COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

In the Matter of:

SOUTHEAST TELEHPONE, INC.	)	
	)	
COMPLAINANT	)	
	)	
V.	)	CASE NO. 2005-00533
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
	)	
DEFENDANT	)	

O R D E R

On December 6, 2005, by letter to the Commission's Executive Director in Case No. 2005-00519,[1] BellSouth Telecommunications, Inc. ("BellSouth") presented the Commission with advance notice of its intent to disconnect SouthEast Telephone, Inc. ("SouthEast") for nonpayment.

On December 13, 2005, SouthEast filed this action against BellSouth seeking to enjoin BellSouth from: rejecting SouthEast's requests for additional services, disconnecting SouthEast's interconnection agreements, or interrupting services to SouthEast's customers. On January 17, 2006, in response to SouthEast's complaint, BellSouth filed its brief supporting its previously filed notice of intent to disconnect. BellSouth also included a motion for confidential treatment of certain information

[1] Case No. 2005-00519, BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect SouthEast Telephone, Inc. for Non-Payment.

attached to its brief. SouthEast joined in BellSouth's request for confidential treatment. This Order addresses the requests for confidentiality.

Specifically, BellSouth requested that the Commission withhold from public inspection an amount that it claimed is owed to it by SouthEast. SouthEast agreed that the alleged debt should receive confidential treatment under Kentucky's Open Records Act, KRS 61.870 to 61.884 ("Open Records Act"), but disagreed with BellSouth's position that the alleged debt constituted "customer proprietary network information" ("CPNI") as defined by 47 U.S.C.A. § 222 of the Telecommunication Act of 1996.[2]

By letter from the Commission's Executive Director dated January 30, 2006, the requests were denied. In response, both parties requested that the Commission reconsider the Letter Ruling denying confidential treatment. Based on the particular facts of this case, the Commission reverses the Letter Ruling and grants the requests for confidential treatment.[3]

ARGUMENT

BellSouth contends that the subject information is exempt from public disclosure pursuant to Kentucky's Open Records Act and federal law. In particular, BellSouth maintains that the information is excluded under KRS 61.878(1)(c) because: (a) the

[2] Where appropriate, given that both parties have requested that the Commission grant confidential treatment to the alleged debt, the parties will be referred to jointly as "Petitioners."

[3] By Order dated December 16, 2005, the Commission ordered, among other things, that Case No. 2005-00519 be held in abeyance pending the outcome of the case sub judice. This Order addresses only the request made in Case No. 2005-00533 to grant confidential treatment to the amount allegedly owed by SouthEast to BellSouth. This Order does not address the request in Case No. 2005-00519 to grant confidential treatment to the number of SouthEast customers potentially affected by BellSouth's intent to disconnect.

information is not known outside of BellSouth or SouthEast; (b) if disclosed, the information would permit an unfair advantage to competitors; (c) the information is known only by BellSouth or SouthEast employees with a legitimate business need to know and act on the information; (d) BellSouth seeks to preserve the confidentiality of the information through all appropriate means; and, (e) granting the request would not damage any public interest.

BellSouth also claims that the information is CPNI pursuant to federal law. As CPNI, BellSouth contends that the documents are exempt under federal law and, therefore, exempt under KRS 61.878(1)(k), which provides an exemption for "[a]ll public records or information the disclosure of which is prohibited by federal law or regulation." SouthEast agrees that the information should be exempt from public disclosure under Kentucky's Open Records Act, but not pursuant to federal law.

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] All material on file with the Commission is to be "open for

[4] KRS 61.870(1) and (2).

[5] KRS 61.871.

inspection by any person, except as otherwise provided in KRS 61.870 to 61.884."[6] Any person requesting that the Commission grant confidential treatment has the burden to show that the material falls within the exclusions from disclosure requirements enumerated in the Open Records Act.[7]

Kentucky's Open Records Act provides for the exemption of certain limited categories of public documents. KRS 61.878(1)(a) exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy. . . ." Likewise, "a plain reading of [KRS 61.878(1)(a)] reveals an unequivocal legislative intention that certain records, albeit they are 'public,' are not subject to inspection, because disclosure would constitute a clearly unwarranted invasion of personal privacy."[8]

The primary purpose of the Open Records Act is to inform the public as to whether governmental agencies are properly executing their statutory functions. This aim is not fostered by disclosure of information about private citizens accumulated in various government files that reveals little or nothing about an agency's own conduct.[9]

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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] Kentucky Bd. of Examiners of Psychologists and Div. of Occupations and Professions, Dept. for Admin. v. Courier-Journal and Louisville Times Co., 826 S.W.2d 324, 327 (Ky. 1992).

