

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of

AN INQUIRY INTO THE STATE)
UNIVERSAL SERVICE FUND) CASE NO
2016-00059

**MOTION FOR CONFIDENTIAL TREATMENT
AND FOR EXTENSION OF TIME**

Birch Communications of Kentucky, LLC (“Birch” or “Company”) through counsel, for its Motion for Confidential Treatment filed pursuant to 807 KAR 5:001, Section 7 and KRS 61.878(1), requests that the Public Service Commission (“Commission”) grant confidential protection for its Exhibit A to the Response to Request No. 1 of the Company’s Responses to the Kentucky Public Service Commission Request for Information dated April 6, 2016, consisting of copies of KUSF forms filed with the Commission. Birch also requests an extension of time allowing the filing of these responses on May 6, 2016.

GROUND FOR CONFIDENTIAL PROTECTION

The Kentucky Open Records Act exempts from disclosure certain commercial information, including records 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. *See* KRS 61.878(1)(c). CMRS is perhaps the most competitive segment of the modern telecommunications business. Potential customers often have five or more carriers to choose from. This reality is acknowledged by Kentucky law, which states the provision of CMRS in Kentucky is market-based and not

subject to regulation. *See* KRS 278.54611(1). As the market is, without question, highly competitive, Birch's disclosures of non-public discussions regarding investigations and/or actions relating to participation in the Lifeline program are highly confidential trade secret information subject to protection under the Kentucky Open Records Act.

The Commission has taken the position that the statute and the regulation require the party requesting confidentiality to demonstrate actual competition and the likelihood of competitive injury if the information is disclosed. That requirement is met here. First, the Company competes not only against other Lifeline service providers in Kentucky but also Commercial Mobile Radio Service ("CMRS") providers like AT&T Wireless, Verizon Wireless, and Sprint. Further, in some respects, the Company competes with voice and unregulated broadband offerings of cable providers and wireline providers like BellSouth Telecommunications and Windstream. Moreover, the Commission has long recognized the highly competitive nature of CMRS as a reason to provide confidential treatment to information submitted to the Commission by CMRS providers. *See, e.g., In the Matter of: ACC of Kentucky LLC's Petition for Confidential Protection*, Case No. 99-184, (January 24, 2000) (confidential treatment for intrastate gross revenue reports). Obviously, the confidential and proprietary business information for which confidential protection is sought in this case is precisely the sort of information meant to be protected by KRS 61.878(1)(c)1.

Second, consumers choose providers based on a variety of factors, including their subjective impression about the service offerings, service quality and operations of carriers. Thus, public disclosure of proprietary information could cause competitive

injury to the Company, particularly if the information were to be used selectively by a competitor.

In *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766 (Ky. 1995), the Kentucky Supreme Court held that financial information submitted by General Electric Company with its application for investment tax credits was not subject to disclosure simply because it had been filed with a state agency. The Court applied the plain meaning rule to the statute, reasoning that “[i]t does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is ‘generally recognized as confidential or proprietary.’” *Id.* at 768.

The same analysis applies here. Birch is disclosing reports that contain line count and reimbursement request information related to its participation in the Lifeline program and its operations. In assembling the responses, internal regulatory personnel at Birch discovered errors related to improper data entry and reimbursement calculations during the relevant period. Birch has reconciled the errors and believes it has underreported the amount of KUSF reimbursement due the Company. However, a significant number of monthly forms include errors, which Birch will correct and file as amended returns. Meanwhile, all of this information is capable of misinterpretation and deliberate misuse. A competitor of the Company, whether an incumbent local carrier, a CLEC, or another wireless carrier, could use this information to disparage Birch or attempt to paint the Company’s operations in a false light. This could include carriers that may or may not be disclosing information comparable to what the Company is providing to the Commission.

CONCLUSION

Birch is entitled to confidential protection for the information at issue and requests that the Commission confirm that its Exhibit A to the Response to Request No. 1 of the Company's Responses to the Kentucky Public Service Commission Request for Information dated April 6, 2016, marked "CONFIDENTIAL," will not be disclosed. If the Commission disagrees, however, it must hold an evidentiary hearing (a) to protect the due process rights of the Company and (b) to supply the Commission with a complete record to enable it to reach a decision with regard to this matter. *Utility Regulatory Commission v. Kentucky Water Service Company, Inc.*, 642 S.W.2d 591, 592-94 (Ky. Ct. App. 1982).

WHEREFORE, Birch respectfully requests (1) that the Commission grant confidential protection for the material identified herein or, in the alternative, schedule an evidentiary hearing on all factual issues; and (2) grant an extension of time for filing the responses.

Respectfully submitted,



Douglas F. Brent
STOLL KEENON OGDEN PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202-2828
Tel.: (502) 568-5734
Fax: (502) 568-0934
douglas.brent@skofirm.com

*Counsel for Birch Communications of
Kentucky*

May 6, 2016