

ATTACHMENT D



FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau, Investigations and Hearings Division
445 12th Street, S.W., Room 4-C320
Washington, D.C. 20554

August 5, 2005

Via Certified Mail, Return Receipt Requested,
Facsimile and E-Mail

Mr. Jim Lamoureux
SBC Services, Inc.
1401 I Street N.W., Suite 400
Washington, D.C. 20005

Ms. Mary C. Albert
Vice President, Regulatory Policy
CompTel / ALTS
1900 M Street, N.W.
Washington, D.C. 20036

Re: Freedom of Information Act Request
FOIA Control No. 2005-333

Dear Mr. Lamoureux and Ms. Albert:

I INTRODUCTION

This letter concerns a Freedom of Information Act ("FOIA") request from CompTel/ALTS ("CompTel") for information submitted by SBC Communications, Inc. ("SBC") in response to a Letter of Inquiry ("LOI") from the Enforcement Bureau. SBC has requested confidential treatment of its submissions. As explained below, we grant SBC's request in part and deny it in part. Therefore, we will release to CompTel SBC's responses as described herein unless we receive an application for review from SBC within ten working days from the date of this letter. If CompTel believes that any portion of this decision is in error, it may file an application for review of this action with the Commission's Office of General Counsel within 30 days of the date of this letter.

II. BACKGROUND

On August 24, 2004, the Investigations and Hearings Division of the Enforcement Bureau (the "Bureau") sent SBC an LOI notifying the company that the Bureau was investigating whether it violated Part 54, Subpart F, of the Commission's rules, 47 C.F.R. §§ 54.500-54.521, and the Commission's orders regarding universal service funding.¹ SBC responded to this LOI on September 13, 2004.¹

¹ Letter to Michelle A. Thomas, Executive Director, Federal Regulatory, SBC Communications, Inc., and Christopher Heimann, General Attorney, SBC Telecommunications Inc. from Hillary S. DeNigro, Deputy Chief.

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On December 16, 2004, the Bureau terminated its investigation by adopting a Consent Decree in which SBC agreed to make a voluntary contribution to the United States Treasury in the amount of \$500,000 and to institute a compliance plan, as specified therein, "to ensure SBC's wholly-owned subsidiaries' future compliance with the Commission's rules governing the E-Rate program."³ The Consent Decree specifies that "it does not constitute an admission, denial, adjudication on the merits, or a factual or legal determination regarding any compliance or noncompliance with the requirements of section 254 of the Act or Part 54 of the Commission's rules."⁴

On April 4, 2005, the Bureau received Comptel's FOIA request for copies of "all pleadings and correspondence contained in file number EB-04-IH-0342,"⁵ the investigative file for the investigation referenced in the December 16, 2004, Consent Decree. On May 27, 2005, SBC filed its response to the FOIA request, opposing release of the requested documents and seeking confidentiality for the materials.⁶ SBC argues in its Opposition that the requested documents were "compiled for law enforcement purposes," and, thus, are exempt from disclosure under FOIA Exemption 7. Specifically SBC argues that disclosure is prohibited by FOIA Exemption 7(C) because it would cause an unwarranted invasion of personal privacy. SBC also contends that FOIA Exemption 4 prohibits release of the requested documents because the documents "clearly pertain to SBC's business dealings with one of its customers" and because many of the documents contain information pertaining to SBC's systems, processes and operations, and include cost, pricing and other "commercially sensitive" information.⁷

By letter dated June 28, 2005, Comptel replied to SBC's Opposition.⁸ Comptel challenges SBC's claims that FOIA Exemptions 7(C) and 4 prohibit disclosure of the requested

Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated August 24, 2004 ("LOI").

² Letter to David Janas, Special Counsel, Investigations and Hearings Division, Enforcement Bureau from Christopher Heimann, General Attorney, SBC Telecommunications Inc., dated September 13, 2004 ("LOI Response").

³ *SBC Communications Inc.*, Order and Consent Decree, 19 FCC Red 24014 (Enf. Bur. 2004).

⁴ *Id.* at 24019, ¶13.

⁵ See Electronic FOIA (E-FOIA) request form from Mary C. Albert ("Requester"), Comptel / ALTS, dated April 4, 2005 ("FOIA 2005-333"). In a telephone conversation with IHD staff on April 12, 2005, the Requester modified and clarified her FOIA request to seek only pleadings filed by SBC and correspondence between SBC and the Commission.

⁶ See Letter from Jim Lamoureux, Senior Counsel, SBC Services, Inc., to Judy Lancaster, Investigations and Hearings Division, Enforcement Bureau, dated May 27, 2005 ("Opposition").

⁷ Opposition at 6.

