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June 16, 1999

VIA HAND DELIVERY

Blanca S. Bayo, Director
Florida Public Service Commission
Division of Records & Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0850

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Re: Docket No. 981052-TP

Dear Ms. Bayo:

Enclosed for filing and distribution are the original and seven copies of The Telephone Company of Central Florida, Inc.'s Response to BellSouth Telecommunications, Inc.'s Motion for Reconsideration in the above docket.

Please acknowledge receipt of the above on the extra copy enclosed herein and return it to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman
Vicki Gordon Kaufman

RECEIVED & FILED

[Signature]
FPSC BUREAU OF RECORDS

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Telephone
Company of Central Florida, Inc.
for resolution of items under
dispute in resale agreement with
BellSouth Telecommunications,
Inc.

Docket No. 981052-TP

Filed: June 16, 1999

**The Telephone Company of Central Florida, Inc.'s Response
to BellSouth Telecommunications, Inc.'s
Motion for Reconsideration**

The Telephone Company of Central Florida, Inc. (TCCF), pursuant to rule 25-22.060, Florida Administrative Code, files its response to BellSouth Telecommunications, Inc.'s (BellSouth) motion for reconsideration. BellSouth's motion is without merit and should be denied. In support thereof, TCCF states:

I.

Introduction

On August 20, 1998, TCCF filed a petition for resolution of items under dispute with BellSouth. The petition had two parts. First, TCCF sought enforcement of its current Resale Agreement¹ with BellSouth pursuant to which TCCF was entitled to resell ESSX. TCCF claimed that BellSouth had failed to provision ESSX as required by the Agreement and that this failure to perform had severely damaged TCCF's business. Second, TCCF sought to arbitrate two issues related to its new Resale Agreement. The first issue related to TCCF's request to be permitted to resell ESSX in its new Agreement due to BellSouth's failure to provision it in the

¹ TCCF was the first reseller to sign a resale agreement with BellSouth after the passage of the Telecommunications Act of 1996. TCCF and BellSouth signed their Agreement on May 28, 1996.

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current Agreement. Second, TCCF objected to the OSS fees which BellSouth insisted on including in the new Resale Agreement.

An evidentiary hearing was held before Commissioners Clark and Jacobs on January 22 and February 9, 1999.

On May 20, 1999, the Commission issued Order No. PSC-99-1013-FOF-TP (Order). In the Order, the Commission found that BellSouth had not provisioned ESSX to TCCF as required by the parties' current Resale Agreement; ordered BellSouth to fulfill all requests for ESSX resulting from TCCF's May 29, 1996 Order; and required BellSouth to make such ESSX lines available to TCCF for 73 months from the date service is implemented. The Commission also directed the parties to negotiate for a term and volume contract to permit TCCF to resell MultiServ (an ESSX equivalent) at the same price or as close as possible to the price points of ESSX in the parties' new Resale Agreement. The Commission further found that no OSS charges were appropriate for inclusion in the new Resale Agreement.

On June 4, 1999, BellSouth filed a motion for reconsideration seeking reconsideration of those rulings related to ESSX issues. BellSouth does not seek reconsideration of the Commission's decision denying it the ability to include OSS charges in TCCF's new Resale Agreement.²

II.

Standard for Reconsideration

The standard for reconsideration is well established. In *Diamond Cab. Co. of Miami v. King*, 146 So.2d 889, 891 (Fla. 1962), the Florida Supreme Court set out the standard as follows:

² BellSouth motion, p. 3, fn 1.

The purpose of a petition for rehearing is merely to bring to the attention of the trial court or, in this instance, the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance. . . . It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order.

Accord, Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981).

BellSouth has failed to meet the standard for reconsideration set forth above. It has merely reargued the same positions which it previously put before the Commission, both at hearing and in its post-hearing brief, and which the Commission rejected. Thus, its motion should be denied.

III.

