particular areas in which the broadband competitor is successfully attracting subscribers. Disclosure of broadband Form 477 data to competitors would therefore facilitate the very anticompetitive conduct that the Commission's precedents make clear that the confidentiality rules are designed to prevent.

But even if the Commission had not repeatedly held that competitively sensitive data of the types at issue here must be protected from unnecessary disclosure, disaggregated form 477 data falls squarely within the categories of information "not routinely available for public inspection." 47 C.F.R. § 0.457. In particular, those rules specify that the Commission is authorized to withhold from public inspection any information that is within the scope of the Federal Trade Secrets Act, 18 U.S.C. § 1905. *See* 47 C.F.R. 0.457(c)(5). Such "trade secrets" comprise any information that is exempt from Freedom of Information Act ("FOIA") disclosure pursuant to FOIA Exemption 4, because it is "commercial *or* financial information" that is "confidential." 5 U.S.C. § 552(b)(4). *See also CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1151 (D.C. Cir. 1987) ("the scope of the [Trade Secrets] Act is at least co-extensive with . . . Exemption 4 of FOIA").

The term "commercial" information is given its "ordinary meaning" under Exemption 4 and thus includes materials relating to a firm's "basic commercial operations." *Public Citizens Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). As the Commission has recognized, however, "commercial" extends well beyond "information regarding basic commercial operations" to include, for example, a "list of sites and construction information." *Southern Company; Request for Waiver of Section 90.629 of the Commission's Rules*, 14 FCC Rcd. 1851 (1998). *See also Mobile Relay Associates; Requests for Confidential Treatment of Materials Submitted in Conjunction with Pending Applications*, 14 FCC Rcd.

18918, 18919 (1999) ("customer records" are "commercial" information).[24] There can be no serious question that the disaggregated business and customer information contained in disaggregated Form 477 data is "commercial" information.[25]

To establish that commercial or financial information is "confidential," a carrier "need not show 'actual competitive harm'"; rather, evidence revealing '[a]ctual competition and the likelihood of substantial injury' is sufficient to bring commercial information within the realm of confidentiality." *Public Citizen Health Research Group* 704 F.2d at 1291 (D.C. Cir. 1983) (quoting *Gulf & Western Industries v. United States,* 615 F.2d 527, 530 (D.C. Cir. 1980)).[26] The D.C. Circuit recently explained that information that "would provide competitors with valuable insights into the operational strengths and weaknesses of a [company]" threatens exactly "the type of competitive harm envisioned in Exemption 4." *Public Citizens Health Research Group v. FDA,* 185 F.3d 898, 905 (D.C. Cir. 1999) (internal quotations omitted). Applying these standards, the Commission has recognized that information should be treated as confidential if it would "assist[] competitors in preparing marketing strategies to use in direct competition with [another telecommunications carrier]." *Southwestern Bell Telephone*

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[24] *See also, Landfair v. DOA,* 645 F. Supp. 325, 327-28 (D.D.C. 1986) (examples of commercial or financial information include "business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition"); *Washington Post v. HHS,* 690 F.2d 252, 266 (D.C. Cir. 1982) (same).

[25] As noted above, Form 477 submissions also reveal sufficient information about competitive LECs' operations to enable other carriers to estimate costs, profits and other financial information. Thus, the information contained in carriers' Form 477 submissions unquestionably qualifies as "financial" information as well.

[26] *See also Landfair,,* 645 F. Supp. at 328 (D.D.C. 1986).

Company, Tariff FCC No. 73, DA 96-1927 (released November 19, 1996).[27] As explained above, access to a competitive carrier's Form 477 submissions would assist its competitors in precisely these ways.

In short, the disaggregated data provided by carriers in Form 477 submissions is competitively sensitive and deserves the full protection of the Commission's confidentiality rules. It was therefore entirely appropriate for the Commission, in the *Data Gathering Order,* to specifically assure carriers that they could "file [the Form 477] data with confidence that any information found to be competitively sensitive under [the Commission's] . . . rules [would] . . . not be disclosed" and that the Commission planned to release the data only in aggregated form so as not to identify the individual provider of the data. *Data Gathering Order* ¶¶ 87, 91-94.