⁸ Letter from Mary C. Albert, Vice President Regulatory Policy, CompTel/Ascent/ALTS to Judy Lancaster, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated June 28, 2005 ("Reply")

documents. Although Comptel does not object to redaction from the requested documents of the names, telephone numbers, and home and email addresses of SBC employees, it argues that Exemption 7(C) is inapplicable to SBC because it is "a large, publicly traded corporation . . . that . . . possesses no protectable personal privacy interest."⁹ Comptel also asserts that SBC's "conflicting positions" regarding whether its submissions were provided to the Bureau voluntarily or under compulsion do not support SBC's reliance upon Exemption 4 to prohibit disclosure of the requested documents, that SBC's "conclusory and generalized" characterizations of the records as confidential commercial information are "insufficient to demonstrate the likelihood of substantial competitive injury" as required by Exemption 4, and that the cost and pricing information that SBC wishes to withhold from disclosure is already in the public domain because E-Rate service providers are required under section 54.501(d)(3) of the Commission's rules¹⁰ to make those records available for public inspection.¹¹

III. DISCUSSION

A. SBC's Requests To Keep Its Responses Confidential In Their Entirety Are Deficient

Section 0.459 of the Commission's rules establishes a procedure by which parties may request that information or materials that they have submitted to the Commission not be made routinely available for public inspection. See 47 C.F.R. § 0.459. This rule requires that a party seeking confidentiality provide a statement of the reasons for withholding the materials in question from public inspection and set forth specific categories of materials for which such treatment is appropriate. A request for confidentiality "shall include," *inter alia*, an "explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;"¹² an "[e]xplanation of how disclosure of the information could result in substantial competitive harm;"¹³ and "[i]dentification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties."¹⁴

We find that SBC's requests for confidential treatment of its submissions substantially fail to comply with the standards set forth in section 0.459(b) of the Commission's rules. The rules clearly state that casual requests for confidentiality that do not comply with the requirements set forth in sections 0.459(a) and (b) will not be considered.¹⁵ Further, the LOI

⁹ *Id.* at 2.

¹⁰ 47 C.F.R. § 54.501(d)(3).

¹¹ Reply at 3.

¹² See 47 C.F.R. § 0.459(b)(3).

¹³ See 47 C.F.R. § 0.459(b)(5).

¹⁴ See 47 C.F.R. § 0.459(b)(7).

¹⁵ See 47 C.F.R. § 0.459(c).

issued to SBC by the Bureau explicitly warns SBC that requests for confidential treatment must comply with the requirements specifically mandated by section 0.459(b), and that the Bureau will not consider confidentiality requests that do not so comply.

Nevertheless, SBC has failed to provide a statement of specific reasons for withholding its responses in their entirety. While generally categorizing the information contained in its submissions, SBC does not, as required by section 0.459(b)(3), explain the degree to which specific information is commercial or financial or contains a trade secret. Nor does it explain, as required by section 0.459(b)(5), how disclosure of such information could result in substantial competitive harm. SBC also fails to state whether any of the information for which it seeks protection is already available to the public.¹⁶

We find SBC's request for the confidential treatment of all its submissions to be overly broad. Portions of the documents submitted by SBC appear to contain commercial or financial information, the disclosure of which could result in substantial competitive harm to SBC. But most of those pages also contain information that is not confidential, such as FRN numbers, lists of equipment, and references to ordinary administrative matters. Some of that information is already within the public domain.¹⁷ Release of such information appears unlikely to result in competitive harm to SBC and SBC offers no justification for withholding such information as commercial, financial or trade secret information. Consequently, that information will be disclosed.

Accordingly, we conclude that SBC has failed to demonstrate by a preponderance of the evidence a case for nondisclosure of all of its submissions. We therefore deny SBC's requests that we grant confidential treatment of the entirety of its submissions.

B. Portions of SBC's Submissions Are Subject To Protection From Disclosure As "Commercially Sensitive Information"

We base confidentiality determinations under section 0.459 of the Commission's rules relating to commercial or financial materials on Exemption 4 of the FOIA which permits us to withhold "trade secrets and commercial or financial information obtained from a person and [that is] privileged or confidential."¹⁸ Exemption 4 protects "any financial or commercial information provided to the Government on a *voluntary* basis if it is of a kind that the provider would not customarily release to the public."¹⁹(emphasis added)¹⁹ However, under Exemption 4 commercial or financial materials that are part of *required* submissions are held to be confidential only when

¹⁶ See 47 C.F.R. § 0.459 (b)(7).

¹⁷ Federal Registration Numbers ("FRN"s), including those of SBC, are available to the public on the Commission Registration System ("CORES") database which is located on the Commission's internet web page. See also 47 C.F.R. 54.501(d)(3).

