

FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

August 1, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF APPEALS (CALDWELL) *awc*
DIVISION OF COMMUNICATIONS (CORDIANO) *cc* *DES*

RE: DOCKET NO. 960356-TL - REQUEST FOR CONFIDENTIAL
CLASSIFICATION OF PERIODIC REPORT SCHEDULES 1, 8, AND 20
BY GTE FLORIDA INCORPORATED -

AGENDA: AUGUST 13, 1996 - REGULAR AGENDA - POST HEARING DECISION
- PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\APP\WP\960356.RCM

CASE BACKGROUND

On January 31, 1996, GTE Florida Incorporated (GTEFL) petitioned the Commission for confidential classification and a protective order under Commission Rule 25-22.006, Florida Administrative Code, for Schedules 8 and 20 of its Quarterly Report, and Schedule 1 of its Annual report. This information was filed in accordance with Commission Rule 25-4.0185, Florida Administrative Code. On May 22, 1996, Order No. PSC-96-0673-CFO-TL was issued which denied GTEFL's request and provided that the information sought for confidential classification did not meet the criteria for proprietary confidential business information set forth in section 364.183(1), Florida Statutes, because the information was readily available through public sources. The public sources where similar information may be obtained were enumerated in the Order. Among the sources listed were data previously filed with the Commission, the Annual Membership Directory of the Florida Telephone Association; and the Florida Department of Commerce, Bureau of Economic Analysis' Annual County Comparison Report.

DOCUMENT NUMBER-DATE

08068 AUG-1 1996

FPSC-RECORDS/REPORTING

DOCKET NO. 960356-TL
DATE: August 1, 1996

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant GTEFL's petition for reconsideration and classify as confidential the information sought in its January 31, 1996, petition?

RECOMMENDATION: No.

STAFF ANALYSIS: GTEFL timely filed its request for confidential classification on January 31, 1996. The request was reviewed under Commission Rule 25-22.006, F.A.C. (Amended 4/26/90), which requires a company to file a line-by-line justification for the confidential classification it seeks and for the Commission to make a determination. On May 22, 1996, a determination was made to deny the request and Order No. PSC-96-0673-CFO-TL was issued.

On June 4, 1996, GTEFL filed a Petition for Reconsideration. The standard for determining whether reconsideration is appropriate is set forth in Diamond Cab Co. of Miami v. King, 146 So. 2d 889, 891 (Fla. 1962). In Diamond Cab, the Florida Supreme Court declared that the purpose of a petition for reconsideration is to bring to an agency's attention a point of law or fact which it overlooked or failed to consider when it rendered its order. In Steward Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974), the Court found that the granting of a petition for reconsideration should be based upon specific factual matters set forth in the record and susceptible to review. Staff has applied this rationale in its review of GTEFL's petition.

In its request for reconsideration, GTEFL argues that the Commission should not have made a determination, but rather should have accepted its petition as a claim for confidential treatment pursuant to section 364.183(1), Florida Statutes, as revised by Chapter 95-403, Laws of Florida. The relevant portion of that section provides: "Upon request of the company or other person, any records received by the commission which are claimed by the company or other person to be proprietary confidential business information shall be kept confidential" GTEFL argues that under section 364.183(1), F.S., it is not required to seek Commission approval for confidential treatment; that "nothing more than a claim of confidentiality is required to protect such records from disclosure." (GTE Florida Incorporated's Petition for Reconsideration, page 5.)

GTEFL also argues that Commission Rule 25-22.006, F.A.C., was amended on April 21, 1996, and should have been applied in this instance since the Order was issued subsequent to the effective date of the amended Rule 25-22.006, Florida Administrative Code.

DOCKET NO. 960356-TL
DATE: August 1, 1996

Staff disagrees. GTEFL's request was properly considered under Commission policy and the rule which was in effect at the time the request was filed. Until Rule 25-22.006, F.A.C., could be appropriately amended to reflect the 1995 changes of section 364.183(1), F.S., Commission policy was to require any request for confidential treatment of proprietary confidential business information to be accompanied by a line-by-line justification and redacted and highlighted versions of the information. The Commission would then make a determination as to whether confidential treatment should be granted. (See Order No. PSC-96-0339-CFO-TL.) GTEFL's petition was processed according to this policy and the rule in effect at the time. The amended rule relating to confidential information did not take effect until April 21, 1996, after the petition was filed. The Prehearing Officer's determination was appropriate under the Commission's policy to make a determination when a claim was made by a telecommunications company pursuant to section 364.183(1), F.S.