The confidentiality concerns associated with Form 477 data are only heightened by the Commission's proposals in the 2nd NPRM to require carriers to submit additional and even more highly disaggregated data by: (1) removing the minimum threshold for broadband reporting, (2) requiring separate reporting of residential broadband services from small businesses, and (3) collecting subscribership information by zip code. If the Commission began collecting subscriber data by zip code and began disaggregating small business from residential

[27] *See also Burke Energy Corp. v. Dep't. of Energy,* 583 F. Supp. 507 (D. Kansas 1984) (protecting materials because their disclosure "would enable competitors to solicit" the information owners' customers"); *National Rural Telephone Cooperative on Request for Inspection of Records,* 5 FCC Rcd. 502, ¶ 12 (1990) (finding that "disclosure of [certain] contracts . . . could result in substantial competitive harm" because it would "provide other carriers with key contractual provisions that they can use in tailoring competitive strategies."); *MCI Telecommunications Corp. On Request for Inspection of Records,* 58 Rad. Reg. 2d (P&E) 187 ¶ 8 (1985) (finding information to be confidential because release of the information would "enable competitors to determine AT&T's forecast of future volume for its switches by specific location").

lines, that information would allow competitors to aim their responses to a submitting carrier's strategic entry plans with even more accuracy.

Nevertheless, in the 2nd NPRM, the Commission proposes to *reduce* the confidentiality protections for carriers' Form 477 data by establishing a "rebuttable presumption that some or all of the data in Form 477 does not typically meet [Commission] standards for competitively-sensitive information." 2nd NPRM ¶ 26. This proposal plainly should be rejected.

As explained above, Form 477 data are unambiguously confidential company-specific data of the type that the Commission's decisions have always properly treated as competitively-sensitive information and shielded from unnecessary disclosure. Indeed, the extensive record in this proceeding supports the opposite presumption – that the Form 477 data *are* competitively sensitive. Thus, the Commission should adopt a presumption that Form 477 data are competitively sensitive and place the burden on those seeking disclosure to demonstrate that there is no possibility of competitive harm from disclosure of a carrier's disaggregated data.

B. There Is No Compelling Public Interest In Disclosure Of Disaggregated Form 477 Data To The Public Or To Selected Third Parties.

Regardless whether the Commission presumes that the information contained in Form 477 is competitively sensitive or retains the *Data Gathering Order* framework of case-by-case litigation of that issue on a blank slate each time a third party makes a FOIA request for access to the data, the Commission should reaffirm that it will not publicly disclose disaggregated Form 477 data *sua sponte*. Although the Commission has authority to disclose confidential information in certain narrowly confined circumstances,[28] those circumstances do

[28] An agency may disclose information that falls under the Trade Secrets Act if that agency is "authorized by law" to do so. 18 U.S.C. 1905. The D.C. Circuit recently held that § 220(f) of

(footnote continued on next page)

not exist here. As the Commission has repeatedly stressed, it is especially "sensitive to ensur[e] that the fulfillment of its regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulatees at a competitive disadvantage." *Confidentiality Order* ¶ 8. Accordingly, "the Commission generally has exercised its discretion to release publicly information falling within FOIA Exemption 4 only in very limited circumstances, [such as] . . . where the Commission has identified a *compelling* public interest in disclosure." *Id.* (emphasis added).

No such public interest in disclosure has been – or could be – identified here. To the contrary, the Commission itself has indicated that it can meet its stated goals *without* disclosing carriers' disaggregated Form 477 data to third parties. The Commission expressly recognized that it could "achieve [its] goal[s] in a manner that ensures the non-disclosure of confidential provider-filed data." *Data Gathering Order* ¶ 87. Specifically, the Commission concluded that it could "achieve substantially the same public benefits by [only] releasing [carriers' Form 477 data] in an aggregated fashion." *Id.* at ¶ 91; *see also id.* ¶ 93 ("We emphasize that apart from publicly available information, which we anticipate reporting, we intend to publish the local competition data in our local competition reports only to the level of detail necessary to provide an understanding of how local competition is developing. We therefore agree with those commenters who suggest that we can aggregate much of the data – for example, by carrier class and to the state level – so that it does not identify the individual

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(footnote continued from previous page)

the Communications Act provides such authorization to the Commission. *See Qwest Communications International v. FCC*, 229 F.3d 1172 (D.C. Cir. 2000).

provider"). Those conclusions remain sound, and the 2nd NPRM identifies no legitimate benefit from public disclosure of disaggregated carrier data.

