

DOCKET FILE COPY ORIGINAL

BellSouth Corporation
 Suite 1800
 1155 Peachtree Street, N.E.
 Atlanta, Georgia 30309-3610

M. Robert Sutherland
 General Attorney

404 249-4839
 Fax 404 249-2385

July 12, 1999

RECEIVED**ORIGINAL**

JUL 12 1999

Mr. Andrew S. Fishel
 Managing Director
 Federal Communications Commission
 445 12th Street, S.W., Room 1-C144
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

Re: MCI WorldCom Freedom of Information Act Request
 CC Docket No. 99-117, ASD File No. 99-22

Dear Mr. Fishel:

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth") hereby oppose the Freedom of Information Act ("FOIA") Request ("Request") filed by MCI WorldCom, Inc. ("MCI") on June 22, 1999, seeking public access to documents submitted to the Commission by BellSouth in connection with a Commission audit of BellSouth's Continuing Property Records ("CPR"). BellSouth also opposes MCI's request for access to certain work papers authored or compiled by the Accounting Safeguards Division ("ASD"), but requests in the alternative that if MCI is granted access to these documents, BellSouth be granted equal access.

MCI requests public disclosure of "any materials that the RBOCs have submitted to the [ASD] to explain why hard-wired COE equipment items were not found by the auditors or to support claims that items in the audit sample should be 'rescored'." Request at 1. MCI also requests public disclosure of "audit work papers generated by ASD staff during the course of the audits that show or support the item-by-item scoring of the items in the audit sample." Finally, MCI requests that the Commission "disclose the CPR detail (vintage, description, etc.) for any items scored 'partially found,' 'not found,' or 'not verifiable' at any time during the audit process." Request at 2.

BellSouth demonstrates below that MCI's Request must be denied. The Managing Director is under no legal compulsion to make public the audit information requested by MCI. MCI is requesting that the Managing Director take the unprecedented action of releasing raw audit information that is clearly exempt from disclosure under the FOIA and the Commission's Rules without the slightest justification for changing the Commission's longstanding policy of protecting audit information from public disclosure. MCI's so-called "public interest" showing is spurious. The information sought is not even relevant to any issue in the captioned

No. of Copies rec'd 0+9
 List ABCDE

proceeding. Therefore, MCI's Request should be denied by the Managing Director out of hand. By submitting this opposition at this time, BellSouth does not waive its rights under Section 0.461(i) of the Rules.

I. The Commission is not legally obligated to release the requested information.

The Freedom of Information Act, 5 U.S.C.A. § 552, generally requires release of information in the possession of federal agencies upon request to a member of the public. There are certain express exceptions to the disclosure requirement, three of which are controlling here. Section 552(b) provides, in pertinent part:

(b) This section does not apply to matters that are—

...
(3) specifically exempted from disclosure by statute (other than section 552b of this Title), provided that such statute . . . refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; . . .

Section 220(f) of the Communications Act prohibits disclosure by any Commissioner, officer or employee of the Commission of "any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinafter provided, except insofar as he may be directed by the Commission or a Court." This is specific statutory authority sufficient to exempt audit information from disclosure under Section 552(b)(3).

The Commission's regulations implementing the FOIA are contained in 47 C.F.R. § 0.441 et seq. 47 C.F.R. § 0.457 is entitled "Records not routinely available for public inspection." Included are rules implementing FOIA Exemptions 3, 4, and 5. Specifically, Section 0.457(d) implements Exemptions 3 and 4. Section 0.457(e) implements Exemption 5. As shown below, the BellSouth documents requested by MCI are exempt from disclosure under Section 0.457(d). The ASD work papers are exempt from disclosure under Section 0.457(e).

A. Exemption 3 and Section 0.457(d)(1)(iii) authorize rejection of the Request.

The Commission's Rules are unequivocal. Under Section 0.457(d)(1)(iii), "Information submitted in connection with audits, investigations, and examination of records pursuant to 47 U.S.C. § 220" are "not routinely available for public inspection." "A persuasive showing as to the reasons for inspection will be required in requests for inspection of such materials submitted under §0.461." 47 C.F.R. § 0.457(d)(1). As discussed below, MCI's Request falls woefully short of this standard. Therefore, the Managing Director is legally authorized to reject MCI's Request out of hand.

B. Exemption 4 and Section 0.457(d)(2) also authorize non-disclosure.

BellSouth's documents are also exempt from disclosure under Exemption 4 and Section 0.457(d)(2) of the Rules. Because the requested documents were submitted in connection with an audit, and are listed in Section 0.457(d)(1)(iii), BellSouth was not required to file a request for non-disclosure under Section 0.459 of the Rules. Nevertheless, as demonstrated below, the documents in question also qualify for non-disclosure under Section 0.457(d)(2) because "commercial, financial or technical data which would customarily be guarded from competitors . . . will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under § 0.461." BellSouth's documents clearly meet the standard for non-disclosure and MCI's Request falls far short of meeting the "persuasive showing" needed to justify disclosure of such documents.

