

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

O R D E R

This matter arising upon two petitions of Cincinnati Bell Telephone Company ("Cincinnati Bell") filed October 24, 1994, and upon the petition of Bell Communication Research, Inc. ("Bellcore"), filed March 31, 1995, pursuant to 807 KAR 5:001, Section 7, for confidential protection of the cost data for Touch-Tone Service and Call Waiting Service provided in Exhibit 30 to Cincinnati Bell's application, and for confidential protection of the market information contained in Schedules E-4.1 and E-4.2 of Cincinnati Bell's application, on the grounds that disclosure of the information is likely to cause Cincinnati Bell and Bellcore competitive injury, that the information is generally recognized as confidential or proprietary, and that the information is a trade secret specifically exempted from disclosure by statute, and it appearing to this Commission as follows:

In this proceeding Cincinnati Bell has applied to the Commission for a rate increase. In support of its application, Cincinnati Bell has furnished cost data and market information relating to the various services it provides. By its petitions,

Cincinnati Bell seeks to protect the confidentiality of the information and is joined by Bellcore in its efforts.

The cost information sought to be protected is provided in Exhibit 30 to Cincinnati Bell's application and relates to its TouchTone Service and Call Waiting Service. The information was obtained by Cincinnati Bell under a license agreement from Bellcore and both Bellcore and Cincinnati Bell have filed petitions to protect this information from public disclosure.

The market information sought to be protected is provided in Schedules E-4.1 and E-4.2 of Cincinnati Bell's application. In support of the petition to protect the market information, Cincinnati Bell has filed the affidavit of Linda D. Frank, Director of Marketing, which it likewise seeks to protect on the grounds that it provides a novel assessment of the information in the schedules which competitors could use to Cincinnati Bell's detriment.

KRS 61.872(1) requires information filed with a public agency to be available for public inspection unless specifically exempted by statute. Exemptions from this requirement are provided in subsection (1) of KRS 61.878. That subsection exempts several categories of information. Any person claiming an exemption for information filed with the Commission under that subsection may petition the Commission to protect such information as confidential by following the procedures in 807 KAR 5:001, Section 7. When originally promulgated, the regulation set forth certain criteria for determining whether information qualified for protection under the statute. In 1991 the regulation was amended and the criteria

were removed. Under the current provisions of the regulations, persons seeking to protect information as confidential need only establish that the information filed with the Commission is exempted from disclosure by the provisions of the statute.

Information exempted by KRS 61.878(1)(c)1 is 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. Both Cincinnati Bell and Bellcore rely upon this exemption in seeking to protect the cost information relating to TouchTone Service and Call Waiting Service provided in Exhibit 30 to Cincinnati Bell's application.

Cincinnati Bell's basis for claiming protection under this exemption is that the information was obtained from Bellcore under an agreement which imposed upon Cincinnati Bell the duty to protect the information as confidential. While the petition and the supporting affidavit allege that disclosure of the information will result in competitive injury to both Cincinnati Bell and Bellcore, neither document establishes who will benefit from the information or how disclosure will detrimentally effect Cincinnati Bell or Bellcore. Therefore, Cincinnati Bell's petition does not establish a right to protect the information.

While Bellcore in its petition does not maintain that disclosure of the information is likely to cause Cincinnati Bell competitive injury, it does maintain that such disclosure would cause it to sustain competitive injury. At risk is a program developed by Bellcore known as its Switching Cost Information System, or SCIS. The SCIS program enables the user to calculate the cost of a variety of different switching services used in or by telephone call routing networks and is based on proprietary cost and engineering data provided by switch vendors. The program contains detailed information from six network switch vendors on the cost, technological capabilities, and planned future upgrades of their switching systems. Mathematical formulas developed by Bellcore convert this information into specific cost profiles based on specific network characteristics and subscriber usage assumptions chosen by the user of the SCIS program. The program was developed and has been maintained at a cost to date in excess of \$25 million. Bellcore licenses the program's use to Regional Bell Operating Companies and other users from whom it derives income of approximately \$6.8 million per year. Public disclosure of the information sought to be protected would enable knowledgeable persons to decode the formulas used in this program and appropriate them for their own use. The value of the program thus lies in the secret nature of the formulas and public disclosure would severely depreciate their value. Furthermore, disclosure of the information provided by the six switch vendors, which was provided to Bellcore in confidence as proprietary

information, would discourage such vendors from providing similar information in the future. Therefore, disclosure of the information is likely to cause Bellcore competitive injury and the information is entitled to protection under KRS 61.878(1)(c)1.

