *Sears*, 421 U.S. at 151.

36/ *Id.*; *Jordan v. Dept. of Justice*, 591 F.2d 753, 772-74 (D.C. Cir. 1978).

37/ *Sears*, 421 U.S. at 153.

38/ *Coastal States Gas Corp.*, 617 F.2d at 866.

39/ *Id.* (emphasis added).

frank communication within the agency."[40/] Materials describing an official's opinions may be ordinarily exempt, but factual documents are not and must be disclosed.[41/]

In light of these rules, the Bureau's blanket invocation of the deliberative process privilege is misplaced. First, a significant amount of information withheld by the Bureau is not pre-decisional. The Commission released the Fifth Report and Order on October 28, 1998. The Commission's staff has continued to work on and modify the Model since October 28, 1998, using customer location data, input values, and other information requested by GTE. Therefore, none of the information used or relied upon in any way since the release of the Fifth Report and Order is "pre-decisional." It does not relate to a decision yet to be made by the Commission. It relates only to the implementation of decisions in the Fifth Report and Order, and thus is not privileged under Exemption 5. The Commission released versions of the FCC Model on November 18, December 5, December 17, 1998, and January 5, 1999. All documents relating to the development, testing, operation and modification of the Model adopted on October 28, 1998, and all subsequent versions are responsive to the FOIA Request and Motion and must be disclosed.

The requested documents are also not the type of subjective, opinion-based materials that constitute "deliberative" information. Most, if not all, of GTE's requests seek factual data and information that was used in developing, testing and modifying the FCC Model -- customer location data, databases, algorithms, input values, spreadsheets from

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40/ *Id.*

41/ *E.P.A. v. Mink*, 410 at 87-91.

Model runs, output reports, and similar information. A prime example is the customer location database identified by the Commission as the default data source for customer locations. These types of factual documents are not privileged under Exemption 5, regardless of when they were created.[42/] Contrary to the Bureau's Order, this type of factual, empirical information discloses nothing about the Commission's deliberative process and reveals no one's "thought processes." Some of the data comes from a third party -- PNR -- and not the Commission. It is unpersuasive for the Bureau to assert that the production of nameless "output reports" showing the results of Model runs will "chill" staff discussions. Simply put, if the Commission were to be involved in litigation involving the operation of the Model, the documents requested by GTE would clearly be discoverable. Thus, they are not privileged.

GTE believes that few, if any, of the requested documents are likely to be letters or memoranda between the staff and the Commission reflecting a "give and take" discussion,

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42/ *See Coastal States Gas Corp.,* 617 F.2d at 868-69 (Exemption 5 protects opinions and other subjective documents, not factual data); *Burka*, 87 F.3d at 519-521 (research data into smoking habits not protected by Exemption 5); *Petroleum Information Corp.,* 976 F.2d at 1436-38 (land record database, even in draft form, is not protected); *Ethyl Corp. v. E.P.A.*, 478 F.2d at 50-52 (scientific, economic and technical data is not protected by Exemption 5); *American Soc. of Pension Actuaries v. I.R.S.*, 746 F. Supp. 188, 190-92 (D.D.C. 1990) (documents showing how agency calculated budget figure not exempt); *Bristol-Myers Co. v. F.T.C.*, 424 F.2d 935, 938-39 (D.C. Cir. 1970) (factual reports and scientific studies not protected under Exemption 5) (dicta); *Consumers Union of U.S., Inc. v. Veterans Admin.*, 301 F. Supp. 797, 805-06 (S.D.N.Y. 1969) (raw test scores and agency's scoring scheme not protected by Exemption 5); *Verrazzano Trading Corp.*, 349 F. Supp. at 1405-07 (test data and comments in notebook regarding test results are not protected by Exemption 5); *see also Don Ray Drive-A-Way Co. v. Skinner*, 785 F. Supp. 198, 199-200 (D.D.C. 1992) (algorithm used by agency to compute vehicle's safety score not exempt under either Exemption 2 (purely internal document) or Exemption 7 (reveals investigative techniques or procedures)).

recommendations, or subjective opinions about the Model. Of course, this is only GTE's assumption, since it has never seen the Commission's documents. If such documents exist, the Commission should list them on a *Vaughn* index that enables GTE to assess the merits of Exemption 5 as to each document withheld, as the Commission typically does in FOIA litigation.

The cases cited by the Bureau do not support its actions.[43/] In fact, they weigh in favor of reversal by the Commission. The three cases cited by the Bureau where disclosure was not ordered did not involve the kind of empirical data and factual information encompassed by GTE's requests. Rather, they involved subjective, opinion-based, narrative documents: a report assessing complaints about the performance of federal employees, and response letters from the affected employees,[44/] draft forest plans and environmental impact statements,[45/] and drafts of a historical description of the government's use of Agent Orange in Southeast Asia.[46/] In two other cases cited by the Bureau, the courts ordered the agency to produce the requested documents -- memoranda setting forth the agency's interpretation of its own regulations[47/] and manuals concerning

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43/ Order at ¶ 8 n. 25-28.