C. Exemption 5 and Section 0.457(e) protect the ASD work papers from disclosure.

The Managing Director is expressly authorized to reject MCI's Request for access to the ASD staff's work papers pursuant to Exemption 5 and Section 0.457(e), which provides that:

...the work papers of members of the Commission or its staff will not be made available for public inspection, except in accordance with the procedures set forth in § 0.461. Only if it is shown in a request under §0.461 that such a communication would be routinely available to a private party through the discovery process in litigation with the Commission will the communication be made available for public inspection. Normally, such papers are privileged and not available to private parties through the discovery process, since their disclosure would tend to restrain the commitment of ideas to writing, would tend to inhibit communication among Government personnel, and would, in some cases, involve premature disclosure of their contents.

MCI has made no attempt whatsoever to demonstrate that disclosure of the staff's work papers is authorized under this standard. Therefore, this portion of MCI's Request must be rejected by the Managing Director. However, if the Managing Director releases the staff's work papers to MCI, BellSouth requests that it be provided with equal access to these documents. BellSouth is the party that was audited by the staff, and BellSouth is the party that is potentially subject to an enforcement proceeding as a result of the audit. Therefore, BellSouth has a superior interest to that of MCI in having access to the staff's work papers if they are released in the captioned proceeding. BellSouth also reserves its right to seek access to the staff auditors and their work papers should an enforcement proceeding be commenced by the Commission.

BellSouth has demonstrated above that the Managing Director is authorized to reject MCI's Request at this stage of the proceeding as a matter of law. The Commission is clearly authorized to withhold the records requested by MCI from public inspection. In such circumstances, under Section 0.461(f)(4) of the Rules, "the considerations favoring disclosure and non-disclosure will be weighed in light of the facts presented." A

“persuasive showing as to the reasons for inspection will be required...” by the proponent of disclosure. 47 C.F.R. § 0.457(d)(1) and (d)(2). MCI has made no such showing.

II. MCI has utterly failed to justify release of the requested documents.

MCI bears the burden of demonstrating that disclosure of the requested documents will serve the public interest. It has utterly failed to make such a showing. MCI begins by asserting BellSouth’s services “are not subject to significant competition.” Request at 3. MCI’s bald assertion is patently ridiculous. BellSouth’s intraLATA toll service revenues have declined more than 40% over the last five years, from \$1.2 billion in 1994 to \$713 million in 1998. Most of that decline is due to competition from interexchange carriers like MCI and AT&T. Competitive Local Exchange Carriers (“CLECs”) now provide over a million access lines in the BellSouth region. BellSouth faces intense competition from numerous CLECs operating on both a facilities and resale basis.

MCI next argues that release of the requested information would not cause BellSouth “substantial competitive harm.” Request at 3. “Substantial competitive harm”, however, is not the standard stated in the Rules. Rather, the standard is whether the information is of a type “which would customarily be guarded from competitors.” 47 C.F.R. § 0.457(d)(2). The raw audit data requested by MCI clearly meets this standard. BellSouth does not disclose its CPR to competitors.

In any event, the detailed information requested by MCI is competitively sensitive. The requested documents contain detailed information that would disclose negotiated prices paid for specific types of equipment from various vendors. Disclosure of such information would give competitors insight into BellSouth’s ability to negotiate prices for equipment with vendors, and could impair future negotiations. Location specific detail of central office investment could also allow MCI and other competitors to target specific locations for competitive entry based on the age and capabilities of BellSouth’s equipment.

MCI also fails to show how release of the requested information would serve the public interest. MCI claims that it needs access to detailed “scoring” information in order to comment on Issue 2 in the pending Notice of Inquiry (“NOI”). However, Issue 2 relates to “the validity and reasonableness of the methodology used by the Bureau’s auditors in determining whether to rescore or modify a finding...” NOI at ¶ 6. The Commission did not ask for comments on the accuracy of the scoring performed by the auditors. As MCI concedes, the Bureau released a Public Notice on April 7, 1999 describing the methodology and procedures employed to respond to claims by BellSouth and other audited carriers that its scoring was incorrect. Request at 2. That is all that MCI needs to address the issue presented in the NOI. The detailed information requested by MCI is simply irrelevant.

The details of the scoring of individual items might be relevant in an enforcement proceeding. The purpose of the NOI, however, is to determine whether or not to initiate an enforcement proceeding. If no enforcement proceeding is initiated, there will be no need to litigate the accuracy of the scoring by the auditors. MCI’s request is at best premature. It falls

far short of the compelling public interest showing required to overcome the Commission's longstanding policy of keeping audit information confidential.

III. The Commission should follow its policy of keeping audit data confidential.

Less than a year ago, the Commission conducted a comprehensive review of its policy concerning treatment of confidential information submitted to the Commission. In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, GC Docket 96-55, **Report and Order**, 13 FCC Rcd 24816, released August 4, 1998. In that proceeding, the Commission discussed what would constitute a "persuasive showing" justifying the release confidential information in the possession of the Commission. The Commission stated:

[T]he Commission generally has exercised its discretion to release publicly information falling within FOIA Exemption 4 only in very limited circumstances, such as where a party placed its financial condition at issue in a Commission proceeding, or where the Commission has identified a compelling public interest in disclosure. **Report and Order** at ¶ 8, 13 FCC Rcd at 24822.