The 2nd NPRM (¶ 29) does suggest that there might be some benefit to some type of limited disclosure of disaggregated Form 477 data to "outside academics" (or undefined "outside parties") who could assist the Commission in "analy[zing] this data." *Id.* Presumably, this proposal reflects a belief that selective disclosure of the commercially sensitive Form 477 data (presumptively, subject to strict protective order conditions) would allow the Commission to obtain "expert" advice that would result in more comprehensive or accurate interpretations of that data. But even accepting the unlikely proposition that there are sophisticated statistical and other analytical techniques that are beyond the abilities of the Commission's staff, there is still no need to disclose the disaggregated data.[29]

Statisticians and other data analysts rarely require the actual disaggregated data to be able to recommend appropriate methodologies for analyzing a data set. To the contrary, as the D.C. Circuit recently explained, the "methodology could be evaluated in theoretical terms as applied to hypothetical situations or to a composite of raw data without identifying an individual [firm's] . . . sensitive commercial information." *See Qwest Communications International,* 229 F.3d at 1183 (D.C. Cir. 2000). These procedures would be especially effective in this case. The Commission could provide outside statisticians with a blank Form 477 and request advice regarding the proper methodologies for analyzing the data sought by that form. The Commission might even provide a hypothetical data set for use by outside parties in developing such

[29] The Commission's staff includes very experienced statisticians and data analysts who are, presumably, familiar with the relevant methods for analyzing data. In fact, the Commission's staff arguably has a significant advantage over most outside analysts in that it has particular experience analyzing data from the telecommunications and broadband industries.

methodologies. Either of these procedures would be very effective at obtaining outside expertise without actually disclosing carriers' highly confidential data. Simply put, there are plausible alternatives to releasing disaggregated Form 477 data that could address the Commission's stated goals, and there is therefore no justification for releasing disaggregated Form 477 data even to a limited subset of the public. *See Qwest*, 229 F.3d at 1183 (Commission must "consider plausible alternatives and discount them before resorting to releasing [confidential information]").

C. The Commission Should Not Disclose A Carrier's Form 477 Data To A State Commission Without, At A Minimum, Prior Notice And An Opportunity To Be Heard By The Carriers Whose Data Has Been Requested.

The Commission currently discloses the confidential information contained in Form 477 submissions to any state commission that has "appropriate" protections in place to safeguard the information from further disclosure. *See Data Gathering Order* ¶ 95. Even if a state does not have such protections in place, the Commission may disclose confidential information to the state commission so long as the state commission pledges to guard carriers' data with confidentiality standards that are at least as restrictive as the Commission's standards.

The problem with this policy is that the carriers, whose data is being disclosed, are hampered in their efforts to object or to enforce the state agency's promises to keep the data confidential, because the carrier is not a party to the agreement between the Commission and the state agency – and, indeed, may not even receive prior notice of the Commission's disclosures to those state agencies.[30] This problem is easily solved.

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[30] For example, the Commission recently released company-specific data from Form 477 to the Illinois Commerce Commission ("ICC"). *See* Letter Agreement Signed by Peyton L. Wynes, Chief, Industry Analysis Division, FCC and Charles R. Fisher, Illinois Commerce Commission, IAD File No. 00-100 (dated 19, 2000). Neither AT&T nor any other carrier is a party (or even an explicit third party beneficiary) to that Letter Agreement.