The Commission's Order is Based on Competent Substantial Evidence

The first part of BellSouth's motion alleges, without specifics, that the Commission's decision is not based on competent substantial evidence. This bald assertion is easily put to rest. The Commission held an evidentiary hearing in this case which lasted approximately one and one half days. At that hearing, the Commission heard the testimony of the following TCCF witnesses on direct: Mr. Kip Ripper, Mr. Ken Koller, and Ms. Andrea Welch. On rebuttal, the Commission heard the testimony of Mr. Ripper and Ms. Welch. In addition, TCCF introduced into evidence 40 exhibits related to ESSX without objection. Further, BellSouth presented several witnesses, including Mr. Hendrix, Ms. Arrington and Mr. Cathey, who were subject to cross-examination on the ESSX issues. Thus, the record was fully developed and the Commission's decision is founded on a firm evidentiary basis.

IV.

BellSouth Had a Clear Obligation to Provide ESSX to TCCF and Failed to Do So

Though the remainder of BellSouth's argument is somewhat lengthy and convoluted (and will be addressed point by point below), it can be succinctly summarized as follows: "Regardless of our Resale Agreement with TCCF and regardless of our actions over a two and one half year period, at the moment ESSX was grandfathered, we had no further obligation to TCCF, even though we failed to inform TCCF of our position on this matter." This preposterous argument should be rejected, just as the Commission did in its final Order in this case. As the Staff said: ". . . BST is just as obligated today to provision the service that was ordered in May of 1996." Staff recommendation at 9.

As the uncontroverted evidence in this case proves, BellSouth was obligated to provide TCCF with ESSX for resale and failed to do so (even by BellSouth's own admission). TCCF's entry into the local market, as contemplated by the Telecommunications Act of 1996, was based on resale of the ESSX product. BellSouth's failure to provision ESSX resulted in disastrous consequences for TCCF. BellSouth cannot escape responsibility for this through tortured legal interpretations.

V.

The Filed Rate Doctrine is Inapplicable

BellSouth hinges much of its motion on the "filed rate doctrine." Nonetheless, in essence, BellSouth makes one procedural and one substantive point on this issue, both of which are without merit.

As to procedure, BellSouth complains that though it argued the filed rate doctrine in its post-hearing brief, neither the Staff recommendation nor the Order addressed this point. BellSouth says that this alone justifies reconsideration. To the contrary, the Commission has no obligation to address every point raised by a party.

In the analogous appellate context, Judge Padavano noted that the fact that a court addresses only some points raised does not mean that the court failed to consider the points not addressed:

An opinion that discusses some but not all of the arguments for reversal implies that the others were without merit. In *Bowles v. D. Mitchell Inv., Inc.*, 365 So.2d 1028 (Fla. 3d DCA 1978), the court noted that a discussion of some of the issues was an indication that they were the only issues worthy of discussion and not an indication that the court overlooked the others.

Padavano, *Florida Appellate Practice* (2d Ed), §18.7, fn 2, emphasis added.

Similarly, the Commission's lack of discussion of the filed rate doctrine is an indication that this point was unimportant, irrelevant or unnecessary to the Commission's decision. A tribunal need not address every issue raised by a party when the case is presented. *Fla. Jur. 2d*, Appellate Review, §297.

Substantively, the filed rate doctrine is simply irrelevant to this case. BellSouth's argument on this point (and succeeding ones) merely "begs the question."³ That question is, what was BellSouth's obligation to TCCF as a result of TCCF signing its Resale Agreement on May 28, 1996, before ESSX was grandfathered by BellSouth? This question was clearly answered by the Commission:

³After BellSouth "begs the question," it then answers it incorrectly by assuming the ESSX service TCCF is entitled to is grandfathered.

[W]e conclude that BST has not completed the provisioning of ESSX service ordered under this agreement prior to the grandfathering of ESSX on May 30, 1996.

Order at 3, emphasis supplied. BellSouth has shown no basis to overturn this determination.

As the evidence unequivocally demonstrated, BellSouth's obligation, which it has yet to fulfill, required it to provide a working ESSX Centrex network to TCCF. (Tr. 18). BellSouth knew and confirmed this obligation in correspondence to TCCF. (Exhibit No. 3, ENR-6). Further, on May 29, 1996, BellSouth accepted TCCF's service request for 201 line ESSX arrangements for 73 months. (Exhibit No. 3, ENR-5).

