

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

O R D E R

On June 3, 2002, Cincinnati Bell Telephone Company (CBT) petitioned for reconsideration of the Commission s Orders denying confidential protection of the identity of a customer with whom CBT had executed a special contract. The Orders arose out of a petition filed by CBT on December 20, 2001, claiming that disclosure of the customer s identity would cause CBT competitive injury. CBT sought to protect the customer s identity under KRS 278.878(1)(c), which protects information as confidential if public disclosure would provide competitors of the party possessing the information a substantial unfair competitive advantage. *Southeastern United Group, Inc. v. Hughes*, 952 S.W. 2d 195 (Ky., 1997). On April 1, 2002, the Commission entered an Order denying the petition based on its finding that the information did not have substantial competitive value.

On April 22, 2002, CBT petitioned for rehearing of the Commission s Order, renewing its original claim that disclosure of the information would cause CBT competitive injury. In addition, CBT also claimed that the information was entitled to protection under KRS 61.878(1)(k), which protects information whose disclosure is prohibited under federal law. In support of the second claim, CBT contended that the

identity of its customer qualified as customer proprietary network information (CPNI), whose disclosure is prohibited by Section 222 of the 1996 Telecommunications Act (Telecom Act). 47 USCA § 222. On May 13, 2002, the Commission reaffirmed its original decision that the information did not have substantial competitive value and was not entitled to protection under KRS 61.878(c)(1). The Commission further determined that the information was not entitled to protection under § 222 of the Telecom Act for the reasons set forth in *U.S. West Inc. v. F.C.C.*, 182 F.3d 1224 (C.A. 10, 1999), and, therefore, denied protection under KRS 61.878(1)(k).

On June 3, 2002, CBT petitioned the Commission to reconsider its May 13, 2002 Order denying protection under KRS 61.878(1)(k). As an additional ground, CBT also contended that neither federal nor state law requires disclosure of the information.

The Information Is Not Protected Under Section 222 of the Telecom Act.

Section 222 of the Telecom Act restricts the use of CPNI by requiring customer approval for its use. Prior to the 10th Circuit's decision in *U.S. West*, cited above, the FCC promulgated 47 C.F.R. 64, which adopted an opt-in approach for obtaining customer approval. Under this approach, carriers were required to obtain customer approval before disclosing CPNI. This is the same method that CBT utilizes, and relies upon to support its position that federal law protects its customer's identity. In *U.S. West*, however, the 10th Circuit determined that the FCC order adopting the regulation unreasonably restricted free speech and vacated the portions of the regulation that required express prior approval before a carrier could use or disclose CPNI. The decision did not, however, vacate all provisions of the regulation.

On September 7, 2001, following the 10th Circuit Court's decision, the FCC issued an order clarifying its position on its CPNI rules as they affect customer consent. *Implementation of the Telecommunications Act of 1996 etc.*, CC Docket No. 96-115 and CC Docket no. 96-149. In support of its petition, CBT contends that the FCC's order makes it clear that the opt-in approach remains viable for determining customer approval. Since the customer whose identity CBT seeks to protect has not given express approval, CBT contends federal law protects the information.

CBT's reliance upon the FCC order is misplaced. The order is not intended to, and does not, validate the use of the opt-in approach. Instead, the FCC, in commenting upon the effect of the 10th Circuit decision, made the following observation in paragraph 7 of its order:

Accordingly, we conclude that that the court sought to eliminate only the specific section of our rules before it, and that its vacatur order applied only to Section 64.2007(c), the only provision inextricably tied to the opt-in mechanism. In reaching this decision, we note that Section 64.2007 contains customer notification requirements which are needed regardless of whether an opt-in or opt-out regime is in effect.

The paragraph goes on to reaffirm the remaining provisions of 47 CFR 64.2007, stating:

Because these notification requirements are general in nature, and necessary without regard to the particular method of customer approval ultimately adopted, we consider it appropriate that they remain in effect notwithstanding the court's vacatur of the specific method of customer approval previously adopted.

Thus, the fact that its customer has not provided CBT prior approval to disclose or use the CPNI that CBT has received, does not protect the information from disclosure under § 222 of the Telecom Act. Therefore, the Commission reaffirms its earlier

conclusion that the customer's identity is not protected by federal law and thereby exempt from disclosure under KRS 61.878(k)(1).

Kentucky Law Requires Disclosure of the Information.

CBT contends that neither Kentucky nor federal law requires disclosure of the information. While we do not address the federal law on this point, it is clear that Kentucky law does require disclosure. KRS 61.872(1) requires information filed with the Commission to be available for public inspection unless specifically exempted by statute. The exemptions from this requirement are provided in KRS 61.878(1). CBT has failed to show whether any of the exemptions listed in that subsection are applicable to the information it seeks to protect. Therefore, the Commission is required to maintain the information as a part of the public record available for public inspection.

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

1. The petition for reconsideration of the Orders entered on April 1, 2002 and May 13, 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.

Done at Frankfort, Kentucky, this 14th day of June, 2002.

By the Commission

ATTEST:


Executive Director