¹⁸ 5 U.S.C. § 552(b)(4).

¹⁹ See *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 880 (D.C. Cir. 1992) ("*Critical Mass*").

disclosure would either impair the government's ability to obtain necessary information in the future or would be likely to substantially harm the competitive position of the submitter.²⁰

SBC's LOI responses were *required* submissions for the purposes of our FOIA analysis.²¹ An LOI is an administrative order that compels the production of information. Failure to respond properly to an LOI may subject an entity to forfeiture action.²² Because we directed SBC to submit its written responses to the Bureau's LOI, its responses were required.

We find that certain information in SBC's submissions constitutes commercial or financial information, the disclosure of which could result in substantial competitive harm to SBC. Such commercially sensitive information includes, but is not limited to, SBC's costs and pricing data, its billing and payment dates, and identifying information of SBC's staff, contractors, and the representatives of its contractors and customers. Accordingly, such information is exempt from disclosure under FOIA Exemption 4.²³

Although section 54.501(d)(3) of the Commission's rules requires telecommunications service providers such as SBC to allow public inspections of the rates it charges and the discounts it allows to schools and libraries eligible for universal service support,²⁴ SBC can comply with the rule's requirements by maintaining a "public inspection file" containing the required rate information. The rule does not mandate disclosure here of all of the pricing data contained in SBC's submissions. In this instance, disclosure of SBC's invoice and discount amounts could disclose the total value of its contract, information that would not otherwise be publicly available. That information is not in the public domain and its release is not required by the rule. Because release of SBC pricing information in this case is likely to substantially harm SBC's competitive position, such information is exempt from disclosure under FOIA Exemption 4.

C. Names of SBC Employees And Customers Are Protected From Disclosure Due To Personal Privacy Concerns

The FOIA statute, 47 U.S.C. § 552(b)(7)(C), provides that records or information compiled for law enforcement purposes are exempt from disclosure to the extent that the

²⁰ *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) ("*National Parks*"); *Critical Mass*, 795 F.2d at 87B (citing *National Parks*).

²¹ See *Critical Mass* (establishing separate tests for confidential treatment of voluntary submissions and required submissions). See also

²² See *SBC Communications, Inc.*, Order of Forfeiture, 17 FCC Rcd 7589 (2002) (forfeiture paid); *Globcom Inc.*, Notice of Apparent Liability for Forfeiture and Order, 18 FCC Rcd 19893, n. 36 (2003), *response pending*.

²³ See, e.g., *In Re The Lakin Law Firm, P.C.*, Memorandum Opinion and Order, 19 FCC Rcd 12727 (2004).

²⁴ 47 C.F.R. § 54.501(d)(3) provides that "[Telecommunications] Service providers shall keep and retain records of rates charged to and discounts allowed for eligible schools and libraries – on their own or as part of a consortium. Such records shall be available for public inspection."

production of such records could reasonably be expected to "constitute an unwarranted invasion of personal privacy" are exempt from disclosure.²⁵ Generally, businesses do not possess "personal privacy" interests as required for application of FOIA Exemption 7(C).²⁶ However, the individuals identified in SBC's submissions do have such privacy rights and, pursuant to this provision, portions of SBC's submissions will be redacted to withhold the names and identifying information of those individuals to prevent unwarranted invasions of their personal privacy.

D. Documents Which Disclose an Agency's Deliberative Process Are Protected From Disclosure

Exemption 5 of the FOIA protects "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."²⁷ Pursuant to this exemption we will withhold from public disclosure drafts of Bureau pleadings and correspondence, and memoranda and emails, distributed among Commission staff, which discuss the issues and investigation related to this matter.

IV. CONCLUSION

For the reasons stated above, we grant in part and deny in part SBC's request for confidentiality. If SBC believes that this decision is in error, it must file an application for review of this action with the Commission's Office of General Counsel within ten working days of the date of this letter. See 47 C.F.R. § 0.461(i). We will produce the documents requested as noted above if no such application for review is filed. We will assess copying charges, if any, at that time. If Comptel believes that this decision is in error, it may file an application for review of this action with the Commission's Office of General Counsel within 30 days of the date of this letter. See 47 C.F.R. § 0.461(j).

We are providing SBC's counsel with a copy of the documents as redacted pursuant to this decision.

Sincerely,



William H. Davenport
Chief, Investigations and Hearings Division
Enforcement Bureau

²⁵ 5 U.S.C. § 552(b)(7)(C). See also 5 U.S.C. § 552(b)(6); *In re William McConnell, Broadcasting and Cable*, Order, 18 FCC Rcd 26371 (2003).

²⁶ See, e.g., *Chadmore Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 23943 (1998)

²⁷ 5 U.S.C. § 552(b)(5).

ATTACHMENT E