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May 10, 2006

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CERTIFICATE OF SERVICE

RE: Case No. 2005-00229  
BellSouth Telecommunications, Inc.

I, Beth O'Donnell, Executive Director 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 addressee by U.S. Mail on May 10, 2006.

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Executive Director

BOD/sh  
Enclosure



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Honorable Cheryl R. Winn  
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COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC.'S )  
NOTICE OF INTENT TO DISCONNECT ) CASE NO. 2005-00229  
PHONE-LINK, INC. FOR NONPAYMENT )

BELLSOUTH TELECOMMUNICATIONS, INC.'S )  
NOTICE OF INTENT TO DISCONNECT ) CASE NO. 2005-00419  
NUSTAR COMMUNICATIONS FOR NONPAYMENT )

BELLSOUTH TELECOMMUNICATIONS, INC.'S )  
NOTICE OF INTENT TO DISCONNECT ) CASE NO. 2005-00469  
EXPRESS TELEPHONE FOR NONPAYMENT )

BELLSOUTH TELECOMMUNICATIONS, INC.'S )  
NOTICE OF INTENT TO DISCONNECT ) CASE NO. 2005-00490  
METRO TELECONNECT FOR NONPAYMENT )

O R D E R

By separate petitions, on April 20, 2006, BellSouth moved the Commission to reconsider its March 31, 2006 Order<sup>1</sup> in Case Nos. 2005-00419;<sup>2</sup> 2005-00469;<sup>3</sup> 2005-00490;<sup>4</sup> and 2005-00229.<sup>5</sup>

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<sup>1</sup> This Order collectively denied BellSouth's requests for confidentiality in the cases discussed herein.

<sup>2</sup> Case No. 2005-00419, BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect Nustar Communications for Nonpayment.

<sup>3</sup> Case No. 2005-00469, BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect Express Telephone for Nonpayment.

<sup>4</sup> Case No. 2005-00490, BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect Metro Teleconnect for Nonpayment.

<sup>5</sup> Case No. 2005-00229, BellSouth Telecommunications, Inc.'s Notice Of Intent To Disconnect Phone-Link, Inc. For Nonpayment.

In its motions for reconsideration, BellSouth argues that the subject information is “customer proprietary network information” (“CPNI”) as defined by 47 U.S.C.A. § 222 of the Telecommunication Act of 1996 (“Section 222”). As CPNI, BellSouth contends that the documents are exempt under federal law, and therefore also exempt under KRS 61.878(1)(k) of Kentucky’s Open Records Act, KRS 61.870 to 61.884 (“Open Records Act”), which excludes, “[a]ll public records or information the disclosure of which is prohibited by federal law or regulation.”

The Commission having carefully considered BellSouth’s petitions confirms its prior Order and again denies confidential treatment of the subject information in these four cases.

#### DISCUSSION

The documents at issue are public documents and the Commission is a public agency subject to the Open Records Act. An analysis of the Open Records Act begins with the premise that “the basic policy of [the Open Records Act] is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.”<sup>6</sup> Under Kentucky law, “[a]ll public records shall be open for inspection by any person, except as otherwise provided in KRS 61.870 to 61.884. . . .”<sup>7</sup>

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<sup>6</sup> KRS 61.871, emphasis added.

<sup>7</sup> See Lexington-Fayette Urban County Government v. Lexington Herald-Leader Co., 941 S.W.2d 469 (Ky. 1997), citing KRS 61.872(1).

BellSouth claims that the subject information is CPNI and therefore exempt from disclosure under federal law and the related provision of the Open Records Act. CPNI is information maintained by a telephone company describing who and when a customer calls and what telephone features the customer uses. CPNI is defined as:

- (A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and
- (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.<sup>8</sup>

The 1996 Act excludes from the definition of CPNI several categories of information, including: subscriber list information such as name, address, and telephone number.<sup>9</sup> It also excludes aggregate customer information from which individual customer identities have been removed.<sup>10</sup>

#### ARGUMENT

BellSouth states that the Commission's March 31, 2006 Order is "apparently based upon the erroneous premise that because the information is the total number of lines, it is aggregate information of the customer, not subject to protection as CPNI under the Act."<sup>11</sup> BellSouth further argues that because the names of "its 'customers'"

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<sup>8</sup> 47 U.S.C.A. § 222(h)(1).

<sup>9</sup> 47 U.S.C.A. § 222(e) and (h)(3).

<sup>10</sup> 47 U.S.C.A. § 222(c)(3) and (h)(2).

<sup>11</sup> BellSouth Telecommunications, Inc.'s Petition For Rehearing at 2, as contained in each petition.

are identified, the information is not aggregate customer information from which individual customer identities have been removed.<sup>12</sup>

The information sought to be withheld from public inspection involves only the aggregate number of consumers served by certain competitive local exchange carriers (“CLECs”) which purchase services from BellSouth. The Commission disagrees with BellSouth’s characterization of the CLECs as “customers” for purposes of the protections and restrictions contained in Section 222. Throughout 47 CFR § 64.2005, which further defines certain CPNI issues, reference is made to the “customer” in a manner that is clearly meant to refer to an end-user and not a “carrier” that happens to be a patron or affiliate of another carrier. By analogy, 47 U.S.C. § 153 defines “customer premises equipment” as “equipment employed on the premises of a person (other than a carrier). . . .” Similarly, 47 CFR § 64.2009 uses the term “customer” interchangeably with the term “consumer.”

Section 222 requires that customers give their approval before their CPNI can be utilized for marketing purposes.<sup>13</sup> This section of the 1996 Act originated in the House of Representatives and was incorporated with minor changes in the final House-Senate conference version of the 1996 Act.<sup>14</sup> The legislative history of the 1996 Act identifies two substantial purposes of Section 222: protecting consumer privacy and promoting competition.<sup>15</sup>

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<sup>12</sup> 47 U.S.C.A. § 222(c)(3) and (h)(2).

