

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)	CASE NO. 2002-00004
INDIVIDUAL CUSTOMER CONTRACT, AND COST)	
DATA IN SUPPORT THEREOF)	

O R D E R

On July 9, 2002, Cincinnati Bell Telephone Company (CBT) filed three petitions to protect as confidential the identities of the customers on three special contracts.¹ On July 15 and July 22, 2002, the Executive Director issued three letter rulings denying the petitions, citing the Commission s May 13, 2002 Order as authority for the decisions. The rulings also advised CBT that the information would be protected from public disclosure for 20 days in order to allow CBT an opportunity to appeal the decisions to the Commission. Upon CBT s motion, the petitions were consolidated into this proceeding on September 4, 2002.

This proceeding was initiated on December 26, 2001, when CBT petitioned the Commission to protect as confidential the identity of the customer with whom it had entered into a special contract on September 27, 2001. In support of its petition, CBT contended that the information had competitive value and was entitled to protection under KRS 61.878(1)(c)(1). That section protects information generally recognized

¹ The petition also sought protection for cost information filed in support of the contract. That request was granted and is not an issue here.

as confidential or proprietary, which, if openly disclosed, *would permit an unfair commercial advantage to competitors of the entity that disclosed the records.*

[Emphasis added] The Commission, however, found that knowledge of the information would not provide CBT's competitors an unfair advantage and, on April 1, 2002, the Commission denied the petition.

Subsequently, CBT petitioned for reconsideration, renewing its claim that the information had competitive value, and further claiming that the information was protected under KRS 68.878(1)(k). That section exempts from public disclosure public records or information the disclosure of which is prohibited by federal law or regulation. CBT contended that the information qualified as customer proprietary network information (CPNI), whose disclosure without customer approval was prohibited by Section 222 of the 1996 Telecommunications Act (Telecom Act).² In this case, CBT did not have the customer's express approval to release his identity and, therefore, CBT maintained that the information was protected under the Telecom Act.

On May 13, 2002, the Commission denied CBT's petition for reconsideration. With respect to CBT's claim of confidentiality under KRS 61.878(1)(c)1, the Commission reaffirmed its earlier finding that CBT had not established that the information was confidential and, even if it was, that CBT had not demonstrated that disclosure would cause competitive injury. With respect to KRS 61.878(1)(k) and Section 222 of the Telecom Act, the Commission concluded that express approval was not required by Section 222 for CBT to use or disclose the information and that the information was not

² 47 U.S.C.A. § 222(c)(1).

protected under the federal statute despite state law providing for public access, citing as authority the decision in *U.S. West v. F.C.C.*, 182 F. 3d 1224 (C.A. 10th Cir., 1999).

On June 3, 2002, CBT again petitioned for reconsideration. In addition to the grounds relied upon in the original petition and the first petition for reconsideration, CBT contended that neither Kentucky law nor federal law required disclosure of the information. The petition was denied on June 14, 2002. In its Order, the Commission reaffirmed its previous rulings on the grounds relied upon in the original petition and the first petition for reconsideration. Concerning the contention that neither federal nor state law required publication, the Commission held that KRS 61.872(1) requires all information filed with a governmental agency to be publicly disclosed, unless specifically exempted. Since CBT had not established that the customer's identity qualified for exemption under that section, the Commission ruled that the information was not entitled to protection.

CBT did not request rehearing of the June 14, 2002 Order, nor did it appeal from the Order to the Franklin Circuit Court. Nevertheless, despite the adverse ruling, CBT filed the three petitions on July 9, 2002, seeking the same relief that it had sought when it filed the petition upon which the June 14, 2002 Order was issued.

On August 5, 2002, CBT filed a motion for an extension of 10 days to file its appeals from the letter rulings issued by the Executive Director on July 15 and 22, 2002. The motion further requested that the three petitions be consolidated into this proceeding since they raised substantially the same issues. On August 15, 2002, CBT petitioned the Commission requesting that it reconsider its decision in this case and renewing its request to consolidate the three petitions filed on July 9, 2002 into this

proceeding. In support of its petition for reconsideration, CBT cited a recent order by the Federal Communications Commission (FCC), which was issued on July 25, 2002.³ CBT contends that the FCC order brings the customers identities within the exemption provisions of KRS 61.878(1)(k).

On September 4, 2002, based on the claim that new law justified reviewing our previous rulings, we granted the motion to consolidate the petitions into this proceeding and to reconsider the denial of confidential protection of the customers identities in their special contracts with CBT, except for the contract for which final determination was made on June 14, 2002.

