COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CINCINNATI BELL TELEPHONE COMPANY S PETITION FOR CONFIDENTIAL TREATMENT OF CERTAIN TERMS AND CONDITIONS OF AN INDIVIDUAL CUSTOMER CONTRACT, AND COST DATA IN SUPPORT THEREOF	)))))	CASE NO. 2002-00004

O R D E R

On April 22, 2002, Cincinnati Bell Telephone Company ("CBT") filed a petition for rehearing of the Commission's Order dated April 1, 2002, denying confidential protection for that portion of a special contract identifying the customer with whom the contract was executed. Under the terms of the contract, CBT agreed to provide the customer a service referred to in its filed tariffs as "Integrated Advantage Service." Subscribers to this service receive a high capacity line that allows them to use the line for several different services simultaneously. Similar services are offered in CBT's operating territory by competing local exchange carriers.

The petition for confidential protection was filed by CBT on December 20, 2001. The petition contends that the information qualified for protection under the provision of the Kentucky Open Records Act that exempts from public disclosure information "generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records." KRS 61.878(1)(c). After reviewing the information, the Commission found that the identity of the customer was not confidential since the customer was free to

disseminate the information to anyone and that, in any event, the identity of the customer would be of little value to CBT's competitors. The Commission's Order denying confidential protection was made on the basis of those findings and followed the standards established by the Supreme Court in *Southeastern United Medigroup, Inc. vs. Hughes,* 952 S.W. 2d 195 (1997). There the Court held, at page 199, that information is entitled to protection if it is established that it is "confidential or proprietary and that disclosure would permit an unfair commercial advantage to competitors of the entity that disclosed the information."

In its petition for rehearing CBT again contends that the information is exempt from public disclosure under KRS 61.878(1)(c). But in addition, CBT also contends that the information is entitled to protection under KRS 61.878(1)(k). That paragraph exempts from public disclosure [a]ll public records or information the disclosure of which is prohibited by federal law or regulation.

Information Having Competitive Value

While CBT agrees that the test established in the *Southeastern* case for determining whether information qualifies for protection under KRS 61.878(1)(c) is controlling, CBT disagrees with the Commission's finding that the information would have little competitive value to CBT's competitors. In its petition for rehearing, CBT argues instead that knowledge of the identity of its customers subscribing to the service would be useful to its competitors in developing marketing strategies for their services that compete with CBT's Integrated Advantage Service. As an example, CBT states that the information could be used to create a list of potential customers for the competing services they offer. These customers could then be targeted by the

competitors as part of a customer-specific marketing campaign. The Commission, after considering the facts and the nature of the service, disagrees with CBT's analysis.

The decision in the *Southeastern* case sets forth a two-pronged test for determining whether information is entitled to protection under KRS 61.878(1)(c). First, it must be established that the information is confidential. That is simply not the case here. The customer whose identity CBT seeks to withhold is under no obligation not to disclose its relationship with CBT. Furthermore, as noted in the original Order, the fact that CBT was aware that Intermedia, a CBT competitor, had offered a similar service to the customer indicates a willingness on the part of the customer to reveal its identity if that would serve the customer's purpose. Thus, as noted in the Order, the allegation in the original petition that the information is not known outside of CBT is inaccurate, and the information does not satisfy the first prong of the test.

But even if the information were not known outside of CBT, it would still fail to qualify for protection under the second prong of the test. Under that prong, it must be demonstrated that the information has more than trivial value to CBT's competitors. However, after analyzing the service in terms of its potential market, the Commission concluded that the information lacked substantial value. That conclusion was based on the Commission's finding that the service offered benefits to subscribers that would be appealing to almost any small business. Given the large size of the potential market for the service, the Commission reasoned that the identity of a particular small business using the service would have no significant value. After reexamining the facts for the purpose of the rehearing petition, the Commission reaches the same conclusion and

reaffirms its decision that the information does not qualify for exemption under KRS 61.878(1)(c).

