

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

LETTER
November 28, 1995

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IN REPLY REFER TO:

Thomas A. Pajda, Esq.
Southwestern Bell Telephone Company
One Bell Center
Room 3528
St. Louis, MO 63101

Re: Southwestern Bell Transmittal Nos. 2498 and 2501.

Dear Mr. Pajda:

This responds to your requests for confidential treatment, pursuant to 47 C.F.R. §§ 0.457 and 0.459 and the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), of certain cost support data filed in conjunction with the transmittals listed above.¹ For the reasons discussed below, we deny your requests.

SWBT seeks confidential treatment for its cost support data on grounds that release would result in competitive harm. It contends that the information reveals SWBT's direct costs for the equipment used in providing the recurring rate elements proposed in the two transmittals, and that if its detailed cost information is made public, competitors will have a target for pricing their own services or for satisfying some specific niche market. Moreover, SWBT argues, customers will seek prices as close to incremental costs as possible and SWBT will be unable to obtain an adequate contribution to overhead from its largest customers. SWBT also contends that pleadings submitted elsewhere² demonstrate that it in fact is subject to competition from other carriers.

Our disposition of this request for confidential treatment is governed by Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and Sections 0.457(d) and 0.459 of the Commission's rules, 47 C.F.R. §§ 0.457(d) and 0.459. Exemption 4 permits withholding of "commercial or financial information obtained from a person and privileged or confidential." Commercial or financial information filed to meet agency requirements may be deemed confidential under Exemption 4 if disclosure of the information is likely to cause substantial competitive harm to the person from whom the information was obtained.³ Parties requesting confidentiality are not required to demonstrate actual competitive harm. Rather, all they need to show is "actual competition and a likelihood of substantial competitive injury."⁴ Although a sophisticated analysis of the likely effects of disclosure is not required, conclusory and generalized allegations of substantial competitive harm are unacceptable.⁵ Parties seeking protection must demonstrate the likelihood of substantial harm "by a preponderance of evidence."⁶ We find that SWBT has not met the threshold requirements for confidential treatment in this case. Although SWBT alleges that it is generally subject to competition, it has failed to explain, except in very general terms, the competitive significance of the particular data for which it seeks confidential treatment and has failed to link these data to specific examples of likely competitive harm. Moreover, the cost support data at issue contain aggregated data rather than costs for individual expense items. SWBT has failed to explain (or even address) how data aggregated at this level could be of use to competitors. In sum, while SWBT states a generalized concern over the disclosure of its cost support data to the public, it offers no support for its assertions that disclosure would likely cause substantial competitive harm in these particular cases.

For the reasons set forth above, SWBT's requests for confidential treatment of its cost support data ARE DENIED. SWBT's data, however, may not be released until it has exhausted its appeal rights under 47 C.F.R. § 0.459(g). SWBT may file an application for review within 5 working days of this ruling. If SWBT does not seek review, the data will be placed in the public file and included in our review of the two transmittals. SWBT may also choose to withdraw the data; in that event the data will not be considered in the review process. Finally, SWBT may, as an alternative to the above options, resubmit its request to the Bureau and state with greater specificity the reasons it believes con-

¹ Both transmittals propose ICB rates for certain services SWBT will provide to AT&T. Transmittal No. 2498 pertains to a Self-healing Transport Network (STN) Digital Transmission Link (DTL) in Fort Worth, Texas. Transmittal No. 2501 proposes rates for one 51.84 Mbp service with a SONET Add Drop Multiplexing of 15 Virtual Tributaries (VT1) in Kansas City, Missouri.

² SWBT's *Reply Comments* filed Sept. 19, 1994 in response to opposition to a previous request for confidentiality and arguments made in its *Application for Review* filed Nov. 16, 1994, on the ruling made in FOIA Control Nos. 94-310, 325, and 328; *Comments and Reply Comments* filed May 9, 1994 and June 29, 1994, respectively, in CC Docket No. 94-1; *Motion of Bell Atlantic Corp., BellSouth Corp., NYNEX Corp., and Southwestern Bell Corp.*, filed July 6, 1994 in Civil Action No. 82-0192 (HHG).

³ *National Parks and Conservation Ass'n v. Morton*, 498 F. 2d 765, 770 (D.C. Cir. 1974); *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 113 S. Ct. 1579 (1993). A different standard applies where information is submitted voluntarily. *Id.*

⁴ *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987), *cert. denied sub nom., CNA Fin. Corp. v. McLaughlin*, 485 U.S. 977 (1988).

⁵ *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 680-81 (D.C. Cir. 1976).

⁶ 47 C.F.R. § 0.459(d). An agency's finding that substantial competitive harm is probable, however, does not automatically lead to a finding against release of information since FOIA exemptions are not mandatory bars to disclosure. Even when particular information falls within the scope of a FOIA exemption, the government may order release based on public interest grounds. *Chrysler v. Brown*, 441 U.S. 281, 290-94 (1979); *see also Classical Radio for Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n.4 (1978); *Commission Requirements for Cost Support Materials to be Filed with Open Network Architecture Access Tariffs*, 7 FCC Rcd 1526, 1533 (*Com. Car. Bur.* 1992).

Confidential treatment is warranted in this proceeding. If SWBT chooses to resubmit its request, it must do so within 5 working days of this ruling.

Sincerely,

Regina M. Keeney
Chief, Common Carrier Bureau

cc: MCI Telecommunications Corporation
Association of Local Telecommunications Services