

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ADJUSTMENT OF RATES OF )           CASE NO. 94-355  
CINCINNATI BELL TELEPHONE COMPANY )

          O R D E R          

This matter arising upon petition of Cincinnati Bell Telephone Company ("Cincinnati Bell"), filed February 21, 1995, pursuant to 807 KAR 5:001, Section 7, for confidential protection of its responses to certain requests for information from the Attorney General, by and through his Public Service Litigation Branch ("Attorney General") and from AT&T Communications of the South Central States, Inc. ("AT&T"), on the grounds that the information is likely to cause Cincinnati Bell competitive injury and that the information is specifically exempted from disclosure by statute, and it appearing to this Commission as follows:

This proceeding was initiated by Cincinnati Bell to adjust its current rate schedule and to present its plan for optional Extended Area Service. Because of their interest in the proceeding, several parties have intervened, including the Attorney General and AT&T. These intervenors, together with the Commission, have requested information from Cincinnati Bell relevant to the issues involved in these proceedings. In responding to these requests, Cincinnati Bell has petitioned that selected responses be protected from public disclosure in accordance with the provisions of KRS 61.878(1)(b) and (j) and 807 KAR 5:001, Section 7. The petition

also seeks to protect information contained in separate affidavits by Robert C. Coogan, Richard T. Findlay, Donald E. Hoffman, and Mariellen Rechten, all of whom are officers of Cincinnati Bell.

KRS 61.878 is a section of the Kentucky Open Records Act which is codified in KRS 61.870 through KRS 61.884. KRS 61.872 of the Act requires that all information filed with any public agency be maintained for public inspection unless specifically exempted by statute. The exemptions from disclosure are provided in KRS 61.878(1). 807 KAR 5:001, Section 7, was promulgated by the Commission to establish a procedure by which persons filing information with the Commission may obtain the protection afforded by the exemption provisions.

Cincinnati Bell, in citing the regulation, relies upon certain criteria which were contained in the regulation when it was originally adopted and were intended to serve as guidelines for determining when information qualified for exemption under the statute. Those criteria, however, were deleted in their entirety when the regulation was amended. The amendment, which became effective on September 24, 1991, simply establishes a procedure for obtaining confidential protection for information filed with the Commission. It sets forth no criteria for determining when information qualifies for such protection under the statute.

In its petition, Cincinnati Bell cites KRS 61.878(1)(b) and (j) as the exemption provisions upon which it relies to protect the information as confidential. It would appear, however, from a

review of the petition that the correct citations are KRS 61.878(1)(c)1 and (1).

KRS 61.878(1)(c)1 exempts 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 publicly disclosed. Competitive injury occurs when disclosure of the information gives competitors an unfair business advantage. Cincinnati Bell maintains that most of the information sought to be protected qualifies for this exemption.

KRS 61.878(1)(1) exempts information whose disclosure "is prohibited or restricted or otherwise made confidential by enactment of the General Assembly." In other words, information whose disclosure is specifically prohibited by state statute is likewise exempt from disclosure under the Open Records Act. Cincinnati Bell maintains that this exemption also applies to the information sought to be protected in this proceeding.

The first item sought to be protected is a response to Item 4(b)(ii) of Part I of the Attorney General's data request. The request asks for the cost and purpose associated with the Northern Kentucky fiber optic ring. Disclosing this information would provide competitors the data to determine the per foot cost and electronics used to support the ring, which competitors could use to devise competing market strategies. Therefore, disclosure of

the information is likely to cause Cincinnati Bell competitive injury and the information should be protected as confidential.

The next item sought to be protected is the information filed in response to Item 4(c)(i) of Part I of the Attorney General's data request. That response provides the expected revenues associated with service to Terminals B and C at the Cincinnati Northern Kentucky International Airport which serve Delta and ComAir Airlines. Cincinnati Bell maintains that this information should be protected because it has entered into a contract with its customers not to disclose the information. The petition, however, does not establish whether the information has competitive value or whether it is protected by statute and, therefore, the petition should be denied.

