

PRD-410
4-83

CASE

NUMBER:

99-184

INDEX FOR CASE: 1999-184
ACC OF KENTUCKY, LLC
Confidentiality

99-00144 - GROSS OPERATING REVENUE REPORT

IN THE MATTER OF ACC OF KENTUCKY LLC'S PETITION FOR
CONFIDENTIAL PROTECTION

SEQ NBR	ENTRY DATE	REMARKS
0001	05/04/1999	Application.
0002	05/06/1999	Acknowledgement letter.
0003	06/10/1999	Order scheduling IC on 7/20; info in Appendix A due 7/5 from ACC.
0004	08/16/1999	Informal Conference Memorandum
M0001	09/01/1999	BRENT RICE ACC OF KY-PETITIONERS BRIEF
0005	09/28/1999	Order cancelling 10/14 hearing; case stands submitted
0006	01/24/2000	FINAL ORDER GRANTING PETITION FOR CONFIDENTIALITY



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

CERTIFICATE OF SERVICE

RE: Case No. 1999-184
ACC OF KENTUCKY, LLC

I, Stephanie Bell, Secretary of the Public Service Commission, hereby certify that the enclosed attested copy of the Commission's Order in the above case was served upon the following by U.S. Mail on January 24, 2000.

Parties of Record:

Lisa H. Jenrette
General Manager
ACC of Kentucky, LLC
301 Highland Park Drive
Richmond, KY. 40475

Honorable W. Brent Rice
Counsel for ACC of KY, LLC
McBrayer, McGinnis, Leslie
& Kirkland PLLC
163 West Short Street
Suite 300
Lexington, KY. 40507 1361

Stephanie J. Bell

Secretary of the Commission

SB/sa
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ACC OF KENTUCKY LLC'S)
PETITION FOR)
CONFIDENTIAL PROTECTION) CASE NO. 99-184

O R D E R

ACC of Kentucky LLC ("ACC") filed a motion with the Commission on May 4, 1999 requesting the Commission's reconsideration of denial of confidential protection for certain information on the grounds that the disclosure thereof is likely to cause ACC competitive injury.

On September 9, 1999, the Commission granted ACC's motion for a formal hearing to be held October 14, 1999. However, ACC subsequently requested that the matter be submitted to the Commission on the record and waived the formal hearing. On July 6, 1999, ACC filed its response to the Commission's data request and filed its brief on September 1, 1999.

Pursuant to KRS 278.130 and 278.140, ACC is required to file with the Commission a Gross Operating Revenue Report. In that report ACC must set forth its total number of customers in Kentucky and its gross revenue in Kentucky. It is this information that ACC seeks to protect from public disclosure under KRS Chapter 61, the Kentucky Open Records Act.

ACC has been denied confidential treatment for its total number of customers and its annual gross revenue upon the grounds that the information is too general in nature to have a competitive value.

ACC urges the Commission to reassess its position on the treatment of this information and to grant confidential treatment of the information pursuant to the provisions of KRS 61.878(1)(c)1 and 61.878(1)(c)2.

First, ACC points out that the information is not required for tariff purposes, but rather is required for assessment purposes. KRS 278.130 requires the Revenue Cabinet to annually assess utilities under the jurisdiction of the Commission for the support of the Commission and its regulatory functions. KRS 278.140 requires utilities to file a report of earnings to ascertain the amount of that assessment. ACC maintains that because the information is collected only for the purpose of calculating an annual assessment, the information should not be subject to public inspection.

Second, ACC argues collectively that the information is generally recognized as proprietary and its disclosure would permit an unfair commercial advantage to its competitors. ACC refers to KRS 65.7639, as amended in 1998, in support of its position that the Kentucky Legislature has recognized the proprietary nature of the information ACC seeks to protect in this proceeding. The Legislature stated in KRS 65.7639 that the entity receiving the information from a commercial mobile radio service ("CMRS") provider could release such information "only in aggregate amounts which do not identify or allow identification of numbers of subscribers or revenues attributable to an individual CMRS provider."

ACC argues that the changing nature of the telecommunications industry converts information which was once too general to have competitive value to competitively sensitive information. ACC maintains that the disclosure of gross revenues and customer numbers reveals ACC's average revenue per customer. This information, ACC argues, can be used by its competitors to approximate the cost of providing cellular service to a customer in a given area; then, using that information, a competitor could calculate ACC's profitability per customer, revealing the principal component of capital available for expansion. ACC further argues that the foregoing, combined with disclosure of annual customer count, would reveal the area of new customer growth. A competitor would thereby be provided the necessary information to focus on that market area, thus creating an unfair commercial advantage.

Based on recent changes in the law and in the wireless telecommunications market, the Commission finds that the gross revenue and customer number information (such as that filed by ACC in the Gross Operating Revenue Report) is the type of information that falls within the provisions of KRS 61.878(1)(c)1. Marina Management Servs., Inc v. Cabinet for Tourism, Ky., 906 S.W. 2d 318 (1995). Accordingly, the gross revenue and customer number information should be granted confidential treatment and withheld from public disclosure.

As the conclusions herein depart from established Commission precedent, a copy of this Order shall be served on each wireless telecommunications provider doing business in Kentucky.

The Commission, being sufficiently advised, HEREBY ORDERS that:

1. The petition of ACC is granted.


2. The gross revenue and customer number information filed in ACC's Gross Operating Revenue Report is hereby held to be confidential and shall be withheld from public disclosure.

3. A copy of this Order shall be served upon each wireless telecommunications provider doing business in Kentucky.

Done at Frankfort, Kentucky, this 24th day of January, 2000.

By the Commission

ATTEST:


Executive Director



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
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September 28, 1999

Lisa H. Jenrette
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301 Highland Park Drive
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Honorable W. Brent Rice
Counsel for ACC of KY, LLC
McBrayer, McGinnis, Leslie
& Kirkland PLLC
163 West Short Street
Suite 300
Lexington, KY. 40507 1361

RE: Case No. 99-184

We enclose one attested copy of the Commission's Order in
the above case.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Bell".

Stephanie Bell
Secretary of the Commission

SB/sa
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ACC OF KENTUCKY LLC'S)
PETITION FOR)
CONFIDENTIAL PROTECTION) CASE NO. 99-184

O R D E R

On May 4, 1999, ACC filed a motion with the Commission requesting a hearing of the Commission's denial of confidential protection for certain information on the grounds that disclosure is likely to cause ACC competitive injury.

On September 9, 1999, the Commission granted ACC's motion for a formal hearing to be held on October 14, 1999. However, ACC has filed a request to waive the formal hearing and to submit the matter to the Commission on the record.

The Commission, being sufficiently advised, HEREBY ORDERS that:

1. The formal hearing scheduled in this case is cancelled.
2. This matter now stands submitted for a decision on the record .

Done at Frankfort, Kentucky, this 28th day of September, 1999.

By the Commission

ATTEST:


Executive Director



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
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September 9, 1999

Lisa H. Jenrette
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Honorable W. Brent Rice
Attorney at Law
McBrayer, McGinnis, Leslie
& Kirkland PLLC
163 West Short Street
Suite 300
Lexington, KY. 40507 1361

RE: Case No. 99-184

We enclose one attested copy of the Commission's Order in
the above case.

Sincerely,

Stephanie J. Bell
Stephanie Bell
Secretary of the Commission

SB/sa
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION.

In the Matter of:

ACC OF KENTUCKY LLC'S)
PETITION FOR)
CONFIDENTIAL PROTECTION) CASE NO. 99-184

O R D E R

On March 30, 1999, ACC of Kentucky LCC ("ACC") filed its Gross Operating Revenue Report, as required by KRS 278.140. ACC also filed a request for confidential treatment of certain information contained in that report, pursuant to 807 KAR 5:001, Section 7. On April 15, 1999, ACC's request for confidential treatment of that information was denied.

ACC filed a motion with the Commission on May 4, 1999 to request a hearing of the Commission's denial of confidential protection for certain information on the grounds that disclosure is likely to cause ACC competitive injury.

Pursuant to a request by ACC, an informal conference was held with the Commission Staff on July 20, 1999. On September 3, 1999, ACC filed a brief with the Commission in support of its request for confidential treatment of the material, as set out in its petition.

The Commission, after reviewing the record, finds that the motion of ACC for a formal hearing should be granted.

The Commission, being otherwise sufficiently advised, HEREBY ORDERS that:

1. A formal hearing upon ACC's petition shall be held on October 14, 1999, at 9:30 a.m., Eastern Daylight Time, in Hearing Room 1 of the Commission's offices at 730 Schenkel Lane, Frankfort, Kentucky.

2. ACC shall file direct testimony on or before October 1, 1999.

3. Neither opening statements nor witnesses' summaries of prefiled direct testimony will be permitted.

Done at Frankfort, Kentucky, this 9th day of September, 1999.

By the Commission

ATTEST:


Executive Director

McBRAYER, MCGINNIS, LESLIE & KIRKLAND PLLC

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September 1, 1999

Ms. Helen C. Helton, Executive Director
Public Service Commission
730 Schenkel Lane
Frankfort, KY 40602

RE: ACC of Kentucky LLC - PSC Case No. 99-¹⁸⁴~~00144~~

RECEIVED

SEP 01 1999

PUBLIC SERVICE
COMMISSION

Dear Ms. Helton:

Please find enclosed an original and ten copies of Petitioner's Brief to Commission in the above-referenced case. Please file with the Commission at your earliest convenience. Thank you.

Sincerely,


W. Brent Rice

Counsel for ACC of Kentucky LLC

WBR/dkw
Enclosures

RECEIVED

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE COMMONWEALTH OF KENTUCKY

SEP 01 1999

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF
ACC OF KENTUCKY LLC'S
PETITION FOR CONFIDENTIAL
PROTECTION

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CASE NO. 99-00144
184

PETITIONER'S BRIEF TO COMMISSION

Procedural History

ACC of Kentucky LLC ("ACC of Kentucky" or "ACC") is an "A" side cellular telecommunications service provider in Kentucky. As such, it is subject to regulation as a "commercial mobile service provider" by the Federal Communications Commission ("FCC"), see generally 47 U.S.C. Section 332, and as a "utility" by the Kentucky Public Service Commission. See 28 K.R.S. Section 278.010(3)(e).

Chapter 278 of the Kentucky Revised Statutes governs Public Utilities in Kentucky. Section 278.130 of that Chapter provides for the imposition of an annual fee on Kentucky utilities "[f]or the purpose of maintaining the [Public Service C]ommission, including the payment of salaries and all other expenses, and the cost of regulation of the utilities subject to its jurisdiction." The amount of the annual fee is based upon a utility's gross intrastate revenue: the Section specifies that "[t]he total amount so assessed shall not in any year exceed two (2) mills on intrastate receipts as so modified, which shall be deposited into the State Treasury to the credit of the general fund." K.R.S. Section 278.130.

In order that the Commission may "ascertain the amount of the assessment provided for in 278.130," Section 278.140 directs that "each utility shall, on or before March 31 of each year, file with the commission a report of its gross earnings or receipts derived from intrastate business for the preceding calendar year."

In accordance with Sections 278.130 and 278.140, ACC of Kentucky filed its Gross Operating Revenue Report with the Commission. In that Report, ACC of Kentucky set forth its total number of customers in Kentucky and its gross revenue in Kentucky for 1998. In conjunction with that filing, ACC filed a Petition for Confidential Treatment of the information contained therein, citing K.R.S. Section 61.878, which is a provision of the Kentucky Open Records Act exempting certain publicly filed information from public disclosure under that Act.

ACC of Kentucky's Petition for Confidential Treatment was denied by letter dated April 15, 1999. In that letter, the Public Service Commission determined that gross revenue and customer number information is "too general in nature to have competitive value and, is not entitled to the protection requested." The PSC informed ACC of Kentucky that the information would be placed in the public record after 20 days if it did not request a hearing.

Within the 20-day period, ACC of Kentucky filed a Motion to Schedule Hearing and requested an informal conference with the Commission Staff. The Commission granted ACC's request for an informal conference, and also directed that ACC of Kentucky file certain information with the Commission, which was filed in advance of the conference date.

At the July 20, 1999 conference, ACC of Kentucky, through its General Counsel, Stephen Easley, explained in detail its position that public release of its customer number and gross revenue information would have a detrimental effect on wireless competition in the Commonwealth of Kentucky. At the conference, Staff requested that ACC of Kentucky LLC file a brief detailing Mr. Easley's argument and supporting its request for confidentiality. This brief is filed in accordance with that request.

Facts

ACC of Kentucky is a small cellular service provider in rural Kentucky. Commercial mobile telephony service providers in the United States provide access to the public switched telephone number via wireless telephone units that employ radiowave technology to transmit their calls. See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 13 FCC Rcd 19746 at 19762 (1998). The mobile telephony market is dominated by providers using three different types of FCC licenses: (1) cellular radiotelephone carriers, such as ACC of Kentucky, (2) broadband PCS providers, and (3) digital SMR providers. Id. These three provider types -- cellular, PCS, and digital SMR -- offer mobile telephone services that, to the consumer, are fundamentally interchangeable. Id.

The FCC licenses spectrum for two competing cellular radiotelephone systems -- "A" and "B" side licenses -- in each licensed service area. A total of 734 geographic cellular license areas exist in the United States: 305 Metropolitan Statistical Areas ("MSAs"), 428 Rural Service Areas ("RSAs"), and one market for service in the Gulf of Mexico, for a total of 734 cellular license areas nationally. ACC of Kentucky is

licensed by the FCC as an "A" side cellular carrier to provide cellular service to customers in three contiguous and one nearly contiguous RSAs in Kentucky. These four RSAs correspond to 28 counties in rural Kentucky in and around Richmond, Kentucky.

Competing broadband PCS and digital SMR providers are licensed by the FCC to provide service by Major Trading Area ("MTA") and Basic Trading Area ("BTA"), rather than by MSA and RSA, but these licensed MTA and BTA service areas are overlaid upon the MSA and RSA areas of cellular providers. Accordingly, all licensed wireless providers compete in the overlay area (MSA, RSA, MTA, or BTA) of their licensed cellular, PCS or SMR counterpart.

As set forth in ACC of Kentucky's Response to Certain Information Requested by the Commission, a total of 19 cellular, broadband PCS, and digital SMR providers hold licenses from the FCC to compete in the 28 counties in Kentucky in which ACC provides service.

American Cellular Wireless LLC acquired Central Kentucky Cellular on June 25, 1998 from PriCellular Corporation. ACC of Kentucky was formed on December 31, 1998 and, accordingly filed its Gross Revenue Report for the first time in March of 1999.

ARGUMENT

I. ACC OF KENTUCKY'S GROSS REVENUE REPORT IS ENTITLED TO CONFIDENTIAL TREATMENT UNDER THE KENTUCKY OPEN RECORDS ACT

When ACC of Kentucky first filed its Gross Revenue Report in March of this year, it argued that the information contained therein was confidential and proprietary

and thus exempt from disclosure under the Kentucky Open Records Act. The Open Records Act provides that, unless a document filed with a public agency in Kentucky falls within approximately 15 enumerated exceptions, it is subject to public disclosure under the Act. As explained more fully below, the information contained in ACC of Kentucky's Gross Revenue Report is exempt from disclosure under at least two specific exemptions to the Open Records Act.

A. THE PROVISIONS OF THE OPEN RECORDS ACT MANDATE THAT ACC OF KENTUCKY'S GROSS REVENUE REPORT BE PROTECTED

Section 61.878(1) of the Kentucky Open Records Act, which sets forth the exceptions to production under the Act, is very specific and states: "The following public records are excluded from the application of K.R.S. 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction." *Id.* (emphasis added). Accordingly, if a party seeking protection establishes the applicability of exceptions under Section 61.878(1), the Act mandates that the information be protected. Because, as set forth below, at least two separate provisions of Section 61.878 protect ACC of Kentucky's Gross Revenue Report, disclosure of that information would constitute a violation of the Open Records Act.

B. ACC OF KENTUCKY'S GROSS REVENUE REPORT CONTAINS INFORMATION GENERALLY RECOGNIZED AS CONFIDENTIAL OR PROPRIETARY

Both exceptions applicable to ACC of Kentucky's claim of exemption from disclosure under the Open Records Act require an initial showing that the information sought to be protected is "generally recognized as confidential or proprietary." *See* K.R.S. Sections 61.878(1)(c)1.; 61.878(1)(c)2. ACC of Kentucky's Gross Revenue

Report contains two numbers for which it seeks confidential treatment: ACC's gross revenue and its total number of subscribers. The Kentucky state legislature and state legislatures, courts, and public service commissions in neighboring states have explicitly recognized that this exact information -- the gross revenue and customer numbers of wireless telecommunications providers -- is proprietary information entitled to confidential treatment, and they have codified that confidential treatment mandate into law.