44/ *Maricopa Audubon Soc.*, 108 F.3d at 1091.

45/ *Nat'l Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114 (9th Cir. 1988).

46/ *Russell v. Dept. of the Air Force*, 682 F2d. 1045 (D.C. Cir. 1982).

47/ *Coastal States Gas Corp.*, 617 F.2d at 868-69.

prosecution decisions and sentencing recommendations[48/] -- because they were not pre-decisional or deliberative.

C. Disclosure Does Not Depend On Whether The Commission Relied On The Requested Documents

As an alternative to its claim under Exemption 5, the Bureau asserts that even if none of the withheld documents are privileged, GTE is not entitled to them because the Commission did not rely on any of them.[49/] This claim is not valid.

First, GTE did not limit its requests to the documents that the Commission "relied upon" for the decisions articulated in the Fifth Report and Order. GTE requested all information and documents "relied on, *created, authored, electronically produced or otherwise used by the FCC or FCC Staff in the development of the Model.*"[50/] GTE's requests, broader than as characterized by the Bureau, must be answered.

Second, the broad disclosure requirements of the FOIA do not limit GTE to the documents "relied upon" by the Commission and cited in the Fifth Report and Order. If that were the case, an agency could shield from disclosure (as the Bureau has attempted to do) documents that were used but not expressly "relied on" or cited in the agency's written decisions. But that is not the law. The FOIA says nothing about permitting an agency to withhold documents that were not "relied upon." Reliance is *not* an element of a proper

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48/ *Jordan*, 591 F.2d at 774.

49/ The Bureau's exacts words were: "*In all cases where we decline to disclose the requested information*, the Commission did not rely on the information in reaching the decisions in the Platform Order and therefore is not necessary. . . to formulate petitions for reconsideration." Order at ¶ 2 (emphasis added).

50/ FOIA Request at ¶ 5 (emphasis added); Motion at p. 6 (emphasis added).

FOIA request, and alleged lack of reliance is *not* a grounds for denying a FOIA request. The Bureau cites no authority -- no section of the FOIA and no cases -- for its position.

The only legal authority discussed by the Bureau on this issue are the cases cited in GTE's Motion, where GTE argued that the Commission may not legally promulgate the FCC Model based on data "that, [in] critical degree *is known only to the agency*."[51/] The Bureau's attempt to distinguish GTE's cases is unavailing, however, because those were not FOIA cases and never addressed the issue of whether a requestor may only obtain the documents "relied on" in an agency decision.[52/] Moreover, the Bureau correctly summarized but ignored the clear holding of those cases: a Commission order is arbitrary and capricious when it "use[s] critical, yet unpublished, data to reach conclusions without public comment."[53/] The Bureau and Commission's use of undisclosed data to develop, test and approve the FCC Model impairs the legality of the FCC Model, as argued in GTE's pending Petition for Reconsideration. The Bureau has compounded that error by refusing to disclose the requested documents, thereby violating the FOIA.

V. REQUESTED RELIEF

The Commission should reverse the Bureau's actions denying GTE's FOIA Request and Motion and order the immediate production of all requested documents. As to any

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51/ Motion at pp. 3-4, citing *National Black Media Coalition v. F.C.C.*, 791 F.2d 1016, 1023 (2nd Cir. 1986) (quoting *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240,251 (2nd Cir. 1977) (emphasis in original); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

52/ It also appears that the FCC produced the internal information at issue in *National Black Media Coalition* either before or during that litigation.

53/ Order at ¶ 7.

documents that the Bureau continues to claim, despite the reversal of its actions, are privileged under Exemption 5, the Commission should order the Bureau to create and produce to GTE a *Vaughn* index, with sufficient detail about each withheld document to enable GTE to assess the merits of the claimed privilege.

VI. CONCLUSION

For the foregoing reasons, GTE's Application for Review of the Common Carrier Bureau's Order dated December 17, 1998, and Review of Freedom of Information Action should be granted.

Respectfully submitted,

GTE SERVICE CORPORATION and its affiliated domestic telephone operating companies

By: Bernard A Nigro

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January 15, 1999

CERTIFICATE OF SERVICE

I, Thomas W. Mitchell, do hereby certify that on this 15th day of January, 1999, I have caused a copy of the foregoing GTE Service Corporation's Application for Review of the Common Carrier Bureau's Order Dated December 17, 1998, and Review of Freedom of Information Action to be served, via hand delivery upon the persons listed on the attached service list.

