

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PROPOSED SPECIAL CONTRACT OF SOUTH)
CENTRAL BELL TELEPHONE COMPANY ON)
BEHALF OF THE LOCAL EXCHANGE) CASE NO. 95-151
CARRIER TELEPHONE GROUP FOR THE)
KENTUCKY INFORMATION HIGHWAY)
RFP ET-41-95)

O R D E R

This matter arising upon petition of BellSouth Telecommunications, Inc., d/b/a South Central Bell Telephone Company ("South Central Bell"), filed May 17, 1995, pursuant to 807 KAR 5:001, Section 7, for confidential protection of its responses to certain data requests of AT&T Communications of the South Central States, Inc. ("AT&T") which provide cost, demand, and design information, and further denying AT&T and MCI access to this information pursuant to a protective agreement on the grounds that public disclosure of the information and disclosure of the information to AT&T and MCI is likely to cause South Central Bell competitive injury, AT&T having filed a response thereto on May 18, 1995, requesting that the petition be denied, and it appearing to this Commission as follows:

South Central Bell's petition was filed on behalf of the Local Exchange Carrier Telephone Group ("LECTG") which, along with LCI

International Telecom Corporation ("LCI"),¹ was awarded a contract to design, install, and operate a statewide information network. The contract was awarded on the basis of competitive bids. In addition to LECTG and LCI, other bidders for the contract included AT&T, MCI, and Kentucky Fiberlink Company. AT&T and MCI have intervened in this proceeding and in its status as an intervenor, AT&T on April 14, 1995, served 42 data requests upon LECTG. In responding for LECTG, South Central Bell refused to furnish the cost, demand, and design information requested in Items No. 2, 5d, 11, 12, 14,² 20, 26, 29f, 34, and 38, and on May 9, 1995, South Central Bell was Ordered by the Commission to respond to those requests. On May 17, 1995, in compliance with the Order, South Central Bell filed its responses to those requests, together with a petition to protect the information as confidential from the public at large, and from AT&T and MCI in particular. On May 18, 1995, AT&T filed its response to the petition requesting that it be denied. On May 22, 1995, at the hearing on this matter, AT&T and MCI argued that if South Central Bell's petition is not denied, South Central Bell should be required to enter into an appropriate confidentiality agreement with the intervenors.

The information sought to be protected is not known outside of South Central Bell and is not disseminated within South Central

¹ The Commonwealth awarded the intraLATA services contract to the LECTG and the interLATA services contract to LCI International Telecom Corporation.

² The information provided in response to this item is also responsive, in part, to MCI Data Request No. 2

Bell except to those employees who have a legitimate business need to know and act upon the information. South Central Bell seeks to preserve the confidentiality of the information through all appropriate means, including the maintenance of appropriate security at its offices.

The first issue to be resolved is whether the information qualifies for confidential protection. KRS 61.872(1) requires information filed with the Commission to be available for public inspection unless specifically exempted by statute. Exemptions from this requirement are provided in KRS 61.878(1). That subsection of the statute exempts several categories of information. One category exempted in paragraph (c)1 of that subsection is commercial information confidentially disclosed to the Commission which if made public would permit an unfair commercial advantage to competitors of the party from whom the information was obtained. To qualify for the exemption, the party claiming confidentiality must demonstrate actual competition and a likelihood of substantial competitive injury if the information is disclosed. Competitive injury occurs when disclosure of the information gives competitors an unfair business advantage.

The cost, demand, and design information sought to be protected is customer-specific information used in the development of rates proposed in the competitive bid for the Information Highway contract. That contract permits the state to renegotiate or rebid the contract every two years. If the state elects to exercise that right, AT&T, MCI, and other telecommunication

companies could use the information in formulating their own bid proposals. In addition, South Central Bell is in direct competition with AT&T and MCI in providing private networks for nine states in the southeastern region of the United States. These networks encompass government and private sector entities which may request proposals for projects similar to the Kentucky Information Highway. Sharing the details of the design for the Kentucky contract could result in their use by a competitor in future bid situations by providing insight into the design decisions which influence South Central Bell's cost in providing this service. Further, Kentucky state agencies are not required to utilize the system to be established under the contract, but may, if they so elect, contract with BellSouth's competitors for the same service. If AT&T, MCI, or other competitors have access to the information sought to be protected, they could use it to make alternate proposals to state agencies, thereby undermining the demand for the information highway contract. Therefore, disclosure of the information is likely to cause South Central Bell competitive injury and the information is entitled to protection as confidential.

The second issue involves the extent to which the information should be protected. South Central Bell's petition specifically requests that AT&T and MCI be denied access to the information, even pursuant to a protective agreement. 807 KAR 5:001, Section 7(5) (b) establishes a procedure by which a party may seek access to confidential information filed by another party in the proceeding.

Under the regulation, a party seeking access to confidential information must first attempt to negotiate a disclosure agreement with a provider of the information. If those efforts are unsuccessful, the party seeking the information may petition for access to the information. The Commission must then determine whether the party seeking the information is entitled to access to the information, and if so, the protection necessary to ensure the confidentiality of the information.

AT&T, in its written response, relies upon three grounds for denying protection: (1) South Central Bell's failure to file its responses in compliance with the Commissions' regulations; (2) South Central Bell's failure to furnish the information pursuant to a confidentiality agreement, and (3) South Central Bell's failure to provide factual support for its protection. These will be discussed in reverse order.

As noted earlier, to qualify for protection under the exemption relied upon by South Central Bell, it must be established that public disclosure of the information will provide competitors with an unfair advantage. An examination of the information sought to be protected supports South Central Bell's assertion that access to the responses would enable its competitors to compete more effectively with South Central Bell to provide the same service. Thus, there is a factual basis for concluding that the information qualifies for protection.

Concerning South Central Bell's refusal to furnish the information pursuant to a confidentiality agreement, that in itself is not a violation of Commission regulation.

Finally, with respect to South Central Bell's failure to file the information according to Commission regulations, that omission was resolved by the Commission's Order of May 9, 1995. South Central Bell has complied with the Order and there is no basis for denying protection because of its earlier failure.

However, the Commission finds that AT&T and MCI should have access to the confidential information under certain conditions. The parties should enter into confidentiality agreements pursuant to which access to the information is limited to counsel retained by the intervenors, and to any expert or experts retained by counsel who are not employees of AT&T or MCI or their affiliates.

In order to allow the intervenors an opportunity to review the information, the hearing should be continued.

This Commission being otherwise sufficiently advised,

IT IS ORDERED that:

1. South Central Bell's responses to AT&T's data request providing cost, demand, and design information for the information highway contract, which South Central Bell has petitioned to be withheld from public disclosure, shall be held and retained by this Commission as confidential and shall not be open for public inspection.

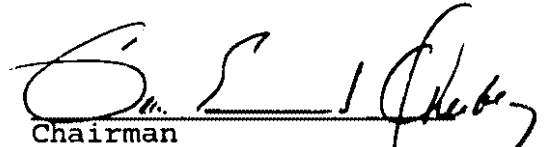
2. The petition to withhold the information from AT&T and MCI be and is hereby denied.

3. South Central Bell shall furnish the confidential information to AT&T and MCI pursuant to confidentiality agreements which specify that neither staff counsel nor any employee of AT&T or MCI or their affiliates shall have access to the information.

4. The hearing on this matter is hereby continued and shall reconvene on May 26, 1995, at 9:00 a.m., Eastern Daylight Time, in Hearing Room 1 of the Commission's offices at 730 Schenkel Lane, Frankfort, Kentucky.

Done at Frankfort, Kentucky, this 22nd day of May, 1995.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director