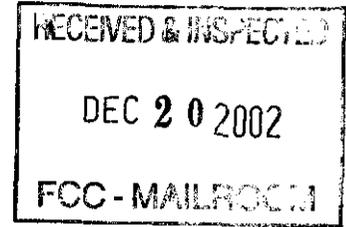


Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of)
Federal-State Joint Board on Universal)
Service)
Public Service Telephone Company)
Petition for Confidential Treatment of Section)
36.61 I Cost Data)

CC Docket No. 96-45

ORDER

Adopted: December 17, 2002

Released: December 18, 2002

By the Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we deny the request by Public Service Telephone Company, Inc. (Public Service) for confidential treatment of loop cost data provided to the Commission by the National Exchange Carrier Association (NECA) pursuant to sections 36.611 and 36.613 of the Commission's rules. We find that Public Service has not demonstrated by a preponderance of evidence that its loop-cost data should be withheld from public inspection.

II. BACKGROUND

2. In accordance with section 36.611 of the Commission's rules, on July 31 of each year, incumbent local exchange carriers (LECs) file with NECA the preceding year's loop-cost data for each study area.¹ Loop cost data include information concerning a carrier's plant costs, operating, maintenance, and depreciation expenses.² Incumbent LECs are also required to include with their loop cost data the number of working loops in their study areas and, if applicable, the number of wire centers or disaggregated zones within wire centers.³ Pursuant to section 36.613 of the Commission's rules, NECA uses these data to compile, among other things, unseparated loop cost and support amounts on a study area and nationwide basis.⁴ NECA

¹ 47 C.F.R. § 36.611. Generally, but not always, a study area corresponds to an incumbent local exchange carrier's entire service area within a state. *See* 47 C.F.R. Part 36 App. (definition of "study area").

² *See id.*

³ *See* 47 C.F.R. § 36.611(h).

⁴ 47 C.F.R. § 36.613.

Universal Service Administrative Company (USAC) on October 1 of each year.' Once NECA files these data with the Commission and USAC, they become available to the public.⁶

3. USAC uses NECA's October 1 filing to submit to the Commission, sixty days prior to the start of each quarter, fund size and administrative cost projections for the universal service mechanisms for the ensuing quarter in accordance with section 54.709 of Commission's rules.' With regard to USAC's high-cost support projections, USAC lists, among other things, projected monthly and annual support amounts for rural carriers on a state-by-state study area basis.⁸ This information is publicly available once USAC makes its filing with the Commission.⁹

4. *Public Service Telephone's Reauesi.* On October 12, 2001, Public Service requested that the Commission grant confidential treatment of its loop cost data reported to NECA, and which NECA has provided to the Commission as part of NECA's October 1, 2001 filing.' In response to this request, NECA redacted all company specific data concerning Public Service when it filed its section 36.613 report with the Commission on October 1, 2001. NECA again redacted all company specific data concerning Public Service when it filed its October 1, 2002 report with the Commission.

5. Public Service argues that its loop cost data contain sensitive commercial and financial information concerning Public Service's operations and, if revealed, would likely cause it substantial competitive injury.' In addition, Public Service claims that the disclosure of its loop cost data will cause it competitive harm because such data includes Public Service's total working loops, which allows competitive eligible telecommunications carriers (ETCs) to determine its universal service per-loop support amounts. Public Service therefore requests that the Commission exempt such data from disclosure under the Freedom of Information Act (FOIA) and provide it confidential treatment under the Commission's rules.

6. *Standards for Disclosure.* The Commission's rules governing disclosure of information distinguish between records that are "routinely available" for public inspection and those that are not.¹² If information or materials submitted to the Commission are routinely available, *i.e.*, they do not fall within one of the listed categories of materials not routinely

⁵ USAC is responsible for collecting contributions to the various universal support mechanisms and disbursing universal service support funds. 47 C.F.R. § 54.702. See also 47 C.F.R § 36.613; Universal Service Fund (USF) 2001 Submission of 2000 Study Results (filed October 1, 2001) (*USF Data Submission*).

⁶ See <http://www.fcc.gov/wcb/iatd/neca.html>.

⁷ See 47 C.F.R. § 54.709.

⁸ See <http://www.universalservice.org/overview/filings/default.asp>

⁹ See *id.*; Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order, 15 FCC Rcd 8746, para. 10 (2000) (*2000 Line Counts Confidentiality Order*).

