

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Ameritech Corporation Telephone Operating)	
Companies' Continuing Property Records)	
Audit)	
)	
Bell Atlantic (North) Telephone Companies')	
Continuing Property Records Audit)	
)	
Bell Atlantic (South) Telephone Companies')	CC Docket No. 99-117
Continuing Property Records Audit)	
)	
BellSouth Telecommunications' Continuing)	
Property Records Audit)	ASD File No. 99-22
)	
Pacific Bell and Nevada Bell Telephone)	
Companies' Continuing Property Records)	FOIA Control No. 99-163
Audit)	
)	
Southwestern Bell Telephone Company's)	
Continuing Property Records Audit)	
)	
US West Telephone Companies' Continuing)	
Property Records Audit)	

APPLICATION FOR REVIEW

Pursuant to Section 0.461(i)(2) of the FCC's Rules,¹ Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell (the "SBC LECs") hereby

¹ 47 C.F.R. § 0.461(i)(2). While the Ruling gives MCI 10 working days to request review pursuant to Section 0.461(i)(2), it only gave the RBOCs 5 working days to do so pursuant to Section 0.459(g). Ruling at 5. Section 0.461(i)(2) is equally applicable to both parties as it provides that "the person who submitted the records to the Commission and the person who filed the request for inspection of those records may file an application for review within the 10 working days . . ." Also, Section 0.459(g) is not applicable because a ruling on a request for confidentiality was not required as indicated by the following sentence in Section 0.459(a): "If the materials are specifically listed in §0.457, such a request is unnecessary." "Information submitted in connection with audits" is specifically listed in Section 0.457(D)(1)(iii). For these reasons, the RBOCs should have been given the same 10 working days to seek review of this Ruling as MCI, especially given that the RBOCs were those most aggrieved by the Bureau decision to grant

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submit this Application for Review (“AFR”) of the Common Carrier Bureau’s (“Bureau”) July 27, 1999 ruling (the “Ruling”) on MCI WorldCom Inc.’s (“MCI”) Freedom of Information Act (“FOIA”) request dated June 22, 1999.² The Ruling largely granted MCI’s FOIA request by allowing MCI to have access to the requested documents and other documents associated with the Continuing Property Record (“CPR”) audits pursuant to a Protective Order adopted in the Ruling.

I. RAW AUDIT DATA AND AUDIT WORKPAPERS SHOULD NOT BE DISCLOSED.

The Ruling is clearly contrary to the FCC’s prior rulings. In case after case over many years, the FCC consistently has limited the information disclosed regarding an audit.³ In the case of most of its audits, the FCC does not release any information at all. In exceptional cases, the FCC has departed from its general policy to release a limited amount of information about an audit, provided the following three-prong test was satisfied:

- (1) that the summary nature of the data and information contained in a particular report is not likely to cause the providing carrier substantial competitive injury; (2) that release of summary data and information is not likely to impair our ability to obtain such information in future audits; and (3) that overriding public interest concerns favor release of the report.⁴

access to their confidential audit information. The SBC LECs respectfully request that the FCC clarify that Section 0.461 is applicable under these circumstances for purposes of future FOIA requests as well as any subsequent judicial challenges to the FCC’s decision on review.

² Letter dated July 27, 1999 from Lisa M. Zaina, Acting Deputy Chief, Common Carrier Bureau, FCC to Mary L. Brown, MCI (the “Ruling”).

³ See, e.g., *The Bell Telephone Operating Companies*, 10 FCC Rcd 11541 ¶4 (1995); *GTE Telephone Operating Companies*, 9 FCC Rcd 2588, 2588, ¶3 (1994); *Bell Communications Research, Inc.*, 7 FCC Rcd 891, 892, ¶5 (1990); *J. David Stoner*, 5 FCC Rcd 6458, 6459, ¶12 (1990); *Martha H. Platt*, 5 FCC Rcd 5742, 5742-43, ¶6 (1990). See also *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, 12 FCC Rcd 133 ¶54 (1998)(“Confidential Treatment R&O”).

⁴ *BellSouth Corporation*, 74 Rad. Reg. 2d (P&F) 411, ¶8 (1993) (footnotes omitted)(emphasis added).

