

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

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In the Matter of)
)
Local Exchange Carriers')
Rates, Terms, and Conditions)
for Expanded Interconnection)
Through Physical Collocation)
for Special Access and Switched Transport)
)
Southwestern Bell Telephone Company.)
Cost Support Filed under Request for)
Confidential Treatment)
)
Cincinnati Bell Telephone Company.)
Cost Support Filed under Request for)
Confidential Treatment)

CC Docket No. 93-162

ORDER

Adopted: January 19, 1999

Released: January 19, 1999

By the Chief, Competitive Pricing Division:

I. Introduction

1. Southwestern Bell Telephone Company (SWB) and Cincinnati Bell Telephone Company (CBT) have filed requests for confidential treatment of certain cost support data submitted in the physical collocation tariff investigation, CC Docket No. 93-162. In this Order, we resolve the confidentiality requests filed by SWB and CBT in the physical collocation tariff investigation by permitting limited disclosure of the data at issue pursuant to a protective order. In addition, we adopt a comment schedule for interested parties to review these data.

II. Background

2. On October 19, 1992, the Commission released the *Special Access Expanded*

Expanded Interconnection Order to interstate switched transport service.⁶ The LECs subject to the requirements of the *Switched Transport Expanded Interconnection Order* filed tariffs offering physical collocation arrangements for switched transport service and the Bureau suspended those filings, initiated an investigation, and consolidated that investigation into CC Docket No. 93-162.⁷

4. During the course of the physical collocation tariff investigation in CC Docket No. 93-162, SWB and CBT filed requests for confidential treatment of certain cost support data under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), and the Commission's parallel regulations governing treatment of private business information, 47 C.F.R. §§ 0.457(d), 0.459.⁸ These data include detailed unit investment and expense items for unbundled components of these companies' DS1 and DS3 access services. SWB and CBT argue that release of these data would enable their competitors to develop pricing strategies to compete with the access services of these companies.⁹

5. In the *Physical Collocation Tariff Investigation Order*, the Commission completed its investigation in CC Docket No. 93-162 for all LECs subject to that investigation except SWB and CBT.¹⁰ In that Order, the Commission, among other things, prescribed overhead loading factors for the physical collocation services of most LECs subject to the investigation. The Commission did not prescribe overhead loading factors for the physical collocation services of SWB and CBT because the confidentiality requests filed by these two

⁶ *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Transport Phase I, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993) (*Switched Transport Expanded Interconnection Order*).

⁷ *See Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Switched Transport*, Memorandum Opinion and Order, 9 FCC Rcd 817 (Com. Car. Bur. 1994); *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Switched Transport Services*, CC Docket No. 93-162, Order, 10 FCC Rcd 12227 (Com. Car. Bur. 1995).

⁸ *See, e.g.*, Letter from Thomas A. Pajda, Attorney, SWB to Chuck Needy, Common Carrier Bureau, FCC (dated May 16, 1994) (*SWB May 16, 1994 Letter*); Letter from Alfred J. Titus, Jr., Regulatory Affairs, CBT to William F. Caton, Acting Secretary, FCC (dated May 20, 1994) (*CBT May 20, 1994 Letter*); Letter from Christine Jines, Corporate Manager, Federal Regulatory, SWB to James D. Schlichting, Chief, Competitive Pricing Division, FCC (dated May 1, 1997) (reiterating request for confidential treatment); Letter from Evelyn W. King, Regulatory Specialist, CBT to William F. Caton, Acting Secretary, FCC (dated June 19, 1997) (reiterating request for confidential treatment). Exemption 4 of FOIA protects confidential commercial and financial information. *See* 5 U.S.C. § 552(b)(4).

⁹ *See SWB May 16, 1994 Letter; CBT May 20, 1994 Letter.*

¹⁰ *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, 12 FCC Rcd 18730, 18736 (1997) (*Physical Collocation Tariff Investigation Order*); *recon.*, 12 FCC Rcd 22273; *petition for review pending, sub nom. Southwestern Bell Telephone Co. v. FCC*, Nos. 93-1779, 97-1468, 97-1487 (D.C. Cir.).

on the public record, we find that a further analysis is necessary to determine whether limited disclosure is appropriate. Even when information falls within the scope of a particular FOIA exemption, we still have the authority to make the materials available to parties if disclosure would best serve the public interest.¹⁷ In evaluating the public interest, we note that the Commission has not yet concluded the investigation of the physical collocation tariffs of SWB and CBT and comment from parties on the detailed cost information filed with these companies' requests for confidentiality would assist the Commission in exercising its responsibility, under Section 204 of the Communications Act,¹⁸ to assess the reasonableness of the physical collocation rates of SWB and CBT. We therefore find it necessary to balance the need to protect proprietary information from public disclosure with the benefit of allowing parties to have access to documents that are potentially of decisional significance. We conclude that disclosure of the data at issue pursuant to a protective order best serves the public interest because it provides adequate protection of the confidential material while allowing maximum participation in this proceeding by interested parties. Accordingly, we adopt the protective order attached hereto as Appendix A to govern the release of the data that are the subject of the requests by SWB and CBT for confidential treatment in the physical collocation tariff investigation. Any party wishing to view this information must first sign the declaration contained in Appendix A, thereby agreeing to the terms of this protective order.

