

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION INTO ALLEGED UNAUTHORIZED)
RATES AND SERVICES OF AMERICALL SYSTEMS)
OF LOUISVILLE, INC.)
_____)
ALLEGED VIOLATION OF KRS CHAPTER 278)

CASE NO.
90-026

O R D E R

This matter arising upon application of AmeriCall Systems of Louisville, Inc. ("AmeriCall") filed June 13, 1990 for rehearing of the Commission's Order of June 4, 1990 denying confidential protection to Exhibit 1 of AmeriCall's response to a Subpoena Duces Tecum served April 24, 1990, and upon AmeriCall's request, filed September 5, 1990, for rehearing of the Commission's Order of August 23, 1990 denying confidential protection to Exhibit 5 of AmeriCall's response to a Subpoena Duces Tecum served May 25, 1990, and it appearing to this Commission as follows:

On April 25, 1990 AmeriCall filed its responses to the Commission's Subpoena Duces Tecum which was served upon AmeriCall on April 24, 1990. Simultaneously, with the filing of its responses, AmeriCall filed a petition for confidential protection of Exhibit 1 to its responses on the grounds that the information constituted a "trade secret" exempt from disclosure under 807 KAR 5:001, Section 7(7)(a). By Order entered June 4, 1990, the motion was denied, and on June 13, 1990 AmeriCall filed this application

for rehearing. By Order entered August 23, 1990, a formal hearing on the application was scheduled for September 11, 1990.

On May 23, 1990, while the application for rehearing of the June 13, 1990 Order was pending, the Commission served a second Subpoena Duces Tecum upon AmeriCall. In responding to that subpoena, AmeriCall requested confidential protection of Exhibits 1, 2, 3, 5 and 6 to its response. By Order entered August 23, 1990, the Commission denied confidential protection to Exhibit 5, but granted such protection to the remaining exhibits. On September 5, 1990, AmeriCall requested a hearing for the purpose of supplementing its request for confidential protection of Exhibit 5 to its response. On September 7, 1990, an Order was entered allowing AmeriCall to present such evidence at the September 11, 1990 hearing.

EXHIBIT 1 TO RESPONSE TO SUBPOENA DUCES TECUM
SERVED APRIL 24, 1990

Exhibit 1 to AmeriCall's responses to the Subpoena Duces Tecum served April 24, 1990 consists of a list of account numbers assigned to each of AmeriCall's 1+ customers. The Commission denied confidential protection upon finding that because the numbers did not identify the names, addresses, or telephone numbers of the customers, it would not have significant competitive value to competitors of AmeriCall. In its motion for rehearing, AmeriCall contends that while the motion sought protection of the information as a "trade secret," the Commission applied the criteria for material that is protected as "confidential commercial information."

In taking this position, AmeriCall relies upon the distinction made in 807 KAR 5:001, Section 7(7), between "trade secrets" and "confidential commercial information." That regulation sets forth guidelines for evaluating petitions for confidential protection of information. Subparagraph (a) of that subsection provides six criteria which the Commission may consider in determining whether information qualifies for such protection as a "trade secret," and subparagraph (b) provides three criteria for determining whether information sought to be protected qualifies as "confidential commercial information." AmeriCall contends that it sought protection of the information under subparagraph (a) as a "trade secret" but that the Commission, in denying protection, incorrectly applied the criteria of subparagraph (b) for "confidential commercial information." AmeriCall's position is erroneous because it ignores the fundamental objective of the regulation.

The regulation was promulgated under the authority of the Kentucky Open Records Act enacted in 1976 and codified in KRS Chapter 61. That Act establishes the policy of this state with respect to the public's right of access to public records. Therefore, any analysis of the regulation must be made in reference to the statute from which it is derived.

The basic premise of the Act, as declared in KRS 61.872(1), is that "all public records shall be open for inspection" unless specifically exempted. KRS 61.878 exempts 10 categories of information, including confidential business information defined

in KRS 61.878(1)(b). The regulation guidelines relate only to information in this category.

One requirement for protection of information under KRS 61.878(1)(b) is that the information "if openly disclosed would permit an unfair advantage to competitors of the subject enterprise." Therefore, whether the information is classified as a "trade secret" or as "confidential commercial information," it is not entitled to protection unless disclosure would give an unfair business advantage to competitors of the party seeking to protect the information. This is the test the Commission used in its June 13, 1990 Order; therefore, the question presented by the motion for rehearing is whether the test was correctly applied.