In these exceptional cases, the FCC has released aggregate or summary data, but it has categorically refused to release raw data or its own auditors' workpapers. The Ruling takes a shortcut around all of its prior decisions and avoids addressing the reasons for nondisclosure, including the legitimate interests of the SBC LECs and the other Regional Bell Operating Companies ("RBOCs"), by reasoning that this is a "unique situation" and that "[b]ecause the release of this information is discretionary, it does not serve as precedent for future requests under FOIA or otherwise."⁵

This Ruling undermines and contradicts all of the previous precedents that established the FCC's long-standing policy of protecting audit-derived information and its categorical refusal to release raw audit data and auditors' workpapers. The FOIA exemptions reflect an attempt to balance the public interest in disclosure against the rights of those submitting information to privacy and confidentiality and other factors favoring nondisclosure. If the Bureau can so easily dismiss the reasons for withholding audit information, then the FCC's long-standing policy and assurances that audit data will be protected are worthless. In effect, the Ruling has created a new category for "unique situations" in which the carrier's confidential audit information and the auditor's workpapers will be subject to wholesale disclosure for little or no reason.

Simply stating that this is a "unique situation" and that disclosure is justified "because of the Commission's duty to ensure that parties are given a reasonable opportunity to make informed comment on Issue No. 2 of the NOI" is not sufficient to create, in effect, a broad exception to the FCC's long-standing policy.⁶ Practically every audit presents unique situations and issues. These CPR

⁵ Ruling at 3.

⁶ See *Pennzoil Co. v. Federal Power Comm'n*, 534 F. 2d 627, 632 (5th Cir. 1976) (held that the FPC abused its discretion by failing to fully consider all the factors relevant to the resolution of the FOIA dispute and required the FPC to

audits are no more exceptional or unique than many of the audits the FCC has conducted in the past and prior to this Ruling, the FCC had already released much more information (i.e., over 900 pages of materials), than in any other previous telephone company audits. In reality, MCI and other interested parties do not need access to all these additional audit materials to comment on Issue No. 2. The NOI sought comment on the methodology described in the Rescoring Public Notice.⁷ In releasing the NOI and the Rescoring Public Notice, the FCC had already defined the scope of its inquiry regarding Issue No. 2. The NOI did not seek to involve MCI or other competitors of the RBOCs in the detailed tasks of the audit process, such as an item-by-item review. This detailed review was the responsibility of the FCC audit staff. If any further item-by-item review or a review of the audit staff's performance is necessary, the FCC should retain an independent third party, rather than enlist competitors, to perform that assessment.⁸ MCI simply does not need raw audit data to comment on the objective reasonableness of the auditors' methodology.

To remain consistent with the prior rulings (cited in footnote 3 above) and Section 0.457, the FCC should consider all of the reasons for nondisclosure explained in the SBC LECs' and the other RBOCs' oppositions to MCI's FOIA request. The SBC LECs hereby incorporate by reference the arguments presented in their opposition. The Ruling states that it need not reach the merits of the Exemption 4 arguments because it has discretionary authority to disclose the

consider three additional factors).

⁷ Public Notice, "The Accounting Safeguards Division Releases Information Concerning Audit Procedures for Considering Requests by the Regional Bell Operating Companies to Reclassify or 'Rescore' Field Audit Findings of Their Continuing Property Records." DA 99-668, released April 7, 1999 (The "Rescoring Public Notice")

⁸ Section 220(c) authorizes the FCC to retain the services of licensed accountants for this purpose.

information.⁹ However, this discretionary authority cannot be exercised in a manner that completely ignores and undermines the audit precedent. In effect, the audit precedent has established the guidelines for the FCC's exercise of its discretion and the FCC should not ignore that precedent arbitrarily and with little explanation.¹⁰ In addition, this disclosure is contrary to Section 0.457 which states in part:

Except where the records are not the property of the Commission or where the disclosure of those records is prohibited by law, the Commission will entertain requests from members of the public under § 0.461 for permission to inspect particular records withheld from inspection under the provisions of this section, and will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in the light of the facts of the particular case.¹¹

Assuming *arguendo* that disclosure of the information is not prohibited by law, Section 0.457 requires the FCC to “weigh the policy considerations favoring nondisclosure against the reasons cited for permitting inspection” – which reasons must be supported by a “persuasive showing” from MCI.¹² MCI has not made such a persuasive showing in support of its request. But, the Ruling does not even reach the merits of the factors that weigh against disclosure under Exemption 4.¹³ Hence, the Ruling does not comply with the basic requirements of Section 0.457 or the FOIA.

In previous audit cases that have considered the FCC's discretionary authority, the FCC has considered the reasons for not allowing disclosure and has weighed them against the public interest in disclosure.¹⁴ Even though those prior

⁹ Ruling at 3.

¹⁰ See *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45 (D.C. Cir. 1981).

¹¹ 47 C.F.R. § 0.457(emphasis added).

¹² *Confidential Treatment R&O*, ¶¶ 6, 15, 19.

¹³ Ruling at 3.