In conjunction with legislation implementing Emergency 911 service to wireless customers, Kentucky and its neighboring states have passed legislation governing the disclosure of customer numbers and revenue information of commercial mobile radio service ("CMRS") providers. CMRS providers must provide state PSAPs with information concerning customer numbers and revenue for purposes of calculating that provider's E-911 fee assessments. Nevertheless, Kentucky's and similar E-911 legislation uniformly direct that such information be published "only in aggregate amounts which do not identify or allow identification of numbers of subscribers or revenues attributable to an individual CMRS provider." K.R.S. Section 65.7639 (emphasis added).¹ This pronouncement of the Kentucky legislature was codified into

¹ See also, e.g., Ind. Code Ann. Section 36-8-16.5-45(b)(West 1998) ("General information collected by the board or treasurer of state may be released or published only in aggregate amounts that do not identify or allow identification of numbers of subscribers or revenues attributable to an individual CMRS provider")(emphasis added); Mo. Ann. Stat. Section 190.430(3)(4) (Vernon 1998)("Notwithstanding any other provision of law, no proprietary information submitted pursuant to this section shall be subject to subpoena or otherwise released to any person other than to the submitting wireless service providers, without the express permission of said wireless service provider. General information collected pursuant to this section shall only be released or published in aggregate amounts which do not identify or allow identification of numbers of subscribers or revenues attributable to an individual wireless provider")(emphasis added); W. Va. Code Section 24-6-11 (Michie 1999)(because "information pertaining to numbers of customers and revenue collected by the CMRS providers ... information pertaining to the providers' subscribers could be used to the disadvantage of the participating CMRS provider ... any such information is ... not subject to disclosure under the provisions of chapter twenty-nine-b [the West Virginia Freedom of Information Act]")(emphasis added).

law effective July 15, 1998, and plainly represents the legislature's current position on the proprietary nature of the precise information ACC of Kentucky seeks to protect in this proceeding.

The Federal Communications Commission also permits confidential treatment of subscriber counts and revenue information on a routine basis. On FCC Universal Service forms and other forms requiring the disclosure of customer number and/or revenue information, the filing entity need only check a box on the form to obtain confidential treatment. See, e.g., FCC Universal Service Form 457.

Accordingly, both in the Commonwealth of Kentucky and in neighboring jurisdictions, information of the type contained in ACC of Kentucky's Gross Revenue Report is "generally recognized as confidential or proprietary," and meets the first requirement of both exemptions from the applicable provisions of the Kentucky Open Records Act.

C. ACC OF KENTUCKY'S GROSS REVENUE REPORT IS EXEMPT FROM DISCLOSURE BECAUSE IT IS A RECORD "REQUIRED BY AN AGENCY TO BE DISCLOSED TO IT, GENERALLY RECOGNIZED AS CONFIDENTIAL OR PROPRIETARY, WHICH IS COMPILED AND MAINTAINED IN CONJUNCTION WITH THE ADMINISTRATION OF ASSESSMENTS"

As detailed above, the Gross Revenue Report that is the subject of this proceeding to maintain confidentiality was filed for the purpose of administering an assessment. Accordingly, the Gross Revenue Report is entitled to confidential treatment under K.R.S. 61.878(1)(c)2.b as a record "required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which is compiled and maintained in conjunction with the administration of assessments, incentives, inducements, and tax credits as described in K.R.S. Chapter 154." Id. (emphasis

added). ACC of Kentucky's Gross Revenue Report must be filed pursuant to the mandate of K.R.S. 278.140, which directs that, in order that the Commission may "ascertain the amount of the assessment provided for in 278.130, each utility shall, on or before March 31 of each year, file with the commission a report of its gross earnings or receipts derived from intrastate business for the preceding calendar year." K.R.S. 278.140 (emphasis added). Because the information contained in ACC of Kentucky's Gross Revenue Report was "compiled and maintained in conjunction with the administration of an assessment," and is generally recognized as confidential or proprietary, it is exempt from public disclosure under K.R.S. 61.878(1)(c)2.b.

In Hoy v. Ky. Industrial Revitalization Authority, Ky., 907 S.W.2d 766 (1995) the Kentucky Supreme Court held that a confidential economic analysis prepared by an accounting firm to support General Electric's application for a tax credit was entitled to a per se exemption from public disclosure under K.R.S. 61.878(1)(c)2.b., because it fell within the plain language of the exemption. See Id., 907 S.W.2d 766, 767-68. The Kentucky Supreme Court found, further, that the disclosure of such financial information could be highly prejudicial: "It does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is 'generally recognized as confidential and proprietary' and falls within the wording of K.R.S. 61.878(2)(c)(2)." 907 S.W.2d at 768.

Here, as in Hoy, gross revenue and customer number information is financial information filed in support of an assessment. Again, as with Hoy, confidential and proprietary information such as revenue figures and subscriber counts are for wireless providers at the center of the inner workings of their corporations and the industry, as

recognized by the Kentucky legislature and other legislatures that legislatively protect this exact same information. Accordingly, this information falls within the plain language of K.R.S. 61.878(1)(c)2.b and is, per se, entitled to confidential treatment.

D. ACC OF KENTUCKY'S GROSS REVENUE REPORT IS EXEMPT FROM DISCLOSURE BECAUSE IT IS A RECORD "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 ACC OF KENTUCKY

K.R.S. 61.878(1)(c)1 provides a second, independent basis for exempting ACC of Kentucky's Gross Revenue Report from public disclosure. That section exempts from public disclosure records "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." Id. (emphasis added). Public disclosure of ACC of Kentucky's gross revenue and customer number information would "permit an unfair commercial advantage to [its] competitors," in contravention of K.R.S. Section 61.878(1)(c)1.

In a similar situation, West Virginia has an E-911 statute that is explicit on this point. It provides that because "information pertaining to numbers of customers and revenue collected by the CMRS providers ... and information pertaining to the providers' subscribers could be used to the disadvantage of the participating CMRS provider ... any such information is ... not subject to disclosure under the provisions of chapter twenty-nine-b [the West Virginia Freedom of Information Act]." W. Va. Code Section 24-6-11 (Michie 1999)(emphasis added). This legislative judgment in West Virginia is worthy of attention, particularly because it is consistent with legislative

judgment in Kentucky as well, as reflected by the legislature's enactment of K.R.S. 65.7621 - 65.7643.

The joint disclosure of gross revenue and customer numbers reveals, by simple division, the average revenue ACC receives per customer (ARPU) in Kentucky. Because wireless telecommunications is generally recognized as a heavily fixed-cost business, see Harry Newton, *Newton's Telecom Dictionary* at 263 (1998), competing wireless carriers can approximate the cost of providing cellular service to a customer in a given RSA. By subtracting the cost, per customer, of providing service in an RSA from the publicly disclosed ARPU in that RSA, a competitor can calculate a company's profitability per customer in that market, which will, in turn, reveal the principal component of capital available for expansion.

In *Marina Management Servs., Inc. v. Cabinet for Tourism, Ky.*, 906 S.W.2d 318 (1995), the Kentucky Supreme Court held that the audited financial statements of private marina operators, which contained financial information such as asset values, profit margins, net earnings, and capital income, were exempt from release under the Open Records Act because disclosure "would unfairly advantage competing operators." Id. at 319(citing K.R.S. 61.878(1)(c)1. Relying on the confidential and proprietary records exception of the Open Records Act, the Supreme Court held that release of these financial records would place the marina operators at a disadvantage by allowing their business competitors easy access to information concerning the marinas' economic status. Id. In the instant case, allowing ACC of Kentucky's competitors access to its customer number and gross revenue information would enable them to ascertain its

revenue per customer, and profitability in the Kentucky market that ACC of Kentucky serves in and around Richmond, Kentucky.

Further, annual disclosure of customer numbers reveals ACC of Kentucky's rate of customer growth in Kentucky, which also would "permit an unfair commercial advantage to [its] competitors" in contravention of K.R.S. 61.878(1)(c)1. When considered in conjunction with marketing efforts, new customer growth "allow[s] competitors to discover . . . the relative effectiveness of [a provider's marketing] efforts." State Utilities Commission v. MCI Telecommunications, N.C. Ct. App., 514 S.E.2d 276, 283 (1999). If a provider is able to concentrate its marketing efforts in areas that have not been penetrated or served well by its competitors, it will achieve a significant competitive advantage. But publicly revealing new customer growth highlights this success and the speed at which it occurs. This could provide an invitation to a competitor to increase its focus on that area. Id.; see also In re: Consideration of BellSouth Telecommunications, Inc.'s Entry Into InterLATA Services Pursuant to Section 271 of the Federal Telecommunications Act of 1996, slip op. at 2 (Fla. Pub. Serv. Comm'n Nov. 3, 1997)(1997 WL 732551 (Fla. P.S.C.))(attached to ACC of Kentucky's previously filed Responses to Staff Questions)("ACSI seeks confidential treatment of the number of customers and access lines ... Upon review, the material is found to be proprietary business information ... Disclosure of this information would harm ACSI's ability to compete by allowing competitor's to target market ACSI's customers")(emphasis added).

Although several of ACC's wireless competitors, such as GTE, BellSouth, and AT&T, hold multiple licenses to provide service across the Commonwealth, other

smaller providers, like ACC of Kentucky, provide service only in discrete areas in the Commonwealth. Reports of the annual customer growth for these larger providers may not divulge their marketing successes because their markets are diffuse and such successes would be difficult to pinpoint by market. But carriers like ACC of Kentucky are uniquely prejudiced by disclosure of this information. Because its service area is virtually contiguous, disclosure of ACC of Kentucky's customer growth could provide an open invitation to competitors to target market its customers. While the Commission's rationale that revenue figures and subscriber counts are "too general in nature to have competitive value" might have some validity when considering a competitor such as BellSouth that provides service state-wide, such a generalization is certainly not true in the case of ACC of Kentucky, which provides service in only a smaller, centrally-located, virtually contiguous rural area. See Affidavit of Stephen J. Easley, attached hereto. ACC's total subscriber count, potential customers, coverage area, and revenues are only a small fraction of those for Kentucky's largest carriers, and information that may be "general" for a state-wide carrier is quite specific to ACC of Kentucky.

In addition, any claim that this confidential information is "too general" fails to recognize the changing nature of the fast-paced telecommunications world. The Telecommunications Act of 1996 and other recent federal regulatory efforts have greatly expanded telecommunications competition: in the wireless arena, two cellular carriers have grown into two cellular carriers, five PCS carriers, two SMR carriers, numerous wireless resellers, not to mention the paging industry and other new wireless technologies. Most of these new competitive entrants are small, and their territories are

limited because of the cost of buildout. As with ACC of Kentucky, these new competitive entrants' subscriber counts and revenue figures are quite specific because of the limited geographic or operational scope of these nascent competitors' businesses. Moreover, these new entrants, and rural carriers such as ACC of Kentucky, are the most vulnerable to the predatory and pernicious actions that could well occur because of the disclosure of this competitively sensitive information. The Commission recognizes that increased competition is surely a tremendous benefit for Kentucky residents. Just as surely, disclosure of this confidential information of smaller and newer competitors will sharply hinder the ability of these smaller and newer competitors to offer innovative and competitive offerings to consumers. See State Utilities Commission v. MCI Telecommunications Corporation, N.C. Ct. App., 514 S.E.2d 276, 283 (1999) ("Most importantly, disclosure of such information would thwart the creativity and innovation that competition brings to the marketplace, and prohibit the competitive environment our legislature intended to create.")

Just because disclosure of revenue information and subscriber counts was not considered harmful in Kentucky in the past does not mean that such reasoning holds in this fast-changing regulatory context.

For all these reasons, "open[] disclos[ure]" of ACC of Kentucky's gross revenue and customer numbers "would permit an unfair commercial advantage to [its] competitors" and ACC of Kentucky is entitled to confidential treatment of that information under K.R.S. 61.878(1)(c)1.

II. THE INFORMATION CONTAINED WITHIN ACC OF KENTUCKY'S GROSS REVENUE REPORT CONSTITUTES A TRADE SECRET UNDER THE KENTUCKY TRADE SECRETS ACT

The information contained within ACC of Kentucky's Gross Revenue Report also constitutes a trade secret under the Kentucky codification of the Uniform Trade Secrets Act. Under that Act –

“Trade Secret” means information, including a formula, pattern, compilation, program, data, device, method, technique, or process, that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

K.R.S. 365.880(4).

First, there is no debate here concerning ACC of Kentucky's reasonable efforts to maintain the secrecy of the information contained in its Gross Revenue Report.² Second, the information contained in that Report constitutes a “compilation” of “data,” particularly, as discussed above, because the information together – customer numbers and gross revenue -- yield the average revenue ACC receives per customer (ARPU) in Kentucky. Third and finally, it is clear that the information at issue “derives independent economic value from not being generally known to, and not being

² Steps to protect confidentiality include: ACC of Kentucky's employees all are required to sign confidentiality agreements to protect this type of information; information containing subscriber information and revenue figures is labeled “Confidential,” and subject to stringent controls; ACC's Employee Handbook and Code of Ethical Conduct both warn employees to treat this type of information with proper respect and confidentiality; and ACC refuses to provide information of this type to outside sources without strict controls, under confidentiality agreements, or in the aggregate. See Affidavit of Stephen J. Easley, attached hereto.

reasonably ascertainable by proper means by other persons who can obtain economic value from its disclosure or use.” As discussed above, ACC of Kentucky’s revenue number and customer number information are financial records, which have inherent “economic value,” and thus are deemed highly confidential. See, e.g., McClelland & Forgy, Is Kentucky Law "Pro-Business" in its Protection of Trade Secrets, Confidential and Proprietary Information? A Practical Guide for Kentucky Businesses and their Lawyers, 24 N.Ky.L.Rev. 229, 231-236 (1997). Moreover, if disclosed, “other persons [could] obtain economic value from th[is] disclosure or use.” This information is, accordingly, entitled to treatment as ACC of Kentucky’s trade secrets.

In a similar situation, the Court of Appeals of North Carolina found that, inter alia, the number of customers served by individual competitive local telephone service providers (“CLP’S”) in that state was entitled to trade secret protection because disclosure “would provide competitors rather extensive insight into the business plans and operations of a particular CLP, information that otherwise would not be available generally.” State Utilities Commission v. MCI Telecommunications Corporation, N.C. Ct. App., 514 S.E.2d 276, 283 (1999) (“Disclosure of this information would allow competitors to discover . . . how quickly [a CLP] acquires new customers, and in which areas of the state the CLP is focusing its marketing efforts and the relative effectiveness of these efforts.”)

In the same way, disclosure of ACC of Kentucky’s subscriber counts and gross revenues not only shows its competitors how quickly it is adding customers and the success of its marketing efforts, as described in State Utilities, the disclosure of revenue

amounts compounds that harm by showing competitors how well-heeled those new subscribers are through the ARPU calculation.

Because ACC of Kentucky's Gross Revenue Report contains trade secret information, disclosure of that information would constitute a violation of the Kentucky Trade Secrets Act. The Kentucky Trade Secrets Act provides for civil damages and injunctive relief for actual or threatened misappropriations of trade secrets and provides for confidential treatment of alleged trade secrets.³

III. DISCLOSURE OF THIS INFORMATION IS NOT IN THE PUBLIC INTEREST

Recent pronouncements of state legislatures, federal and state regulatory bodies, and state courts, have all granted confidential treatment to gross revenue and customer number information submitted by competitive telecommunications carriers to regulatory bodies on a confidential basis. This information is generally recognized to be confidential, is exempt from disclosure under state or federal open records or freedom of information acts, and constitutes a trade secret. Disclosure of this information would unfairly prejudice ACC of Kentucky by providing its 18 competitors in the 28 Kentucky counties in which it provides service with valuable financial information, unavailable elsewhere, about its business.

A final factor militates against public disclosure of this information in this case with respect to this, and similarly situated rural telecommunications providers. That factor is the public interest. When the ARPU of a wireless provider in a market is

³ Further, the United States Supreme Court has recognized that disclosure of trade secret information submitted to a regulator in confidence may constitute a "taking" of property without just compensation in violation of the Fifth Amendment of the Constitution. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013-14, 104 S. Ct. 2862-2878 (1984). The Monsanto Court further found that the disclosing entity could sue and recover damages for such a taking. Id.

analyzed in conjunction with publicly available, generally accepted information quantifying the size of the potential wireless market ("POPs"), would-be competitors can also assess wireless market penetration in that RSA.

Information is publicly available, regarding the RSAs in Kentucky where ACC provides service, that quantifies the potential size of the wireless market. Interest in wireless markets licensed by the FCC are commonly measured on the basis of the population of the market served, with the population of a licensed area referred to as "POPs," and "Net POPs" an estimated population -- including all residents and not just subscribers -- for a given service area, multiplied by the percentage interest a wireless provider owns in the licensed entity in that area. Detailed information regarding POPs in individual wireless markets is set forth in the annual Kagan Cellular Telephone Atlas which is derived, in part from information available from the FCC, the U. S. Department of Commerce, the U.S. Census Bureau, Rand McNally, and the U.S. Department of Transportation. However, gross revenue and customer information about individual wireless providers -- the information ACC of Kentucky seeks to keep confidential -- is not publicly available, unless published by a state regulatory body.

Two questions are key to any competitor or potential competitor assessing a potential wireless market: (1) How strong is wireless competition in that market? and (2) How much market penetration has occurred, or how "mature" is the market?

When the ARPU of a wireless provider in a market is analyzed in conjunction with publicly available, generally accepted information quantifying the size of the potential wireless market ("POPs"), would-be competitors can assess wireless market penetration in that RSA. This information could have the effect of discouraging


competition in a particular market if the numbers looked bad. This is more likely in rural areas that tend to be underserved, both nationally and in the Commonwealth of Kentucky – rural areas like those served by ACC of Kentucky.

In the short run, what that means for Kentucky consumers, particularly in rural markets, is that there will be less competition because the perennial shortage of investment capital will not flow to markets that offer marginal returns on investment, such as some rural markets. While that might seem to be a result that current providers would be happy to live with, studies clearly show that in the long run even the incumbent wireless carriers benefit from increased advertising and consumer awareness that are the natural result of the entry of new wireless competitors. It is generally far better to have one quarter of a huge pie than half of a much smaller pie.