Information Protected From Disclosure Under Federal Law

As an alternative ground for protection, CBT contends that the information qualifies as Customer Proprietary Network Information ("CPNI") under Section 222 of the 1996 Telecommunications Act. 47 USCA Section 222. This section was enacted by Congress to protect the privacy rights of telecommunication customers by restricting their carriers use or disclosure of information concerning their customers usage of the services they purchase. Specifically, subsection (c) provides in part:

> (1) Privacy requirements for telecommunications carriers
> Except as required by law or *with the approval of the customer*, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service, shall only use, *disclose,* or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunication service from which such information is derived, or (B) services necessary to, or used in, the provisions of such telecommunications service, including the publishing of directories.

47 U.S.C. 222 (Emphasis added).

CPNI includes service offerings to which a customer subscribes, and CBT contends that it is prohibited by *Section 222* from disclosing the identity of a customer receiving Integrated Advantage Service, unless the customer has given CBT approval to disclose the information.

Though CBT in making this argument asserts the privacy rights of its customer, it does not allege that the customer has either given or denied express approval to disclose the information. Therefore, assuming that the identity of a customer qualifies for protection as CPNI under *Section 222*, the question becomes: what constitutes the

approval sufficient to allow a carrier to disclose the information? The issue was addressed by the Federal Court of Appeals for the Tenth Circuit in *U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224 (C.A. 10, 1999). That case concerned a Federal Communications Commission ("FCC") order adopting a regulation that was promulgated to clarify the provisions of Section 222. In particular, *U.S. West* challenged the provisions of 47 CFR 64.2007, contending that they violated its free speech rights under the First Amendment.

47 CFR 64.2007 requires telecommunication carriers to obtain express prior approval from a customer before using the customer's CPNI for marketing purposes. This method was referred to in the decision as the "opt-in" approach. Given the ambiguous wording of the statute, the FCC acknowledged in *U.S. West,* 182 F.3d at 1230, that it could have chosen other approaches, including an "opt-out" approach that would have inferred approval "from the customer-carrier relationship unless the customer specifically requested that his or her CPNI be restricted." U.S. West objected to the opt-in approach and on appeal contended that the FCC regulation unreasonably restricted its free speech rights under the First Amendment. After a review of the regulation, the court agreed with U.S. West. Citing the Supreme Court decision in *Central Hudson Gas & Electric Corp. vs. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L. Ed2d 341 (1980), the court found that the regulation was more restrictive than necessary to protect the customer s privacy interests and vacated the Order.

Although the decision in *U. S. West* did not advocate any particular method for obtaining customer approval, the decision makes it clear that the "*approval of the*

customer" referred to in Section 222(c)(1) of the Telecommunications Act should not be construed to mean the customer's *prior express* approval. Therefore, CBT's position that the customer's identity is protected under federal law because the customer has not authorized its disclosure is contrary to the decision in *U.S. West.* Thus, the information is not protected under 61.878(1)(k).[1]

Conclusion

The petition for rehearing filed by CBT does not establish that disclosure of the identity of the customer to whom it has contracted to provide Integrated Advantage Service is likely to cause CBT competitive injury. Nor does it establish that the information is protected from disclosure under federal law. Therefore, the petition should be denied and the Commission's Order entered April 1, 2002 denying confidential protection for the information should be reaffirmed.

This Commission, being otherwise sufficiently advised, HEREBY ORDERS that:

1. The petition for rehearing of the Order entered April 1, 2002 to protect as confidential the identity of a customer with whom CBT executed a special contract for Integrated Advantage Service is denied.

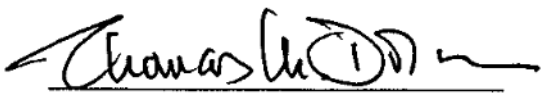
2. The information sought to be protected shall be held and retained by the Commission as confidential for an additional 20 days, at the expiration of which it shall be placed in the public record and be open for public inspection.

[1] Because we find that *U.S. West* disposes of CBT's arguments in regard to nondisclosure by carriers, we need not reach the issue of whether the federal statutes and regulations purport to regulate disclosure by governmental bodies such as this Commission.

Done at Frankfort, Kentucky, this 13th day of May, 2002.

By the Commission

ATTEST:



Executive Director