¹⁰ Public Service Telephone Company, Request for Confidential Treatment of Section 36.611 Cost Data (filed Oct. 12, 2001) (*Public Service Petition*).

¹¹ See *Public Service Petition* at 2.

¹² See 47 C.F.R. § 0.451. See also, *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816 (1998) (*Confidentiality Order*) (examining the Commission's policies and rules governing the handling of confidential information).

available for public inspection, the entity submitting them may request, on an *ad hoc* basis, that such information not be routinely available for public inspection.’ Such a request will be granted if the entity submitting the request presents, by a preponderance of the evidence, a case for non-disclosure consistent with the exemption provisions of FOIA.¹⁴ In the case of commercial or financial information, Exemption 4 of FOIA permits the withholding of such information from public disclosure.¹⁵ In applying Exemption 4 protection, courts have used the following test originally set out in *National Parks and Conservation Ass’n v. Morton (National Parks I)*: “a [c]ommercial or financial matter is ‘confidential’ . . . if disclosure of the information is likely . . . either . . . (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”¹⁶

7. Even if the Commission can lawfully withhold information under Exemption 4 of FOIA, the Commission’s rules permit disclosure of such information upon a “persuasive showing” of the reasons in favor of releasing the information.” Consistent with the United States Supreme Court’s decision in *FCC v. Schreiber*,¹⁸ the Commission’s rules contemplate that the Commission will engage in a balancing of the interests favoring disclosure and non-disclosure. In balancing such public and private interests, the Commission has been sensitive to ensure 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.” Accordingly, the Commission generally has exercised its discretion to release to the public competitively sensitive information in limited circumstances, such as where the Commission has identified a compelling public interest in disclosure.”

8. The Wireline Competition Bureau (Bureau), formerly the Common Carrier

¹³ The Commission’s rules currently provide that the following materials related to trade secrets and commercial or financial information are presumed not routinely available for public inspection: (i) financial reports submitted by licensees of broadcast stations pursuant to former § 1.611; (ii) applications for equipment authorizations (type acceptance, type approval, certification, or advance approval of subscription television systems), and materials relating to such applications; (iii) information submitted in connection with audits, investigations, and examination of records pursuant to 47 U.S.C. § 220; (iv) programming contracts between programmers and multichannel video programming distributors; (v) certain materials submitted to the Commission prior to July 4, 1967, or with respect to equipment authorizations between July 4, 1967 and March 25, 1974; and (v) rates, terms, and conditions in any agreement between a U.S. carrier and a foreign carrier that govern the settlement of U.S. international traffic. *See* 47 C.F.R. § 0.457(d).

¹⁴ *See* 5 U.S.C. § 552(b); 47 C.F.R. §§ 0.457(d) and 0.459; *see, e.g., GE American Communications, Inc.*, 11 FCC Rcd 11497, 11498 n.3 (Internat’l Bur. 1996); *Sandab Communications Ltd. Partnership II*, 11 FCC Rcd 11790, 11791 (1996) (Sandab), citing *TKR Cable of Ramapo*, 11 FCC Rcd 3538 (1996). Under the Commission’s rules, information submitted under a request for confidentiality will be treated as confidential until the relevant Bureau rules on the request, and in the event the request is denied, until the Bureau gives the submitting party an opportunity to seek review by the full Commission and the courts. 47 C.F.R. §§ 0.459(g) and (h).

¹⁵ 5 U.S.C. § 552(b)(4).

¹⁶ *See, e.g., National Parks and Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

¹⁷ *See* 47 C.F.R. §§ 0.457(d)(1), 0.457(d)(2)(i).

¹⁸ 381 U.S. 279, 291-92 (1965).

¹⁹ *See e.g., Confidentiality Order*, 13 FCC Rcd at 24823, para. 8.

²⁰ *See id.* (citing *MCI Telecommunications Corp.*, 58 RR 2d 187, 190 (1985)).