9. We find that in the case before us, it is appropriate to use the protective order that the Commission adopted in the virtual collocation expanded interconnection proceeding, CC Docket No. 94-97.¹⁹ Although the Commission last year adopted a model protective order to be used when it is appropriate to grant limited access to confidential information,²⁰ each Bureau retains the authority to use a different or modified protective order if the Bureau determines such action is warranted.²¹ The protective order adopted by the Commission in CC Docket No. 94-97 is similar to the model protective order, but contains additional provisions that are particularly applicable to expanded interconnection proceedings, such as provisions related to the protection of equipment vendor prices. Therefore, we find that the

¹⁷ See *Chrysler v. Brown*, 441 U.S. 281, 293 (1979).

¹⁸ See 47 U.S.C. § 204.

¹⁹ See *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, *Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Application for Review*, CC Docket No. 94-97, Order, 13 FCC Rcd 13615 (1998); *Southwestern Bell Telephone Company, on Requests for Inspection of Records*, FOIA Control Nos. 94-310, 325, 328, Memorandum Opinion and Order, 12 FCC Rcd 7770 (1997). See also *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, CC Docket No. 94-97, Order, 13 FCC Rcd 13354 (Com. Car. Bur. 1998).

²⁰ See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, Report and Order, FCC 98-184 at paras. 21-32, Appendix C (released August 4, 1998), *pet. for recon. pending (Confidential Treatment Policy Order)*.

²¹ *Confidential Treatment Policy Order* at para. 23.

Appendix A **IS ADOPTED** to govern the release of confidential data submitted by Southwestern Bell Telephone Company and Cincinnati Bell Telephone Company in the physical collocation tariff investigation. CC Docket No. 93-162.

15. **IT IS FURTHER ORDERED** that the schedule for comments to be filed in response to the confidential data submitted by Southwestern Bell Telephone Company and Cincinnati Bell Telephone Company in the physical collocation tariff investigation. CC Docket No. 93-162, **IS ADOPTED**, as specified in Section III of this Order.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink that reads "Jane E. Jackson". The signature is written in a cursive, flowing style.

Jane E. Jackson
Chief, Competitive Pricing Division
Common Carrier Bureau

proceeding designating items for treatment as confidential. Confidential Information shall also include information specifically designated by the Commission in this proceeding as confidential. The Commission may, *sua sponte* or upon petition, determine that all or part of the information claimed by the producing party as "Confidential Information" is not entitled to such treatment.

Procedure

4. In filings made in this docket, SWB and CBT, the producing parties, may designate certain documents and information they produce as "Confidential Information" consistent with the definition of that term in this Protective Order. All such documents and information shall be clearly labeled by SWB and CBT to show that the documents are considered "Confidential."

5. Personnel. (a) Counsel. All Confidential Information produced pursuant to this Protective Order shall be made available to parties solely through counsel for the parties, including in-house counsel, or persons working under the supervision of counsel within the following categories:

(1) Attorneys, including in-house counsel, actively engaged in the conduct of this proceeding, secretaries, paralegal assistants, and employees of such an attorney to the extent reasonably necessary to assist in the review of tariff support materials and the preparation of documents in the proceeding, and

(2) Any persons requested by counsel of record to furnish technical or other expert services, or otherwise to prepare material for the proceeding, except:

(a) Disclosure shall be prohibited, subject to the limited exception set out in paragraph 5(b) below for deposition witnesses and outside consultants and experts, to persons now engaged, or who reasonably expect they will be engaged, in the purchase of similar or identical equipment, or equipment substitutable in whole or in part for the equipment the prices of which are contained in the cost support data.

(b) For any such person who is in a position to use the information for competitive, commercial, or business purposes, other than those governed by subparagraph (a), disclosure shall be limited to the minimum extent necessary to obtain analysis and management guidelines for participation in this proceeding. In addition, disclosure shall be permitted only upon sworn certification by counsel requesting such disclosure that he or she has used his or her best efforts to obtain personnel who are not in a position to use the information for competitive, commercial or business purposes, and that such personnel do not exist.

(b) Depositions. In the event the Commission orders that depositions may be taken, disclosure is permitted to persons noticed for depositions or designated as witnesses to the extent reasonably necessary to prepare testimony or to outside consultants or experts retained for the purpose of assisting counsel prepare testimony for such depositions. If such persons include those described in paragraph 5(a)(2)(a) above, then disclosure is permitted only upon sworn certification by counsel requesting such disclosure that he or she has used his or her best efforts to identify personnel with the same or substantially similar knowledge who are not now engaged, or who reasonably expect they will not be engaged, in the purchase of similar or identical equipment, or equipment substitutable in whole or in part for the equipment the prices of which are contained in the cost support data and that such

Confidential designation of the item. The stamp shall be affixed in such a manner that the text of the Confidential Information is not obscured on either the original or any copies thereof.