[9] See Hines v. Com., Dept. of Treasury, 41 S.W.3d 872 (Ky.App. 2001); 95-ORD-151.

The question of privacy under the Open Records Act is not one of total nondisclosure, but rather of the individual's interest in selective disclosure.[10] If it is determined that the information is of a personal nature, then an agency must determine whether public disclosure would constitute a clearly unwarranted invasion of personal privacy.[11]

The issue of personal privacy includes commercial matters. In 96-ORD-176, the Office of Attorney General ("AG")[12] found that a municipal utility could properly deny a request for individual customer billing records on the basis that, among other things, the records could be used to infer or suggest the competitive position of commercial and industrial customers, and as such, disclosure would be an improper and unjustifiable invasion of privacy.

In reviewing the privacy exemption found in KRS 61.878, the court in Palmer v. Driggers[13] noted that judicial review of a disclosure decision must be approached on a case-by-case basis. The court acknowledged the clear public interest in privacy

[10] Zink v. Com., Dept. of Workers' Claims, Labor Cabinet, 902 S.W.2d 825 (Ky.App. 1994), review denied.

[11] Id. at 828.

[12] York v. Commonwealth, 815 S.W.2d 415, 417 (Ky.App. 1991). ("Attorney general opinions are usually sought by state officials concerning their official duties, since the attorney general is the legal advisor of all the 'state officers, departments, commissions, and agencies' of the Commonwealth. KRS 15.020. The government officials are expected to abide by the opinion until a court decrees otherwise or the legislature changes the law. OAG 84-136. An attorney general's opinion is highly persuasive, but not binding on the recipient.").

[13] Palmer v. Driggers, 60 S.W.3d 591, 597-98 (Ky.App. 2001).

reflected in the Open Records Act such that "privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny."[14]

In balancing the competing interests of privacy and the public's interest in transparency, the court stated as follows:

> *[G]iven the privacy interest on the one hand and, on the other, the general rule of inspection and its underlying policy of openness for the public good, there is but one available mode of decision, and that is by comparative weighing of the antagonist interests. Necessarily, the circumstances of a particular case will affect the balance. . . .* Moreover, the question of whether an invasion of privacy is "clearly unwarranted" is intrinsically situational, and can only be determined within a specific context.[15]

KRS 61.878(1)(c) of the Open Records Act provides an additional 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 BellSouth relies on KRS 61.878(1)(c), it must show that the commercial documents are such that are generally recognized as confidential or proprietary and that disclosure would permit an unfair commercial advantage to

[14] Id., noting the potential significance of the privacy issue, the court went on to state that "We are therefore spared debate (or deprived of it) on privacy as a matter of natural right or constitutional law."

[15] Palmer v. Driggers, supra, relying on Kentucky Board of Examiners of Psychologists & Division of Occupations & Professions, Dept. for Administration v. Courier-Journal & Louisville Times Co., 826 S.W.2d 324 (Ky. 1992) (emphasis in original).

competitors.[16] The court in Southeastern United Medigroup, Inc. v. Hughes,[17] 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.

The Open Records Act provides another relevant exemption in KRS 61.878(1)(i) and (j), which provide that certain "preliminary records" are not subject to disclosure as follows:

> (i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency; (j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.

The Palmer v. Driggers[18] court considered the issue of finality as it pertains to KRS 61.878(1)(i) and (j). The court looked to Black's Law Dictionary which defines "final" as: "Last; conclusive; decisive; definitive; terminated; completed. As used in reference to legal actions, this word is generally contrasted with 'interlocutory.' For res judicata purposes, a judgment is 'final' if no further action by court rendering judgment is required to determine matter litigated."[19]

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[16] 93-ORD-43.

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

[18] Palmer v. Driggers, supra, at 596.