In its request, GTEFL claimed that the information for which it sought confidential classification was proprietary confidential business information. To support this claim, GTEFL stated that alternative local exchange companies (ALECs) could discern the number of GTEFL's access lines by location and type of service from this data. GTEFL stated that ALECs will know the level of its presence in the specified locations and lines of business. GTEFL argues that with ongoing public disclosure of this information, its competitors will be able to determine growth and market trends in GTEFL's specific exchange areas and types of services. GTEFL concludes that with this knowledge, its competitors can tailor their marketing, entry, and expansions accordingly, while avoiding much of the trial and error that is the hallmark of an openly competitive marketplace.

Rule 25-22.006 (Amended 4/26/90), requires the Commission to make a determination upon the filing of a petition. In making that determination, the Prehearing Officer followed Commission policy to deny confidential classification of information that can be obtained through public sources. Where information can be obtained through public sources, it does not meet the definition of "proprietary confidential business information." Those sources were cited in the Order denying confidential classification. Previously, the schedules filed under 25-4.0185, F.A.C., have been made available for public inspection. The information contained in the schedules have changed little over the years as a result of the monopoly status of the local exchange companies (LECs). As pointed out in Order No. PSC-96-0673-CFO-TL, a review of the data would reveal that the access line information has not changed

DOCKET NO. 960356-TL
DATE: August 1, 1996

dramatically from year-to-year. Thus, competitors would derive the same results using the previously filed data.

The Prehearing Officer stated in the Order that GTEFL's argument that the information can be used by ALECs to determine marketing strategies, etc., had merit. But for the public disclosure, the information would meet the requirements to be classified as proprietary confidential business information. The prehearing Officer recognized that the "time will come when all participants in a competitive market place must treat this information in a proprietary manner." The problem recognized by the Prehearing Officer was that if the information must remain public because the requirements of "government in the sunshine," at what point can it become private without being detrimental to GTEFL, as well as the other incumbent LECs, in the meantime.

The solution may lie in the amended Rule 25-22.006, F.A.C. Currently, any telecommunications filing received by the Commission where confidential classification is being claimed is now being automatically classified confidential. The internal procedure being followed requires the Clerk to treat the information as confidential, file it securely, and track the file in docket No. 9X0000-TL. GTEFL's filing under Rule 25-4.0185(1)(a), F.A.C., for the first quarter in 1996 has already been given confidential classification and treatment. At some later point, if a person requests to see the access line data, the Commission may then compare all of the filings received to date to determine if a change occurred and make a revised policy decision at that time.

In the meantime, this information sought for confidential treatment was from the last quarter in 1995 and has not changed significantly from the previous quarter. Denial of a confidential classification for the information filed was consistent with Commission policy at that time the request was filed. GTEFL's petition for reconsideration should be denied.

DOCKET NO. 960356-TL
DATE: August 1, 1996

ISSUE 2: Should GTEFL's documents be denied confidential classification made available for public record and the docket closed?

RECOMMENDATION: Yes.

STAFF ANALYSIS: Upon the time period for appeal of this decision expiring, the documents denied confidential classification should be made available for public record and the docket closed.

Attachment

Order No. PSC-96-0673-CFO-TL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Request for Confidential) DOCKET NO. 960356-TL
Classification of Periodic) ORDER NO. PSC-96-0673-CFO-TL
Report Schedules 1, 8, and 20 by) ISSUED: May 22, 1996
GTE Florida Incorporated)

ORDER DENYING REQUEST FOR CONFIDENTIALITY

On January 31, 1996, GTE Florida Incorporated (GTE) filed a request for confidential classification of access line data by exchange contained in Schedules 8 and 20 of its Quarterly Report, as well as the annually filed Schedule 1.