Discouraging competition and entry of new competitors into under-served markets is only one of the pernicious results of disclosure of sensitive revenue and subscriber information. Consumers could also be hurt by disclosure of this information if it leads to price-fixing or price maintenance. It goes without saying that if any wireless carrier were providing subscriber counts and revenue information to its competitors, they could expect a visit from antitrust officials at the Department of Justice. This is because disclosure of ARPU information in a given market would go a long way towards allowing otherwise fierce competitors to set prices at a level that would protect the providers in a market, since providers are well aware of the levels ARPU must be at to maintain profitability. Antitrust concerns alone should be enough to convince the Commission not to disclose this information.

These two compelling public interest reasons for non-disclosure of the information must be weighed against the public policy interest in disclosure. ACC of Kentucky has been unable to discern any real benefit to Kentucky consumers from disclosure of its revenue and subscriber information. When the legal arguments are considered with the compelling public interest reasons weighing against disclosure, the case for nondisclosure is clear.

Respectfully submitted,



W. Brent Rice
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KIRKLAND
163 West Short Street, Suite 300
Lexington, KY 40507-1361
Phone: 606/231-8780
COUNSEL FOR ACC OF KENTUCKY
LLC

Brief reviewed by:

Stephen J. Easley, Esq.
Vice President External Affairs
and General Counsel
ACC of Kentucky, LLC

In Re Confidentiality Request)
Of ACC of Kentucky) Affidavit of
) Stephen J. Easley

City of Washington)
) ss:
District of Columbia)

Stephen J. Easley, being duly sworn, deposes and says:

1. I am Vice President for External Affairs and General Counsel for ACC of Kentucky LLC and maintain an office at 1155 Connecticut Avenue, N.W., Suite 700, Washington, DC 20036.

2. I am a Certified Public Account and an attorney licensed to practice in four jurisdictions, including the District of Columbia (active), Maryland (active), Georgia (inactive), and Texas (inactive).

3. One of my primary responsibilities is designing and implementing procedures to maintain confidentiality of our trade secrets and other business information. In addition, as a corporate officer and a senior member of the management team, I am quite familiar with our business decisions, particularly legal, regulatory, legislative, engineering and financial decisions.

4. ACC of Kentucky's employees are required to sign confidentiality agreements to protect all financial and accounting information, including subscriber information and revenue figures.

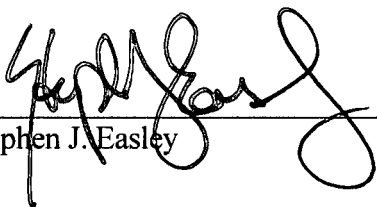
5. Information containing subscriber information and revenue figures is labeled "ACC Confidential," and is subject to stringent controls that limit access to that information to employees with a need to know.

6. ACC of Kentucky's Employee Handbook and Code of Ethical Conduct both warn employees to treat accounting and financial information such as revenue figures and subscriber counts with proper respect and confidentiality.

7. ACC of Kentucky refuses to provide financial and accounting information such as subscriber counts and revenue information to outside sources without strict controls, such as confidentiality agreements. From time to time, ACC of Kentucky's parent corporation reports such information on a company-wide, aggregate basis or as part of overall industry figures without identifying ACC of Kentucky's individual numbers.

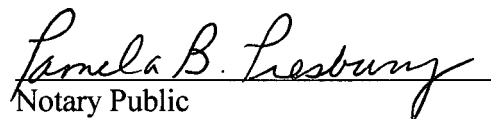
8. I have reviewed "ACC of Kentucky's Response to Certain Information Requested by the Commission in its Order dated June 10, 1999," and to the best of my information and belief, the information contained therein is true and correct.

9. The map attached hereto as Exhibit A is a true and accurate depiction of the four small Rural Statistical Areas where ACC of Kentucky provides service, which includes three contiguous RSAs (KY RSAs 4, 5, and 6) and a nearly contiguous RSA (KY RSA 8).



Stephen J. Easley

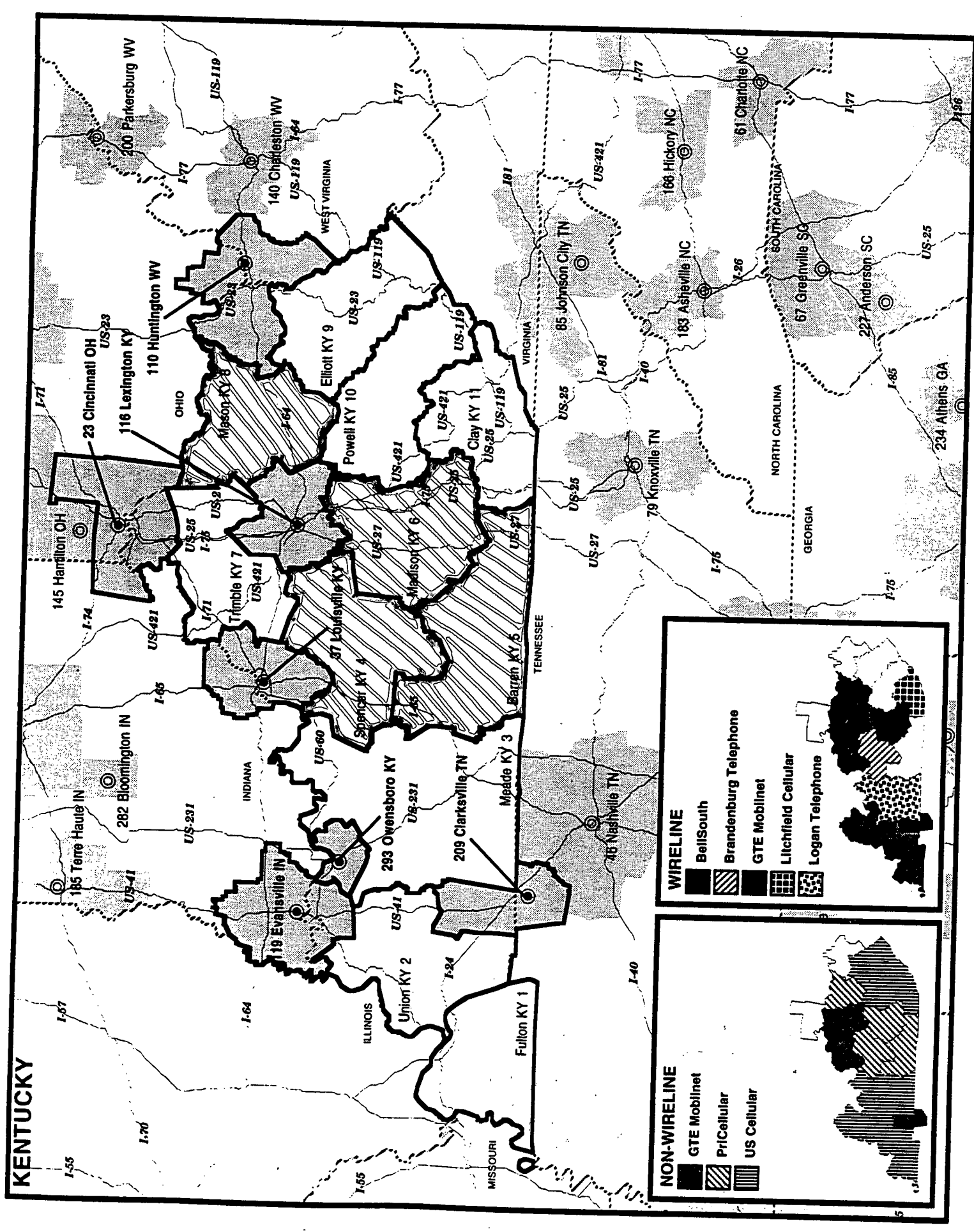
Sworn and subscribed to this 27th day of August, 1999.



Notary Public

My Commission Expires: 8/14/99

KENTUCKY



WIRELINE

- BellSouth
- Brandenburg Telephone
- GTE Moblinet
- Litchfield Cellular
- Logan Telephone

NON-WIRELINE

- GTE Moblinet
- PrCellular
- US Cellular

INTRA-AGENCY MEMORANDUM

KENTUCKY PUBLIC SERVICE COMMISSION

TO: Main Case File No. 99-184

FROM: J. R. Goff
Staff Attorney *J.R.*

DATE: August 16, 1999

RE: Informal Conference of July 20, 1999

Pursuant to the Commission's Order of June 10, 1999, an informal conference was held on July 20, 1999 at the Commission offices in Frankfort, Kentucky. Present were:

W. Brent Rice	-	ACC of Kentucky
Steve Easley	-	ACC of Kentucky
J.R. Goff	-	Commission Staff
William Strack	-	Commission Staff
Jim Stevens	-	Commission Staff

The Commission convened the conference to discuss the Commission's response to the applicant's request for confidential treatment of information and possible settlement of this proceeding.

ACC of Kentucky LCC ("ACC") is a wireless carrier authorized to do business in Kentucky. On March 30, 1999, ACC filed its Gross Operating Revenue Report as required by KRS 278.140. Along with this report ACC filed an application, pursuant to 807 KAR 5:001, Section 7 for confidential treatment of certain information contained in that report. Confidential treatment was denied and ACC requested a hearing on the denial and requested an informal conference with Commission Staff.

At the beginning of the informal conference on July 20, 1999, Mr. Stephen J. Easley V.P. and General Counsel of ACC presented ACC's position to the Staff.

First, ACC briefly outlined its organization and operations in Kentucky. Secondly, ACC presented the items upon which it relies for confidential treatment of the information. The first of these was the reason the information was gathered, that being for the purpose of determining an assessment of the utility for the purposes set out in KRS 278.130. ACC maintains that this "assessment statute" does not effect the public safety but only serves to collect a fee for operation of the public agency. Next, ACC contends that the information

Main Case File No. 99-184

August 16, 1999

Page 2

is entitled to protection under KRS 61.870-61.884, The Open Records Act in that the information is general recognized as a trade secret. In conjunction with that Act, ACC maintains that the information also falls under the provisions of the Kentucky Trade Secret's Act.

ACC then presented Staff with reported court opinions in support of their position. ACC also put forth the position that the disclosure of the information would tend to limit competition and would be harmful to the public rather than a help in the fast changing market place of wireless communications.

After a brief discussion the Staff informed ACC that Staff would consider its presentation, but the ultimate decision would have to be up to the Commission.

The parties discussed the possible procedural schedule of this case in that ACC is entitled to a hearing or that ACC could waive a public hearing and submit a brief to the Commission for a decision.

The conference then adjourned.

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July 6, 1999

RECEIVED

JUL - 6 1999

PUBLIC SERVICE
COMMISSION

VIA HAND DELIVERY

Ms. Helen Helton
Executive Director
Public Service Commission
730 Schenkel Lane
Frankfort, Kentucky 40602

RE: In the Matter of: ACC of Kentucky LLC's
Petition for Confidential Protection
Case No. 99-184

Response to the Commission's Order of
June 10, 1999

Dear Ms. Helton:

Pursuant to the Commission's Order dated June 10, 1999 in the above-styled case, enclosed for filing please find the original and six copies of my client's responses to questions set forth on Appendix "A" attached to the Commission's Order. Please file with the commission at your earliest convenience. Thank you and if you should have any questions, please feel free to call me.

Sincerely,



W. BRENT RICE
COUNSEL FOR ACC OF KENTUCKY, LLC

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE COMMONWEALTH OF KENTUCKY
CASE NO. 99-00144-99-104

RECEIVED
JUL - 6 1999
PUBLIC SERVICE
COMMISSION

IN THE MATTER OF: ACC OF KENTUCKY, LLC'S
PETITION FOR CONFIDENTIAL PROTECTION

**ACC OF KENTUCKY, LLC'S RESPONSE TO
CERTAIN INFORMATION REQUESTED BY THE
COMMISSION AND ITS ORDER DATED JUNE 10, 1999**

Comes ACC of Kentucky, LLC, by counsel, and hereby responds to certain information requested by the Commission and its Order dated June 10, 1999, as follows:

1. List the counties in Kentucky in which ACC provides service.

ACC of Kentucky LLC ("ACC of Kentucky") provides service in the following Kentucky counties: Adair, Anderson, Bath, Barren, Boyle, Bracken, Casey, Clinton, Cumberland, Fleming, Garrard, Green, Hardin, Hart, Laurel, Larue, Lewis, Lincoln, McCreary, Madison, Marion, Mason, Metcalfe, Mercer, Menifee, Monroe, Montgomery, Nelson, Nicholas, Pulaski, Robertson, Rockcastle, Rowan, Russell, Spencer, Taylor, Washington and Wayne.

Witness: Lisa Jenrette and/or Stephen J. Easley

2. Provide the names of your competitors in those areas.

The following cellular, broadband PCS, and digital SMR providers hold licenses to compete in some or all of the above-listed counties:

ABC Wireless, Inc.
ACC of Kentucky LLC
AT&T Wireless
Cellular Phone of Kentucky Inc./Ramcell
Cincinnati Bell Telephone
Cumberland Cellular Partnership
GTE Wireless of the South, Inc.
Kentucky CGSA Inc./BellSouth Mobility Inc.
Kentucky RSA 4 Cellular General Partnership
Nextel License
Nextel License Acquisition Corp.

Nextwave Personal Communications
Northcoast Communications LLC
Powertel Inc.
PV/SS PCS L.P.
Sprint PCS
Sprintcom
Third Kentucky Cellular Corporation
Westel-Milwaukee Company, Inc.

In addition, the following wireline carriers compete in some or all of the above-listed counties:

BellSouth
Brandenburg Telephone Co.
Duo County Telephone Co.
GTE
Highland Telephone Co.
Mountain Telephone Co.
South Central Rural Telephone Co.

Witness: Lisa Jenrette and/or Stephen J. Easley

3. Is ACC a subsidiary of a larger company? If so, what is the name of its parent company?

Although ACC of Kentucky is willing to disclose publicly available information about its business, it is unclear how this information is relevant to the inquiry in this proceeding, which concerns competition in the Kentucky wireless market. ACC of Kentucky is a subsidiary of American Cellular Wireless LLC.

Witness: Lisa Jenrette and/or Stephen J. Easley

4. Does the parent company operate in other jurisdictions? If so, what jurisdictions?

Although ACC of Kentucky is willing to disclose publicly available information about its business, it is unclear how this information is relevant to the inquiry in this proceeding, which concerns competition in the Kentucky wireless market. American Cellular Wireless LLC does not operate in other jurisdictions. American Cellular Wireless LLC, however, does own interests in companies that operate in the following states: Illinois, Kentucky, Michigan, Minnesota, New York, Ohio, Pennsylvania, Tennessee, Wisconsin, and West Virginia.

Witness: Lisa Jenrette and/or Stephen J. Easley

5. On page 2, paragraph 1 of ACC's May 4, 1999 Motion ("Motion"), ACC states that its gross revenue and customer number information is "generally recognized as confidential and proprietary."

a. Are you aware that this Commission has consistently denied confidential protection to the gross operating revenue report for all telecommunications providers in Kentucky?

This is the first year that ACC of Kentucky has filed a gross operating revenue report with the KY PSC. American Cellular Wireless LLC acquired Central Kentucky Cellular Corporation on June 25, 1998 from PriCellular Corporation. It was in connection with this proceeding that ACC of Kentucky first became aware that the Kentucky Public Service Commission has had a practice of denying confidential protection to the gross operating revenue reports of wireless providers. ACC of Kentucky is unaware of the Commission's practice with respect to non-wireless telecommunications providers.

b. Based on this policy, would you say that this Commission has not viewed the two numbers in question as competitively sensitive and therefore not generally recognized as confidential and proprietary?

The public disclosure of such information may have been routine during an era of little or no competition. The information would be less competitively sensitive if there were no competitors. The recent growth in competition in the telecommunications industry in general, and the wireless industry in particular, has prompted many state utility commissions to recognize that now this information is commercially sensitive and to grant it protection from public disclosure, as ACC of Kentucky is asking the Kentucky Public Service Commission to do in this matter.

Witness: Lisa Jenrette and/or Stephen J. Easley

6. The following questions relate to your cite of the West Virginia legislature's decision in its E-911 proceeding.

a. Provide a copy of the entire statute.

A copy of Article 6 of the West Virginia statute, governing the West Virginia Local Emergency Telephone System, W. Va. Code section 24-6-1, et seq., is attached.

b. The cite seems to indicate that "information pertaining the providers' subscribers" relates to the customer's name and addresses and any other customer-specific information residing in the 911 database and not to the total number of customers of the company. If this is not your understanding, please elaborate.

That is not what the statute provides. Protected information is not exclusively customer-specific information but also includes the number of customers a commercial mobile radio service (CMRS) provider serves. The statute provides that because "information pertaining to numbers of customers and revenue collected by the CMRS providers . . . and information pertaining to the providers' subscribers could be used to the disadvantage of the participating CMRS provider . . . any such information is . . . not subject to disclosure under the provisions of chapter twenty-nine-b [the West Virginia Freedom of Information Act]." (Emphasis added). As is made plain in West Virginia Code section 24-6-6b ("Wireless enhanced 911 fee"), all CMRS providers are required to collect a wireless E-911 fee from each of their in-state two-way service subscribers. The E-911 fee that a wireless provider pays in West Virginia is based upon the number of its "valid retail commercial radio service subscription[s]." Id. The fee is seventy-five cents per month for each such subscription and, after retaining a three percent billing fee, the CMRS provider is required to send the E-911 fee moneys to the West Virginia Public Service Commission. Id. at 24-6-6b(c), (d). For auditing purposes, providers must provide the West Virginia Commission with monthly reports reflecting the total amount of E911 fees billed in the preceding billing period, and its total customer count, on an annual basis. See W.Va. P.S.C. Leg. Rule Section 150-25-4.5; 150-25-5.4. Accordingly, the statutory reference to "numbers of customers" means the number of customers a CMRS provider serves in West Virginia. The practice in West Virginia to protect subscriber counts is absolutely clear from both the statute and practice of the West Virginia Public Service Commission.