[19] Id., quoting Black's Law Dictionary 629 (6th ed. 1990).

The information sought to be withheld herein is clearly not definitive. There will be no final determination of what, if any, amount is owed BellSouth in this matter until the action is terminated or completed on that issue. In addition, to the extent that an amount is owed, BellSouth considers the amount to be a fluctuating amount that it is continually increasing.[20]

BellSouth further claims that 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. SouthEast, however, states that the information is not CPNI. 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.[21]

The 1996 Act excludes from the definition of CPNI several categories of information, including: subscriber list information such as name, address, and telephone number.[22] Importantly, it also excludes aggregate customer information from which

[20] BellSouth's Brief in Support of its Notice to Disconnect Service for Nonpayment at 4 (January 17, 2006).

[21] 47 U.S.C. § 222(h)(1).

[22] 47 U.S.C. § 222(e) and (h)(3).

individual customer identities have been removed.[23] This is the type of information that BellSouth incorrectly characterizes as CPNI.

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 particular facts of this case, the Commission finds that the Petitioners have met their statutory burden of proof and that the subject information should at this time be granted confidential treatment pursuant to Kentucky's Open Records Act.

The determination of whether a request for information under the Open Records Act constitutes a clearly unwarranted invasion of personal privacy requires a comparative weighing of antagonistic interests in which the interest of privacy in nondisclosure is balanced against the general rule of inspection. Each case must be balanced with careful consideration of its particular circumstances.[24]

The privacy interests that adhere to the subject information outweigh any relevant public interest supporting disclosure. Disclosure of this one disputed number would not subject this agency's action to public scrutiny in any meaningful way.[25] The Commission must include in its deliberation the fact that the amount at issue is contested. The potential deleterious effects of disclosure must be balanced against the

[23] 47 U.S.C. § 222(c)(3) and (h)(2).

[24] Zink, supra.

[25] 96-ORD-176.

public's limited benefit from disclosure. To the extent that the alleged debt is preliminary, its disclosure offers little benefit to the public and could tend to confuse or misinform the public.

Further, the Commission finds that disclosure of the subject information has the potential to provide more than a trivial unfair advantage to competitors. In reaching this conclusion, the Commission must consider the degree of uncertainty and the lack of finality of the subject information. In so doing, the Commission views the disputed debt as fundamentally analogous to a "preliminary draft" as exempted by KRS 61.878(1)(i) and (j).

Generally, a comparative weighing of antagonistic interests is only applicable to the privacy exemption in the Open Records Act.[26] However, there is an overlap between certain exceptions to the Open Records Act and the "specific context" of the facts of this case. To wit, this portion of the record is preliminary and unresolved, which increases the possible unfair disadvantage that would accompany its disclosure and will tend to suggest the competitive position of a particular commercial business.

The Commission finds, consistent with SouthEast's position, that the subject material is not CPNI as defined by 47 U.S.C.A. § 222 of the Telecommunication Act of 1996. This information involves only aggregate customer information and does not include the disclosure of individual customer identities.[27] As such, the exemption contained in KRS 61.878(1)(k) of Kentucky's Open Records Act does not apply.

[26] Department of Corrections v. Courier-Journal and Louisville Times, 914 S.W.2d 349, 351 (Ky.App. 1996).

[27] 47 U.S.C. § 222.

In granting these requests for confidential treatment, the Commission makes clear that this Order is subject to modification based on future events. The Petitioners have a duty to inform the Commission in writing at any time when information granted confidential treatment becomes publicly available.[28] Also, to the extent the Commission becomes aware that material granted confidentiality is publicly available or otherwise no longer qualifies for confidential treatment, it shall by Order so advise the Petitioners, giving each of them 10 days to respond.[29]

IT IS THEREFORE ORDERED that:

1. The Petitioners' requests for confidential treatment are granted.

2. Either or both Petitioners shall advise the Commission in writing if at any time the information becomes publicly available or otherwise no longer qualifies for confidential treatment.

Done at Frankfort, Kentucky, this 31st day of March, 2006.

By the Commission

ATTEST:

Executive Director

[28] 807 KAR 5:001, Section 7(9)(a).

[29] 807 KAR 5:001, Section 7(9)(b).