In its petition, Bellcore also maintains that the information is entitled to protection under KRS 61.878(1)(c)2.c. That exemption applies to information filed with a public agency in conjunction with the regulation of a commercial enterprise when such information is generally recognized as confidential or proprietary. While the statute does not require that such information have competitive value, it does require that the information be of a type or nature that is customarily protected by its custodian. The petition does not establish that the cost data sought to be protected falls within this description and is, therefore, not entitled to protection under the provisions of this exemption.

The last basis claimed for protecting the cost data is that the information is protected by statute, specifically KRS 365.880 through 365.894. Those sections comprise this state's enactment of the Uniform Trade Secrets Act which establishes equitable and legal remedies for the unauthorized disclosure of trade secrets. Bellcore maintains that this Act must be read in tandem with the provisions of KRS 61.878(1)(1), which exempts information "made confidential by enactment of the General Assembly." In a recent opinion the Attorney General concluded that the Uniform Trade Secrets Act is intended to prohibit disclosure of trade secrets

and, therefore, trade secrets fall within the purview of KRS 61.878(1)(1). 94-ORD-97, pp 4-80 through 4-83.

Trade secrets are defined by KRS 365.880(4) as:

"Trade secret" means information, including a formula, pattern, compilation, program, data, device, method, technique, or process that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Because its elements are confidential, the SCIS Program has independent economic value not only to Bellcore, its developer, but to other companies who can use it as an analytical tool to improve their operation. The program, therefore, qualifies as a "trade secret" as that term is defined by the statute and is exempt from public disclosure when filed with the Commission by KRS 61.878(1)(1).

Cincinnati Bell has also petitioned to protect the market information in Schedules E-4.1 and E-4.2 and the affidavit of Linda D. Frank, its Director of Marketing. In recent years there have been many changes in the telecommunications industry which have made competitive services available to local access consumers. For

example, the petition identifies Metropolitan Fiber Systems and American Communication Systems, Inc. of Louisville as two access providers who have applied to offer telecommunications to consumers in Cincinnati Bell's operating territory. Additionally, cable television providers have likewise expressed an interest and an intent to provide local telecommunications in Cincinnati Bell's area. Therefore, proprietary information that would assist existing and potential competitors in their competitive efforts against Cincinnati Bell qualifies for protection under KRS 61.878(1)(c).

Schedules E-4.1 and E-4.2 provide information relating to the size of the market served by Cincinnati Bell, the demand for various services offered by Cincinnati Bell, the identity of specific customers served under individual contracts with Cincinnati Bell, and the primary strategies of Cincinnati Bell. Competitors could use this information to devise more effective competing market strategies to the detriment of Cincinnati Bell and, therefore, such information should be protected as confidential.

With the exception of the identity of certain customers, the affidavit filed in support of the petition does not contain any information which cannot be obtained from the unedited portions of Schedules E-4.1 and E-4.2. Although the petition alleges that the information is used in a novel way by the affiant, a review of the affidavit does not support the allegation. Therefore, with the exception of the customers identified in the affidavit, the

affidavit should not be protected as confidential.

This Commission being otherwise sufficiently advised,

IT IS ORDERED that:

1. The cost data for TouchTone Service and Call Waiting Service, which Cincinnati Bell and Bellcore have 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 marketing information in Schedules E-4.1 and E-4.2, 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.

3. Except as hereinafter provided, the petition to protect as confidential the affidavit of Linda D. Frank is hereby denied.

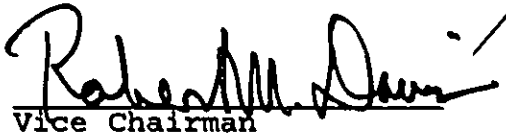
4. The identity of specific customers contained in the affidavit of Linda D. Frank filed in support of Cincinnati Bell's petition to protect as confidential the market information contained in Schedules E-4.1 and E-4.2 shall be held and retained by this Commission as confidential and shall not be open for public inspection.

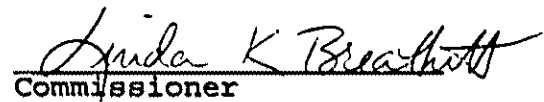
5. Cincinnati Bell shall, within 20 days from the date of this Order, file an edited copy of the affidavit of Linda D. Frank obscuring only the names of the customers identified therein.

Done at Frankfort, Kentucky, this 17th day of May, 1995.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director