The evidence also demonstrated that ESSX is TCCF's flagship product and TCCF's business plan called primarily for it to sell ESSX. (Tr. 50-51; Exhibit No. 3, ENR-4). BellSouth itself was well aware of TCCF's business plan and knew TCCF intended to sell ESSX. (Tr. 18, 330, 332).

It is further undisputed that no one at BellSouth ever informed TCCF (prior to TCCF filing its complaint with this Commission) that in BellSouth's view TCCF had no right to resell ESSX. (Tr. 201-202, 263, 324, 443; Exhibit No. 2, p. 47).⁴ To the contrary, BellSouth personnel corresponded and met with TCCF over the 2 1/2 year period regarding the numerous problems with ESSX. (Exhibit No. 3, ENR-7, 9; Exhibit No. 6, KEK-1-28).

⁴ If someone had, of course, TCCF would have immediately filed a complaint with this Commission, rather than spending 2 1/2 years trying to work with BellSouth to provision ESSX.

And lastly, as this Commission found, it is undisputed that all the ESSX lines required by TCCF were not provided by BellSouth. BellSouth had problems provisioning ESSX during the contract period. Order at 2.⁵

Despite this uncontroverted evidence, BellSouth argues that its grandfathering of ESSX on May 30, 1996 relieves it of any obligation to TCCF. If this argument were correct, it would permit BellSouth to contractually commit to provide services to an ALEC that are essential to the ALEC's market success, string that ALEC along for years (essentially decimating its business) and then when the ALEC complains to the appropriate agency, say "gotcha, that service is grandfathered!" Such a "result" would be in direct contravention of the Telecommunications Act of 1996 as well as principles of equity and justice.

Nor do the cases BellSouth cites lead to the anomalous result described above. In fact, none are on point. Not a single case upon which BellSouth attempts to rely relates to a situation involving an agreement under the Telecommunications Act of 1996 nor the failure of a carrier to perform under the Act. None of BellSouth's cases even remotely deal with a factual situation in any way similar to the one at issue in this case. For the most part, the cases on which BellSouth relies deal with a telecommunications company seeking to recover unpaid charges from customers and the customers asserting a variety of defenses which the filed rate doctrine

⁵ In TCCF's view, BellSouth has yet to provision one ESSX customer correctly. (Tr. 29).

prohibits.⁶ Those cases provide no support for BellSouth's failure to provision ESSX to TCCF under the terms of the parties' Resale Agreement.

VI.

The Commission's Order is Supported by the Resale Agreement As Well as by BellSouth's Own Actions

Next BellSouth argues that the language of the Resale Agreement does not obligate BellSouth to provide ESSX. However, § IIIA of the Agreement clearly provides that all Centrex service are available for resale. Further, it is uncontroverted that ESSX was not grandfathered at the time the TCCF Agreement was signed nor at the time the order for the ESSX lines was placed. Thus, it was included in the services BellSouth was obligated to provide.

Additionally, as discussed above, TCCF's ability to resell ESSX was confirmed over and over again by a myriad of personnel at BellSouth. For example, BellSouth's Wade Johnson wrote to TCCF and said:

BellSouth and the Telephone Company of Central Florida, Inc. have entered into a contractual agreement whereby the Telephone Company of Central Florida may purchase BellSouth Telecommunications services, such as BellSouth's ESSX(r) service, for resale purposes.

(Exhibit No. 3, ENR-1, emphasis supplied). The fact that the Resale Agreement contemplated the provision of ESSX was also confirmed by BellSouth's Jerry Hendrix:

⁶ See, i.e., *American Telephone and Telegraph Company v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998); *MCI Telecommunications Corp. v. Happy the Glass Man*, 974 F. Supp. 1016 (E.D. Ky. 1997); *MCI Telecommunications Corp. v. O'Brien Marketing, Inc.*, 913 F. Supp. 1536 (S.D. Fl. 1995); *MCI Telecommunications Corp. v. The Best Telephone Co., Inc.*, 898 F. Supp. 868 (S.D. Fl. 1994).