Copies of similar Indiana and Missouri statutes are also attached. See Ind. Code Ann. section 36-8-16.5-45(b)(West 1998)("General information collected by the board or treasurer of state may be released or published only in aggregate amounts that do not identify or allow identification of numbers of subscribers or revenues attributable to an individual CMRS provider")(emphasis added); Mo. Ann. Stat. section 190.430-3(4) (Vernon 1998)("Notwithstanding any other provision of law, no proprietary information submitted pursuant to this section shall be subject to subpoena or otherwise released to any person other than to the submitting wireless service providers, without the express permission of said wireless service provider. General information collected pursuant to this section shall only be released or published in aggregate amounts which do not identify or allow identification of numbers of subscribers or revenues attributable to an individual wireless provider")(emphasis added).

Witness: Stephen J. Easley

7. At the top of page 3 of the Motion, you state that all cellular carriers can monitor each other's costs. Explain how your company can obtain the costs of your competitors.

Estimating the cost of providing wireless service in Kentucky is not an extremely difficult process. In fact, wireless telecommunications is generally regarded as a heavily fixed-cost business. Such costs include, for example, the cost of spectrum acquisition, building or leasing towers, antenna and associated transmission equipment, switching equipment, engaging long distance, interconnect, E-911 and other ancillary service providers, dealers and agents, and personnel costs. The cost of spectrum is information publicly available from the FCC, SEC filings and private sources. The number of vendors of wireless equipment and services is limited, and wireless providers generally seek bids from the same core group of vendors. Moreover, it is not at all uncommon for such vendors to issue press releases when a provider has engaged it to provide its equipment or service on an ongoing basis. Accordingly, it is not difficult to approximate a competitor's cost of doing business in a given Kentucky market.

Witness: Lisa Jenrette and/or Stephen J. Easley

8. In paragraph 2 on page 3 of the Motion, you state that disclosure of ACC's gross revenues and customer numbers reveals ACC's Average Revenue Per Unit.

a. Are ACC's service prices exactly the same as its competitors?

No.

b. Is the mix of services an ACC customer pays for exactly the same as the mix of services for which your competitors' customer pays?

The phrase "mix of services" is not defined and is unclear. "Mix of services" could be interpreted to mean mix of telecommunications services, including wireless, local, and inter and intra-LATA. To ACC of Kentucky's knowledge, at this time no such one-stop "mix of services" is currently available from any provider in the Kentucky areas in which ACC of Kentucky competes, although such an offering could be available there in the future.

With respect to the "mix" of wireless services exclusively, although competing carriers in ACC of Kentucky's service areas do provide different wireless packages, this does not necessarily have a significant impact on the cost of providing service in Kentucky. ACC of Kentucky differentiates itself as a wireless provider through, among other things, its excellent customer service and local footprint.

(1) If yes, how did you determine this fact?

N/A

(2) If no, why isn't it meaningless to know an average revenue per unit if the prices are different and the mix of services between customers is different?

As stated above, the fact that wireless carrier's provide different wireless products does not necessarily significantly impact the cost of providing wireless service in Kentucky. Moreover, Average Revenue Per Unit information is not used exclusively to compare a competitor's product offerings. It reveals a competitor's profitability, and information about competition in a given market.

c. In the same paragraph you equate "average revenue per unit" with cost per customer. Explain why these two phrases are the same. Are not revenues and costs entirely different accounting concepts?

Yes. The referenced sentence should be revised to read: "The joint disclosure of gross revenue and customer numbers reveals ACC's 'Average Revenue Per Unit,' or revenue, per customer, from providing service in the Kentucky market." An Errata is filed herewith.

Witness: Lisa Jenrette and/or Stephen J. Easley

9. In paragraph 2 on page 3 of the Motion, you state that most existing competitors can approximate the actual cost of providing service per customer in a given market. Explain how you would determine the cost per customer for your competitors listed in question 2 and provide an analysis of the computation of those costs by cost category, i.e., depreciation, taxes, capital costs, administrative costs and so forth.

Although ACC of Kentucky is willing to disclose publicly available information about its business, the information sought is highly proprietary. As detailed in response to question Nos. 7 and 8, above, wireless providers can make a reasonable assessment of each others' cost of doing business by monitoring FCC, SEC and other publicly available data, and the costs assessed by industry vendors.

Witness: Lisa Jenrette and/or Stephen J. Easley

10. Relative to your statement in paragraph 2 of page 3 of the Motion that "disclosure of average revenue per unit would reveal how much capital a company has available for expansion,"

a. Is not the capital available to any company for expansion the result of a company's total cash flow including depreciation, taxes, expenses, deferred taxes, and so on?

Yes; in the wireless industry cash flow is commonly referred to as "EBITDA" (earnings before interest, taxes, depreciation and amortization). This acronym and formula is most commonly used for the valuation of wireless telecom stocks because of the

heavy fixed-cost nature of the business. See Harry Newton, *Newton's Telecom Dictionary* at 263 (1998).

b. If ACC is a subsidiary of a large, multi-jurisdictional company, does this parent provide ACC in Kentucky with funds for expansion from a corporate line of credit or financing completed by the parent, or does ACC raise its own capital through the sale of equity and debt?

Although ACC of Kentucky is willing to disclose publicly available information about its business, the information sought is highly proprietary. Furthermore, it is unclear how this information is relevant to the inquiry in this proceeding, which concerns competition in the Kentucky wireless market.

Witness: If an appropriate protective order is entered, ACC of Kentucky will designate a witness.

11. Provide a complete description of the market-specific information available from the FCC relative to the cellular and PCS industries and in particular the information that relates to Kentucky.

Information is publicly available regarding the RSAs in Kentucky where ACC provides service, which quantifies the potential size of the wireless market. Interest in wireless markets licensed by the FCC are commonly measured on the basis of the population of the market served, with the population of a licensed area referred to as "POPs," and "Net POPs" an estimated population for a given service area, multiplied by the percentage interest a wireless provider owns in the licensed entity in that area. Detailed information regarding POPs in individual wireless markets is set forth in the annual Kagan Cellular Telephone Atlas which is derived, in part from information available from the FCC, the U. S. Department of Commerce, the U.S. Census Bureau, Rand McNally, and the U.S. Department of Transportation. Auction information is also available from the FCC and on its web site: at: <http://www.fcc.gov/wtb/auctions>.

By order of Congress, the FCC also releases an Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, which is an exhaustive compendium of information derived from publicly available sources regarding the development of the wireless industry for the year. It contains maps showing mobile telephony service deployment across the United States. See generally Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 13 FCC Rcd. 19746 (1998).

Witness: Lisa Jenrette and/or Stephen J. Easley

12. a. In the last paragraph on page 3 and over to page 4 of the Motion, you indicate that the average revenue per unit could reveal sensitive profitability information. Are not the concepts of average revenue per unit and profitability per unit different concepts? If no, what is your definition of these concepts?

ACC stated that: (1) Public disclosure of ACC's gross revenue and customer number information will reveal, by simple division, the average revenue ACC receives per customer (ARPU) in Kentucky; (2) Competing wireless carriers can approximate the cost of providing cellular service to a customer in a given RSA; (3) By subtracting the cost, per customer, of providing service in an RSA from the publicly disclosed average revenue per unit in that RSA: (a) a competitor can calculate a company's profitability per customer in that market, which will, in turn, reveal at least one component of capital available for expansion; and a competitor can (b) use this information as a factor in determining whether that market is an attractive one for the competitor to expand into, due, for example, to high profit margins there or lack of significant competition from the existing carrier(s), based upon the information revealed about number of customers served, or profitability, or both.

Two questions are key to any competitor or potential competitor assessing a potential wireless market: (1) How strong is wireless competition in that market? and (2) How much market penetration has occurred, or how "mature" is the market? Areas of weak competition are attractive to aggressive marketers because, even if substantial market penetration has already occurred, a competitor offering lower prices, or introducing new features or products, such as bundled services, may take market share away from existing competitors. Similarly, areas where less market penetration has occurred are attractive because most of the potential market is as yet unclaimed. ACC also stated that when the ARPU of a wireless provider in a market is analyzed in conjunction with publicly available, generally accepted information quantifying the size of the potential wireless market ("POPs") (see response to Question 11, above), would-be competitors can assess wireless market penetration in that RSA. This information could have the effect of discouraging competition in a particular market if the numbers looked bad. This is more likely in rural areas which tend to be underserved, both nationally and in the Commonwealth of Kentucky.

Accordingly, although average revenue per unit is a different concept than profitability, public disclosure of this revenue information enables competitors to make reasonable estimates about other providers' profitability in that market.

b. Does not profitability relate to revenues less expenses, taxes, fixed charges and dividends, while the average revenue per unit only relates to revenues? If you disagree, explain your answer.

ACC of Kentucky agrees that profitability and ARPU are separate concepts, but the calculation of profitability flows directly from ARPU and other information that can easily be calculated.

Witness: Lisa Jenrette and/or Stephen J. Easley

13. Explain your definition of market share as used in paragraph 2 on page 4 of the Motion.

Black's Law Dictionary defines "market share" as "The percentage of a market that is controlled by a firm. A 20 percent share of market means that the firm has captured 20 percent of the actual sales in the market." Id. at 971 (6th ed. 1990). When ACC referred to its "market share in the Commonwealth of Kentucky," it meant the share of actual wireless sales that are attributable to ACC in the Kentucky RSAs in which ACC is licensed to provide wireless service.

Witness: Lisa Jenrette and/or Stephen J. Easley

14. a. In the quote from North Carolina at the bottom of page 4 of the Motion, explain how ACC would be competitively harmed if its rate of customer growth could be determined.

As stated by the North Carolina Court of Appeals, when considered in conjunction with marketing efforts, new customer growth "allow[s] competitors to discover . . . the relative effectiveness of [a provider's marketing] efforts." State Utilities Commission v. MCI Telecommunications, 514 S.E.2d 276, 283 (N.C. App. 1999). If a provider is able to concentrate its marketing efforts in areas that have not been penetrated or served well by its competitors, it will achieve a significant competitive advantage. But publicly revealing new customer growth highlights this success and the speed at which it occurs. This could provide an invitation to a competitor to increase its focus on that area. See id.; see also In re: Consideration of BellSouth Telecommunications, Inc.'s Entry Into InterLATA Services Pursuant to Section 271 of the Federal Telecommunications Act of 1996, slip op. at 2 (Fla. Pub. Serv. Comm'n Nov. 3, 1997)(attached)("ACSI seeks confidential treatment of the number of customers and access lines Upon review, the material is found to be proprietary business information Disclosure of this information would harm ACSI's ability to compete by allowing competitor's to target market ACSI's customers")(emphasis added).

b. Explain how a competitor could "gain extensive insight into ACC's business plans by knowing ACC's total gross revenues and total number of customers."

That quote does not appear in the Motion filed by ACC. The Court of Appeals of North Carolina found that, disclosure of, inter alia, the number of customers served by individual competitive local telephone providers ("CLP's") "would provide competitors rather extensive insight into the business plans and operations of a particular CLP." State Utilities Commission v. MCI Telecommunications, 514 S.E.2d at 283.

Witness: Lisa Jenrette and/or Stephen J. Easley

Respectfully submitted,

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& KIRKLAND, PLLC
163 West Short Street, Suite 300
Lexington, Kentucky 40507
(606) 231-8780

BY: 
W. BRENT RICE
COUNSEL FOR ACC OF KENTUCKY, LLC

CERTIFICATE OF SERVICE

This is to certify that the foregoing was served by hand delivery to:

Ms. Helen Helton
Executive Director
Public Service Commission
730 Schenkel Lane
Frankfort, Kentucky 40602

on this the 6th day of July, 1999.


COUNSEL FOR ACC OF KENTUCKY, LLC

ERRATA

Please correct the sentence that begins on Line 9 of Page 3 and ends on Line 11 of Page 3 of ACC of Kentucky LLC's Motion to Schedule Hearing, filed herein, to read: "The joint disclosure of gross revenue and customer numbers reveals ACC's 'Average Revenue Per Unit,' or revenue, per customer, from providing service in the Kentucky market."

**MICHIE'S
WEST VIRGINIA CODE
ANNOTATED**

VOLUME 9

1999 Replacement Volume

*(Including Acts through the 1998 Regular and First
and Second Extraordinary Sessions)*

Prepared by the Editorial Staff of the Publishers

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What is a final order. — An experimental order of the commission, valuing the plant of, and fixing the rates to be charged by, a public utility, and retaining the case on the docket for future report and action after the results of such experiment are ascertained, is not final, and an appeal therefrom will be dismissed, without prejudice to further action thereon by the commission. *Berkeley Springs Water Works v. Public Serv. Comm'n.* 93 W. Va. 180, 116 S.E. 140 (1923); *City of Bluefield v. Bluefield Water Works & Imp. Co.*, 81 W. Va. 201, 94 S.E. 121 (1917).

But an experimental order entered by the public service commission fixing the rate to be charged by a public service corporation for the services rendered by it to its patrons, covering a certain period of time, or until the further order of such commission, is such an order as is subject to control by the supreme court of appeals under the exercise of its original jurisdiction conferred by the provisions of this section. *City of Charleston v. Public Serv. Comm'n.* 83 W. Va. 718, 99 S.E. 63 (1919).

Question of expediency. — An order of the public service commission in cases on questions of expediency, and as to what is best for the public interests, is final and not reviewable by the supreme court of appeals. *United Fuel Gas Co. v. Public Serv. Comm'n.* 73 W. Va. 571, 80 S.E. 931 (1914).

Effect of wrongful dismissal of case by commission. — When the public service commission dismisses a proceeding before it upon grounds not justified, the supreme court will not, in advance of the final decision of the case on its merits, undertake finally to dispose thereof, but will set aside its order and command it to hear and finally determine the case according to law. *Kelly Axe Mfg. Co. v. United Fuel Gas Co.*, 87 W. Va. 368, 105 S.E. 152 (1920).

Relitigation. — A utility has no right to relitigate factual questions on the ground that constitutional rights are involved. *Preston County Light & Power Co. v. Public Serv. Comm'n.* 297 F. Supp. 759 (S.D.W. Va. 1969).

Effect of pending appeal. — A water company obtained an appeal to the supreme court of the United States from a decree of the state

supreme court affirming an order of the commission, in which order the valuation of the company's plant was ascertained and it was granted an increase in rates based on such valuation. Without exercising its right to increase its rates under such order, the company, in an independent proceeding, based on materially different facts, subsequently applied to the commission for a temporary increase in rates; the commission was held to have jurisdiction to hear and determine the matters involved on such new application, though the appeal in the former proceeding was undetermined. *City of Bluefield v. Public Serv. Comm'n.* 91 W. Va. 442, 113 S.E. 745 (1922).

Original jurisdiction of supreme court of appeals is limited to matters purely judicial. — Under this section the supreme court of appeals is given jurisdiction not by appeal, but as upon original process to review an order of the public service commission, and such jurisdiction is limited to matters purely judicial and does not extend to matters purely administrative, executive or legislative, such jurisdiction not being conferred by the Constitution. *United Fuel Gas Co. v. Public Serv. Comm'n.* 73 W. Va. 571, 80 S.E. 931 (1914).

Mandamus by supreme court of appeals. — When the public service commission, under a misapprehension as to the law, refuses an applicant relief against a public service corporation to which he is entitled, and the proceeding is transferred to the supreme court by petition under this section, the court, upon final hearing and decision of the matter in controversy, will suspend the order of the commission, refusing the relief, and award a peremptory writ of mandamus against such corporation, requiring it to render the service denied or perform the act wrongfully omitted by it. *Wingrove v. Public Serv. Comm'n.* 74 W. Va. 190, 81 S.E. 734, 1918A L.R.A. 210 (1914).

Applied in *Delardas v. Morgantown Water Comm'n.* 148 W. Va. 318, 137 S.E.2d 426 (1964).

Stated in *Capitol Radio-Telephone Co. v. Public Serv. Comm'n.* 185 W. Va. 39, 404 S.E.2d 528 (1991).

Cited in *West Virginia AAA Statewide Ass'n v. Public Serv. Comm'n.* 186 W. Va. 287, 412 S.E.2d 481 (1991).

ARTICLE 6.

LOCAL EMERGENCY TELEPHONE SYSTEM.

- Sec. 24-6-1. Legislative findings.
- 24-6-1a. Municipal emergency telephone systems.
- 24-6-2. Definitions.

- Sec. 24-6-3. Adoption of emergency telephone system plan.
- 24-6-4. Creation of emergency telephone systems.

Sec. 24-6-5. F
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Sec.
24-6-5. Enhanced emergency telephone sys-
tem requirements.
24-6-6. Enhanced emergency telephone sys-
tem proposed requirement.
24-6-6a. Alternate procedure for proposal by
the department of public safety.
24-6-6b. Wireless enhanced 911 fee.