11. The information produced shall be organized in a manner that clearly identifies each document or portion thereof that is claimed to be Confidential. SWB and CBT, the producing parties, shall be responsible for producing the Confidential Information in a sealed envelope that is clearly marked on the outside as containing Confidential Information and that clearly specifies the numbers of pages contained therein.

12. Counsel of record for the party authorized hereunder who requested the copies shall sign a statement in the form of Attachment D attached hereto verifying that the sealed envelope clearly marked as containing Confidential Information has been received and designating the name and address of the individual into whose custody the copies shall be delivered. The designated representative of the producing party shall also sign Attachment D and verify to whom the sealed envelope was delivered. Access to said copies shall be limited to those persons defined in Paragraph 5 of this Order. No additional copies shall be made, unless the parties agree otherwise, or upon a showing of a good cause the Commission directs otherwise.

13. Persons that have agreed in writing to be bound by this Protective Order and are therefore permitted access to Confidential Information by this Order may take notes regarding such information as may be necessary in connection with this proceeding. Such notes shall be treated in the same manner as the Confidential Information from which the notes were taken.

Storage at the Commission

14. Confidential Information, including that portion of testimony containing references thereto, if filed with the Commission, shall clearly be labeled as Confidential and filed under seal, and shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or, after notice to the parties and hearing, pursuant to the order of the Commission Staff, the Commission, or a court.

Good Faith Use of Material

15. All persons having access to the confidential data shall use their best efforts to keep the Confidential Information secure in accordance with the purposes and intent of this Protective Order. To this end, persons having custody of any Confidential Information shall keep the documents properly secured during all times when the documents are not being reviewed by a person authorized to do so.

16. As obtained pursuant to this Order, Confidential Information shall be used exclusively for purposes of participating in this proceeding, including any appeals, and shall not be used or disclosed for any other purpose. The limitation on the use or disclosure of Confidential Information shall be construed to prohibit disclosure orally or in writing or through reproduction or by any other means to anyone not designated under paragraph 5 of all information contained therein. The limitation shall also be construed to prohibit making decisions, participating in any decision making process or rendering advice, legal or otherwise, wherein any information or knowledge derived from said

requirements of this Order. The designation of any information as Confidential Information may be challenged before the Commission, or a court having jurisdiction to review a Commission determination, that said material should be so classified.

20. Disclosure of Confidential Information under this Protective Order shall not be deemed a waiver by either the producing party or the vendors the data of which are contained therein, in any other proceeding, agency, or court, of any privilege or entitlement to confidential treatment. Any parties receiving access to Confidential Information under this Order:

(a) agree not to assert any such waiver;

(b) agree not to use information derived from Confidential Information in any proceeding other than this one or for any purpose unrelated to other than this proceeding; and

(c) agree that accidental disclosure of privileged information shall not be deemed a waiver of the privilege.

21. Nothing contained herein shall limit any party's right to judicial review of any decisions rendered hereunder.

22. Any failure to abide by the terms of this Protective Order may result in the imposition of sanctions, including dismissal of a party's petitions, or censure, suspension, or disbarment of the attorneys involved. *See* 47 C.F.R. § 1.24.

23. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

Attachment B to the Protective Order

Notification to Equipment Vendors

Pursuant to the terms of the Protective Order entered in CC Docket No. 93-162, notice is hereby given to counsel or designated representative of an equipment vendor(s), pursuant to paragraph 6 of the Protective Order in CC Docket No. 93-162, that copies of its equipment prices contained in confidential physical collocation cost support data of SWB and/or CBT have been disclosed to the person listed below pursuant to paragraph 5(a)(2) or 5(b).

Statement of Receipt

I, _____, as (COUNSEL OF RECORD) OR (DESIGNATED REPRESENTATIVE) of _____ (insert name of equipment vendor) have received notice that equipment prices of _____ (insert name of equipment vendor), as contained in the confidential physical collocation cost support data of SWB and/or CBT, have been disclosed to:

Name: _____

Title: _____

Representing: _____

Address: _____

Facsimile No: _____

Signed on this _____ day of _____, 19__

Signature

Attachment D to the Protective Order

Statement of Receipt

I, _____, as (COUNSEL OF RECORD) OR (DESIGNATED REPRESENTATIVE) of _____ (insert name of party) have received the sealed envelope marked "Confidential Information" for the purpose of making copies of said confidential information, pursuant to paragraph 12 of the Protective Order. These copies are to remain in the custody of:

Name: _____

Title: _____

Address: _____

Signed on this _____ day of _____, 19__

Name: _____

