COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC XSPEDIUS MANAGEMENT CO. OF LEXINGTON, LLC AND XSPEDIUS MANAGEMENT CO. OF LOUISVILLE, LLC	)	CASE NO. 2004-00044

O R D E R

On May 17, 2005, in accordance with an agreement between BellSouth Telecommunications, Inc. ("BellSouth") and NewSouth Communications Corp. ("NewSouth"); Nuvox Communications, Inc. ("Nuvox"); KMC Telecom V, Inc.; KMC Telecom III LLC;[1] and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC ("Xspedius") (collectively referred to as "Joint Petitioners"), upon Commission request, BellSouth provided certain discovery responses, depositions, and a transcript of the

[1] KMC Telecom V, Inc. and KMC Telecom III LLC, originally parties to this action, served notice of their withdrawal with prejudice and withdrew their request for arbitration on May 31, 2005.

hearing from a Florida proceeding ("Florida Record")[2] involving BellSouth and Joint Petitioners, to be incorporated into the record of this case. Also on that date, BellSouth provided the Commission with discovery responses and excerpts of depositions from a North Carolina proceeding ("North Carolina Record")[3] also involving BellSouth and Joint Petitioners. BellSouth claimed that a portion of the information was protected from disclosure as proprietary/trade secret information.

On June 24, 2005, BellSouth petitioned the Commission for confidential treatment of certain portions of the Florida Record and the North Carolina Record pursuant to KRS 61.878 of Kentucky's Open Records Act, KRS 61.870 to 61.884 ("Open Records Act") and 807 KAR 5:001, Section 7.

On July 15, 2005, Joint Petitioners, by letter to the Commission's Executive Director, requested that the Commission pull from the public record, certain "confidential" documents that they claim were filed in the record in error. On that date, Joint Petitioners filed a motion similarly requesting that the Commission afford confidential treatment to those same documents. Specifically, they requested confidential treatment for documents from the North Carolina Record, Docket Numbers P-772, P-913, P-989, P-824, and P-1202.

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[2] Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications Corp., KMC V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on Behalf of its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC; Docket No. 040130-TP.

[3] Joint Petition for Arbitration of NewSouth Communications Corp, et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended; Docket Nos. P-772, Sub 8; P-913, Sub 5; P-989, Sub 3; P-824, Sub 6; P-1202, Sub 4.

On July 18, 2005, the Commission's Executive Director denied the requests for confidentiality filed on June 24, 2005. Also on that date, in response, BellSouth filed a motion to withdraw from the record the documents denied confidential treatment. On August 16, 2005, the Commission's Executive Director denied the requests for confidentiality, stating that the documents would be made available for public inspection on September 6, 2005.

On August 23, 2005, BellSouth requested confidential treatment for portions of the Florida Record and the North Carolina Record claiming that the information is confidential and proprietary or otherwise constitutes customer proprietary network information ("CPNI").

On September 6, 2005, Joint Petitioners moved for confidential treatment of a certain Customer Service Agreement for Network Services ("Customer Service Agreement"). Also on September 6, 2005, Joint Petitioners moved to withdraw certain documents from the record (NVX 000001 through 000004, NVX 000026 through 000037, NSC/NVX 000076 through 000081, and NSC/NVX 000003).

On September 28, 2005, the Commission's Executive Director denied the requests for confidential treatment made on September 6, 2005. On October 17, 2005, Joint Petitioners moved to receive confidential treatment for only the "customer name, customer identifiable information, and critical monetary term" contained in the Customer Service Agreement. By letter from the Commission's Executive Director dated January 30, 2006, the requests were denied. In response, the parties requested that the Commission reconsider the denial of confidential treatment.

ARGUMENT

The parties contend that the subject information is exempt from public disclosure pursuant to Kentucky's Open Records Act. In their various motions, they maintain that the information is excluded under KRS 61.878(1)(c) because they assert that disclosure would permit an unfair advantage to their competitors and potential competitors by allowing free access to all of the substantial research and business analysis they have developed. They further contend, inter alia, that disclosure of certain information would allow competitors to target their customers while they would lack similar access.