Sec.
24-6-7. Resolution of conflicts.
24-6-8. Limitation of liability.
24-6-9. Prohibitions and penalty.
24-6-10. Prohibition against using "911" in
company name.
24-6-11. Confidentiality of proprietary infor-
mation.

§ 24-6-1. Legislative findings.

The Legislature hereby finds and declares that it is in the public interest to shorten the time required for a citizen to request and receive emergency aid. There are hundreds of different emergency phone numbers throughout the state. Present telephone exchange boundaries and central office service areas do not necessarily correspond to public safety and political boundaries. Provision of a single, primary emergency number through which emergency services can be quickly and efficiently obtained will provide a significant contribution to law enforcement and other public service efforts. This simplified means of procuring emergency services will result in the saving of life, a reduction in the destruction of property, quicker apprehension of criminals, and ultimately the saving of money. The Legislature further finds and declares that the establishment of a uniform, statewide emergency number is a matter of statewide concern and interest to all inhabitants and citizens of this state. It is the purpose of this article to establish a primary emergency telephone number for use in this state and to encourage units of local government and combinations of units of local government to develop and improve emergency communication procedures and facilities in a manner that will allow a quick response to any person calling the primary emergency telephone number seeking police, fire, medical, rescue and other emergency services. (1979, c. 99.)

Cross references. — Enhanced emergency telephone systems. §§ 7-1-3cc, 24-6-5 et seq. **Cited in** *City of Kenova v. Bell Atlantic-West Va., Inc.*, 196 W. Va. 426, 473 S.E.2d 141 (1996).

§ 24-6-1a. Municipal emergency telephone systems.

Effective the first day of April, one thousand nine hundred eighty-eight, and thereafter, the provisions of this article shall also be applicable to municipalities of this state. Where the provisions of this article refer to the word "county" or "counties," henceforth such references shall be considered to include the word "municipality" or "municipalities" with respect to the subject matter therein, except and unless such reference to "municipality" or "municipalities" would not have a logical and clear meaning within such context.

It is the intent of this section to make this article equally applicable to counties and municipalities alike and to allow county commissions and the officials of municipalities to enter into such agreements between them or the telephone company as may be necessary to accomplish the purposes provided for by this article: Provided, That if any county has a system in place, municipalities may not adopt a different system without county approval. (1988, c. 56.)

Jurisdiction. — Neither § 24-6-7 nor this section authorizes the public service commission to resolve conflicts which arise between a county commission and a municipality concern-

ing emergency telephone systems or enhanced emergency telephone systems. *City of Kenova v. Bell Atlantic-West Va., Inc.*, 196 W. Va. 426, 473 S.E.2d 141 (1996).

§ 24-6-2. Definitions.

As used in this article, unless the context clearly requires a different meaning:

(1) "Commercial mobile radio service provider" or "CMRS provider", means cellular licensees, broadband personal communications services (PCS) licensees and specialized mobile radio (SMR) providers, as those terms are defined by the federal Communication Commission, which offer real-time, two-way switched voice service that is interconnected with the public switched network, and includes resellers of any commercial mobile radio service.

(2) "County answering point" means a facility to which enhanced emergency telephone system calls for a county are initially routed for response, and where county personnel respond to specific requests for emergency service by directly dispatching the appropriate emergency service provider, relaying a message to the appropriate provider or transferring the call to the appropriate provider.

(3) "Emergency services organization" means the organization established under article five (§ 15-5-1 et seq.), chapter fifteen of this code.

(4) "Emergency service provider" means any emergency services organization or public safety unit.

(5) "Emergency telephone system" means a telephone system which through normal telephone service facilities automatically connects a person dialing the primary emergency telephone number to an established public agency answering point, but does not include an enhanced emergency telephone system.

(6) "Enhanced emergency telephone system" means a telephone system which automatically connects the person dialing the primary emergency number to the county answering point and in which the telephone network system automatically provides to personnel receiving the call, immediately on answering the call, information on the location and the telephone number from which the call is being made, and upon direction from the personnel receiving the call routes or dispatches the call by telephone, radio or any other appropriate means of communication to emergency service providers that serve the location from which the call is made.

(7) "Public agency" means the state, and any municipality, county, public district or public authority which provides or has authority to provide fire fighting, police, ambulance, medical, rescue or other emergency services.

(8) "Public safety unit" means a functional division of a public agency which provides fire fighting, police, medical, rescue or other emergency services.

(9) "Telephone company" means any public utility and any CMRS provider, which is engaged in the provision of telephone service whether primarily by means of wire or wireless facilities.

(10) "Comprehensive plan" means a plan pertaining to the installing, modifying or replacing of telephone switching equipment; a telephone utility's response in a timely manner to requests for emergency telephone service by a

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public agency; a telephone utility's responsibility to report to the public service commission; charges and tariffs for the services and facilities provided by a telephone utility; and access to an emergency telephone system by emergency service organizations.

(11) "Technical and operational standards" means those standards of telephone equipment and processes necessary for the implementation of the comprehensive plan as defined in subdivision (10) of this subsection. (1979, c. 99; 1986, c. 78; 1988, c. 56; 1990, c. 163; 1997, c. 91.)

Cross references. — Enhanced emergency telephone systems. §§ 7-1-3cc, 24-6-5 et seq.

Effect of amendment of 1997. — The amendment inserted (1), and redesignated the remaining subsections accordingly; in (9), substituted "any public utility and any CMRS provider" for "a public utility," and added

"whether primarily by means of wire or wireless facilities"; in (11), added "of this subsection" following "as defined in subdivision (9)"; and made stylistic changes.

Quoted in *City of Kenova v. Bell Atlantic-West Va., Inc.*, 196 W. Va. 426, 473 S.E.2d 141 (1996).

§ 24-6-3. Adoption of emergency telephone system plan.

(a) The public service commission shall develop, adopt and periodically review a comprehensive plan establishing the technical and operational standards to be followed in establishing and maintaining emergency telephone systems and enhanced emergency telephone systems.

(b) In developing the comprehensive plan, the public service commission shall consult with telephone companies, and with the various public agencies and public safety units, including, but not limited to, emergency services organizations.

(c) The public service commission shall annually review with each operating telephone company their construction and switching replacements projections. During this review, the public service commission shall ensure that all new switching facilities will accommodate the emergency telephone system. (1979, c. 99; 1986, c. 78; 1989, c. 116; 1990, c. 163.)

Quoted in *City of Kenova v. Bell Atlantic-West Va., Inc.*, 196 W. Va. 426, 473 S.E.2d 141 (1996).

§ 24-6-4. Creation of emergency telephone systems.

(a) Upon the adoption by the public service commission of a comprehensive plan, the public agency may establish, consistent with the comprehensive plan, an emergency telephone system within its jurisdiction. Nothing contained in this section shall be construed to prohibit or discourage in any way the establishment of multi-jurisdiction or regional systems, and any emergency telephone system established pursuant to this article may include the territory of more than one public agency, or may include only a portion of the territory of a public agency. To the extent feasible, emergency telephone systems shall be centralized.

(b) Every emergency telephone system shall provide access to emergency services organizations, police, fire fighting and emergency medical and ambu-

lance services and may provide access to other emergency services. The system may also provide access to private ambulance services. The emergency telephone system shall provide the necessary mechanical equipment at the established public agency answering point to allow deaf persons access to the system. In those areas in which a public safety unit of the state provides emergency services, the system shall provide access to the public safety unit.

(c) The primary emergency telephone number to the extent possible shall be uniform throughout the state.

(d) Insofar as it is consistent with applicable federal law and federal communications commission regulations and orders, a telephone company in the normal course of replacing or making major modifications to its switching equipment shall include the capability of providing for the emergency telephone system and shall bear all costs related to including that capability. All charges for other services and facilities provided by the telephone company, including the provision of distribution facilities and station equipment, shall be paid for by the public agency or public safety unit in accordance with the applicable tariff rates then in effect for those services and facilities. Other costs pursuant to the emergency telephone system shall be allocated as determined by the applicable comprehensive plan of the public service commission.

(e) All coin-operated telephones within the state shall be of a design that will permit a caller to initiate, without first having to insert a coin (dial tone first or post-pay systems), local calls to the long distance and directory assistance operators, calls to the emergency telephone number answering point, if one has been established in his or her local calling area, and to other numbers for services as the telephone company may from time to time make available to the public. (1979, c. 99; 1986, c. 78; 1989, c. 116; 1997, c. 91.)

Effect of amendment of 1997. — The amendment, in (a), deleted "respective" preceding "jurisdiction" at the end of the first sentence, and substituted "Nothing contained in this section" for "Nothing herein contained, however" in the second sentence; in (d), added "Insofar as it is consistent with applicable federal law and federal communications commis-

sion regulations and orders" at the beginning of the first sentence, substituted "to including that capability" for "thereto" at the end of the first sentence; and made stylistic changes.

Quoted in *City of Kenova v. Bell Atlantic-West Va., Inc.*, 196 W. Va. 426, 473 S.E.2d 141 (1996).

§ 24-6-5. Enhanced emergency telephone system requirements.

(a) An enhanced emergency telephone system, at a minimum, shall provide that:

(1) All the territory in the county, including every municipal corporation in the county, which is served by telephone company central office equipment that will permit such a system to be established shall be included in the system: Provided, That if a portion of the county or a portion of a municipal corporation within the county is already being served by an enhanced emergency telephone system, that portion of the county or municipality may be excluded from the county enhanced emergency telephone system;

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(2) Every emergency service provider that provides emergency service within the territory of a county participate in the system:

(3) Each county answering point be operated constantly:

(4) Each emergency service provider participating in the system maintain a telephone number in addition to the one provided for in the system: and

(5) If the county answering point personnel reasonably determine that a call is not an emergency, the personnel provide the caller with the number of the appropriate emergency service provider.

(b) To the extent possible, enhanced emergency telephone systems shall be centralized.

(c) In developing an enhanced emergency telephone system, the county commission or the West Virginia State Police shall seek the advice of both the telephone companies providing local exchange service within the county and the local emergency providers.

(d) As a condition of continued employment, persons employed to dispatch emergency calls shall successfully complete a forty-hour nationally recognized training course for dispatchers within one year of the date of their employment; except that persons employed to dispatch emergency calls prior to the effective date of this subsection, as a condition of continuing employment, shall successfully complete such a course not later than the first day of July, one thousand nine hundred ninety-five.

(e) Each county or municipality shall appoint for each answering point an enhanced emergency telephone system advisory board consisting of at least six members to monitor the operation of the system. The board shall be appointed by the county or municipality and shall include at least one member from affected fire service providers, law-enforcement providers, emergency medical providers and emergency services providers participating in the system and at least one member from the county or municipality. The board may make recommendations to the county or municipality concerning the operation of the system.

In addition, the director of the county or municipal enhanced telephone system shall serve as an ex officio member of the advisory board. The initial advisory board shall serve staggered terms of one, two and three years. The initial terms of these appointees shall commence on the first day of July, one thousand nine hundred ninety-four. All future appointments shall be for terms of three years, except that an appointment to fill a vacancy shall be for the unexpired term. All members shall serve without compensation. The board shall adopt such policies, rules and regulations as are necessary for its own guidance. The board shall meet monthly on the day of each month which the board may designate. The board may make recommendations to the county or municipality concerning the operation of the system.

(f) Any advisory board established prior to the first day of January, one thousand nine hundred ninety-four, shall have three years to meet the criteria of subsection (e) of this section.

(g) Nothing herein contained shall be construed to prohibit or discourage in any way the establishment of multijurisdictional or regional systems, or multijurisdictional or regional agreements for the establishment of enhanced

emergency telephone systems, and any system established pursuant to this article may include the territory of more than one public agency, or may include only a portion of the territory of a public agency. (1986, c. 78; 1989, c. 116; 1994, c. 60; 1996, 1st Ex. Sess., c. 5.)

Cross references. — Enhanced emergency telephone systems authorized, § 7-1-3cc.

Construction. — At a minimum, an enhanced emergency telephone system must provide service to all territory in the county, including every municipal corporation served by any telephone company central office equipment that will allow for an emergency system. *City of Kenova v. Bell Atlantic-West Va., Inc.*, 196 W. Va. 426, 473 S.E.2d 141 (1996).

196 W. Va. 426, 473 S.E.2d 141 (1996).

Injunction properly issued. — The trial court properly enjoined the implementation of an enhanced 911 county ordinance enacted by the county commission where the enhanced system failed to include all of the territory in the county. *City of Kenova v. Bell Atlantic-West Va., Inc.*, 196 W. Va. 426, 473 S.E.2d 141 (1996).

§ 24-6-6. Enhanced emergency telephone system proposed requirement.

(a) If a county commission decides to adopt an enhanced emergency services telephone system it shall first prepare a proposal on the implementation of the system and shall hold a public meeting on the proposal to explain the system and receive comments from other public officials and interested persons. At least thirty but not more than sixty days before the meeting, the county commission shall place an advertisement in a newspaper of general circulation in the county notifying the public of the date, purpose and location of the meeting and the location at which a copy of the proposal may be examined.

(b) The proposal and the final plan adopted by the county commission shall specify:

(1) Which telephone companies serving customers in the county will participate in the system;

(2) The location and number of county answering points; how they will be connected to a telephone company's telephone network; from what geographic territory each will receive system calls; what areas will be served by the answering point; and whether an answering point will respond to calls by directly dispatching an emergency service provider, by relaying a message to the appropriate provider, or by transferring the call to the appropriate provider;

(3) A projection of the initial cost of establishing, equipping and furnishing and of the annual cost of the first five years of operating and maintaining each county answering point;

(4) How the county will pay for its share of the system's cost; and

(5) How each emergency service provider will respond to a misdirected call.

(c) Within three months of the public meeting required by this section the county commission may modify the implementation proposal. Upon completion and adoption of the plan by the commission, it shall send a copy of the plan to the public service commission, who shall file such plan and ensure that its provisions are complied with.

(d) After a plan is adopted, all telephone companies included in the plan are subject to the specific requirements of the plan and the applicable requirements of this article.

(e) A final plan or amendments is given, as a public meeting is held. (1986, c. 78; 1989, c. 116; 1994, c. 60; 1996, 1st Ex. Sess., c. 5.)

Cross references. — telephone systems authorized, § 7-1-3cc. Quoted in City of Kenova v. Bell Atlantic-West Va., Inc., 196 W. Va. 426, 473 S.E.2d 141 (1996).

§ 24-6-6a. Alternative requirements.

(a) In any county where a public safety may be enhanced and may cause a system and receive service from other public agencies within than sixty days, the county shall place an advertisement notifying the members of the public of the date, time and location at which a copy of the proposal may be examined.

(b) The proposal and the final plan adopted by the county commission shall specify:

§ 24-6-6b. Wireline service.

(a) Beginning January one, nineteen ninety-eight, all counties under this article, shall, on or before August one, nineteen ninety-eight, shall, after the presentation of a proposal regarding all requirements for the determination of which shall be shortfalls caused by the county shall solicit the public in issuing the order.

(b) The wireline service shall be a valid retail communication as defined by the public service commission (a) of this section.

(c) Beginning January one, nineteen ninety-eight, every two years...

(e) A final plan may be amended only after notice of the proposed amendments is given, as provided in subsection (a) of this section and a new public meeting is held. (1986, c. 78.)

Cross references. — Enhanced emergency telephone systems authorized, § 7-1-3cc. West Va., Inc., 196 W. Va. 426, 473 S.E.2d 141 (1996).

Quoted in City of Kenova v. Bell Atlantic-

§ 24-6-6a. Alternate procedure for proposal by the department of public safety.

(a) In any county or counties which have areas thereof not receiving service from an enhanced emergency services telephone system, the department of public safety may prepare a proposal on the implementation of such a system and may cause a public meeting to be held on the proposal to explain the system and receive comments from the members of the county commission and from other public officials and interested persons. At least thirty, but not more than sixty days, before such a meeting, the department of public safety shall place an advertisement in a newspaper of general circulation in the county notifying the members of the county commission or county commission and the public of the date, purpose and location of the meeting and the location at which a copy of the proposal may be examined.

(b) The proposal prepared by the department of public safety shall conform to the requirements of subsection (b), section six [§ 24-6-6(b)] of this article and shall be further modified, adopted, filed or amended by the county commission only in conformity with said section six [§ 24-6-6]. (1989, c. 116.)

§ 24-6-6b. Wireless enhanced 911 fee.

(a) Beginning on the first day of January, one thousand nine hundred ninety-eight, all CMRS providers, as defined in section two [§ 24-6-2] of this article, shall, on a monthly basis, collect from each of their in-state two-way service subscribers a wireless enhanced 911 fee. No later than the first day of August, one thousand nine hundred ninety-eight, the public service commission, shall, after the receipt of comments and the consideration of evidence presented at a hearing, issue an order which directs the CMRS providers regarding all relevant details of wireless enhanced 911 fee collection, including the determination of who is considered an in-state two-way service subscriber and which shall specify how the CMRS providers shall deal with fee collection shortfalls caused by uncollectible accounts. The public service commission shall solicit the views of the wireless telecommunications utilities prior to issuing the order.

(b) The wireless enhanced 911 fee is seventy-five cents per month for each valid retail commercial mobile radio service subscription, as that term is defined by the public service commission in its order issued under subsection (a) of this section.

(c) Beginning in the year one thousand nine hundred ninety-seven, and every two years thereafter, the public service commission shall conduct an

§ 24-6-6b

PUBLIC SERVICE COMMISSION

audit of the wireless enhanced 911 fee and shall recalculate the fee so that it is the weighted average rounded to the nearest penny, as of the first day of March of the respecification year, of all of the enhanced 911 fees imposed by the counties which have adopted an enhanced 911 ordinance: Provided, That the wireless enhanced 911 fee may never be increased by more than twenty-five percent of its value at the beginning of the respecification year.