CBT contends that its special contract customers identities are entitled to protection under KRS 61.878(1)(k), and that neither Kentucky nor federal law requires the information to be disclosed. CBT contends that each customer s identity is CPNI as defined by Section 222 of the Telecom Act (Section 222),⁴ and that Section 222, and by extension KRS 61.878(1)(k), therefore, prohibits this Commission from publicly disclosing the information. On October 4, 2002, in response to the Commission s request for information pertaining to the issue, CBT withdrew its request for confidential protection on the basis of competitive injury pursuant to KRS 61.878(1)(c). CBT has,

³ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers Use of Customer Proprietary Network Information; Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; 2000 Biennial Regulatory Review of Policies Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Dockets Nos. 96-115, 96-149 and 00-257, Third Report and Order and Third Further Notice of Proposed Rulemaking, FCC 02-214 (rel. July 25, 2002) (CPNI Third Report and Order).

⁴ 47 U.S.C.A. § 222.

therefore, presented no additional evidence that Kentucky law permits us to withhold the information from the public. Therefore, the ruling on those issues stand, and they are no longer before the Commission. The only issue remaining is whether the information should be withheld from the public pursuant to KRS 61.878(1)(k) because it is information whose disclosure is prohibited by federal law. We find that it is not.

We begin our analysis with KRS 61.871, which states the General Assembly's explicit intention to provide for free and open examination of public records. Accordingly, the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed.⁵ We must, therefore, decline to accord a broad reading to the exemption provided by KRS 61.878(1)(k), which denies public access if prohibited by federal law or regulation. The federal law at issue -- Section 222(c)(1) -- does not contain an absolute prohibition against disclosure. It provides for two situations in which disclosure by a carrier is lawful: when required by law or with the approval of the customer. Here, disclosure is required by law, as we have found in our previous orders.

The lack of federal prohibition is sufficient to support our denial of CBT's petition. However, we also note that it is highly questionable whether Section 222 of the Telecom Act is relevant at all to Kentucky's Open Records Act.

CPNI is defined by Section 222 to include 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

⁵ KRS 61.871.

carrier-customer relationship.⁶ The FCC has described CPNI as including personal information such as the phone numbers called by a customer, the length of phone calls, and services purchased by a consumer, such as call waiting.⁷ No restriction on CPNI disclosure by carriers is, however, to be construed to require nondisclosure of the names of customers who are, of course, listed in telephone directories.⁸ We do not have before us the issue of whether a customer's personal calling patterns should be disclosed. And, though a special contract links the name of a customer to a service he purchases, it is highly unlikely that this information, without more, infringes upon a customer's privacy. If it did, we would apply the Kentucky law exemption for clearly unwarranted invasion of personal privacy under KRS 61.878(1)(a). CBT does not even argue that this exemption should apply. Such logic would make publication of a telephone directory unlawful, in that it is obvious that each customer listed buys basic telephone services; but Section 222 clearly states that it does not apply to lists of names.

Even if it is assumed that a customer's identity in a special contract is CPNI, Section 222 does not purport to preempt state open records laws. Both the statute and the FCC regulation, 47 CFR 64.2007, at Section (a), and 47 U.S.C.A. § 222, address the use of CPNI by *carriers* for *marketing* purposes. This restriction is consistent with the general purpose of the Telecom Act, which is to establish and develop competitive

⁶ 47 U.S.C.A. § 222(h)(1)(A).

⁷ CPNI Third Report and Order, FCC 02-214, ¶ 7

⁸ 47 U.S.C.A. § 222.

markets for telecommunication services.⁹ Without this restriction incumbent local exchange carriers would be able to target potential customers for new services using customer usage information not available to their competitors.

Finally, we reject CBT's argument that, because no public purpose is served by disclosure of the information, we should refuse the public access to it. Even if CBT were correct in its assumption that the public interest is not served by disclosure of the information, there simply is no exemption in the Open Records Act for information which is allegedly useless to the public. We construe the Open Records Act as the General Assembly intended. Records in the possession of this agency belong to the public and are to be accessible to that public unless specifically exempted from disclosure requirements. The exemption provided by KRS 61.876(1)(k) does not apply.

IT IS THEREFORE ORDERED that:

1. The petitions to protect from public inspection the identities of the customers with whom CBT executed the contracts on September 27, 2001, January 28, 2002, and May 8, 2002 are denied.

2. The information at issue shall be held and retained by the Commission as confidential, and shall not be open for public inspection for a period of 30 days from the date of this Order, at the expiration of which it shall be placed in the public record.

⁹ 47 U.S.C.A § 252 *et seq.*

Done at Frankfort, Kentucky, this 15th day of November, 2002.

By the Commission

ATTEST:

Deputy W^m H. Fowler
Executive Director