AmeriCall contends that disclosure of the information can cause it harm in several ways. AmeriCall states that by revealing the total number of accounts, its competitors could estimate AmeriCall's market share and, together with its published Annual Report, determine the average revenue AmeriCall receives from each customer. AmeriCall contends that competitors could use this information to determine whether to offer competing services to AmeriCall's customers. In addition, AmeriCall states that persons possessing the customer account numbers might be able to obtain customer information from AmeriCall's customer service department. To support its allegations, AmeriCall offered the testimony of Joseph L. Riley, its Vice President of Sales and Marketing.

In his testimony, Mr. Riley admitted that the account numbers, in and of themselves, were virtually meaningless to anyone looking at them. Although the numbers are classified into

series of groups, each group representing a particular category of customer, only persons who knew what numbers were assigned to what categories could determine the number of accounts in that category. Except for a handful of former employees, the information is known or available to only a limited number of company employees. Therefore, there is little likelihood that the information could be used by anyone outside of the company to determine AmeriCall's share of any segment of the One Plus market.

In addition, the exhibit merely shows all of AmeriCall's accounts by account numbers listed in sequential groups. It does not identify by name, address, or telephone number to whom the account is assigned nor does it show the volume of traffic generated by each account. It further does not identify the category of service assigned to each sequential group. Therefore, it is unlikely that even if someone knew what type of customer each category of account numbers represented, that the information could be used to make any meaningful analysis of AmeriCall's market.

Concerning the statement that knowledge of the account numbers could be used to gain access to information concerning the account, Mr. Riley admitted that such information could only be obtained by misrepresentation on the part of the person seeking the information and by a lapse of security by those in the customer service department. Therefore, disclosure of the information contained in the exhibit is not likely to cause AmeriCall competitive injury and the petition for confidential protection was properly denied.

EXHIBIT 5 TO RESPONSE TO SUBPOENA DUCES TECUM
SERVED MAY 25, 1990

Exhibit 5 to AmeriCall's response lists by category the total number of customers subscribing to Multi-WATS Service, Direct WATS Service, Universal 800, Select 800, Credit Cards, Travel Service, and Speed 800. In denying protection of this information, the Commission found that it was too general in nature to have any competitive value.

In his testimony, Mr. Riley stated that competitors could use this information as a marketing tool to disparage AmeriCall's ability to provide comparable service. These same services are offered by other long-distance competitors such as AT&T, MCI, and US Sprint, all of whom are much larger and all of whom presumably have more customers in each category. AmeriCall is concerned that these competitors would use the difference in size to dissuade existing and potential customers from using AmeriCall.

To have competitive value, the information must not be available from other sources or be a matter of common knowledge. While its competitors may not know the exact number of AmeriCall's customers in each category, it is probably a matter of common knowledge, and it is certainly a matter of public record, as determined from the Annual Reports, that AmeriCall is not as large and does not have the customer base of some of its competitors, such as AT&T, MCI, and US Sprint. Therefore, the information contained in Exhibit 5 merely confirms what is already known and has no competitive value for which it is entitled to protection.

This Commission being otherwise sufficiently advised,

IT IS ORDERED that:

1. The Order entered June 13, 1990 denying AmeriCall confidential protection of Exhibit 1 to its responses to the Subpoena Duces Tecum, served April 24, 1990, be and is hereby affirmed.

2. The Order of June 4, 1990 denying confidential protection to Exhibit 5 to AmeriCall's responses to the Subpoena Duces Tecum, served May 25, 1990, be and is hereby affirmed.

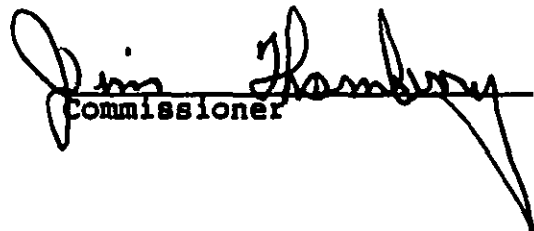
3. The information sought to be protected from disclosure shall be held as confidential and proprietary for a period of five working days from the date of this Order, at the expiration of which it shall be placed in the public record.

Done at Frankfort, Kentucky, this 11th day of February, 1991.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director