Cincinnati Bell also seeks to protect the response to Item 65 of Part I of the Attorney General's data request which asks for any studies detailing the effectiveness of Cincinnati Bell's advertising and marketing programs. The data provided in response to the request contains conclusions and recommendations regarding relationships between call volume and various forms of advertising, inward and outward movement, churn, and several other categories of material. Cincinnati Bell has incurred great expense in connection with the commissioning of the study that produced this information, and the results would provide competitors with market information for which they did not incur any of the attendant costs. Therefore, disclosure of the information is likely to cause

Cincinnati Bell competitive injury and the information should be protected as confidential.

The next item for which protection is requested is information filed in response to Item 281 of Part I of the Attorney General's data request. This request asks for the individualized amounts for non-rate case legal expenses for each item over \$10,000. Because the response includes a description of the work each attorney performed, the rates, the matter, and the identity of the attorney who performed the work, Cincinnati Bell maintains that the information is protected from disclosure by the attorney/client privilege.

Kentucky Rule of Evidence 503 protects as privileged confidential communications between attorney and client "made for the purpose of facilitating the rendition of professional legal services to the client." The rule is part of the Rules of Evidence enacted into the law by the General Assembly in 1992 and, thus, any communication between an attorney and client concerning a matter for which the client has sought legal advice is exempt from public disclosure by KRS 61.878(1)(1). The privilege is limited to information confidentially disclosed to the attorney and does not generally extend to attorney fees charged for services rendered in relation to those communications. 81 Am Jur 2nd, Witnesses, § 414. Therefore, only the information furnished in response to this item which identifies the matter and describes the work performed is entitled to protection on the basis of the lawyer client privilege.

Items 264(c) and 270(i) of Part I of the Attorney General's data request each request documents which discuss, evaluate, describe or project the revenues, expenses, assets, or net operating income from inside wire maintenance services. Disclosure of this information would allow competitors to pinpoint those costs associated with offering this service as well as determining the possible revenue stream of a similar service. Competitors could unfairly benefit from the time and effort expended by Cincinnati Bell and the research Cincinnati Bell conducted to determine the feasibility of this service. Therefore, disclosure of the information is likely to cause Cincinnati Bell competitive injury and the information should be protected as confidential.

Item 282 of Part I of the Attorney General's data request seeks information on legal settlement claims for the years 1993 and 1994. Cincinnati Bell maintains that these settlements were privately negotiated and that Cincinnati Bell is contractually bound to maintain the confidentiality for the settlement agreements. While disclosure of this privileged information is likely to cause Cincinnati Bell competitive injury, it would seem that such disclosure is unwarranted since settlements filed with courts are generally accepted as confidential. Therefore, the information should be protected as confidential.

Item 293(b) of Part I of the Attorney General's data request asks for the test year marketing expenses for jointly marketed regulated and non-regulated services. Disclosure of this information would enable competitors to analyze Cincinnati Bell's

marketing investment and develop a more effective strategy to market their competing services. Therefore, disclosure of this information is likely to cause Cincinnati Bell competitive injury and the information should be protected as confidential.

Item 349 of Part I of the Attorney General's data request asks that Cincinnati Bell identify the expected percentage growth in 1995 revenues for the accounts which make up the basic local service category. Competitors who have applied for certification in Cincinnati Bell's service area could use this information to identify those areas which are most attractive and develop a marketing strategy to target those areas. Thus, disclosure of the information would have a detrimental impact on Cincinnati Bell and the information should be protected as confidential.

Item 366(g) and (h) of Part I of the Attorney General's data request seeks the charge for Answerlink and its monthly cost. Answerlink is an unregulated and competitive service. Disclosure of this information would allow competitors to determine the contribution margin from the service as well as provide them information on the marketability of the service to the detriment of Cincinnati Bell. Therefore, disclosure of this information is likely to cause Cincinnati Bell competitive injury, and the information should be protected as confidential.

Item 44 of Part I of the Attorney General's data request asks for a copy of the separation offers made to Cincinnati Bell Vice Presidents and Senior Vice Presidents. These contracts contain private, individualized severance amounts as well as other options

negotiated between the officer and Cincinnati Bell. Cincinnati Bell has requested that the severance pay amounts as well as the other options be protected from disclosure. This information is of a personal nature and its disclosure would constitute an unwarranted invasion of privacy. Therefore, protection should be granted on the basis of KRS 61.878(1)(a).