¹⁴ *J. David Stoner*, 5 FCC Rcd 6458, 6460-61 ¶¶ 19-22 (1990); *Martha H. Platt*, 5 FCC Rcd 5742, 5743 ¶9 (1990).

audits involved important public interest issues, the FCC refused to exercise its discretion to release detailed audit materials. Further, the FCC explained that it would not exercise its discretion to disclose exempt material “on the mere chance that it might be interesting or helpful; rather, it insists on a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue.”¹⁵ In this case, MCI does not need detailed audit data to resolve any issue. The FCC has already disclosed more than enough information for MCI to be able to comment on the objective reasonableness of the auditors’ rescoring methodology, which is all that Issue No. 2 inquires about. Furthermore, Issue No. 2 does not ask MCI to become involved in the detailed task of reviewing each individual item that was the subject of a rescoring request; rather, it merely asks about the general reasonableness of the auditors’ methodology as described in the Rescoring Public Notice.

At a minimum, the FCC should consider and analyze the reasons for nondisclosure under Exemptions 4 and 5 and withhold those audit materials that clearly fall within these exemptions. Any information that does not clearly fall within the exemptions should be released pursuant to an appropriate protective order.

II. INFORMATION THAT DOES NOT RELATE TO RESCORING OF “NOT FOUND” ITEMS INVOLVED IN ISSUE NO. 2 SHOULD BE WITHHELD.

As explained above, the SBC LECs submit that MCI does not need the requested materials to comment on Issue No. 2. Accordingly, MCI’s request should have been denied, or at a minimum, the disclosure under the protective order should have been severely limited. Assuming, however, that the FCC concludes that disclosure is required for purposes of permitting MCI to comment

¹⁵ *Martha H. Platt*, 5 FCC Rcd 5742, 5743 ¶9 (1990).

on Issue No. 2, the FCC should not release information that is clearly beyond the scope of Issue No. 2.¹⁶ Some of the information that the Ruling orders to be disclosed is not related at all to Issue No. 2, and thus, its disclosure is not justified by the reasoning of the Ruling. That is, the Ruling states that discretionary release is warranted “to allow a reasonable opportunity for informed public comment on Issue No. 2 of the NOI,”¹⁷ but some of the documents and information to be disclosed are not even arguably relevant to that issue. In particular, the following documents and information should not be disclosed to MCI or any other party:

- (1) Continuing Property Record (CPR) listings for all sampled items and all undetailed investment other than those “not found” items that were the subject of the requests for rescoring;
- (2) Evidentiary submissions regarding undetailed investment items;
- (3) FCC auditors’ field notes other than those relating to “not found” items that were the subject of the requests for rescoring;
- (4) Chronological indication of scoring of items other than those “not found items” that were the subject of the requests for rescoring;
- (5) All vendor-specific pricing information and invoices; and
- (6) Company responses to other requests from the auditors unrelated to the items determined to be “not found” in the November 5 and 18, 1997 letters to the SBC LECs from the audit staff.

Issue No. 2 is limited to the “validity and reasonableness of the methodology used by the Bureau’s auditors in determining whether to rescore or to modify a finding during a field audit that equipment was ‘not found.’” Therefore, assuming MCI needs any additional information for purposes of Issue No. 2, the most that it needs is documentation related to items which (1) were scored as “not found” during a field audit and (2) were subject to a request to rescore or modify

¹⁶ See *St. Joseph’s Hospital Health Center, v. Blue Cross of Central New York, Inc.*, 489 F. Supp. 1052, 1065 (N.D.N.Y. 1979). In considering “alternatives to full disclosure which will provide consumers with adequate knowledge to make informed choices and participate in the regulatory process,” *id.*, the agency should not disclose materials that are not necessary for the stated purpose of the request.

¹⁷ Ruling at 4.

the field audit score. Disclosure of any other documentation is unwarranted as it is unrelated to the “not found” items that are the subject of Issue No. 2. For example, CPR listings or audit workpapers concerning items that were scored as “found” or “unverified” have no relevance to the scoring or rescoring of “not found” items. Likewise, undetailed investment is not the subject of Issue No. 2, rather, it is the subject of Issue No. 5. To explain further, there was no item-by-item scoring or rescoring of undetailed investment as “found” or “not found,” and thus, it is not the subject of either Issue No. 2 or the Rescoring Public Notice. Also, beyond the scope of items under Issue No. 2 is any item that was scored “not found” during the field audit if the audited company did not request rescoring.