. . . [I]n compliance with the Resale Agreement entered into between TCCF and BellSouth effective May 28, 1996, BellSouth will honor your request for additional ESSX lines.

(Exhibit No. 3, ENR-2, emphasis added). Thus, it is clear that both parties knew and understood that the resale of ESSX was part and parcel of the Agreement between TCCF and BellSouth.

BellSouth also argues that TCCF knew ESSX was going to be grandfathered and "rushed" to sign the Agreement. There was nothing nefarious about TCCF and BellSouth signing the Agreement before ESSX was grandfathered. TCCF always planned to resell ESSX and BellSouth was well aware of that fact. (Tr. 330, 332). That is the obvious reason that TCCF signed the Resale Agreement before May 30, 1996, on BellSouth's advice.

BellSouth then suggests that MultiServ was always available to TCCF and that ESSX and MultiServ are the same product. This disingenuous argument fails to point out that MultiServ costs 40% more than ESSX, thus making it a financially unworkable substitute for ESSX. The Commission recognized that the sale of MultiServ as a substitute for ESSX with no price adjustment would clearly "disadvantage" TCCF.

Finally, as a matter of law, given its conduct, BellSouth has waived any right to assert that it had no obligation to provision ESSX. BellSouth has clearly engaged in conduct and a course of dealing with TCCF which warrants the inference that it has relinquished a known right. *Board of County Commissioners of Jackson County v. International Union of Operating Engineers*, 620 So.2d 1062 (Fla. 1st DCA 1993); *Capital Bank v. Needle*, 596 So.2d 1134 (Fla. 4th DCA 1992).

VII.

The Commission's Order Is Consistent

BellSouth argues that somehow the Commission's order is internally inconsistent because it will permit TCCF to sell ESSX to customers who did not have it before the grandfather date.⁷ Obviously, this is the only way that the Commission can remedy BellSouth's failure to perform under the current Resale Agreement. Further, this argument ignores one of the Commission's central findings:

BellSouth has not completed the provisioning of ESSX service ordered under this contract prior to the grandfathering of ESSX on May 30, 1996. . . . BST is obligated to perform under its agreement with TCCF.

Order at 3, emphasis added. That is, the Commission found that prior to the grandfather date, TCCF was entitled to ESSX lines which BellSouth never provisioned. The fact that BellSouth subsequently grandfathered the service cannot obviate its prior contractual obligation to TCCF. Otherwise, a LEC could unilaterally grandfather a service to the competitive disadvantage of an ALEC. Thus, contrary to BellSouth's assertion, the Commission's ruling does not turn on whether TCCF is a grandfathered customer, but rather on BellSouth's obligation under the contract to provision ESSX to TCCF for resale.

⁷ BellSouth also says the Order is inconsistent with prior rulings of the FCC and other Commission orders but provides no citations to support this allegation.

VIII.

The Commission's Finding that BellSouth Failed to Perform is Supported by the Evidence and Within the Scope of Issues to Be Decided

BellSouth spent much of its time at hearing and much of its motion for reconsideration attempting to distinguish between "standard" and "nonstandard" ESSX service. This was a "distinction" which TCCF vehemently disputed with record evidence and which the Commission ultimately found to be irrelevant. Nonetheless, BellSouth inappropriately reargues the same position it took at hearing.

The Commission found that, "[w]hether as a standard or nonstandard ESSX arrangement, BST is obligated to perform under its agreement with TCCF." Order at 3. This finding is supported and explained in the Staff recommendation which the Commission approved in its entirety:

To answer this question [did BellSouth perform under the contract?], one must recognize that whether or not the requested ESSX service was standard (i.e., as tariffed in Section A12 of BST's tariff) or nonstandard (i.e., as anything not tariffed in Section A12 of BST's tariff) is irrelevant. The contract for ESSX required performance. Therefore, it is important that the issue is not transposed from a question of performance to a question of nomenclature. The record shows that either as a standard or nonstandard ESSX, BST is obligated either by the Resale Agreement or Bona Fide Request/Business Opportunity Request contracts to perform. Furthermore, staff interprets the phrase "..., not available for purchase:" as used in the Resale Agreement to mean that TCCF may not order grandfather services, but requests for installation must be honored, even though the service may have been grandfathered after the order date.