(d) The CMRS providers shall, after retaining a three percent billing fee, send the wireless enhanced 911 fee moneys collected, on a monthly basis, to the public service commission. The public service commission shall, on a quarterly and approximately evenly staggered basis, disburse the fee revenue in the following manner:

(1) Each county that does not have a 911 ordinance in effect as of the effective date of this section or has enacted a 911 ordinance within the five years prior to the effective date of this section shall receive one percent of the fee revenues received by the public service commission and from the remainder of the revenues, each county shall receive a pro rata portion of the fee revenues received by the public service commission based on that county's percentage of the total number of local exchange telephone access lines and line equivalents in service in the state. The public service commission shall recalculate the county disbursement percentages on a yearly basis, with the changes effective on the first day of July, and using data as of the preceding first day of March. The public utilities which normally provide local exchange telecommunications service by means of lines, wires, cables, optical fibers or by other means extended to subscriber premises shall supply the data to the public service commission on a county specific basis no later than the first day of June of each year:

(2) Counties which have an enhanced 911 ordinance in effect shall receive their share of the wireless enhanced 911 fee revenue for use in the same manner as the enhanced 911 fee revenues received by those counties pursuant to their enhanced 911 ordinances:

(3) The public service commission shall deposit the wireless enhanced 911 fee revenue for each county which does not have an enhanced 911 ordinance in effect into an escrow account which it has established for that county. Any county with an escrow account may, immediately upon adopting an enhanced 911 ordinance, receive the moneys which have accumulated in the escrow account for use as specified in subdivision (2), subsection (d) of this section: Provided, That a county that adopts a 911 ordinance after the effective date of this section or has adopted a 911 ordinance within five years of the effective date of this section shall continue to receive one percent of the 911 fee revenue for a period of five years following the adoption of the ordinance and thereafter shall receive that county's portion of the fee revenue being disbursed to counties on a pro rata basis: Provided, however, That every five years from the year one thousand nine hundred ninety-seven, all fee revenue residing in escrow accounts shall be disbursed on the pro rata basis specified in subdivision (1), subsection (d) of this section, except that data for counties without enhanced 911 ordinances in effect shall be omitted from the calculation and all escrow accounts shall begin again with a zero balance.

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(e) CMRS providers have the same rights and responsibilities as other telephone service suppliers in dealing with the failure by a subscriber of a CMRS provider to timely pay the wireless enhanced 911 fee.

(f) Notwithstanding the provisions of section one-a [§ 24-6-1a] of this article, for the purposes of this section, the term "county" means one of the counties provided for in section one [§ 1-1-1], article one, chapter one of this code.

(g) From any funds distributed to a county pursuant to this section, a total of three percent quarter shall be set aside in a special fund to be used exclusively for the purchase of equipment that will provide information regarding the x and y coordinates of persons who call an emergency telephone system through a commercial mobile radio service: Provided, That upon purchase of the necessary equipment, the special fund shall be dissolved and any surplus shall be used for general operation of the emergency telephone system as may otherwise be provided by law. (1997, c. 91.)

Editor's notes. — Concerning the references in (d) to "the effective date of this section." Acts 1997, c. 91, which enacted this section, passed April 12, 1997, and became effective 90 days from passage.

§ 24-6-7. Resolution of conflicts.

In the event that a conflict arises between county commissions, between telephone companies, between a telephone company or companies and a county commission or commissions, or between the department of public safety [West Virginia state police] and any of the foregoing entities concerning an emergency telephone system or systems or an enhanced emergency telephone system or systems, the public service commission, upon application by such county commission, telephone company or department of public safety [West Virginia state police], shall resolve such conflict. The resolution of such conflict may include the modification or suspension of any final plan adopted pursuant to section six or six-a [§ 24-6-6 or § 24-6-6a] of this article or the ordering of the centralization of emergency telephone systems and enhanced emergency telephone systems. (1986, c. 78; 1989, c. 116.)

Editor's notes. — The bracketed words were inserted by the editor. See § 15-2-2 for change of name.

Jurisdiction. — Neither this section nor § 24-6-1a authorizes the public service commission to resolve conflicts which arise between a county commission and a municipality concerning emergency telephone systems or enhanced emergency telephone systems. *City of Kenova v. Bell Atlantic-West Va., Inc.*, 196 W. Va. 426, 473 S.E.2d 141 (1996).

§ 24-6-8. Limitation of liability.

A public agency or a telephone company participating in an emergency telephone system or a county which has established an enhanced emergency telephone system, and any officer, agent or employee of the public agency, telephone company or county is not liable for damages in a civil action for injuries, death or loss to persons or property arising from any act or omission, except willful or wanton misconduct, in connection with developing, adopting

or approving any final plan or any agreement made pursuant to this article, or otherwise bringing into operation or participating in the operation of an emergency telephone system or an enhanced emergency telephone system pursuant to this article. (1986, c. 78; 1997, c. 91.)

Effect of amendment of 1997. — The amendment inserted "or a telephone company" following "A public agency," "telephone company" following "agent or employee of the public agency," and "or participating in the operation of" following "or otherwise bringing into operation"; and made stylistic changes.

§ 24-6-9. Prohibitions and penalty.

(a) No person may knowingly use the telephone number of an emergency telephone system or enhanced emergency telephone system to report an emergency if he or she knows that no such emergency exists.

(b) No person may disclose or use, for any purpose other than for an emergency telephone system or enhanced emergency telephone system, any information contained in the data base used for either an emergency telephone system or an enhanced emergency telephone system established pursuant to this article.

(c) Any person who violates any provision of this section is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than two hundred dollars nor more than five thousand dollars, or imprisoned in the county jail not more than one year, or both fined and imprisoned. (1986, c. 78.)

§ 24-6-10. Prohibition against using "911" in company name.

No person or organization of any kind may use "911" or such other numbers which are similar and calculated to deceive the public as representing "911" services in their name unless the person or organization is authorized to provide emergency telephone services for firefighting, law enforcement and medical personnel. The public service commission shall propose rules for legislative promulgation in accordance with article three (§ 29A-3-1 et seq.), chapter twenty-nine-a of this code regarding the acceptable use of "911" and shall have the authority to authorize any organization or person to use "911" for the purposes of promoting the education of the public regarding the "911" service. This section may not be construed as affecting motor vehicle license plate numbers issued by the division of motor vehicles, or race cars that use a "911" logo, when the number is not used for purposes of deceiving the public that the operator or owner operates "911" services. Any person or organization convicted of a violation of this section shall be guilty of a misdemeanor, punishable by a fine of not more than five hundred dollars per occurrence. (1996, c. 123.)

§ 24-6-11. Confidentiality of proprietary information.

In recognition of the fact that information pertaining to numbers of customers and revenues collected by the CMRS providers is obtained and maintained

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in a competitive environment and that information pertaining to the providers' subscribers could be used to the disadvantage of the participating CMRS provider, the Legislature declares that any such information provided by the public service commission and any county or enhanced 911 program, is not subject to disclosure under the provisions of chapter twenty-nine-b [§ 29B-1-1 et seq.] of this code. (1997, c. 91.)

ARTICLE 7.

HEADQUARTERS.

Sec.

24-7-1. Legislative findings; commission authorized to acquire headquarters.

24-7-2. Exclusive authority for purchase of headquarters.

Sec.

24-7-3. Management and control of public service commission headquarters building.

§ 24-7-1. Legislative findings; commission authorized to acquire headquarters.

(a) The Legislature hereby finds that the public service commission's present physical facilities impede the efficient operation of the commission in that many offices are severely overcrowded, several divisions are physically isolated from the main offices of the commission at the capitol building, and only one hearing room is available internally. The Legislature further finds that pursuant to section twenty [§ 4-1-20], article one, chapter four of the code of West Virginia, it has assigned and set aside for the exclusive use of the Legislature all of the space on the second floor of the east wing of the capitol building, which location is presently occupied by the public service commission.

The Legislature further adopts the recommendation presented to the subcommittee on the public service commission of the joint committee on government and finance in a final report dated February, one thousand nine hundred seventy-nine and entitled "A Plan for Regulatory Reform and Management Improvement" that the public service commission should be authorized to buy or lease suitable office, hearing and other facilities in the Charleston area in order to consolidate its operations, and that existing surplus funds should be used to pay the one-time costs incurred in relocation.

(b) Accordingly, the Legislature hereby authorizes and directs the public service commission:

(1) To contract to acquire and to acquire, in the name of the commission or of the state, a suitable site in or near the seat of government for a public service commission headquarters building that will consolidate all of its operations, related facilities and grounds, including real property, rights and easements necessary for this purpose, or to use any suitable site which may be owned by the state and available and designated for this purpose and to construct a public service commission headquarters building on such site and equip and furnish said building.

150CSR25

TITLE 150
LEGISLATIVE RULE
PUBLIC SERVICE COMMISSION

SERIES 25
RULES AND REGULATIONS GOVERNING
EMERGENCY TELEPHONE SERVICE

§150-25-1. General.

1.1. Scope -- These rules govern the billing, collection, and remission of wireless enhanced 911 monthly fees by certain telecommunications carriers subject to the jurisdiction of the Public Service Commission of West Virginia pursuant to W.Va. Code §24-2-1 and the disbursement of such fee revenues to counties in West Virginia.

1.2. Authority -- W.Va. Code §§24-1-1, 24-1-7, 24-2-1, 24-2-2, 24-6-6b, and 24-6-11.

1.3. Filing Date -- December 24, 1997

1.4. Effective Date -- March 6, 1998

§150-25-2. Definitions.

2.1. For purposes of this section, the Commission adopts the definitions of "commercial mobile radio service provider or CMRS provider," "county answering point," "emergency services organization," "emergency service provider," "emergency telephone system," "enhanced emergency telephone system," "public agency," "public safety unit," "telephone company," "comprehensive plan," "technical and operational standards," set forth in W. Va. Code §24-6-2.

2.2. "Commission" -- The Public Service Commission of West Virginia.

2.3. "County" -- One of the counties provided for in W. Va. Code §1-1-1.

2.4. "Emergency Number" -- Any telephone number, including 9-1-1, and any 7-digit or 10-digit number which could access a 9-1-1 line or trunk, which is primarily used for the purpose of reporting emergencies such as fires, the need for law enforcement, rescue and/or medical assistance, actual or imminent disasters, etc.

2.5. "Emergency Services Organization" -- The organization established under Article 5 (§§15-5-1 et seq.), Chapter 15 of the West Virginia Code, as amended.

2.6. "Emergency Telephone System" -- A telephone system which through normal telephone service facilities automatically connects a person dialing the primary emergency telephone number to an established public agency answering point.

2.7. "E911" -- Enhanced 911.

2.8. "E911 Fees" -- Wireless Enhanced 911 Fees.

2.9. "FCC" -- The Federal Communications Commission.

2.10. "In-state two-way service subscriber" -- A person or entity with a valid retail CMRS subscription.

2.11. "Local Exchange Carrier" or "LEC" -- A person or entity granted a certificate of public convenience and necessity to provide local exchange services within a defined service area of the State. Incumbent LECs shall be those LECs holding certificates of public convenience and necessity prior to January 1, 1995.

2.12. "NANC" -- The North American Numbering Council.

2.13. "NANP" -- The North American Numbering Plan.

2.14. "Public Agency" -- Means the State, and any municipality, county, public district, or public authority which provides or has the authority to provide fire-fighting, police, ambulance, medical, rescue or other emergency services.

2.15. "Public Safety Unit" -- Means a functional division of a public agency which provides fire-fighting, police, medical, rescue or other emergency services.

2.16. "Telephone Utility" -- Any person, firm, partnership, or corporation engaged in the business of furnishing telephone communications services to the public under the jurisdiction of the Public Service Commission of West Virginia.

2.17. "Valid retail CMRS subscription" -- A two-way, voice grade or better, cellular or PCS telecommunications service associated with a unique multi-digit area code prefix assigned by NANC, pursuant to NANP, for any area within the State of West Virginia, and which may be used to signal terminal equipment devices associated with the service. Note: A single cellular or PCS account may have more than one valid retail CMRS subscription associated with that account.

§150-25-3. Local Emergency Telephone Systems.

3.1. Creation of emergency telephone systems.

3.1.1. A public agency may establish, consistent with these rules, an emergency telephone system within its respective jurisdiction. Nothing herein contained, however, shall be construed to prohibit or discourage in any way the establishment of multi-jurisdictional or regional systems, and any system established may include only a portion of the territory of a public agency. To the extent feasible, these systems shall be centralized.

3.1.2. Every system shall provide access to emergency services organizations, police, fire-fighting, and emergency medical and ambulance services and may provide access to other emergency services. The system may also provide access to private ambulance services. The system may also provide the necessary mechanical equipment at the established public agency answering point to allow deaf persons access to the system. In those areas in which a public safety unit of the State provides emergency services, the system shall provide access to the public safety unit.

3.1.3. The number "9-1-1" shall be used as the primary emergency number whenever practicable. If the use of the number "9-1-1" is not practicable, the telephone utility or companies shall make application to this Commission in order to use an alternate emergency telephone number. The Commission encourages the use of "1-9-1-1" as the alternate emergency telephone number.

3.1.4. The telephone utility in the normal course of replacing or making major modifications to its switching equipment shall include the capability of providing for the emergency telephone system and shall bear all costs related thereto. All charges for other services and facilities provided by the telephone utility, including the provision of distribution facilities and station equipment, shall be paid for by the public agency or public safety unit in accordance with the applicable tariff rates then in effect for such services and facilities.

3.2. Establishment of emergency telephone systems.

3.2.1. The telephone utility when establishing a new wire center or when replacing the switching equipment for any existing wire center shall insure that the new switching equipment contains the capability of providing emergency telephone system services.

3.2.2. The telephone utility shall design the

switching equipment used in all new wire centers and in the replacement of existing wire centers to be capable of accessing emergency services by using the telephone number "9-1-1".

3.2.3. The telephone utility when modifying the existing switching equipment in any wire center shall configure the equipment in a manner that will most easily facilitate the implementation of an emergency telephone system in that wire center, using the telephone number "9-1-1", if practicable.

3.2.4. Under normal circumstances, the telephone utility shall respond within ninety (90) days to any application for emergency telephone service made by a public agency, emergency services organization or public safety unit. This response shall show the projected cost of the system to the maker of the application and the projected date on which emergency telephone service can be established. A copy of this response shall be filed with the Commission.

3.2.5. Under normal circumstances where equipment is available, the telephone utility shall have as its objective the satisfaction of all requests for the establishment of emergency telephone service within nine (9) months of the date of a firm order for such service. Under all circumstances, emergency telephone service should be established within twenty-four (24) months of the date of such firm order received by the telephone utility.

3.2.6. The telephone utility shall report to the Commission emergency telephone service it is unable to satisfy within nine (9) months of any application therefor.

3.2.7. The provision of emergency telephone service shall be made under tariffs approved by this Commission.

3.2.8. In political jurisdictions served by more than one (1) telephone utility, the telephone utilities shall cooperate in establishing an emergency telephone system. The Utilities Division of this Commission shall, upon request, assist in the coordination of the different telephone utilities. In these political jurisdictions, the telephone utilities shall have as their objective the satisfaction of all requests for an emergency telephone system within nine (9) months of the date a firm order for such system is received. Under all circumstances, emergency telephone service should be established within twenty-four (24) months of the date of such firm order

received by the telephone utility.

3.2.9. The telephone utilities shall report to the Commission any request for emergency telephone systems involving more than one (1) utility which cannot be established within one (1) year of the date a firm order is received.

3.3. Reporting requirements of the telephone utility.

The telephone utility before establishing any wire center, replacing any wire center or making major modifications to any wire center, shall furnish the Commission plans showing that it has complied with the requirements of these rules. "Major Modifications" is hereby defined to be a central office modification affecting level assignments, thousands levels or trunking.

3.4. 9-1-1 rule regarding telephone directory emergency numbers pages.

3.4.1. Telephone directories shall list, on the inside of the directory front cover or on the front page of the directory, otherwise known as the emergency calling information page, all emergency service providers accessible from the exchanges covered by the directory on a local call and/or 9-1-1 basis: **Provided**, That, if a 9-1-1 system serves any portion of the area covered by the directory, the emergency calling information page shall boldly and prominently display the 9-1-1 telephone number. Furthermore, all major public agencies such as, municipal police, fire, ambulance, sheriff and state police, that are accessible by calling 9-1-1 shall be listed in close proximity to the 9-1-1 listing along with the appropriate agency generic symbols.

3.4.2. Each telephone directory shall have a page immediately following the emergency calling information page which shall clearly list the name and seven (7) digit non-emergency administrative telephone number of each individual emergency services provider which serves any portion of the area covered by the telephone directory. Such listings shall be grouped by service type (e.g., ambulance, fire, law enforcement, rescue, etc.) and the listings shall be arranged alphabetically within the service type grouping. Where appropriate, subgrouping by county may be done. The seven (7) digit non-emergency administrative telephone number of each 9-1-1 Public Safety Answering Point which serves any portion of the area covered by the telephone directory shall be prominently displayed at the top of the page.

3.4.3. Where an entire directory coverage area is not covered by 9-1-1, the emergency calling information page shall list the seven (7) digit telephone numbers of all directory coverage area Public Safety Units not accessible by calling 9-1-1. The emergency calling information page shall, at least, clearly show which emergency calls should be made to 9-1-1 and which should be made to other emergency telephone numbers listed on the page.