Pursuant to Section 119.01, Florida Statutes, all documents submitted to this Commission are public record. The only exceptions to this law are documents which are exempt pursuant to specific statutory terms or provisions. Moreover, under Section 364.183, Florida Statutes, and Rule 25-22.006, Florida Administrative Code, the person requesting confidential treatment of materials has the burden of demonstrating that the materials qualify for confidential classification.

The information in Document No. 1144-96 for which GTE has requested confidential classification concerns access line data by exchange and by class and grade of service contained in Schedules 8 and 20 of their Quarterly Report and access lines by exchange and access lines in base rate area contained in Schedule 1 of their Annual Report. In its request for confidential treatment, GTE argued that the information on access line location and distribution is information relating to the competitive interests of GTE and will impair its business if revealed.

GTE argues that disclosure of the information would allow alternative local exchange carriers (ALECs) to discern the number of GTE's access lines by location and type of service. GTE claims that competitors will know the level of its presence in the specified locations and lines of business and more importantly, because the information is provided quarterly, the ongoing public disclosure would allow GTE's competitors to determine growth and market trends in its specific exchange areas and types of services. GTE argues that with this knowledge, competitors can tailor their marketing, entry, and expansion plans accordingly.

GTE argues that the information which GTE seeks to protect is analogous to interexchange carriers' (IXC) market share and

traffic data, which reveals where a carrier's customers are located and their distribution across lines of business. GTE reasons that the Commission should grant the same protections afforded IXC's data to GTE's data because of the introduction of full competition in the local exchange market.

Finally, GTE argues that in a competitive business, any knowledge obtained about a competitor can be used to the detriment of the entity to which it pertains, often in ways that cannot be fully anticipated. This unfair advantage skews the operation of the market, to the ultimate detriment of the telecommunications consumer.

Though GTE argues and this Commission agrees that the local service market is transitioning itself from a monopolistic structure to a competitive market place and that the data can be used to target high access line/traffic geographic areas, data that is similar to the data which the Company seeks to protect is readily available through public sources. These sources include previously filed data from earlier Quarterly Reports which have not been classified as confidential. A review of this data would reveal that the access line information has not changed dramatically from year to year. Thus, competitors would derive the same results using the previously filed data.

Another source of similar information is available through the Florida Telephone Association (FTA). Local exchange company access line data by exchange is published in FTA's annual membership directory. Local exchange company's business and residential access line data by exchange could also be derived, to varying degrees and depending upon the resources a company is willing to expend, by using the data contained in annual reports from the Commission's Division of Auditing and Financial Analysis and the Division of Research and Regulatory Review, as well as with the telephone directories. Finally, the Florida Department of Commerce, Bureau of Economic Analysis, publishes an annual County Comparison Report, which identifies the population densities of each county in Florida. Competitors could use this information to estimate the number of LEC business and residential access lines by exchange. Although these sources do not contain identical information to that at issue here, they illustrate the continuum of available access line information.

Section 364.183(3), Florida Statutes, states that the term "proprietary confidential business information" is information that "has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not

ORDER NO. PSC-96-0673-CFO-TL
DOCKET NO. 960356-TL
PAGE 3

be released to the public." That information which has been released to the public cannot later be subject to a claim of confidentiality. Since this data is available or may be derived from other sources, pursuant to current Commission policy, it is not appropriate to consider the data as proprietary.

In so ruling, I am careful to note that GTE's argument has merit. The time will come when all participants in a competitive marketplace must treat this information in a proprietary manner. However, given the point at which we are in our transition to a competitive marketplace, there is a question whether that time is now. Furthermore, a policy determination such as this is best left for the entire Commission to make. At this time, there is no compelling reason to deviate from existing Commission policy.

It is, therefore,

ORDERED by Commissioner Joe Garcia, as Prehearing Officer that the request by GTE Florida Incorporated for confidential classification of quarterly report schedules 8 and 20 and annual report schedule 1 is hereby denied.

By ORDER of Commissioner Joe Garcia, as Prehearing Officer, this 22nd day of May, 1996.

/s/ Joe Garcia
JOE GARCIA, COMMISSIONER
AND PREHEARING OFFICER

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-904-413-6770.

(S E A L)

DWC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 and 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas, or telephone utility, or the First District court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural, or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.