Staff recommendation at 3, emphasis added, footnote omitted. Staff further noted that:

Staff disagrees with BST's definition of nonstandard because this definition could potentially brand an industry accepted alternative practice/arrangement as nonstandard just for the fact that BST is

not deploying such alternative arrangement. (EXH-2, 29)
Staff believes that since BST is provisioning the service, it is
BST's responsibility to ensure that it designs a workable
arrangement.

Staff recommendation at 8. BellSouth has shown no basis for reconsidering the Commission's determination on the "nonstandard" issue.

Further, BellSouth incredibly claims that the Commission's finding that BellSouth did not perform under the Resale Agreement "goes beyond the bounds of this case." To the contrary, the complaint issue TCCF raised was whether or not BellSouth had fulfilled its obligations under the Resale Agreement to provision ESSX and the Commission, based on record evidence, found that it had not. Even BellSouth witnesses, Mr. Hendrix and Mr. Cathey, admitted that BellSouth was required to provide the service which TCCF sought. (Tr. 204-205, 447). The Commission's findings are squarely within the issues to be decided.

IX.

The Commission's 73-Month Decision is Correct

In this portion of its argument, BellSouth appears to concede that the 73-month period during which ESSX must be provisioned is correct, but argues that it should run from May 29, 1996. Because the Commission found that BellSouth did not fulfill its obligations under the Resale Agreement and thus should be required to do so pursuant to its Order, it would make little sense for the 73-month period to run from 1996 when the service was not provisioned. Clearly, the time period for the service must run from the time the service is provided. To follow BellSouth's suggestion would make the Commission's Order meaningless.

Additionally, in this section of its argument, BellSouth attempts to read something into the Commission's order which is not there and then asks the Commission for "clarification."

BellSouth suggests that it need only fill requests received after March 14, 1997 and that if no requests were received during that time, it has no obligation to provision ESSX. It is clear that this is not the intent of the Order as pointed out in footnote 2 of the Staff recommendation:

Staff believes that in its May 29, 1996, order TCCF effectively reserved this block of lines for future installations. Staff, therefore, believes that "order" as used here implies TCCF's request for installation dates as its signs end-user customers for the already ordered 201 line ESSX M systems. (TR 436)

Staff recommendation, p. 4, fn 2, emphasis added.

The discussion between the Commissioners and Staff at the Agenda Conference further illustrates that BellSouth's request for "clarification" is misplaced. In response to a question from Commissioner Jacobs, Mr. Audu responded:

What we are basically saying is that when TCCF ordered those 23,201 [sic] ESSX M systems, those amounted to about 43 - - I mean 4,600 lines in total. Those were acquired or purchased prior to the service becoming grandfathered on May 30, 1996. That is an order that is legitimate for TCCF to go on and finish.

Commissioner Jacobs: So they can fill out those --

Mr. Audu: That could imply that new customers might be signed up on that, but it does not imply in any way that TCCF has the right to go on and increase that to 6,000.

Commissioner Jacobs: So they can fill out that original --

Mr. Audu: That's what we recommended, yes, sir.

Commissioner Clark: All right. They can sign up new customers to fill out the original 23,201 [sic] lines?

Mr. Audu: That's correct.

Commissioner Clark: All right. That's the remedy with respect to them not providing it pursuant to their previous agreement.

Mr. Audu: Yes, ma'am.

Agenda Conference transcript, pp. 5-6, emphasis added. The Commission's order clearly requires BellSouth to provision the original 4,600 lines that were ordered on May 29, 1996.

X.

The Commission's Conclusion on Volume and Term Discounts is Appropriate

In its last argument, BellSouth says that the Commission's requirement that the parties negotiate a volume and term discount for MultiServ at a price equivalent to ESSX is beyond the scope of the proceeding. BellSouth is wrong again.