The Commission reiterated that the "requester of such information should continue to bear the burden of making a persuasive showing as to the reasons for inspection when access to confidential information is sought." **Report and Order** at ¶ 19, 13 FCC Rcd at 24831. With regard to audit information, the Commission reiterated its "longstanding policy of treating information obtained from carriers during audits as confidential." **Report and Order** at ¶ 54, 13 FCC Rcd 24848. The Commission stated:

Carriers have a legitimate interest in protecting confidential information, and we agree that disclosure could result in competitive injury to those who provide such information to the Commission. This policy is also designed to enhance the efficiency and integrity of our audit process by encouraging carriers to comply in good faith with Commission requests for information. Moreover, the Commission considers audit reports to be internal agency documents that, consistent with FOIA Exemption 5, generally should not be disclosed to the extent they present staff findings and recommendations to assist the Commission in pre-decisional deliberations. Since we are able to make a finding that audit materials received from carriers generally fall within FOIA Exemption 4, and as an indication of the importance we place on upholding the confidentiality of these materials, we will amend Section 0.457 of our rules to indicate that information submitted in connection with audits, investigations and examination of records will not routinely be made available for public inspection. **Report and Order** at ¶ 54, 13 FCC Rcd at 24848.

In this case, the Commission has already weighed the factors for and against disclosure and has determined that the proper balance was to release the staff's audit report and the carriers' responses thereto. MCI's request, however, seeks to have the Managing Director take the unprecedented step of releasing raw audit documents and staff work papers. The Managing

Director should consider taking such a step only in the most compelling of circumstances. MCI's showing does not come close to meeting that standard.

MCI's Request does not even address the Commission's concern about the impact of disclosure on the efficiency and integrity of the audit process. As the Commission has repeatedly noted, the audit process relies upon and receives the full cooperation of the audited companies. As stated in Paragraph 51 of the Notice leading to the **Report and Order**:

The Commission has held that the public disclosure of data gathered in an audit is likely to impair its future ability to obtain such data because while the Commission could rely on compulsory process to obtain the desired materials, such measures would involve significant expense and delay. The Commission has also recognized in this regard that although the information gathering process that takes place during an audit begins with a general inquiry that presents an opportunity for a very selective response by the carrier, carriers have been very cooperative, not only permitting examination of company records, but also allowing employee interviews and preparing new documents. The Commission has also recognized that if audit materials were routinely disclosed, it would be likely that voluntary assistance in providing information would diminish, especially since the audits do not present the expectation of a government-bestowed benefit on the carrier. In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, CC Docket No. 96-55, Notice of Inquiry and Notice of Proposed Rulemaking, FCC 96-109, released March 25, 1996 at ¶ 51.

The Commission's policy in this regard goes back more than a decade. *See, e.g., Scott J. Rafferty*, 5 FCC Rcd 4138, ¶ 5 (1990), emphasizing the Commission's settled policy of not disclosing raw audit data. It should not be overturned by the Managing Director in this case. The present audit is a perfect example. BellSouth believes that it is no overstatement to say that the ASD audit staff could not have performed the CPR audit without extensive cooperation and assistance from BellSouth. In providing that cooperation and assistance, BellSouth operated with the full expectation, based on long history as well as the recent **Report and Order**, that the documents provided to the Commission would not be made public. If that expectation is destroyed in this proceeding, BellSouth will be forced to view future audits as possible precursors to litigation. In the absence of an expectation of confidentiality, the appropriate litigation strategy would be to respond very literally to an auditor's inquiry.

IV. The Commission should not release audit data pursuant to a protective order.

As an alternative to public release of BellSouth's documents, MCI requests that the Commission could issue a protective order limiting access to and use of the information. Request at 4. The Commission should deny this request. First, use of a protective order should not be considered unless and until the Commission determines that it is appropriate to release raw audit data. As shown above, the Commission should not do so in this case. Second, release of raw audit data subject to a protective order does not address the damage that would be done to the audit process if carriers cannot be confident that the data they submit to the Commission during an audit will be kept confidential and not disclosed to a competitor, even pursuant to a

protective order. Third, MCI does not explain how it could use the data in this proceeding without violating the protective order. The Commission would have to establish separate filings for public and private versions of comments in this proceeding. The Commission has generally refused to take such steps in rulemaking or Notice of Inquiry proceedings. *See, e.g., Report and Order*, ¶ 44.

V. Conclusion.

The Managing Director has clear legal authority to deny MCI's Request. MCI has not demonstrated that the public interest would be served by granting its request. The Managing Director should not abandon years of consistent Commission policy by ordering the release of raw audit information and staff work papers. If the Managing Director abandons precedent and undercuts settled expectations, the Commission's future audit capability could be severely damaged.

A copy of this opposition is being served on Mary L. Brown, Senior Policy Counsel, at MCI.

Sincerely,

Handwritten signature of Robert Sutherland in cursive, followed by the initials "RS".

M. Robert Sutherland

cc: Chris Wright
Lisa Zania
Ken Moran
Andy Mulitz
Cliff Rand