3.4.4. Additional information regarding emergency calling, as is beneficial to the public interest, may appear on the emergency calling information page.

3.4.5. Each and every local exchange telephone carrier responsible for a telephone directory emergency calling information page shall submit each emergency calling information page and the page immediately following to the Public Service Commission for review, by informally filing same with the Public Service Commission's Telecommunications Section, before said pages are published. Such submittals shall be sent at least thirty (30) calendar days prior to the deadline for making changes.

§150-25-4. Billing and Collection of E911 Fees.

4.1. Each CMRS provider shall, beginning on January 1, 1998, levy an E911 fee on each valid retail CMRS subscription.

4.2. The initial E911 fee amount shall be \$0.75 per billing month.

4.3. Each CMRS provider shall bill the currently applicable E911 fee to each valid retail CMRS subscription monthly.

4.4. The applicable E911 fee shall be a separate line item on the monthly billing statement provided to each valid retail CMRS subscription by CMRS providers.

4.5. Each CMRS provider shall file with the Commission, by February 15th of each year, a total customer count as of December 31 of the preceding year. This annual report, as well as the required monthly reports, shall be subject to verification by the Commission.

§150-25-5. Remission of E911 Fees to Commission.

5.1. On the first business day on or after the twenty-fifth (25th) day of each month, each CMRS provider shall remit to the Commission's a check or appropriate financial equivalent, for the net E911 fees collected, after retaining three percent (3%) as a

billing and collection fee, during the preceding monthly billing period. The fees should be remitted to:

Public Service Commission
Attention: Executive Director
P.O. Box 812
201 Brooks Street
Charleston, West Virginia 25323

5.2. Each CMRS provider shall remit to the Commission such E911 fees actually collected by the CMRS provider. Such E911 fees remitted shall include any previously unpaid E911 fees collected by the CMRS provider during the preceding monthly billing period.

5.3. The first \$0.75 collected on each valid retail CMRS subscription, or such E911 fee as may be respecified by the Commission in accordance with these rules, shall be attributed to payment of the applicable monthly E911 fee.

5.4. Each CMRS provider shall, contemporaneous with the remission of E911 fees, file with the Commission a financial report reflecting the total amount of E911 fees billed in the preceding monthly billing period and the total amount of E911 fees collected.

5.4.1. In the alternative, a CMRS provider may remit the E911 fee based on what is billed, and subsequently take a deduction for bad debt, for customers who refuse to pay the fee, and for other uncollectibles, and submit its report on this basis.

\$150-25-6. Disbursement of E911 Fees.

6.1. The Telecommunications Section of the Commission's Utilities Division shall, using the methodology and data required by W. Va. Code §24-6-6b, calculate the E911 fee disbursement ratios as provided herein.

6.1.1. The initial disbursement ratios shall be effective on April 1, 1998. Disbursement ratios shall be recalculated by the Telecommunications Section of the Commission's Utilities Division in each subsequent year and shall be effective on July 1 of each such year.

6.2. Each county which has not enacted an E911 ordinance as of July 11, 1997, or which enacted an E911 ordinance on or after July 11, 1992 but before July 11, 1997, shall receive one percent (1%) of the monthly E911 fee revenue submitted to the Commission by the CMRS providers.

6.2.1. Counties which enact an E911 ordinance after July 11, 1997, or which enacted an E911 ordinance on or after July 11, 1992 but before July 11, 1997, shall continue to receive one percent (1%) of the monthly E911

fee revenues for a period of five (5) years following the adoption of the ordinance. After the fifth anniversary of the date of adoption of the ordinance, each such county shall receive only that county's portion of the monthly E911 fee revenues being disbursed on a pro rata basis, as set forth in 6.3. herein.

6.3. From the remainder of E911 fee revenues remitted to the Commission, each county shall receive a pro rata portion of the E911 fee revenues received by the Commission based on that county's percentage of the total number of local exchange telephone access lines and line equivalents in service in the State at the beginning of the calendar year.

6.4. Each county which has an E911 ordinance in effect shall receive its share of the wireless E911 fee revenue for use in the same manner as the E911 fee revenues received by those counties pursuant to their E911 ordinances.

6.5. For each county that does not have an E911 ordinance in effect, the Commission shall deposit the wireless E911 fee revenue allocable to such county into an escrow account established by the Commission for that county, in accordance with 6.2 herein.

6.6. Each county with an E911 fee revenue escrow account may, immediately upon adopting an E911 ordinance, receive the moneys which have accumulated in the escrow account for use as specified in W. Va. Code §24-6-6b(d)(2), subject to the following provisions:

6.6.1. Such county shall file with the Commission, together with its request for the release of moneys accumulated in the county's escrow account, a duly verified copy of the county's E911 ordinance. Escrow account moneys shall not be released until such copy of the county's ordinance has been filed with the Commission.

6.6.2. Beginning January 1, 2003, and on January 1 of every fifth year thereafter, all E911 fee revenue on deposit in the escrow account of a county without an E911 ordinance shall be disbursed on the pro rata basis specified in W. Va. Code §24-6-6b(d)(1), except that data for counties without E911 ordinances in effect shall be omitted from the calculation and all escrow accounts shall begin again with a zero (0) balance.

§150-25-7. E911 Fee Revenues Accounting.

7.1. The Commission shall cause to be established an account for all monthly E911 fee revenues remitted to the Commission. Said account shall serve as a repository for such fee revenues until, in accordance with the quarterly disbursement schedule set forth in

8.3 herein, such revenues are either: (1) disbursed to each county with an E911 ordinance currently in effect; or (2) deposited to a separate escrow account for each county without an E911 ordinance currently in effect.

7.2. The Commission shall cause to be established a separate escrow account for the E911 fee revenues remitted to the Commission for each county without an E911 ordinance currently in effect. Such accounts shall be used for the quarterly deposit of monthly E911 fee revenues received from CMRS providers and shall be placed in such counties' escrow accounts in accordance with these rules.

\$150-25-8. Disbursement of Monthly E911 Fee Revenues.

8.1. Disbursement of monthly E911 fee revenues shall begin on April 10, 1998 and shall be disbursed, by check or appropriate financial equivalent, to each county with an E911 ordinance currently in effect, by the Commission by the 10th day of the month in accordance with the schedule set forth in 7.3 herein.

8.2. Disbursement of monthly E911 fee revenues shall begin on April 10, 1998 and shall be deposited to the escrow account established for each county without an E911 ordinance currently in effect, by the Commission by the 10th day of the month in accordance with the schedule set forth in 8.3 herein.

8.3. Monthly E911 fee revenues shall be disbursed, either directly, by check or appropriate financial equivalent, to counties with E911 ordinances currently in effect, or deposited to escrow accounts established for counties without an E911 ordinance currently in effect, as follows:

8.3.1. In the months of January, April, July and October, checks/escrow entries shall be issued to, or made for, the following counties: Barbour, Berkeley, Boone, Braxton, Brooke, Cabell, Calhoun, Clay, Doddridge, Fayette, Gilmer, Grant, Greenbrier, Hampshire, Hancock, Hardy, Harrison, Jackson and Jefferson.

8.3.2. In the months of February, May, and August and November, checks/escrow entries shall be issued to, or made for, the following counties: Kanawha, Lewis, Lincoln, Logan, Marion, Marshall, Mason, McDowell, Mercer, Mineral, Mingo, Monongalia, Monroe, Morgan, Nicholas, Ohio, Pendleton and Pleasants.

8.3.3. In the months of March, June, September, and December, checks/escrow entries shall be issued to, or made for, the following counties: Pocahontas, Preston, Putnam, and Raleigh, Randolph, Ritchie, Roane, Summers, Taylor, Tucker, Tyler, Upshur, Wayne, Webster, Wetzel, Wirt, Wood and Wyoming.

8.4. The fee revenues disbursed in any given month shall be those billed during the three-month period which ended three-months prior to the disbursement month. For example, the monthly E911 fee revenues filed with the Commission by CMRS providers for April, May and June 1998 shall be disbursed in October 1998.

§150-25-9. Registration of CMRS Providers.

9.1. Each CMRS provider, or any reseller of any commercial mobile radio service, which has received FCC authority to serve any area within the state of West Virginia on or before December 31, 1997 shall, no later than January 31, 1998, register with the Commission. Such CMRS providers shall register with the Commission even if the CMRS provider is not actually providing service in any part of West Virginia.

9.2. CMRS providers which receive authority to serve any area within the State of West Virginia after January 31, 1998 shall register within thirty (30) calendar days of receiving FCC authority to operate in West Virginia.

9.3. Such registration shall be filed with the Commission's Executive Secretary and shall include the following information:

9.3.1. Legal name of CMRS provider;

9.3.2. All business names used by the CMRS provider;

9.3.3. Name, title, mailing address, telephone number, fax number, and E-Mail address (if available) of the person to be contacted regarding state regulatory matters;

9.3.4. A listing of all areas in which the CMRS provider is authorized, by the FCC, to serve any portion of West Virginia; and

9.3.5. A copy of the FCC license authorizing the CMRS provider to serve any portion of West Virginia.

9.4. Changes to any of the above-listed information shall be filed with the Commission's Executive Secretary within thirty (30) calendar days of the effective date of such change(s). This filing requirement includes providing notice to the Commission's Executive Secretary of any and all mergers, divestitures, acquisitions, etc. affecting West Virginia service areas.

§150-25-10. Submission of Local Exchange Information.

10.1. Each local exchange carrier certificated by the Commission shall, by no later than February 15, 1998, submit to the Telecommunications Section of the Commission's Utilities Division

line counts, by county, as of January 1, 1998.

10.2. Such line counts shall be for each access line, trunk and trunk equivalent, including PBX trunks and CENTREX trunk equivalents, in actual service.

10.3. Beginning in 1999, and for each subsequent year, the line count data shall be submitted by February 15 and shall be for line counts as of January 1.

§150-25-11. Respecification of E911 Fees.

11.1. The E911 fee shall be respecified biennially, beginning in 1999 and using the respecification methodology and data required by W. Va. Code §24-6-6b(d)(1). The respecified E911 fee shall become effective on July 1 of the respecification year.

11.2. The Commission shall provide notice of the respecified E911 fee to each CMRS provider currently registered with the Commission on or before November 1 of each respecification year.

11.3. The Commission shall provide notice of the currently applicable E911 fee to each new CMRS provider that registers with the Commission on or after November 1 of each calendar year, within thirty (30) calendar days after the date such CMRS provider registers with the Commission.

§150-25-12. Uncollectibles.

12.1. CMRS providers shall make reasonable and diligent efforts to collect unpaid E911 fees from each valid retail CMRS subscription. Notwithstanding the foregoing, a CMRS provider shall not be deemed to be a collection agent or otherwise held liable for a such subscription's failure to pay E911 fees properly billed by the CMRS provider.

WEST'S ANNOTATED INDIANA CODE
TITLE 36. LOCAL GOVERNMENT
ARTICLE 8. PUBLIC SAFETY
CHAPTER 16.5. ENHANCED WIRELESS EMERGENCY TELEPHONE SERVICE

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Current through End of 1998 2nd Regular Sess.

36-8-16.5-45 Confidentiality of **proprietary** information; disclosure of general information

Sec. 45. (a) All **proprietary** information submitted to the board or the treasurer of state is confidential. Notwithstanding any other law, **proprietary** information submitted under this chapter is not subject to subpoena, and **proprietary** information submitted under this chapter may not be released to a person other than to the submitting CMRS provider without the permission of the submitting CMRS provider.

(b) General information collected by the board or the treasurer of state may be released or published only in aggregate amounts that do not identify or allow identification of numbers of subscribers or revenues attributable to an individual CMRS provider.

CREDIT(S)

1998 Electronic Update

As added by P.L.98-1998, SEC.1.

I.C. 36-8-16.5-45

IN ST 36-8-16.5-45

END OF DOCUMENT

VERNON'S ANNOTATED MISSOURI STATUTES
TITLE XII. PUBLIC HEALTH AND WELFARE
CHAPTER 190. EMERGENCY SERVICES
WIRELESS SERVICE PROVIDERS

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Current through End of 1998 2nd Reg. Sess.

190.430. Fees--rules and regulations--administration of fund and distribution of moneys--disclosure of information--provider's compensation-- immunity from liability of providers

1. The commissioner of the office of administration is authorized to establish a fee, if approved by the voters pursuant to section 190.440, not to exceed fifty cents per wireless telephone number per month to be collected by wireless service providers from wireless service customers.

2. The office of administration shall promulgate rules and regulations to administer the provisions of sections 190.400 to 190.440. Any rule or portion of a rule, as that term is defined in section 536.010, RSMo, that is promulgated pursuant to the authority delegated in sections 190.400 to 190.440 shall become effective only if it has been promulgated pursuant to the provisions of chapter 536, RSMo. All rulemaking authority delegated prior to July 2, 1998, is of no force and effect and repealed; however, nothing in this section shall be interpreted to repeal or affect the validity of any rule filed or adopted prior to July 2, 1998, if it fully complied with the provisions of chapter 536, RSMo. This section and chapter 536, RSMo, are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536, RSMo, to review, to delay the effective date or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after July 2, 1998, shall be invalid and void.

3. The office of administration is authorized to administer the fund and to distribute the moneys in the wireless service provider enhanced 911 service fund for approved expenditures as follows:

(1) For the reimbursement of actual expenditures for implementation of wireless enhanced 911 service by wireless service providers in implementing Federal Communications Commission order 94-102; and

(2) To subsidize and assist the public safety answering points based on a formula established by the office of administration, which may include, but is not limited to the following:

(a) The volume of wireless 911 calls received by each public safety answering point;

(b) The population of the public safety answering point jurisdiction;

(c) The number of wireless telephones in a public safety answering point jurisdiction by zip code; and

(d) Any other criteria found to be valid by the office of administration provided that of the total amount of the funds used to subsidize and assist the public safety answering points, at least ten percent of said funds shall be distributed equally among all said public safety answering points providing said services under said section;

(3) For the reimbursement of actual expenditures for equipment for implementation of wireless enhanced 911 service by public safety answering points to the extent that funds are available, provided that ten percent of funds distributed to public safety answering points shall be distributed in equal amounts to each public safety answering point participating in enhanced 911 service;

(4) Notwithstanding any other provision of the law, no proprietary information submitted pursuant to this section shall be subject to subpoena or otherwise released to any person other than to the submitting wireless service provider, without the express permission of said wireless service provider. General information collected pursuant to

this section shall only be released or published in aggregate amounts which do not identify or allow identification of numbers of subscribers or revenues attributable to an individual wireless service provider.

4. Wireless service providers are entitled to retain one percent of the surcharge money they collect for administrative costs associated with billing and collection of the surcharge.

5. No more than five percent of the moneys in the fund, subject to appropriation by the general assembly, shall be retained by the office of administration for reimbursement of the costs of overseeing the fund and for the actual and necessary expenses of the board.

6. The office of administration shall review the distribution formula once every year and may adjust the amount of the fee within the limits of this section, as determined necessary.

7. The provisions of sections 190.307 and 190.308 shall be applicable to programs and services authorized by sections 190.400 to 190.440.

8. Notwithstanding any other provision of the law, in no event shall any wireless service provider, its officers, employees, assigns or agents, be liable for any form of civil damages or criminal liability which directly or indirectly result from, or is caused by, an act or omission in the development, design, installation, operation, maintenance, performance or provision of 911 service or other emergency wireless two- and three-digit wireless numbers, unless said acts or omissions constitute gross negligence, recklessness or intentional misconduct. Nor shall any wireless service provider, its officers, employees, assigns, or agents be liable for any form of civil damages or criminal liability which directly or indirectly result from, or is caused by, the release of subscriber information to any governmental entity as required under the provisions of this act [FN1] unless the release constitutes gross negligence, recklessness or intentional misconduct.

CREDIT(S)

1999 Electronic Update

(L.1998, S.B. No. 743, § A, eff. July 2, 1998.)

[FN1] This act (S.B. No. 743, 1998) contains numerous sections. Consult V.A.M.S. Vol. 42, Tables, for definitive listing.

V. A. M. S. 190.430

MO ST 190.430

END OF DOCUMENT

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Consideration of
BellSouth Telecommunications,
Inc.'s entry into interLATA
services pursuant to Section 271
of the Federal Telecommunications
Act of 1996.

DOCKET NO. 960786-TL
ORDER NO. PSC-97-1391-CFO-TL
ISSUED: November 3, 1997

ORDER GRANTING REQUESTS FOR CONFIDENTIAL TREATMENT

Pursuant to Section 271(d)(3) of the Telecommunications Act of 1996 (the Act), the Federal Communications Commission (FCC) has 90 days to issue a written determination approving or denying a Bell Operating Company's (BOC) application for interLATA authority. Further, the FCC is directed to consult with the appropriate State Commission before making a determination regarding the BOC's entry into the interLATA market. Specifically, the Act requires the FCC to consult with the State Commission in order to verify the BOC's compliance with the requirements of Section 271(c) of the Act. On June 28, 1996, we opened this docket to begin to fulfill our consultative role. Evidence was presented on whether BellSouth Telecommunications, Inc. (BellSouth) has met the requirements of Section 271(c) of the Act during the hearing, which was held September 2 - 10, 1997.

