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March 31, 2006

To: Parties of Record

RE: Case Nos. 2005-00229, 2005-00419, 2005-00469, 2005-00490

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

Sincerely,

A handwritten signature in black ink, appearing to read "Beth O'Donnell", with a large, stylized flourish at the end.

Beth O'Donnell
Executive Director

BOD/jc

Enclosure

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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) CASE NO. 2005-00229
DISCONNECT PHONE-LINK, INC.)
FOR NONPAYMENT)

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

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

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

O R D E R

BellSouth Telecommunications, Inc. ("BellSouth") initiated these cases against Phone-Link, Inc., NuStar Communications Corp., Express Telephone Services, Inc., and Metro Teleconnect Companies, Inc. (collectively "CLECs") to disconnect for nonpayment.¹ BellSouth requested confidential treatment of portions of the documents filed in these cases. Specifically, BellSouth requested that the Commission redact from the public record the number of each CLEC's customers potentially affected by

¹ Because these cases involve the same petitioner and almost identical issues, a single Order combining the cases is issued.

BellSouth's complaints herein and, in one instance, also redact the amount BellSouth claims is owed by a CLEC.² By separate letters from the Commission's Executive Director, the requests for confidentiality were denied. In response, BellSouth appealed the Executive Director's denials to the Commission. This Order again denies BellSouth's requests.

ARGUMENT

BellSouth argues that the subject information is exempt from public disclosure pursuant to Kentucky's Open Records Act, KRS 61.870 to 61.884. In particular, BellSouth contends that the information is excluded under KRS 61.878(1)(c)1 because the information: (a) is not known outside of BellSouth; (b) would, if disclosed, permit an unfair advantage to competitors; (c) is known only by BellSouth employees with a legitimate need to know; (d) is preserved from public scrutiny by all appropriate means; and (e) would not affect any public interest. BellSouth also claims that the documents are exempt under KRS 61.878(1)(k) as public records, the disclosure of which is prohibited by federal law or regulation.

With regard to federal law, BellSouth claims that the information is "customer proprietary network information" ("CPNI") as defined by 47 U.S.C.A. § 222 of the Telecommunications Act of 1996. As CPNI, BellSouth alleges that the documents are exempt under federal law, and therefore also exempt under KRS 61.878(1)(k).

DISCUSSION

The documents at issue are public documents; the Commission is a public agency subject to the Open Records Act. An analysis of the Open Records Act begins

² In this instance, the amount allegedly owed to BellSouth presents no competitive disadvantage as this CLEC has discontinued providing services.

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 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.”³ 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,”⁴

In relying on KRS 61.878(1)(c), BellSouth must show that the commercial documents are generally recognized as confidential or proprietary and that disclosure would permit an unfair commercial advantage to competitors.⁵ A bare allegation that the subject records are confidential is not sufficient.⁶ The court in Southeastern United Medigroup⁷ noted that words and phrases such as “confidential, proprietary, and unfair advantage” apply with more or less strength to a variety of documents.⁸ Even if a document is confidential or proprietary, to be exempt from disclosure to competitors, the document must provide “substantially more than a trivial unfair advantage.”⁹

All material on file with the Commission should be available for examination by the public unless it is found to be exempt. If the Commission chooses to withhold a

³ KRS 61.871; emphasis added.

⁴ See Lexington-Fayette Urban County Government v. Lexington Herald-Leader Co., 941 S.W.2d 469 (Ky. 1997), citing KRS 61.872(1).

⁵ 93-ORD-43.

⁶ Id., see also 92-ORD-1020; 95-ORD-107; 96-ORD-135; and 97-ORD-132.

⁷ Southeastern United Medigroup, Inc. v. Hughes, 952 S.W.2d 195 (Ky.1997).

⁸ Id. at 199.

⁹ Id.

document, it has the burden of proving that the document is covered by an exception to the Open Records Act.¹⁰ Any party requesting that the Commission grant confidential treatment has the burden to prove that the material is excluded from the Open Records Act.¹¹ BellSouth has failed to sustain its statutory burden of proof. Disclosure of the number of customers that potentially could be affected by these complaints and of an amount allegedly owed to BellSouth by a CLEC would not provide substantially more than a trivial unfair advantage to competitors. On the other hand, consistent with the Open Records Act, this limited incursion of privacy is warranted, and the public's interest in disclosure outweighs any privacy interest presented herein.¹²

BellSouth also 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.¹³

The Telecommunications Act of 1996 excludes from the definition of CPNI several categories of information, including subscriber name, address, and telephone

¹⁰ Hardin County Schools v. Foster, 40 S.W.3d 865, 868 (Ky. 2001).

¹¹ 807 KAR 5:001, Section 7(2)(d).

¹² 96-ORD-176.

¹³ 47 U.S.C. § 222(h)(1).

number.¹⁴ Importantly, it also excludes aggregate customer information from which individual customer identities have been removed,¹⁵ which is the type of information for which BellSouth seeks confidential treatment.

In U.S. West,¹⁶ while reviewing a Federal Communications Commission ("FCC") CPNI Order, the court applied the Constitutional standards applicable to governmental regulation of commercial speech enunciated in Central Hudson Gas & Elec. Corp. v. Public Service Commission.¹⁷ In finding the FCC's Order to be an unconstitutional restriction on commercial speech, the court stated:

In the context of a speech restriction imposed to protect privacy by keeping certain information confidential, the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment, or misappropriation of sensitive personal information for the purposes of assuming another's identity. Although we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely.¹⁸

¹⁴ 47 U.S.C. § 222(e) and (h)(3).

¹⁵ 47 U.S.C. § 222(c)(3) and (h)(2).

¹⁶ U.S. West, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999).

¹⁷ Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

¹⁸ U.S. West, *supra*, 182 F.3d at 1235.

CONCLUSION

The exceptions provided in KRS 61.878 must be strictly construed.¹⁹ The Commission finds that BellSouth has failed to meet its burden of proof. Public documents may not be withheld from public review unless they satisfy an exception under the Open Records Act or other law. All of the documents are public records and, pursuant to the Open Records Act, the documents should be open for public inspection. The subject information does not satisfy KRS 61.878(1)(c) in that disclosure would not provide substantially more than a trivial unfair commercial advantage to competitors.

The documents are not CPNI as defined by 47 U.S.C. § 222 of the Telecommunication Act of 1996. The material sought to be redacted consists of the number of consumers served by the CLECs and an amount allegedly owed to BellSouth by a CLEC. This information involves only "aggregate customer information from which individual customer identities have been removed."²⁰ This is not CPNI and thus is not exempt under KRS 61.878(1)(k) of Kentucky's Open Records Act.

IT IS THEREFORE ORDERED that:

1. BellSouth's petitions for confidential treatment are denied.
2. The material for which confidential treatment is sought shall not be placed in the public record for 20 days to allow BellSouth to seek any remedy afforded by law.²¹

¹⁹ KRS 61.871.

²⁰ 47 U.S.C. § 222.

²¹ 807 KAR 5:001, Section 7(4).

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

By the Commission

ATTEST

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and curves, positioned over the text 'Executive Director'.

Executive Director