BellSouth further claims that certain of the information is CPNI as defined by 47 U.S.C.A. § 222 of the Telecommunication Act of 1996. As CPNI, BellSouth alleges that the documents are exempt under federal law, and therefore also exempt under KRS 61.878(1)(k) of the Open Records Act.

DISCUSSION

The Commission is a public agency and the documents at issue are public records subject to the Open Records Act.[4] "The basic policy of [the Open Records Act] is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others."[5] The primary purpose of the Open Records Act is to inform the public as to whether governmental agencies are properly executing their statutory functions.

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[4] KRS 61.878(1-2).

[5] KRS 61.871.

All material on file with the Commission is to be "open for inspection by any person, except as otherwise provided in KRS 61.870 to 61.884."[6] A person requesting that the Commission grant confidential treatment has the burden to show that the material falls within an exclusion from disclosure requirements enumerated in the Open Records Act.[7]

KRS 61.878(1)(c) of the Open Records Act provides an exemption for "records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records. . . ."

To the extent that the parties rely on KRS 61.878(1)(c), they must show that the commercial documents are generally recognized as confidential or proprietary and that disclosure would permit an unfair commercial advantage to competitors.[8] The court in Southeastern United Medigroup, Inc. v. Hughes,[9] in considering KRS 61.878(1)(c), held that if it is established that a document sought to be withheld is confidential or proprietary, and if disclosure to competitors would provide substantially more than a trivial unfair advantage, the document should be protected from disclosure.

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[6] See Lexington-Fayette Urban County Government v. Lexington Herald-Leader Co., 941 S.W.2d 469 (Ky. 1997), citing KRS 61.872(1).

[7] 807 KAR 5:001, Section 7(2)(d).

[8] 93-ORD-43.

[9] Southeastern United Medigroup, Inc. v. Hughes, 952 S.W.2d 195 (Ky.1997).

BellSouth further claims that portions of the subject information is CPNI and therefore exempt from disclosure under federal law and the Open Records Act. KRS 61.878(1)(k) exempts from disclosure records or information of which the disclosure is prohibited by federal law or regulation. CPNI is information maintained by a telephone company describing who and when a customer calls and what telephone features the customer uses. CPNI is defined as:

> (A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and
> (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.[10]

The 1996 Act excludes from the definition of CPNI several categories of information, including: subscriber list information such as name, address, and telephone number.[11] It also excludes aggregate customer information from which individual customer identities have been removed.[12]

CONCLUSION

The Commission is mindful of the fact that the exceptions provided in KRS 61.878 are to be strictly construed. The burden falls upon the person seeking to withhold a public document from public inspection to show that it falls within an exception to the Open Records Act. Having considered this exacting standard and the

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[10] 47 U.S.C. § 222(h)(1).

[11] 47 U.S.C. § 222(e) and (h)(3).

[12] 47 U.S.C. § 222(c)(3) and (h)(2).

particular facts of this case, the Commission finds that the parties have met their statutory burden of proof with respect to certain of the documents and have failed to meet their burden with the remainder.

Document Withdrawal

The parties have requested that in lieu of non-disclosure, they be allowed to withdraw certain documents from the record. They fail to cite any law in support of this request. Neither the relevant statutes nor the Commission's regulations specifically provide for the withdrawal of a document herein.[13]

It is well established that "while all government agency records are public records for the purpose of their management, not all these records are required to be open to public access, as defined in [Kentucky's Open Records Act], some being exempt under KRS 61.878."[14] As such, a party's remedy for non-disclosure turns on whether the documents satisfy an exemption under KRS 61.878. To allow a party to withdraw a document merely because it fails to satisfy an exemption to the Open Records Act is to allow a party to subvert the intent of the Open Records Act.[15]

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[13] See, e.g., 401 KAR 100.010, Section 7(2), for certain Kentucky agency regulations that provide for the withdrawal of public records. Notably, these regulations contemplate original documents withdrawn from the record may be substituted with true copies.