Thomas W. Mitchell

SERVICE LIST

The Honorable William E. Kennard,
Chairman
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

The Honorable Michael K. Powell,
Commissioner
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

The Honorable Susan P. Ness,
Commissioner
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

The Honorable Gloria Tristani,
Commissioner
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Christopher J. Wright, General Counsel
Office of the General Counsel
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

The Honorable Harold Furchtgott-Roth,
Commissioner
Federal Communications Commission
The Portals
445 12th Street, S.W.
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Sheryl Todd
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1231 20th Street, N.W.
Washington, DC 20036

GTE Service Corporation
January 15, 1999

EXHIBIT A

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

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	
Forward-Looking Mechanism for High Cost Support for Non-Rural LEC's	)	CC Docket No. 97-160

AFFIDAVIT OF CHRISTIAN MICHAEL DIPPON
IN SUPPORT OF
GTE'S APPLICATION FOR REVIEW AND
REVIEW OF FREEDOM OF INFORMATION ACTION

I, Christian Michael Dippon, being duly sworn, say:

1. I have been employed at National Economic Research Associates, Inc. ("NERA") for the last two and one half years. As an Economic Consultant for NERA, I work mainly on regulatory, antitrust, and strategic management issues for the increasingly competitive telecommunications markets and other industries. I have analyzed cost studies for telecommunications services and elements and determined reasonable long-run incremental costs (TELRIC and TSLRIC) that meet competitive standards and are consistent with the Federal Communications Commission's ("FCC" or "Commission") guidelines. Specifically, I have analyzed and commented on more than ten versions of the HAI Model (previously called the Hatfield Model), several versions of the Benchmark Cost Proxy Model ("BCPM"), the Telecom Economic Cost Model ("TECM"), the Hybrid Cost Proxy

Model ("HCPM"), and other industry-sponsored cost models. On several of these models, I have prepared testimony and coauthored expert reports detailing the results of NERA's analysis. I also have appeared before several state public utilities commissions as a subject matter expert in telecommunications matters. A copy of my resume is attached as Exhibit A.

2. Recently, I attempted to analyze the cost proxy model ("Model") adopted by the Commission in its *Fifth Report and Order* released on October 28, 1998.[1] In an affidavit filed on December 18, 1998, in support of GTE's Petition for Reconsideration ("PFR") of the *Fifth Report and Order*, I explained that I could not fully analyze the Model because it was missing crucial components, and because I did not have access to a significant amount of information needed for a complete review.

3. I file this affidavit in support of GTE's Application for Review of the Common Carrier Bureau's ("Bureau") Order, released on December 17, 1998,[2] which denied much of GTE's Freedom of Information Act ("FOIA") request and Emergency Motion ("Motion").[3] GTE's FOIA request and Motion sought factual information needed to evaluate the Model—information not available to the

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[1] Federal-State Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, *Fifth Report and Order*, CC Docket Nos. 96-45, 97-160, FCC 98-279 (rel. Oct. 28, 1998) ("*Fifth Report and Order*").
[2] Federal-State Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, *Order*, CC Docket Nos. 96-45, 97-160, DA 98-2567 (rel. Dec. 17, 1998) ("*Order*").
[3] *See* Letter from John F. Raposa, GTE Assistant General Counsel, to Andrew F. Fischel, Federal Communications Commission, Re. Freedom of Information Act Request - CC Docket Nos. 95-45 and 97-160, dated November 30, 1998, and *Emergency Motion of GTE for Disclosure of Data and Information to Permit Public Review and Extension of Time*, dated November 30, 1998.

public, including a complete and operational version of the Model and its customer location module's database. In my opinion, GTE did not request any information beyond what it requires to perform an analysis similar to one that should have been done by the Commission staff. By refusing to produce the documents sought by GTE, the Bureau effectively has prevented GTE and me from evaluating the Model.

4. The Bureau denied some of GTE's requests stating that the information needed to analyze the Model—the separate components drawn from the BCPM, HAI, and HCPM models and the new interface software—have been publicly available to GTE and that GTE needs nothing else to perform an evaluation. The Bureau is mistaken that this limited information permits a full and meaningful evaluation.

5. First, the Model cannot be meaningfully evaluated by reading the description in the *Fifth Report and Order*, or in the other sources mentioned by the Bureau, of how the Model is supposed to work in theory. I also cannot evaluate it by analyzing how the modules work in their original models. The Bureau needs to provide a complete Model (*i.e.*, all the modules and associated interfaces in *one* fully functional model). This Model also needs a customer location database and a full set of inputs before it can be fully evaluated. The Commission claims that "it is not necessary to know the specific input values that will be used in the model to select an accurate model platform to estimate the forward-looking costs

of providing universal service."[4] This simply is not true. Rather, just as an airplane is flight-tested after the design stage, but well before production begins and passengers are boarded, a cost proxy model *must* be "flight-tested" after it is designed and before it is adopted. The Model itself must be operational and capable of being tested.

6. However, I cannot conduct necessary tests of the FCC Model because it is an incomplete, nonoperational, work in progress. I have yet to see a fully operational version of the Model, with all its components working together as described. The fact that I may have seen a description of the Model's modules in the BCPM, HAI and HCPM model documentation does not help me analyze whether the Model operates as described. Moreover, some modules from the BCPM, HAI, and HCPM models have been modified in the FCC's Model. Yet, these "as modified" modules have not been published.

7. Second, in its FOIA request and Motion, GTE did not ask for any workable geocoded or non-geocoded data to run the FCC Model, but for "<u>the same Model version and inputs that the FCC Staff is using</u>."[5] By simply listing a series of possible data sets that could be used for testing the platform's functionality, the Commission did not adequately respond to GTE's request in the FOIA request and Motion.