The ideal solution is for the Commission to stop disclosing carriers' Form 477 submissions to state agencies. Instead, state agencies should seek that information directly from the carriers.[31] This solution has several advantages. It would (1) allow carriers to directly enter into agreements with the state agencies regarding the confidentiality of the requested information; (2) allow the confidentiality agreements to be tailored to address varying confidentiality levels of the data; and (3) allow carriers to enforce those agreements against the state agencies. The efficacy and robustness of this solution is confirmed by the fact that carriers and state commissions already frequently enter into such agreements. Thus, such a policy would impose little if any additional burdens on state commissions and carriers, but would successfully protect competition by allowing carriers to enforce the confidentiality of their competitively sensitive data.

At a minimum, each carrier whose data is requested by a state commission should receive pre-disclosure notice and an opportunity to be heard, and the Commission should insist that the states grant carriers third party beneficiary rights to enforce state promises of confidentiality. Although this policy would not allow carriers to negotiate the best possible

[31] Such a procedure would not introduce any substantial new burdens on carriers since they already have the data collected and organized for submission to the Commission.

confidentiality terms with the state commission, it would at least provide some protection to carriers by allowing them to enforce the confidentiality agreements against the state commissions.

In sum, it is critically important that the Commission give disaggregated Form 477 data the full protection of its established confidentiality rules. Any relaxation of those rules with respect to Form 477 data – or even additional uncertainty regarding the Commission's willingness to safeguard such information from unnecessary disclosure – could only impede the Commission's ability to obtain complete and timely local competition and broadband data. In this regard, any indication that the Commission will not strictly enforce its confidentiality rules would invite court challenges, stay motions and general reluctance to disclose disaggregated Form 477 data to the Commission in the first instance. And, as explained above, any actual failure to protect competitively sensitive Form 477 data that the Commission does acquire would directly undermine the 1996 Act's core competition goals by fostering the very unfair competition that the Commission's confidentiality rules were designed to prevent.

Accordingly, based upon the extensive record in this docket, the Commission should explicitly adopt a presumption that Form 477 data *are* competitively sensitive and place the burden on those seeking disclosure to demonstrate that there is no possibility of competitive harm from disclosure of a carrier's disaggregated data. In so doing, the Commission would ensure that carriers continue to submit accurate and complete Form 477 data in a timely manner and that new entrants are afforded a fair opportunity to compete with the entrenched local monopolists.

CONCLUSION

For the foregoing reasons, the Commission should decline to adopt any proposals that would increase the level of detail broadband providers would have to provide. The Commission should also decline to gather data on "availability" until it provides and allows comment on a specific workable definition and attendant rules. In addition, the Commission should not eliminate or lower the broadband reporting threshold, and should move from a semi-annual to an annual reporting requirement. Furthermore, the Commission should require the release of Form 477 three months before the filing deadline. Moreover, the Commission should retain its current process allowing allocation of pre-paid subscribers to states on the basis of good faith estimates.

In addition, the Commission should take steps to ensure continued timely and accurate Form 477 filings by adopting a presumption that the data in Form 477 satisfy the Commission's criteria for competitively sensitive information. The Commission should not disclose this information *sua sponte* – to the public, outside academics or other parties. Finally, the Commission should ensure that carriers retain the right to enforce state promises to keep confidential any Form 477 data that they obtain from the Commission or from the carriers.

Respectfully submitted,

Mark C. Rosenblum
Stephen C. Garavito
James W. Grudus
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920

Howard J. Symons
James J. Valentino
Jonathon P. Cody*
MINTZ, LEVIN, COHN, FERRIS
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2608

David L. Lawson
Christopher T. Shenk
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006

March 19, 2001

CERTIFICATE OF SERVICE

I, Karen Kotula, do hereby certify that on this 19th day of March, 2001, a copy of the foregoing "Comments of AT&T Corp." was hand-delivered to the following parties:

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals, 445 Twelfth Street, SW
TW-B204
Washington, DC 20554

International Transcription Services, Inc.
1231 20th Street, NW
Washington, DC 20036

Suzanne McCrary
Industry Analysis Division
445 Twelfth Street, SW
Sixth Floor
Washington, DC 20554

Karen Kotula

Karen Kotula