[14] KRS 61.8715.

[15] See, e.g., 05-ORD-141; see, also, the State Archives and Records Act, KRS 171.410 - .740, as discussed in 05-ORD-141, similar to Kentucky's Open Records Act. This Act states that "it is the duty of an agency to 'establish such safeguards against removal or loss of records as he shall deem necessary and as may be required by rules and regulations issued under authority of KRS 171.410 to 171.740.' KRS 171.710. These safeguards include 'making it known to all officials and employees of the agency that no records are to be alienated or destroyed except in accordance with law, and calling attention to the penalties provided by law for the unlawful removal or destruction of records.' KRS 171.710."

Specific Findings

The Commission makes the following findings with respect to the requests for confidential treatment. The Commission grants confidential treatment to the information requested in the May 17, 2005 petition for confidential treatment.

In its June 24, 2005 petition, BellSouth requested confidential treatment for certain documents from the North Carolina Record and the Florida Record. The Commission finds that this information constitutes confidential and proprietary information such that disclosure of the subject information has the potential to provide more than a trivial unfair advantage to competitors and that certain of the information constitutes CPNI. The Commission therefore affords confidential treatment to these documents.

Joint Petitioners request that several categories or types of documents be granted confidential treatment in their July 15, 2005 petition. The Commission grants their request in part and denies the request in part. The Commission finds the documents labeled NSC/NVX 000003, NSC/NVX 000076-000078 and NVX 000001-000004 represent confidential information and shall be excluded from the public record.

The Commission denies confidential treatment to the documents labeled NSC/NVX 000079-000081. These documents do not contain information subject to exclusion and should be available for public inspection. The Commission also denies confidential treatment to the document labeled NVX 000026. This document contains general customer reports insufficient to subject the document to exemption. The Commission denies confidential treatment for the "Master Service Agreement" document labeled NVX 00027-00030. The unexecuted document is generic in nature

and contains no information sufficiently confidential or proprietary to be granted confidentiality.

Joint Petitioners requested confidential treatment for certain complaint response letters in documents labeled NVX 000031-000037. These documents are 3 years to 5 years old. In addition to the fact that they are old, they fail to contain information subject to exemption from public disclosure.

The Commission denies Joint Petitioners' request for confidential treatment for the document labeled XSP 000090-000091. The copy of this "'Bad Act'" Reporting Form was redacted prior to submission to the Commission. It appears that any information that might otherwise qualify for exemption has not been provided to the Commission and the redacted information has not been placed in the public record.

The Commission finds that the unexecuted document entitled "Xspedius Communications Services Agreement," labeled XSP 000004-000005, fails to qualify for confidential treatment. The document does not appear to contain information of a confidential or proprietary nature so as to qualify for exemption from public inspection.

The document labeled NSC/NVX 000051 is a complaint response letter dated April 12, 2001. It is more than 5 years old and does not contain information appropriate to permit its exclusion from the public record. Finally, the e-mail document labeled NSC/NVX 000052 is dated January 15, 2001. The nature of its contents and the age of the e-mail prohibit the Commission from withholding this document from public inspection.

To the extent that certain requests for confidential treatment have been granted, the Commission makes clear that these exemptions are subject to modification based on future events. The parties have a duty to inform the Commission in writing when any information granted confidential treatment becomes publicly available.[16] Also, to the extent the Commission becomes aware that material granted confidentiality is publicly available or otherwise no longer qualifies for confidential treatment, it will notify the parties and allow them 10 days to respond.[17]

IT IS THEREFORE ORDERED that:

1. The requests for confidential treatment are granted in part and denied in part as described above.

2. The parties shall advise the Commission in writing when the information granted confidential treatment becomes publicly available or otherwise no longer qualifies for confidential treatment.

Done at Frankfort, Kentucky, this 2nd day of June, 2006.

By the Commission

ATTEST:

Executive Director

[16] 807 KAR 5:001, Section 7(9)(a).

[17] 807 KAR 5:001, Section 7(9)(b).