In view of the SBC LECs’ contractual obligation to protect from public disclosure vendor-specific information, including vendor pricing and invoices, the SBC LECs request modification of the Ruling to require redaction or other method of withholding of such vendor-specific information from the SBC LECs’ evidentiary submissions and the audit workpapers. The invoices and other vendor-specific pricing information have no relevance to the existence of an item of equipment. While such pricing information may be relevant to other audit issues, such as the availability of adequate support for the original cost of items booked in the plant accounts, it is not necessary for purposes of showing whether an item was properly scored “not found.”

In an ex parte filing, the SBC LECs offered to perform the redaction of such vendor-specific information and hereby renew that offer.¹⁸ In any event, in order to ensure that only those materials authorized by the Protective Order (as revised to conform to this AFR) are actually disclosed, the SBC LECs should be given an opportunity to review the SBC LEC materials to be disclosed before any

¹⁸ Letter dated July 21, 1999 from B. Jeannie Fry, SBC, to Magalie R. Salas, Secretary, FCC, attachment at 2.

other Reviewing Party is allowed access to such materials pursuant to the Protective Order.¹⁹

In summary, while the Ruling claims to provide access to audit information “only...insofar as such disclosure may be necessary for parties to prepare comments and respond to NOI Issue No. 2,”²⁰ it actually allows access to far more information than is reasonably necessary. The Ruling should be revised to withhold the unnecessary audit information listed above.

III. THE FCC SHOULD PROVIDE ADDITIONAL PROTECTION FOR VENDOR-SPECIFIC PRICING INFORMATION.

Previously, the FCC has permitted the SBC LECs to provide additional protection for vendor-specific pricing information. To the extent this Ruling allows MCI and any other party claiming to have an interest in filing comments on the NOI to have access to vendor-specific invoices and pricing information without additional protection, it is inconsistent with the precedents. For example, in 1998, in CC Docket No. 94-97, the FCC adopted a protective order that provided special protection for vendor-specific pricing data.²¹ Specifically, the protective order

¹⁹ During the course of these audits, the SBC LECs responded to numerous requests for information they received from the auditors. The SBC LECs are concerned that the audit staff may allow MCI or other competitors to have access to entire notebooks or files that contain both material that the Protective Order permits as well as other unauthorized material. For example, the Protective Order, at 2, states that the auditors’ workpapers “are kept in notebooks that include: Commission auditors’ field notes and subsequent notes related to consideration and decisions made on rescoring issues.” This language suggests that other notes may also be included in these same notebooks. The SBC LECs should be allowed a brief period of time, such as 10 working days, to review the notebooks and other materials to be disclosed to assure that overbroad disclosure in violation of the Protective Order does not occur.

²⁰ Ruling at 4.

²¹ *In the Matter of 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*, 13 FCC Rcd 13615 (1998). See also *Commission Requirements for Cost Support Material to be Filed with Open Network Architecture Access Tariffs*, 7 FCC Rcd 1526, ¶¶ 36-37, 50-51 and Attachment B (1992); *Confidential Treatment R&O*, ¶ 35. Recently, the SBC LECs also withheld vendor-specific information associated with long-term number portability tariffs. See Letter dated May 3, 1999 from Hope

assured that a vendor would be notified and given an opportunity to protect its data before any competitor (or employee of, or consultant to, a competitor) of the vendor would be allowed access to the vendor's data. Consistent with this and other precedent, the vendor-specific data contained in the evidentiary submissions and audit workpapers should receive additional protection. Given that the FCC has recognized redaction as an effective method of protecting confidential information,²² the SBC LECs submit that this would be the best method of protecting the vendor-specific pricing information. The SBC LECs would redact the vendor-specific information from their evidentiary submissions and the auditors' workpapers before the information is made available pursuant to the protective order.²³

For the foregoing reasons, the SBC LECs request that the FCC review the Ruling and revise it in the respects discussed above.

Respectfully submitted,

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August 3, 1999

Thurrott, SBC, to Magalie R. Salas, Secretary, FCC (regarding SWBT Tariff FCC No. 73, Transmittal No. 2745).

²² *Confidential Treatment R&O*, ¶ 9.

²³ The SBC LECs need a reasonable period of time to perform this redaction and return a redacted copy of the materials to the Bureau. The SBC LECs submit that sixty (60) days would be a sufficient period of time to complete this redaction process.

CERTIFICATE OF SERVICE

I, Katie M. Turner, hereby certify that the foregoing, "APPLICATION FOR REVIEW" in CC Docket No. 99-117, ASD File No. 99-22 and FOIA CONTROL No. 99-163 has been filed this 3rd day of August, 1999 to the Parties of Record.

A handwritten signature in black ink, appearing to read "Katie M. Turner", written over a horizontal line.

Katie M. Turner

August 3, 1999

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