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[4] *Order* at ¶ 6.
[5] Motion at 6

8. Customer location data (*e.g.*, the geocoded database) is critical to my evaluation of the Model because customer locations are a major factor in determining loop length, support structure amounts and, ultimately, all costs. Only the geocoded database will enable me (or anyone interested in performing a thorough evaluation) to see how accurately the customer location module is placing customers. This, in turn, allows me to verify whether the outside plant engineering algorithms place enough loop plant to adequately serve customers. Yet, the Bureau declined to produce the geocoded data used to develop, test, and modify the Model.

9. The Bureau states that GTE can use other location data, such as Maryland "mock data," the BCPM sponsors' alternative database, or geocoded locations from GTE customer files. Nevertheless, such data, to the extent it exists, is not of much value to my analysis. My analysis is useful to GTE only if it is based on the data that the staff used to develop, test, and modify the Model. For that reason, GTE's FOIA request and Motion did not seek *any workable test data set*, but the *same customer location database* used by the Commission to conclude that the Model is reliable and should be adopted. Further, GTE should not be required to use data that the Commission staff did not use.

10. The Model's limited documentation[6] leads me to believe that the Commission

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[6] "Currently the official data files for the HCPM and HAI synthesis model are being provided by PNR Associates." Hung Le and W. W Sharkey, *The HCPM/HAI Interface For a Cost Proxy Model Synthesis: A User Manual*, Federal Communication Commission, at 2.

staff relied on customer location data from PNR and Associates. The Bureau, in its Order, claims that the data are available from PNR, and GTE should pursue this path.[7] Either the Bureau misunderstood PNR or PNR has changed its position as I tried to obtain the PNR data mentioned in the *Order* and was only partially successful. I contacted PNR on December 30, 1998, and requested the information that the Bureau said was available. PNR informed me that, although the surrogate points and some of the pre-processed state data were "in the works," the data currently are not available. As for the point data—the only relevant data set—I was informed that such data will not be released at this time.[8] Therefore, contrary to the Bureau's statement, PNR's data, pre-processed or not, was not available when the First Report and Order was released, and is only partially available at this point in time.[9] Further, even if PNR does make some pre-processed and surrogate data available, this is not sufficient. What is needed is a completely documented data set containing the longitude and latitude of each customer location contained in the FCC Model and sufficient time to analyze the data.

11. Curiously, the Bureau's Order treats customer location data as an input value to the Model. Ignoring for the moment that the Model is incomplete without this

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[7] *Order* at ¶ 9.
[8] Phone calls with William Newman and Kevin Landis, both of PNR, on December 30, 1998.
[9] Follow up phone calls with Kevin Landis from PNR indicated that some surrogate data and pre-processed data were scheduled to be released the week of January 11, 1999. On January 14, 1999, I received one of two disks that contain the surrogate database. According to PNR, the second disk is supposed to follow shortly, with the pre-processed data to be available "at a later date." Letter from Kevin Landis (PNR) to Christian Dippon dated January 13, 1999 (attached as Exhibit B).

database and therefore cannot be analyzed, the Bureau never clearly states when and how an appropriate database will be debated and decided. The Bureau states that "staff is making available on its World Wide Web site for discussion and comment purposes preliminary input values or ranges of values for most inputs, and is hosting public workshops."[10] However, neither the Commission's web site nor the workshops have the customer location database on their agenda.

12. Statements by the Commission and Bureau confirm that the model is not yet complete. The Commission explicitly stated in the *Fifth Report and Order* that the "Common Carrier Bureau [has] the authority to make changes or direct that changes be made as necessary and appropriate to ensure that the platform of the federal mechanism operates as described in this Order."[11] Thus, the Commission itself describes the FCC Model platform as a work in progress, *ergo* incomplete.[12]

13. The Bureau also recently announced that "the current version of the model and a list of modifications that have been made" will be maintained on the FCC's web site, and "will be updated on the first and third Tuesday of each month, as necessary."[13] This procedure reinforces GTE's contention that the Model is

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[10] *Order* at n. 8.
[11] *Fifth Report and Order* at ¶ 13.
[12] Since the filing of the FOIA request and Motion, the sponsors have released at least three more versions of the FCC Model, the most recent on January 5, 1999.
[13] *Common Carrier Bureau to Post Modifications to the Forward-Looking Economic Cost Model for Universal Service Support on the Internet*, CC Docket Nos. 96-45, 97-160, DA 98-2533 (rel. Dec. 15, 1998).

incomplete, which prohibits a full analysis.[14]

14. Without a full analysis, GTE has no way of validating the Model and must accept the Commission's findings and conclusions. Yet, GTE should be allowed to perform its own validation of the Model, including verification that it functions as designed and, more important, that it produces realistic outputs. Commissioner Furchgott-Roth, as an economist, understands the impediments that the Commission has placed in the evaluation process:

> [w]ithout such information . . . it would be difficult if not impossible to determine whether the model complies with engineering design standards. Similarly, the failure to explain how the modules interface would make it impossible to assess whether the assumptions and algorithms are consistent from module to module.[15]

Without the information requested by GTE, it *is* impossible for me to evaluate the Model.