Bureau, previously has considered the application of Exemption 4 of FOIA to loop cost data. In *Arvig Telephone Company*, the Bureau found that such data could not be withheld under either prong of the *National Parks I* test.²¹ The Bureau determined that the first prong of the *National Parks I* test did not apply because the impairment aspect of Exemption 4 is generally unlikely to occur when submission is mandatory, as is the case with loop cost data, and the materials to be filed are listed in explicit detail.²² Under the second prong of *National Parks I*, the Bureau found no evidence of actual or incipient competition in the petitioners' study areas and, therefore, no threat of competitive harm from disclosure of loop cost data.²³ Moreover, even if a competitive threat did exist, the Bureau determined that disclosure of loop cost data would not cause substantial competitive harm because it contains little useful information that a competitor could use to divert business from an incumbent LEC.²⁴ In addition to applying the *National Parks I* test, the Bureau also recognized that public interest factors favor disclosure of loop cost data over non-disclosure because the availability of such data enabled ratepayers to analyze the reasonableness of the universal service program.²⁵

11. DISCUSSION

9. We deny confidential treatment of Public Service's loop cost data filed with the Commission by NECA on October 1, 2001 and 2002. Since the inception of the Commission's high-cost loop support program, carriers have been required to file loop cost data at the study area level and such data routinely have been publicly available.²⁶ Because these data have been made routinely available for public inspection by the Commission, we examine whether Public Service has presented by a preponderance of evidence a case for non-disclosure of its loop cost data consistent with the provisions of FOIA.²⁷

10. We disagree with Public Service's claim that the Bureau's analysis in *Arvig Telephone Company* is outdated because it occurred prior to the passage of the Telecommunications Act of 1996 and therefore prior to the introduction of competition in local telephone markets. As discussed above, the Bureau specifically considered in *Arvig Telephone Company* the application of Exemption 4 of FOIA to local loop cost data in a competitive environment.²⁸ Consistent with the standard set forth in *National Parks I*, the Bureau determined

²¹ *Arvig Telephone Co.*, 3 FCC Rcd 3723 (Com. Car. Bur. 1988) (*Arvig Order*).

²² *Arvig Order*, 3 FCC Rcd at 3723-24, para. 5. In *Critical Mass*, the court held that the *National Parks* two-pronged test for "confidential" information applied only to situations where a party *must* submit information to a federal agency. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). Under *Critical Mass*, submissions that are required to "realize the benefits of a voluntary program" generally are considered mandatory. *Lykes Bros. S.S. Co. v. Peña*, No. 92-2780, slip op. at 9 (D.D.C. Sept. 2, 1993); *accord*, Department of Justice FOIA Update, Spring 1993 at 5.

²³ *Arvig Order*, 3 FCC Rcd at 3724, para. 7

²⁴ *See id.*

²⁵ *See id.* at para. 13.

²⁶ *See* 2000 *Line Counts Confidentiality Order*, 13 FCC Rcd at 24824-25, para. 10; 47 C.F.R. § 36.611

²⁷ 47 C.F.R. § 0.459(d); *see, e.g., GE American Communications, Inc.*, 11 FCC Rcd 11497, 11498 n.3 (Internat'l Bur. 1996); *Sandab Communications Ltd. Partnership II*, 11 FCC Rcd 11790, 11791 (1996) (*Sandab*), citing *TKR Cable of Ramapo*, 11 FCC Rcd 3538 (1996).

²⁸ *See Arvig Order*, 3 FCC Rcd at 3724, para 7 (*citing* Letters from Chief, Common Carrier Bureau to Richard A Rocchini (July 21, 1986; Sept. 25, 1986)).

that such data would provide competitors “with little useful information since it does not show the actual costs of providing a particular service, serving particular customers or installing new local loops.”²⁹ Despite the existence of a competitive regulatory environment, we find that the availability of loop cost data still offers little competitive value to carriers seeking to enter an incumbent LEC’s service area and therefore confidential treatment is not warranted.

11. We also reject Public Service’s claim that disclosure of its working loop total, which is included in its loop cost data, will result in competitive harm because the disclosure of an incumbent ETC’s working loops allows competitive eligible ETCs to determine its per-loop high-cost support distributions.³⁰ The Commission has emphasized that “the public availability of support amounts is essential to implement a competitively neutral universal service support mechanism, and to ensure availability of support amounts to any eligible competitive telecommunications carrier, consistent with sections 254(e) and 214(e) of the Act.”³¹ Consistent with this principle of competitive neutrality, the Commission requires that a competitive ETC receive the same per-line, high-cost support for lines that it captures from an incumbent LEC, as well as for any “new” lines the competitive ETC serves in high-cost areas.³² As a result, disclosure of the incumbent LEC’s per-line support amounts is necessary to enable a competitor to determine the per-line support amount it would receive were it to enter a particular study area.³³

12. In addition to finding Public Service has failed to demonstrate a case for non-

²⁹ See *Arvig Order*, 3 FCC Rcd at 3724, para. 7.

