

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In the Matter of:)
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Communications Assistance for Law)
Enforcement Act)
)
_____)

CC Docket No. 97-213

**REPLY COMMENTS REGARDING THE
CONFIDENTIAL TREATMENT OF COST DATA**

The Department of Justice and the Federal Bureau of Investigation ("DOJ/FBI") file these reply comments in support of DOJ/FBI's Petition for Reconsideration of the Order of the Office of Engineering and Technology ("OET") released in this proceeding on March 2, 1999. That Order granted the requests of five telecommunications equipment manufacturers for confidential treatment of cost data submitted in this proceeding. DOJ/FBI sought reconsideration because OET's Order departs from the policies and procedures that the Commission has established for the use of confidential information in rulemaking proceedings.^{1/} DOJ/FBI requested that the Commission either return the confidential materials to the manufacturers that submitted them or modify the order to provide a meaningful opportunity to comment upon the underlying data. Five interested parties have opposed DOJ/FBI's petition.^{2/}

^{1/} See Treatment of Confidential Information Submitted to the Commission, GC Docket No. 96-55, Report and Order, FCC 98-184, (released August 4, 1998).

^{2/} The Cellular Telecommunications Industry Association ("CTIA") filed an opposition to DOJ/FBI's petition in early April. On May 28, 1999, the Commission set a deadline of June 23, (continued...)

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1. The commenters argue that the Commission should deny DOJ/FBI's petition for reconsideration because the cost of a particular assistance capability may determine whether or not that capability is required by CALEA. See BellSouth Opposition at 2; CTIA Opposition at 3; US West Opposition at 2; USTA Opposition at 2. This argument overlooks the limited role that Congress assigned to cost considerations when it identified the scope of CALEA's assistance capability requirements. As DOJ/FBI has repeatedly explained, cost is significant in determining how the assistance capability requirements of Section 103 are to be met, but it cannot be used to excuse carriers from "meet[ing] the assistance capability requirements" in the first instance. 47 U.S.C. § 1006(b)(1).^{2/} In any event, if the commenters were correct about the overwhelming significance of cost considerations, then it would be even more important for the Commission to provide the parties with a meaningful opportunity to address the details of the manufacturers' submissions.

2. USTA contends that the DOJ/FBI Petition is moot because OET has already released aggregated data pursuant to its Order regarding confidentiality and "the DOJ/FBI and all

^{2/}(...continued)

1999 within which further oppositions might be filed. Petitions for Reconsideration of Action in Rulemaking Proceedings, 64 Fed. Reg. 30, 519 (1999). Four additional interested parties filed timely oppositions: BellSouth Corporation ("BellSouth"); MCI WorldCom, Inc. ("MCI WorldCom"); U S West, Inc. ("U S West") and the United States Telephone Association ("USTA").

^{3/} DOJ/FBI's filings in this proceeding have fully set forth the considerations relating to the significance of cost under Section 107 of CALEA. Rather than repeat those considerations here, we refer the Commission to the relevant parts of our prior filings. See, e.g., DOJ/FBI December 14, 1998 Comments Regarding Standards For Assistance Capability Requirements at 8-15; DOJ/FBI January 27, 1999 Reply Comments Regarding Standards For Assistance Capability Requirements at 8-18; DOJ/FBI March 30, 1999 Petition For Reconsideration at 3-4; DOJ/FBI May 17, 1999 Comments Regarding CALEA Manufacturer Revenue Estimates at 3-4; DOJ/FBI May 27, 1999 Reply Comments Regarding CALEA Manufacturer Revenue Estimates at 2-3.

interested parties were provided an opportunity to see the aggregate estimates and to provide comments" upon them. USTA Opposition at 2. USTA's objection misses the point of the reconsideration petition. In seeking reconsideration, DOJ/FBI sought not to prevent the release of the cost data — although this would have occurred if the Commission had decided to return information to the manufacturers under 47 C.F.R. § 0.459(e) — but to ensure that cost data would be available for meaningful comment and would provide a sound basis for agency decisionmaking.

DOJ/FBI requested three alternative forms of relief that required no suppression of cost information, but, rather, would have added to the record before the Commission regarding cost. First, DOJ/FBI requested access to the confidential data under a protective order so that it could provide substantive comments to the Commission. Petition at 7. Second, it asked the Commission to condition a grant of confidentiality upon the manufacturers' agreement to release DOJ/FBI from the non-disclosure agreements that have prevented the FBI from sharing its own manufacturer cost data with the Commission. *Id.* at 8. Third, it sought disclosure of the assumptions that form the basis of the manufacturers' analyses of cost, such as the number and type of switches covered, estimated phase-in requirements, and discounts to be offered on price. Ibid. ⁴

None of these requests for relief was rendered moot either by the Commission's release of the aggregated data or by the subsequent filing of comments. On the contrary, DOJ/FBI has

⁴ MCI WorldCom asserts that "[t]he basic relief that the DOJ/FBI seek, is that the Commission not consider cost data on the public record." MCI WorldCom Opp. at 1. MCI WorldCom has overlooked DOJ/FBI's requests for relief that would accommodate the submission of cost data, but would modify the existing confidentiality Order to allow for meaningful notice and comment.

explained to the Commission why the aggregated revenue estimates could not assist the Commission in fulfilling its responsibilities under Section 107, and why further information regarding costs must be obtained. See DOJ/FBI May 17, 1999 Comments Regarding CALEA Manufacturer Revenue Estimates; DOJ/FBI May 27, 1999 Reply Comments Regarding CALEA Manufacturer Revenue Estimates. DOJ/FBI still seeks the relief requested in the petition so that the deficiencies in the Commission's record on costs may be addressed, and the Commission remains free to grant that relief.

3. Both USTA and MCI WorldCom erroneously suggest that DOJ/FBI is deliberately withholding cost data from the Commission. See USTA Opp. at 2; MCI WorldCom Opp. at 2. As DOJ/FBI has explained, however, it is unable to provide the Commission with price information submitted to DOJ/FBI by manufacturers because that information is subject to non-disclosure agreements that prohibit the FBI from disclosing price information without the manufacturers' consent. See Petition for Reconsideration at 7. Far from seeking to withhold its cost data, DOJ/FBI has specifically asked the Commission for assistance in encouraging the manufacturers to consent to the disclosure of cost information provided to the FBI. See *id.* at 8 (requesting that the Commission "grant confidential treatment to * * * manufacturers only on condition that the manufacturers release the FBI from pertinent nondisclosure agreements, at least to the extent necessary for DOJ/FBI to submit its own cost information to the Commission").

4. The commenters have made no attempt to show that OET's Order regarding confidentiality allows for meaningful comment upon the cost data submitted in this proceeding. Accordingly, for the reasons set forth in DOJ/FBI's Petition for Reconsideration, the Commission

should vacate OET's Order and should fashion relief that better serves its general policy regarding the treatment of confidential materials.

DATE: July 6, 1999

Respectfully submitted,

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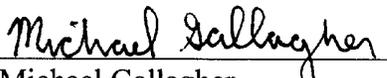
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Certificate of Service

I, Michael Gallagher, a Program Analyst in the office of the Federal Bureau of Investigation, Washington, D.C., hereby certify that, on July 6, 1999, I caused to be served, by first-class mail, postage prepaid (or by hand where noted) copies of the above-referenced Reply Comments Regarding The Confidential Treatment Of Cost Data, the original of which is filed herewith and upon the parties identified on the attached service list.

DATED at Washington, D.C. this 6th day of July, 1999.



Michael Gallagher

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CC DOCKET 97-213
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