<sup>13</sup> 47 U.S.C.A. § 222(c).

<sup>14</sup> H. Rep., 1996 U.S.C.C.A.N. 203-05.

<sup>15</sup> H. Rep., 1996 U.S.C.C.A.N. 205.

Congress recognized that telephone customers/consumers do not want sensitive CPNI information misused because of its confidential content.<sup>16</sup> Congress enacted Section 222 with a focus on the customer. The statute speaks of “customer proprietary network information” and “approval of the customer” when referring to CPNI ownership and control.<sup>17</sup> It seems clear that Congress considered CPNI to be the property of the end-user customer.

The 1996 Act specifically lists the exceptions to times when a telecommunications carrier is not required to obtain customer approval to use CPNI.<sup>18</sup> Section 222 states that CPNI may be disclosed if disclosure is required by law or if the customer approves of release of the information to a carrier or another service provider designated by the end-user customer.

The protections contained in Section 222(b) and (c) represent a balance of distinctly separate considerations. First is the need for customers to be sure that personal information that carriers may collect is not misused. Customers, on the other hand, rightfully expect that when they are interacting with their carrier that its employees will have access to pertinent information concerning their service. The balance is reflected in subsections 222(b) and (c) which impose strict controls with limited exceptions for the carrier’s use of customer information in connection with providing its own services to that customer. For example, a carrier is not required to obtain the

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<sup>16</sup> H. Rep., 1996 U.S.C.C.A.N. 90.

<sup>17</sup> 47 U.S.C.A. § 222(c)(1).

<sup>18</sup> 47 U.S.C.A. § 222(c)(1-3).

approval of customers to use customer information in the provision of common carrier communications services such as publishing directories by a carrier or affiliate.<sup>19</sup>

Another reason Congress included Section 222 was because incumbent local exchange carriers possess prodigious amounts of CPNI as a result of their historic monopolies. Allowing the former monopolies to routinely use CPNI allows a significant competitive disadvantage to new carriers seeking to compete for customers. Congress stated that Section 222 “strives to balance both competitive and consumer privacy interests with respect to CPNI.”<sup>20</sup> It was not intended to protect aggregate customer (i.e., consumer) information pertaining to a CLEC, even though the CLEC could be characterized as the “customer” of another carrier.

Finally, BellSouth has requested that, in lieu of non-disclosure, it be allowed to withdraw certain documents from the record. BellSouth fails to cite substantive law or Commission precedent to support its request.<sup>21</sup>

It is well established that “while all government agency records are public records for the purpose of their management, not all these records are required to be open to public access, as defined in [Kentucky’s Open Records Act], some being exempt under KRS 61.878.”<sup>22</sup> As such, a party’s remedy for non-disclosure turns on whether the documents satisfy an exemption under KRS 61.878. To allow a party to withdraw a

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<sup>19</sup> H Rep., 1996 U.S.C.C.A.N. 90.

<sup>20</sup> H. Conf. Rep., 1996 U.S.C.C.A.N. 205.

<sup>21</sup> See, e.g., 401 KAR 100.010, Section 7(2), a Kentucky agency regulation that provides for the withdrawal of public records. This regulation contemplates original documents withdrawn from the record being substituted with true copies.

<sup>22</sup> KRS 61.8715.



document merely because it fails to satisfy an exemption to the Open Records Act is to permit a party to subvert the intent of the Open Records Act.<sup>23</sup>

### CONCLUSION

The exceptions provided in KRS 61.878 are to be "strictly construed."<sup>24</sup> A party seeking confidential treatment of public documents has a difficult burden. The Commission finds that BellSouth has failed to meet its burden. Public documents may not be withheld from public review unless they satisfy an exception under the Open Records Act or other law. The subject documents are public records and are to be open for public inspection unless they satisfy an exception provided under the Open Records Act.

The documents are not CPNI as defined by 47 U.S.C.A. § 222 of the Telecommunication Act of 1996. The material sought to be redacted consists only of the number of consumers served by the CLECs.<sup>25</sup> This information involves only "aggregate customer information from which individual customer identities have been

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<sup>23</sup> See, e.g., 05-ORD-141; see also, the State Archives and Records Act, KRS 171.410 - .740, as discussed in 05-ORD-141, similar to Kentucky's Open Records Act. This Act mandates that "it is the duty of an agency to 'establish such safeguards against removal or loss of records as he shall deem necessary and as may be required by rules and regulations issued under authority of KRS 171.410 to 171.740.' KRS 171.710. These safeguards include 'making it known to all officials and employees of the agency that no records are to be alienated or destroyed except in accordance with law, and calling attention to the penalties provided by law for the unlawful removal or destruction of records.' KRS 171.710."

<sup>24</sup> KRS 61.871.

<sup>25</sup> Although one of the cases herein also involved an amount allegedly owed to BellSouth by a CLEC, BellSouth does not argue that this information constitutes CPNI. Case No. 2005-00229.

removed.<sup>26</sup> This is not CPNI and thus is not exempt under KRS 61.878(1)(k) of the Open Records Act.

IT IS THEREFORE ORDERED that:

1. BellSouth's motions for reconsideration are denied.
2. BellSouth's requests to withdraw the subject documents are denied.
3. The material shall not be placed in the public record for 20 days to allow

BellSouth to seek any remedy afforded by law.<sup>27</sup>

Done at Frankfort, Kentucky, this 10th day of May, 2006.

By the Commission

ATTEST:



Executive Director

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<sup>26</sup> 47 U.S.C.A. § 222.

<sup>27</sup> 807 KAR 5:001, Section 7(4).