In its arbitration issue concerning the resale of ESSX in the new Agreement, TCCF argued that it had been greatly damaged by BellSouth's failure to perform and to remedy this the Commission should require ESSX to be included in the new Agreement due to the large price differential between ESSX and MultiServ, despite the fact that they are essentially the same product. The Commission recognized the position in which BellSouth had placed TCCF and concluded that a remedy was appropriate⁸:

We are concerned that denying TCCF the ability to resell ESSX, without any recourse but MultiServ, has the potential to drive TCCF out of business since TCCF's "flagship" product is ESSX-based.

The record shows that TCCF has expressed interest in and BST has indicated a willingness to consider a special contract

⁸ BellSouth's assertion that TCCF knew that it would have to order MultiServ after May 30, 1996 is absolutely false and contrary to the evidence. Both TCCF and BellSouth believed that TCCF was entitled to resell ESSX throughout the term of the original Agreement and BellSouth never told TCCF otherwise until this action was filed.

through which TCCF will resell "centrex"-like services to customers in place of the grandfathered ESSX. . . . Therefore, we conclude that a special contract arrangement that will allow TCCF to resell MultiServ in place of ESSX is critical in resolving this issue fairly.

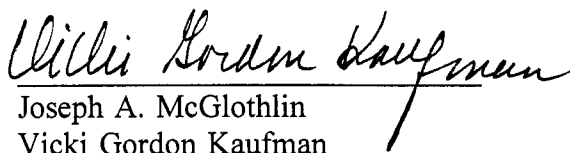
Order at 9, emphasis added. Thus, the requirement for a volume and term discount was the Commission's way of fairly resolving the issues between the parties and was well within the issues in this case as well as within its authority.⁹

XI.

Conclusion

The Commission's order on the ESSX issues should not be reconsidered. It is correct as a matter of both law and fact and BellSouth has shown no basis for reconsideration.

WHEREFORE, BellSouth's motion for reconsideration should be denied.



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Central Florida, Inc.

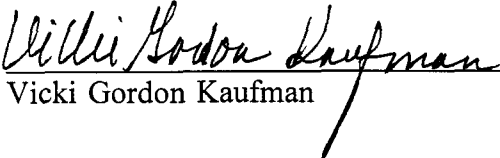
⁹ The Staff recommendation also notes that "BST's recent filing which extends ESSX service indefinitely is troubling. . . . BST has gained and maintains a competitive advantage in the marketplace." Staff recommendation at 15, footnote omitted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the **Telephone Company of Central Florida, Inc.'s** foregoing **Response to BellSouth Telecommunications, Inc.'s Motion for Reconsideration** has been furnished by United States Mail or Hand Delivery (*) this **16th** day of **June, 1999**, to the following:

Cathy Bedell*
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0870

Nancy B. White
Michael P. Coggin
c/o Nancy H. Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301


Vicki Gordon Kaufman

Kay Flynn

To: Diana Caldwell; jonathan audu
Subject: RE: 981052

I will return Document 00849-99 based on this concurring e-mail.

Kay
-----Original Message-----
From: Diana Caldwell
Sent: Friday, June 09, 2000 2:42 PM
To: Kay Flynn
Subject: FW: 981052

-----Original Message-----
From: Jonathan Audu
Sent: Friday, June 09, 2000 2:41 PM
To: Diana Caldwell
Subject: RE: 981052

Yes!

-----Original Message-----
From: Diana Caldwell
Sent: Friday, June 09, 2000 2:39 PM
To: Jonathan Audu
Subject: RE: 981052

then recommend to send it back.

-----Original Message-----
From: Jonathan Audu
Sent: Friday, June 09, 2000 2:03 PM
To: Diana Caldwell
Subject: RE: 981052

Just thinking, since case was "so" withdrawn be petitioner; do we really have need for any documents, and let alone grant confidentiality. Or are we obligated to decide one way or another regardless?

-----Original Message-----
From: Diana Caldwell
Sent: Friday, June 09, 2000 1:38 PM
To: Jonathan Audu
Subject: 981052

I have to do a confidentiality order for document number 00849-99. Can you look at it and determine whether we should grant confidential treatment?

CAF _____
CMP _____
COM _____
CTR _____
ECR _____
LEG _____
OPC _____
PAI _____
RGO _____
SEC 1 _____
SER _____
OTH copy to Kay

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