15. Since the Bureau issued the Order, I have spent considerable time and effort trying to piece together the parts of the Model, while keeping current with the frequent updates. I am thoroughly familiar with the Commission's web site and documents in the record of this proceeding referred to by the Bureau.

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[14] An incidental, but important, point is the evergreen status of the FCC Model in combination with the Commission's refusal to provide all the essential information. Affected parties are spending tremendous amounts of time, at considerable expense, trying to analyze a model that is constantly changing. The old analogy about trying to hit a moving target, especially when armed with half a load of buckshot, is most appropriate here.

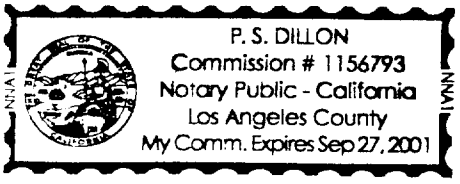
[15] Statement of Commissioner Harold Furchgott-Roth, *Re: Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*: (CC Docket Nos. 96-45, 97-160) at 2.

Nevertheless, the Model cannot be fully analyzed based on what is currently available. If and when that information is produced, a full evaluation will require even more time and effort.

I hereby swear, under penalty of perjury, that the foregoing is true and correct.

Christian Michael Dippon

Subscribed and sworn to before me this 12th day of January 1999.



Notary Public

My Commission Expires: Sept. 27, 2001

EXHIBIT A

NATIONAL ECONOMIC
RESEARCH ASSOCIATES
777 SOUTH FIGUEROA STREET, SUITE 4200
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n/e/r/a
Consulting Economists

CHRISTIAN MICHAEL DIPPON
ECONOMIC CONSULTANT

BUSINESS ADDRESS

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christian.dippon@nera.com

Christian Dippon received a Master of Arts in Economics from the University of California at Santa Barbara. Prior to joining NERA, he was an analyst at BMW's operations in Bangkok, Thailand, where he worked on a variety of economic analysis and strategic planning issues.

Since joining NERA, Mr. Dippon has worked extensively on economic cost model analyses, market share and market power studies, market entry and exit, and the assessment of competition in the telecommunications industry. He has designed and analyzed cost studies for telecommunication services and elements and determined reasonable TELRICs and TSLRICs, which meet competitive standards, are consistent with the FCC's guidelines, and provide the client with a strategic management tool. Mr. Dippon also has conducted highly advanced market share and market power studies, employing the latest qualitative choice model techniques and marketing surveying tools. Based on the result of these studies, Mr. Dippon has advised his clients on strategic management and policy issues. Mr. Dippon has appeared before various public utilities commissions as a subject matter expert and prepared testimony, papers, and expert reports detailing the results of NERA's analyses.

EDUCATION

UNIVERSITY OF CALIFORNIA, SANTA BARBARA (DECEMBER 1995)
Master of Arts in Economics
G.P.A. 3.64

CALIFORNIA STATE UNIVERSITY, HAYWARD (AUGUST 1993)
Bachelor of Science in Business Administration
Cum Laude
G.P.A. 3.7

PROFESSIONAL EXPERIENCE

NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC., Los Angeles, CA

1999- ***Economic Consultant***
1998-1999 ***Senior Analyst***
1998-1998 ***Economic Analyst***
1996-1998 ***Associate Analyst***

Focus is mainly on market research projects, pricing policy issues, total factor productivity, evaluating demand for new and existing products/services, and assessing competition in the telecommunications industry. Designed and analyzed economic cost models to address regulatory and other issues and performed econometric demand analyses for various industries, including telecommunications. Authored, coauthored, coordinated, and supervised the preparation of testimony, expert reports, and arbitration documents.

BAVARIAN MOTOR WORKS, BANGKOK, THAILAND

1993-1994 ***Analyst***

Managed and assisted in the management of a multitude of projects, such as the economic and financial analysis of the operations in Thailand, strategic planning and forecasting for the year 2000, and the development and implementation of various quality programs.

CALIFORNIA STATE UNIVERSITY, HAYWARD

1992-1993 ***Tutor***

Tutored undergraduate students in economics, mathematics, history, and the German language.