³⁰ See *Public Service Petition* at 3. If NECA had not redacted Public Service’s cost data in its October 1 filings, Public Service’s approximate annual per loop draw could be determined from dividing its annual universal service support by its total working loops. Because Public Service is the only company for which NECA has redacted cost information, its per loop draw can still be determined by subtracting the working loops and support amounts for all other carriers from the published national totals and then dividing the remaining support amount by the remaining working loops.

³¹ See *2000 Line Counts Confidentiality Order* 13 FCC Rcd at 28429, para. 14. Contrary to Public Service’s assertion, the Commission has determined that the principle of competitive neutrality is the same for ETCs in all service areas, including those served by rural carriers. See *First Report and Order*, 12 FCC Rcd at 8944, para. 311 (“We adopt the Joint Board’s recommendation to make rural carriers’ support payments portable. As we discussed above regarding non-rural carriers, a CLEC that qualifies as an eligible telecommunications carrier shall receive universal service support to the extent that it captures subscribers formerly served by customers in the ILEC’s study area. We conclude that paying support to a competitive eligible telecommunications carrier that wins the customer or adds a new subscriber would aid the entry of competition in rural study areas.”).

³² See 7 U.S.C. § 254(b)(3); 47 C.F.R. § 54.307; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8932, para. 11 (1997) (*First Report and Order*); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourteenth Report and Order and Twenty-Second Order on Reconsideration, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Report and Order, 16 FCC Rcd 11256, 11299-300, para. 134 (2001) (*Rural Task Force Order*) (citing *First Report and Order*, 12 FCC Rcd at 8944, para.); *Federal-State Joint Board on Universal Service*, CC Docket 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, para. 89 (1999) (*Ninth Report and Order*), reversed in part and remanded in part, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001). The Commission has requested that the Federal-State Joint Board on Universal Service review the Commission’s rules relating to high-cost universal service support in study areas in which a competitive ETC is providing service, as well as the Commission’s rules regarding support for second lines. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 02-307 (rel. Nov. 8, 2002).

³³ See *2000 Line Counts Confidentiality Order*, 13 FCC Rcd at 24829, para. 17

disclosure of its loop cost data under the standards set forth in *National Parks I*, we continue to recognize public interest benefits in the disclosure of these data. As the Bureau concluded in *Arvig Telephone Company*, information concerning computation and distribution of universal service support is valuable in analyzing the reasonableness of the universal service program and “since ratepayers ultimately bear the costs of such assistance, the public should be fully informed of the specific data from which the amount of such assistance is derived.”³⁴ We reaffirm that the public benefit gained from disclosing cost information employed in the administration of high-cost universal service support system is paramount over any proprietary interest claimed by an incumbent carrier, such as Public Telephone, in such data, especially when we have determined that the competitive value of the data is negligible.³⁵ We also find other public interest benefits exist in the release of loop cost data. For example, such data is used by the Federal-State Joint Board on Universal Service to advise the Commission on universal service high-cost support calculations.

IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201-205, 214, 218-220, 254, 303(r), 403, and 410 of the Communications Act or 1934 as amended, 47 §§ 151-154, 201-205, 214, 218-220, 254, 303(r), 403, and 410, and sections 0.457 and 0.459 of the Commission’s rules, 47 C.F.R. §§ 0.457, 0.459, the request for confidential treatment, filed October 12, 2001, by Public Service Telephone Company IS DENIED.

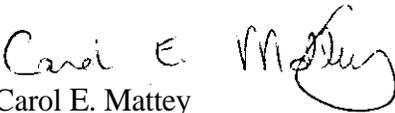
14. IT IS FURTHER ORDERED that, pursuant to section 0.459(g) of the Commission’s rules, 47 C.F.R. § 0.459(g), Public Service Telephone Company will be afforded five (5) working days in which to file an application for review by the Commission.

³⁴ See *Arvig Order*, 3 FCC Rcd at 3724, para. 9

“ See *id.*”

15. IT IS FURTHER ORDERED that the Wireline Competition Bureau shall, upon release of this Order, furnish immediate notice by telephone of our determination and of the time for filing an application for review by the Commission to Public Service Telephone Company and shall follow up by serving a copy of this Order on such parties.

FEDERAL COMMUNICATIONS COMMISSION


Carol E. Matthey
Deputy Chief, Wireline Competition Bureau