Item 71 of Part II of the Attorney General's data request asks for a copy of any studies detailing the impact of advertising. Disclosure of this information would provide competitors with market data involving public awareness, purchase likelihood, pricing preference and overall marketing communication advertising awareness. Competitors could use this information in marketing their own services and, therefore, disclosure of the information is likely to cause Cincinnati Bell competitive injury and the information should be protected as confidential.

The attachment to Cincinnati Bell's responses to Item 159 of Part I of the Attorney General's data request and Item 14 of AT&T's data request contains market share information for Cincinnati Bell's toll revenue and local exchange services. The minutes and number of messages on this report would allow competitors of Cincinnati Bell to compile accurately Cincinnati Bell's market share and level of market penetration Cincinnati Bell currently possesses. Therefore, disclosure of this information is likely to cause Cincinnati Bell competitive injury, and the information should be protected as confidential.



Item 14 of the second set of the Commission's data requests seeks a listing of those to whom "access ability" is distributed. The list of names includes the identities of persons who are not employed by Cincinnati Bell and disclosure of those identities would provide a valuable contact list to Cincinnati Bell's competitors. Thus, disclosure would cause Cincinnati Bell competitive injury, and the names of the individuals included on the list who are not employees of Cincinnati Bell should be protected as confidential.

As additional grounds for protection of the information, Cincinnati Bell maintains that the information qualifies as trade secrets and is exempt from disclosure by KRS 61.878(1)(1). KRS 365.880 through 365.990 comprise the Uniform Trade Secrets Act which has been adopted in this state. That Act specifically prohibits the unauthorized disclosure of trade secrets as they are defined by the Act. A recent opinion of the Attorney General concludes that prohibition must be read in conjunction with the exemption provisions of KRS 61.878(1)(1). 94-ORD-97, pp 4-80 through 4-83.

As defined by KRS 365.880(4), a "trade secret" is information maintained as secret which "derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by persons who can obtain economic value from its disclosure or use." The definition is similar to the test used to determine whether or not information has competitive value. Therefore, information which did not

qualify for protection under KRS 61.878(1)(c)1 would not qualify for protection under KRS 61.878(1)(1).

In addition to requesting confidential protection of the information filed in response to the data requests enumerated above, Cincinnati Bell has objected to furnishing information in response to Item 158 of Part I of the Attorney General's data request on the grounds that the information has no relevance to these proceedings and that release of this information would cause Cincinnati Bell substantial competitive injury. Further, Cincinnati Bell has refused to furnish information requested in Item 83 of Part II of the Attorney General's request and Item 365 of Part I of the Attorney General's data request on the grounds that disclosure of this information would also cause Cincinnati Bell competitive injury. No ruling should be made on Cincinnati Bell's refusal to furnish the information unless the matter is raised upon proper motion by the parties to this proceeding.

This Commission being otherwise sufficiently advised,

IT IS ORDERED that:

1. The information furnished in response to Item 4(b)(ii), Item 65, Item 264(c), Item 270(i), Item 282, Item 293(b), Item 349, Item 366(g) and (h), Item 44, of Part I of the Attorney General's data request; Item 71 of Part II of the Attorney General's data request, the attachment to Item 159 of Part I of the Attorney General's data request, and the attachment to Item 14 of AT&T's data request, and Item 14 of the 2nd set of the Commission's data request, which Cincinnati 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 protect as confidential the information filed in response to Item 4(c)(i), of Part I of the Attorney General's data request, be and is hereby denied.

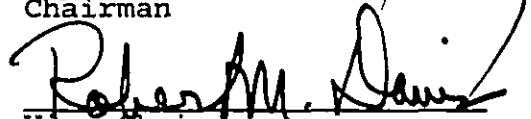
3. The petition to protect as confidential the information contained in Item 281 of Part I of the Attorney General's data request shall be granted confidential protection only to the extent of the identification of the legal matters and the description of work performed.

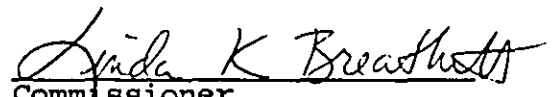
4. The information which has been denied confidential protection shall be held and retained by this Commission as confidential and shall not be open for public inspection for a period of 20 days from the date of this Order, at the expiration of which it shall be placed in the public record.

Done at Frankfort, Kentucky, this 23rd day of May, 1995.


PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

  
Executive Director