SWISS ARTILLERY, BIERE, SWITZERLAND

1989-1990 ***Corporal***

1989-1990 ***Soldier***

HONORS AND PROFESSIONAL TRAINING

- National Dean's List
- Golden Key National Honor Society
- Dean's Honor Roll for the academic year 1991-1992
- Qualitative Choice Workshop, University of California at Berkeley, 1996
- Advanced Qualitative Workshop, University of California at Berkeley, 1997
- Time Series Workshop, University of California at Berkeley, 1998
- Fundamentals in SAS, The SAS Institute, 1997
- Introduction to Visual Basics 5.0, 1997
- Telecommunications Engineering, TRA, 1997
- Senior Writing Seminar, NERA, 1998
- Business Development Strategy and Skills, Carlson Associates, 1998

LANGUAGES

- Fluent in German (native language)
- Fluent in English
- Fluent in French
- Proficient in conversational Thai and Spanish

COMPUTER SOFTWARE

- Microsoft Windows 95
- Microsoft Office 97
- SAS
- Visual Basics 5.0
- Map Info 4.12
- Corel Suite 8.0

AFFILIATIONS

- American Economic Association

SELECTED CONSULTING REPORTS AND TESTIMONIES

Economic and Algorithmic Errors in the Hatfield Model, Release 3.1. With Dr. Gregory Duncan, Dr. Timothy Tardiff, and Dr. Rafi Mohammed. Expert report prepared for GTE Corporation for interconnection arbitration in various states.

Economic and Algorithmic Errors in the Hatfield Model, Release 4.0. With Dr. Gregory Duncan, Dr. Timothy Tardiff, and Dr. Rafi Mohammed. Expert report prepared for GTE Corporation in interconnection arbitrations in various states.

Evaluation of the Hatfield Model, Release 5.0. With Dr. Gregory Duncan, Dr. Timothy Tardiff, Dr. Rafi Mohammed, Mr. Francis Murphy, and Mr. Robert Cellupica. Expert report prepared for GTE Corporation for interconnection arbitration in various states.

Evaluation of HAI Consulting Inc.'s implementation of actual average loop length into HM 3.1. Prepared for GTE Northwest, Inc. in response to a bench request by the Washington Public Utilities Commission.

Affidavit of Christian Michael Dippon In Support of the Motion of Contel of Minnesota, Inc. d/b/a GTE Minnesota for Reconsideration of the Commission's Decision to Recommend HAI 5.0a. Before the Minnesota Public Utilities Commission, May 10, 1998.

The Cost of the Local Communication Network: A Comparison of Minimum Spanning Trees and the HAI Model. With Dr. Kenneth Train, University of California at Berkeley, June 12, 1998. (Publication pending)

Affidavit of Christian Michael Dippon In Support of GTE's Petition for Reconsideration of the Fifth Report and Order. Before the Federal Communications Commission, CC Docket Nos. 96-45, 97-160, December 18, 1998.

CONSULTING PRESENTATIONS AND SPEECHES

Dippon C. M.; Murphy F., "Economic And Engineering Errors in HM 3.1," presented before the Hawaiian Public Utilities Commission, Honolulu, HI, February 1998.

Dippon C. M.; Train, K., "The Cost of the Local Telecommunications Network: A Comparison of Minimum Spanning Trees and the HAI Model" presented at the Telecommunications Policy Research Conference, Alexandria, VA, October, 1998.

01/99

PNR

Statistics Solutions Strategic Advantage

EXHIBIT B

January 13, 1999

Mr. Christian Dippon
NERA
777 South Figueroa
Los Angeles, CA 90017

Dear Christian,

Enclosed are the PNR Road Surrogate inputs to the HCPM Model. If you have any questions please call Kevin Landis at (215) 886-9200.

Sincerely,

Kevin B. Landis

Economic, Statistical and Market Research Consultants
101 Greenwood Avenue, Suite 302, Jenkintown, Pennsylvania 19046
215-886-9200 • 215-886-9912 (Fax) • http://www.pnr.com

Enclosed is the two disk set containing PNR Road Surrogate inputs to the HCPM model. It includes 48 states, excluding Alaska, Iowa, Virginia and Puerto Rico. As well, the following Wire Centers are missing:

AL	GOVLALXA
AZ	KMTKAZXA, MRCNAZXC, SPRSAZEA, SUPAAZXC, TLSNAZMA
CA	DSPLCAXF, HLVLCA11, HPLDCA12, IRVNCA01, SLVRCA11, WLGVCAXF
FL	CDKYFLMA, HLNVFLMA
GA	BUFRGABH, FLBRGAMA, GSVLGAMA
HI	AHMLHIQA, HILOHIMN, HNKAHICO, HNMUHICO, KEAUHICO, KHAEHICO, HLAHICO, KHLUHICO, KHOUHICO, KLAOHICO, KLKKHICO, KMLAHICO, KONAHICO KWLNHICO, LAUPHICO, MTVWHICO, NLHUHICO, PAAUHICO, PHLAHICO, PPKUHICO
ID	BOISIDNW, IRWNIDXC
IL	NCHCILNC, SLSPILXE, TWNDILXD, UTICILUT
IN	AUSTINXA, LAPZINXA, LXTNINXA, MSHWIN02, NLBTINXA, NWCRINXA, OSCLIN01 SBNDIN01, SBNDIN03, SBNDIN04, SCBGINXA, WKRSINXA, WKTNINXA, WYTTINXA
LA	IDA LAXA
MD	SMISMDSI
MI	EVRTMIMN, LROYMIMN, MARNMIMN, RDCYMIMN, TRNYMIXI, TUSTMIMN
MN	AGINMNXA
MS	BSLSMSMA
MT	DRMDMTXC
NC	BEMTNCXA
NM	SNJONMXC
NY	NYCMNY30, OCBHNYOB
PA	DUNBPADU
TN	ESSPTNXA, HNLDTNMA, SEWNTNMW, TLLHTNMA, WNCHTNMA
TX	AUSTTXTW, PNLDTXXA
UT	HLCHUTXC
WA	FRKSWAXA

Further documentation as well as geocoded BIN files will be available at a later date.