On October 7, 1997, American Communications Services of Jacksonville, Inc. (ACSI) filed a Request for Confidential Classification of information contained in witness James Falvey's Late-Filed Hearing Exhibit 75, regarding the number of ACSI's customers and access lines, as found in Document No. 10278-97 and referenced Document No. 09382-97. ACSI asserts that it treats this information as confidential, proprietary information and that this information has not otherwise been disclosed.

Florida law presumes that documents submitted to governmental agencies shall be public records. The only exceptions to this presumption are the specific statutory exemptions provided in the law and exemptions granted by governmental agencies pursuant to the specific terms of a statutory provision. This presumption is based on the concept that government should operate in the "sunshine." Rule 25-22.006(4)(c), Florida Administrative Code, provides that it is the Company's burden to demonstrate that the documents fall into one of the statutory examples set out in Section 364.183, Florida Statutes, or to demonstrate that the information is proprietary

ORDER NO. PSC 97-1391-CFO-TL
DOCKET NO. 960786-TL
PAGE 2

confidential information, the disclosure of which will cause the Company or its ratepayers harm.

Specifically, for Document No. 10278-97, and referenced Document No. 09382-97, ACSI seeks confidential treatment of the number of customers and access lines identified in the paragraph titled "Response." ACSI argues the disclosure of this information would allow competitors to ascertain ACSI's market penetration, its revenues and its business plans. ACSI asserts that with this knowledge, its competitors would be able to adversely affect ACSI's business interests.

Upon review, the material is found to be proprietary business information in accordance with Section 364.183, Florida Statutes, and Rule 25-22.006, Florida Administrative Code. Disclosure of this information would harm ACSI's ability to compete by allowing competitors to target market ACSI's customers. As such, ACSI's request for confidential treatment is hereby granted.

Based on the foregoing, it is therefore

ORDERED by Chairman Julia L. Johnson, as Prehearing Officer, that American Communications Services of Jacksonville, Inc.'s Request for Confidential Classification of information contained in Document No. 10278-97 and referenced Document No. 09382-97 is granted.

ORDERED that pursuant to Section 364.183, Florida Statutes, and Rule 25-22.006, Florida Administrative Code, any confidentiality granted to the material specified herein shall expire eighteen (18) months from the date of the issuance of this Order in the absence of a renewed request for confidentiality pursuant to Section 364.183, Florida Statutes. It is further

ORDERED that this Order will be the only notification by the Commission to the parties concerning the expiration of the confidentiality time period.

ORDER NO. PSC 97-1291-CFO-TL
DOCKET NO. 960786-TL
PAGE 3

By ORDER of Chairman Julia L. Johnson, as Prehearing Officer,
this 3rd Day of November, 1997.

/s/ Julia L. Johnson
JULIA L. JOHNSON
Chairman and Prehearing Officer

This is a facsimile copy. A signed
copy of the order may be obtained by
calling 1-850-413-6770.

(S E A L)

BC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review

ORDER NO. PSC 97-1391-CFO-TL
DOCKET NO. 962756-TL
PAGE 4

of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

June 10, 1999

Lisa H. Jenrette
General Manager
ACC of Kentucky, LLC
301 Highland Park Drive
Richmond, KY. 40475

Honorable W. Brent Rice
Attorney at Law
McBrayer, McGinnis, Leslie
& Kirkland PLLC
163 West Short Street
Suite 300
Lexington, KY. 40507 1361

RE: Case No. 99-184

We enclose one attested copy of the Commission's Order in
the above case.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Bell".

Stephanie Bell
Secretary of the Commission

SB/hv
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ACC OF KENTUCKY LLC'S PETITION FOR) CASE NO. 99-184
CONFIDENTIAL PROTECTION)

O R D E R

On March 30, 1999, ACC of Kentucky LCC ("ACC") filed its Gross Operating Revenue Report as required by KRS 278.140. ACC also filed a request for confidential treatment of certain information contained in that report pursuant to 807 KAR 5:001, Section 7. On April 15, 1999, ACC's request for confidential treatment of that information was denied.

ACC filed a motion with the Commission on May 4, 1999 to request a hearing of the Commission's denial of confidential protection for certain information on the grounds that disclosure is likely to cause ACC competitive injury.

ACC has also requested an informal conference with the Commission Staff. The Commission finds that ACC should be granted an informal conference with Commission Staff and that a date for a formal hearing, if any, should be determined after the informal conference in this case.

The Commission, upon its own motion, finds that ACC should be required to provide the Commission with certain information concerning the data that ACC claims should be given confidential treatment.

The Commission being otherwise sufficiently advised,

IT IS HEREBY ORDERED that:

1. The motion for a formal hearing is held in abeyance until after the informal conference granted herein.

2. An informal conference shall be held on July 20, 1999 at 1:00 p.m., Eastern Daylight Time, in Conference Room 1 of the Commission's offices at 730 Schenkel Lane, Frankfort, Kentucky.

3. Pending a hearing and final decision in this case, the information relating to ACC's gross revenues and number of customers for which ACC seeks confidential protection shall be held and retained by the Commission as confidential and shall not be open for public inspection.

4. No later than July 5, 1999 ACC shall file the information requested in Appendix A, which is attached hereto and incorporated herein. All responses shall include the name of the witness who will be available to respond to questions concerning each item of information requested, with copies to all parties of record and the original and 6 copies to the Commission.

Done at Frankfort, Kentucky, this 10th day of June, 1999.

By the Commission

ATTEST:


Executive Director

APPENDIX A

AN APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 99-184 DATED 6/10/99

1. List the counties in Kentucky in which ACC provides service.
2. Provide the names of your competitors in those areas.
3. Is ACC a subsidiary of a larger company? If so, what is the name of its parent company?
4. Does the parent company operate in other jurisdictions? If so, what jurisdictions?
5. On page 2, paragraph 1 of ACC's May 4, 1999 Motion ("Motion"), ACC states that its gross revenue and customer number information is "generally recognized as confidential and proprietary."
 - a. Are you aware that this Commission has consistently denied confidential protection to the gross operating revenue report for all telecommunications providers in Kentucky?
 - b. Based on this policy, would you say that this Commission has not viewed the two numbers in question as competitively sensitive and therefore not generally recognized as confidential and proprietary?
6. The following questions relate to your cite of the West Virginia legislature's decision in its E-911 proceeding.
 - a. Provide a copy of the entire statute.

b. The cite seems to indicate that "information pertaining the providers' subscribers" relates to the customer's name and address and any other customer-specific information residing in the 911 database and not to the total number of customers of the company. If this is not your understanding, please elaborate.

7. At the top of page 3 of the Motion, you state that all cellular carriers can monitor each other's costs. Explain how your company can obtain the costs of your competitors.

8. In paragraph 2 on page 3 of the Motion, you state that disclosure of ACC's gross revenues and customer numbers reveals ACC's "Average Revenue Per Unit."

a. Are ACC's service prices exactly the same as its competitors?

b. Is the mix of services an ACC customer pays for exactly the same as the mix of services for which your competitors' customer pays?

(1) If yes, how did you determine this fact?

(2) If no, why isn't it meaningless to know an average revenue per unit if the prices are different and the mix of services between customers is different?

c. In the same paragraph you equate "average revenue per unit" with cost per customer. Explain why these two phrases are the same. Are not revenues and costs entirely different accounting concepts?

9. In paragraph 2 on page 3 of the Motion, you state that most existing competitors can approximate the actual cost of providing service per customer in a given market. Explain how you would determine the cost per customer for your competitors

listed in question 2 and provide an analysis of the computation of those costs by cost category, i.e., depreciation, taxes, capital costs, administrative costs and so forth.

10. Relative to your statement in paragraph 2 of page 3 of the Motion that "disclosures of average revenue per unit would reveal how much capital a company has available for expansion,"

a. Is not the capital available to any company for expansion the result of a company's total cash flow including depreciation, taxes, expenses, deferred taxes, and so on?

b. If ACC is a subsidiary of a large, multi-jurisdictional company, does this parent provide ACC in Kentucky with funds for expansion from a corporate line of credit or financing completed by the parent, or does ACC raise its own capital through the sale of equity and debt?

11. Provide a complete description of the market-specific information available from the FCC relative to the cellular and PCS industries and in particular the information that relates to Kentucky.

12. a. In the last paragraph on page 3 and over to page 4 of the Motion, you indicate that the average revenue per unit could reveal sensitive profitability information. Are not the concepts of average revenue per unit and profitability per unit different concepts? If no, what is your definition of these concepts?

b. Does not profitability relate to revenues less expenses, taxes, fixed charges and dividends, while the average revenue per unit only relates to revenues? If you disagree, explain your answer.

13. Explain your definition of market share as used in paragraph 2 on page 4 of the Motion.

14. a. In the quote from North Carolina at the bottom of page 4 of the Motion, explain how ACC would be competitively harmed if its rate of customer growth could be determined.

b. Explain how a competitor could "gain extensive insight into ACC's business plans by knowing ACC's total gross revenues and total number of customers."



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
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May 6, 1999

Lisa H. Jenrette
General Manager
ACC of Kentucky, LLC
301 Highland Park Drive
Richmond, KY. 40475

Honorable W. Brent Rice
Attorney at Law
McBrayer, McGinnis, Leslie
& Kirkland PLLC
163 West Short Street
Suite 300
Lexington, KY. 40507 1361

RE: Case No. 99-184
ACC OF KENTUCKY, LLC
(Confidentiality) 99-00144

This letter is to acknowledge receipt of initial application in the above case. The application was date-stamped received May 4, 1999 and has been assigned Case No. 99-184. In all future correspondence or filings in connection with this case, please reference the above case number.

If you need further assistance, please contact my staff at 502/564-3940.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Bell".

Stephanie Bell
Secretary of the Commission

SB/jc

McBRAYER, MCGINNIS, LESLIE & KIRKLAND PLLC

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** ALSO ADMITTED IN COLORADO
+ ALSO ADMITTED IN TEXAS & FLORIDA
++ ALSO ADMITTED IN WEST VIRGINIA

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May 4, 1999

RECEIVED

MAY 04 1999

PUBLIC SERVICE
COMMISSION

HAND DELIVERED

Ms. Helen C. Helton, Executive Director
Public Service Commission
730 Schenkel Lane
Frankfort, KY 40602

RE: ACC of Kentucky LLC - PSC Case No. ~~99-00144~~

CASE 99-184

Dear Ms. Helton:

Please find enclosed an original and ten copies of Motion to Schedule Hearing in the above-referenced case. Please file with the Commission at your earliest convenience. Thank you.

Sincerely,



W. Brent Rice
Counsel for ACC of Kentucky LLC

WBR/dkw
Enclosures

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE COMMONWEALTH OF KENTUCKY

RECEIVED

MAY 04 1999

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF
ACC OF KENTUCKY LLC'S
PETITION FOR CONFIDENTIAL
PROTECTION

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CASE NO. ~~99-00144~~ 99-184

MOTION TO SCHEDULE HEARING

Pursuant to the Commission's letter of April 15, 1999 denying the Petition for Confidential Protection of ACC of Kentucky LCC ("ACC"), ACC hereby respectfully requests a hearing in this matter. The grounds for this request are recited below.

ACC is a provider of wireless telecommunications service in Kentucky. On March 30, 1999, ACC filed its Gross Operating Revenue Report with the Kentucky Public Service Commission ("PSC"). In that Report, ACC set forth the total number of its customers and, as required by KRS § 278.140 (Report of gross earnings from intrastate business), its gross revenue for 1998. In conjunction with the Report, ACC filed a Petition for Confidential Treatment of the information contained therein under KRS § 61.878 (Certain public records exempted from inspection except on order of court- Restriction of state employees to inspect personnel files prohibited). ACC's Petition was denied by letter dated April 15, 1999. In that letter, the PSC determined that ACC's gross revenue and customer numbers were "too general in nature to have competitive value and, [are] not entitled to the protection requested on the grounds relied upon in the petition." The PSC informed ACC that the information would be placed in the public record after 20 days if ACC did not request a hearing. ACC hereby respectfully requests a hearing in this matter.

In its Petition for Confidential Treatment, ACC argued that its gross revenue and customer numbers were entitled to protection under KRS § 61.878(c)(1). That statute requires the confidential treatment of “records . . . 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.” Contrary to the PSC’s April 15, 1999 letter, ACC’s gross revenue and customer number information are “generally recognized as confidential and proprietary” and public disclosure of this information would “permit an unfair commercial advantage to [ACC’s] competitors.” These two criteria are discussed in turn.

First, contrary to the PSC’s determination, gross revenue and customer number information are “generally recognized as confidential and proprietary” in the cellular industry. For example, in conjunction with its E-911 legislation, the West Virginia legislature has enacted a statute codifying these findings. The West Virginia statute provides:

In recognition of the fact that information pertaining to numbers of customers and revenue collected by the CMRS providers is obtained and maintained in a competitive environment and that information pertaining to the providers’ subscribers could be used to the disadvantage of the participating CMRS provider, the Legislature declares that any such information provided by the public service commission and any county or enhanced 911 program, is not subject to disclosure under the provisions of chapter twenty-nine-b [the West Virginia Freedom of Information Act].

W. Va. Code section 24-6-11. Indeed, at least one court has recently recognized that, in the competitive telecommunications industry, the number of customers a carrier serves constitutes a “trade secret” entitled to protection under that state’s codification of the Uniform Trade Secrets Act. State Utilities Commission v. MCI Telecommunications Corporation, ___ S.E. 2d ___ ’ 1999 WL 183835 (N.C. App. April 6, 1999).

Moreover, uniform disclosure of this information across the cellular industry could effect an artificial manipulation of prices: because all cellular carriers can monitor each others' costs and revenue, and a change in one carrier's price per unit could result in "lock step" rate elevation across the industry. Disclosure of revenue information not only fails to serve the public interest in this instance, it could inflict the grave harm of higher prices and reduced competition.

Second, public disclosure of ACC's gross revenue and customer number information would "permit an unfair commercial advantage to [ACC's] competitors" in contravention of KRS § 61.878(c)(1). The joint disclosure of gross revenue and customer numbers reveals ACC's "Average Revenue Per Unit," or cost, per customer, of providing services in the Kentucky market. This Average Revenue Per Unit, which under the PSC's determination would be revealed to all wireless competitors in Kentucky, is a critical element in calculating funds available for investment. Because most existing competitors can approximate the actual cost of providing service per customer in a given market, disclosure of average revenue per unit would reveal how much capital a company has available for expansion. This would enable competitors and would-be competitors to tailor their own expansion and future investments in the Kentucky market accordingly.

Further, analyzed in conjunction with market-specific information available from the Federal Communications Commission locating cellular points of presence (or "POPs") in Kentucky, Average Revenue Per Unit information enables would-be competitors to "size" and assess wireless market penetration in Kentucky before making the decision to invest there or in a particular Kentucky market. Depending on what such analysis reveals, this could not only

prejudice ACC and other similarly situated wireless providers by revealing sensitive profitability information, but could actually have the effect of discouraging competition in Kentucky.

As ACC argued in its Petition for Confidential Treatment, annual disclosure of gross revenue and customer number information also enables existing and potential competitors to track ACC's market share, assess the effectiveness of its marketing practices, and respond accordingly:

[d]isclosure of gross revenues gives other carriers the ability to calculate ACC of Kentucky's market share in the Commonwealth of Kentucky. Market share information is a valuable tool that allows competitors to assess the competitive threat posed by specific carriers in particular markets; for example ACC of Kentucky's competitors could use this information to tailor their marketing efforts in the Commonwealth of Kentucky and surrounding areas. The information relating to the number of customers gives other carriers the ability to determine the rate at which ACC of Kentucky is growing in the Commonwealth of Kentucky.

The Court of Appeals of North Carolina found that inter alia, the number of customers served by individual competitive local telephone service providers ("CLP's") was entitled to trade secret protection in North Carolina because disclosure "would provide competitors rather extensive insight into the business plans and operations of a particular CLP, information that otherwise would not be available generally," State Utilities Commission v. MCI Telecommunications Corporation, 1999 WL 183835 at *6:

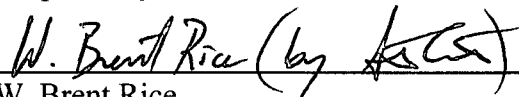
Disclosure of this information would allow competitors to discover . . . how quickly [a CLP] acquires new customers, and in which areas of the state the CLP is focusing its marketing efforts and the relative effectiveness of these efforts. Most importantly, disclosure of such information would thwart the creativity and innovation that competition brings to the marketplace, and prohibit the competitive environment our legislature intended to create.
Id.

The United States Supreme Court has recognized that disclosure of trade secret information submitted to a regulator in confidence may constitute a "taking" of property without just compensation in violation of the Fifth Amendment of the Constitution. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013-14, 104 S. Ct. 2862, 2878 (1984).

ACC and its predecessor corporations have been operating as an "A" side cellular carrier in Kentucky since 1994. At that time, only two wireless carriers offered service in each Kentucky market. Today, up to nine wireless companies may compete in each wireless market in Kentucky. Wireless service is no longer the oligopoly it was even five short years ago. Wireless providers in Kentucky should have the same ability to protect confidential information such as gross revenue and customer numbers as do their counterparts in non-regulated industry and in the wireless markets in neighboring states such as North Carolina and West Virginia.

Wherefore, the Applicant respectfully moves the Commission to schedule a hearing at its earliest convenience.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 1999, the original and ten copies of the foregoing Motion to Schedule Hearing were hand-delivered to Hon. Helen C. Helton, Executive Director, Public Service Commission, 730 Schenkel Lane, Frankfort, KY 40602

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