EXHIBIT B

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

In the Matter of	)	
	)	CC Docket No. 96-45
Federal-State Joint Board	)	
On Universal Service	)	
Forward-Looking Mechanism	)	CC Docket No. 97-160
For High Cost Support for	)	
Non-Rural LECs	)	

AFFIDAVIT OF FRANCIS J. MURPHY
IN SUPPORT OF GTE'S APPLICATION FOR REVIEW
AND REVIEW OF FREEDOM OF INFORMATION ACTION

FRANCIS J. MURPHY, being duly sworn, deposes and says as follows:

1. I am the founder and president of Network Engineering Consultants, Inc. ("NECI"). I am filing this affidavit in response to the Common Carrier Bureau's ("Bureau") Order of December 17, 1998 ("Order") denying GTE's Freedom of Information Act ("FOIA") request and Emergency Motion of GTE for Disclosure of Data and Information to Permit Pubic Review and Extension of Time ("Motion").[1] As part of the Motion, I filed an affidavit substantiating GTE's need for the information and documents requested in the Motion. In addition, I filed an

[1] *See* Federal-State Joint Board on Universal Service and Forward-Looking Cost Mechanism, CC Docket Nos. 96-45 and 97-160, *Order*, DA 98-2567, (rel. December 17, 1998).

affidavit on December 18, 1998, as part of GTE's Petition for Reconsideration of the Commission's Fifth Report and Order ("Petition" or "PFR").[2]

2. In its FOIA request and Motion, GTE requested the data and documents that were used, relied upon or considered in developing the Model,[3] which is information that I need to fully evaluate the Model platform adopted by the FCC (the "Model"). The Bureau's Order, for the most part, denies GTE's requests. As a result, I am not able to fully evaluate the Model.

3. In response to GTE's request for a "complete and operational copy of the FCC's Model platform," the Bureau stated that "the components of the synthesis platform that the Commission has selected all are and have been available in the public record."[4] The availability of the components of the platform is not synonymous with the availability of a "complete and operational" copy of the Model. In order to validate the Model, I must have access to the versions of the modules adopted in the Fifth Report and Order, and an opportunity to ensure that those modules work together as a cohesive model. Even the latest releases of the Model on the FCC web site (December 17, 1998 and January 5, 1999) are not "complete and operational" as requested by GTE.

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[2]Affidavit of Francis J. Murphy in Support of GTE's Petition for Reconsideration of the Fifth Report and Order, CC Docket Nos. 96-45 and 97-160, December 18, 1998.
[3]*See* Motion at 1.
[4] Order at ¶ 3.

4. The FCC Model is not complete and operational for several reasons. First, the FCC adopted the expense and switching modules of the HAI Model with Commission modifications,[5] but these modified modules have not yet been made available. They were not available in the Model versions released on November 18, 1998, December 7, 1998, December 17, 1998, nor with the version released on January 5, 1999.

5. Second, the Model lacks a customer location data set. Customer location is the driving force behind the design and construction of the Model's network. If GTE is not given a sufficient opportunity to validate the Model's placement of customers, it cannot validate the network that is built to serve those customers. If it cannot validate the network, then it cannot validate the costs produced by the Model. Therefore, the Commission's contention that, "parties can readily evaluate the relative merit of the cost model platform components adopted without knowing specific input values that will be used, including the specific customer location data set,"[6] is clearly incorrect.

6. Despite Commission claims to the contrary, the geocoded data required to run the Model and produce results for GTE (or any other ILEC) is not available.[7] The Commission's failure to provide this data so that the Model can be run for all

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[5] *See* Federal-State Joint Board on Universal Service and Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, CC Docket Nos. 96-45 and 97-160, *Fifth Report and Order*, FCC 98-279, (rel. October 28, 1998), ¶ 71.
[6] Order at ¶ 6.

jurisdictions is inconsistent with earlier Commission rulings in this proceeding. In the Universal Service Order, the FCC, when discussing its ability to evaluate the HAI and BCPM Models, stated that, "efforts to study the models have been severely hampered by the delays in their submission to the Commission and the constant updating of the models to correct technical problems, such as missing data."[8] The FCC was referring to the fact that the models had been submitted with data for only some states, rather than nationwide data.[9] Indeed, the Telecom Economic Cost Model ("TECM") was excluded by the FCC early in this proceeding because "proponents have never provided nationwide estimates of universal support using that model."[10]

7. Third, the December 17, 1998 and January 5, 1999 versions of the Model are not "complete and operational " because, in addition to the lack of customer location data, the algorithm for placing customer location surrogates is completely absent from the Model. Without this algorithm, the Model cannot place non-geocoded customers along roads, and therefore cannot accurately calculate universal service support levels.

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[7]*See* Affidavit of Christian Dippon in Support of GTE's Application for Review at ¶¶9-10.
[8]Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order,* FCC 97-157, (rel. May 8, 1997), ¶ 243.
[9]Id.
[10]Further Notice of Proposed Rulemaking, Before the Federal Communications Commission, CC Docket Nos. 96-45 and 97-160, (rel. July 18, 1998), ¶ 11.

8. Fourth, the Model is not "complete and operational" because the Commission has made clear its intention to continually update and modify the platform as often as twice a month.[11] The adoption of a platform that is going to be continually updated is not consistent with an earlier Public Notice where the Commission stated that, "[i]n order to choose a 'specific model,' however, the Commission must evaluate and compare completed versions of the models."[12] Clearly, a model platform that is continually updated and does not include the expense and switch modules cannot be evaluated and compared to other models.

9. The Bureau's Order also erroneously asserted that GTE has much of the other requested information. This is wrong for several reasons. GTE does not have any output reports because the Model is not complete and fully operational. Without output reports, neither GTE nor any other party in this proceeding is able to validate the universal service support amounts produced by the Model. The dismissal of GTE's request for output reports[13] is inconsistent with the ruling in

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[11] *See "Common Carrier Bureau to Post on the Internet Modifications to the Forward-Looking Economic Model for Universal Service Support,"* CC Docket Nos. 96-45, 97-160, DA 98-2533, (rel. December 15,1998).

[12] *"Guidance to Proponents of Cost Models in Universal Service Proceeding: Customer Location and Outside Plant,"* Public Notice, CC Docket Nos. 96-45 and 97-160, DA 97-2372, (rel. November 13, 1997).

[13] *See* Order at ¶ 14.

the Universal Service Order that excluded the TECM Model,[14] and with Criterion Eight of the FCC's rules, which states that outputs should be plausible.[15]

10. The Bureau claimed that, "A complete description of the model methodology is provided by Commission staff in a Report available on the Commission's web site,"[16] and that documentation regarding the interface modules can be found on its web site in a "User Manual."[17] However, the Report and the User Manual fail to provide sufficient data to determine the "sequential flow of algorithms"[18] that are the foundation of the Model. Significant effort on the part of the user is required to determine the interrelationship of the various Pascal Language "procedures" and "units," which when compiled, form the executable files of the Model. The documentation does not contain any flowcharts that detail these interactions, thereby forcing the user to trace the flow of data through the various program modules in an effort to validate the Model.

11. Other aspects of the documentation in the Report are also incomplete. For instance, it does not contain any explanation regarding the allocation of feeder costs. As a result, the user must try to trace the logic through the Model, which

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[14] *See* Further Notice of Proposed Rulemaking, CC Docket Nos. 96-45 and 97-160, (rel. July 18, 1998), ¶ 11.
[15] *See* Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, CC Docket Nos. 96-45, *Report and Order*, (rel. May 8, 1997), ¶250.
[16] Order at ¶ 16.
[17] *See* Order at ¶ 17.
[18] *See* Motion at 7.

is difficult without documentation and flowcharts explaining the flow of algorithms through the Model.

12. In response to GTE's request for the documentation supporting the use of copper-based T-1 technology in the platform, the Bureau stated that the "Commission intends to study the issue further in the inputs phase of the proceeding and resolve the issue by appropriately setting the cost input values for T-1 technology."[19] As discussed in my December 18, 1998 affidavit, the use of T-1 on copper impacts how the network is built, which in turn impacts the costs produced by the Model. If the Commission has any factual, industry material indicating that T-1 on copper is forward-looking, I need it to evaluate the Model.

13. The Bureau denied GTE's request that the Commission identify how the remote provisioning and maintenance capabilities of fiber DLC are accounted for in the Model on grounds "this issue has not yet been resolved,"[20] and that a workshop was held on December 10, 1998 to address, in part, input values relating to plant specific maintenance factors.[21] This response is insufficient for two reasons. First, GTE did not request the value of expense factors. It requested how maintenance and provisioning costs are accounted for in the Model. The

[19] Order at ¶ 11.
[20] Order at ¶ 25.
[21] Id.

Commission has classified the "method of calculating maintenance and corporate overhead expense" as a platform issue,[22] not an input issue. Second, GTE requested an explanation of both the maintenance and provisioning activities. In the Order, the Bureau only addressed the maintenance portion of the request, and failed to address the request for provisioning information.

I declare under penalty of perjury that the foregoing information is true and correct. Executed on this 13th day of January 1999.

Francis J. Murphy

Subscribed and sworn before me this 13th day of January 1999.

Notary Public

My Commission expires: June 4, 2004

[22] *See* Further Notice of Proposed Rulemaking, CC Docket Nos. 96-45 and 97-160, (rel. July 18, 1998), ¶ 17.