

IN THE SUPREME COURT OF FLORIDA

CHARLES J .CRIST, JR.,
Attorney General, State of Florida;
HAROLD McLEAN, Public
Counsel, State of Florida; and
AARP,

Appellants,

Consolidated Case Nos.
SC04-9, SC04-10, SC04-946

vs.

On Appeal from the
Public Service Commission

LILA A. JABER, Chairman, et al,
constituting the FLORIDA PUBLIC
SERVICE COMMISSION, an agency of
the STATE OF FLORIDA; BELLSOUT
TELECOMMUNICATIONS, INC.;
VERIZON FLORIDA INC.; and
SPRINT-FLORIDA, INC., et al.,

Appellees.

**RESPONSE OF AT&T AND MCI IN OPPOSITION TO ATTORNEY
GENERAL'S MOTION FOR DETERMINATION REGARDING
PUBLIC DISCLOSURE OF BRIEF AND COURT RECORD**

Appellees AT&T Communications of the Southern States, LLC (“AT&T”) and MCI WorldCom Communications, Inc. (“MCI”) hereby file their Response in Opposition to the Attorney General’s Motion for Determination Regarding Public Disclosure of Brief and Court Record, pursuant to this Court’s Order dated September 9, 2004, and the joinder in that motion by the Office of Public Counsel. The Attorney General takes the unprecedented position that the mere filing of a Notice of Appeal nullifies

final orders of confidentiality issued by the Public Service Commission (“PSC”). More directly, the final orders on confidentiality were issued in a proceeding in which the Attorney General was a party and the Attorney General failed to challenge the request for confidentiality and failed to seek reconsideration or appeal of the orders when issued. The Attorney General has waived any attempt to attack collaterally the confidentiality orders by such an unauthorized motion.

Moreover, the sole basis for the Attorney General’s claim is predicated on a selective reading of Rule 2.051 of the Florida Rules of Judicial Administration and Rules 9.190 and 9.200 of the Florida Rules of Appellate Procedure, that these documents are “records of the judicial branch” and therefore public documents. The Attorney General ignores Rule 2.051(c)(7), which exempts from public disclosure records made confidential under state law, and Rule 2.051(c)(9)(A)(ii), which exempts from public disclosure of “records of the judicial branch” any documents that a court rules are a “trade secret.” The documents at issue have been found to be “proprietary confidential business information” pursuant to Section 364.183, Florida Statutes, and are “trade secrets” and therefore should remain confidential for this appeal. The documents in question do not need to be made public for this Court to decide this appeal.

ARGUMENT

I. The Attorney General has Waived its Right to Contest the Confidentiality Orders of the PSC.

The PSC has rigorously applied the standards of Section 364.183, Florida Statutes, and has issued final orders that certain trade secret documents of AT&T and MCI, as well as other telephone companies, were confidential and therefore exempt from public disclosure.¹ Pursuant to Section 120.659, Florida Statutes, each of these final orders provided the required notices by which the Attorney General could seek an administrative hearing or judicial review. While the Attorney General was a party to these proceedings at the PSC, the Attorney General did not seek reconsideration or appeal any of the confidentiality rulings of the PSC.

Now, despite the then-immediate appellate remedies available to the Attorney General, the Attorney General has waited until the filing of his Initial Brief to try to reverse the PSC's confidentiality orders. It is well-settled that these orders have obtained finality and that the Attorney General has waived its ability to challenge the determination of confidentiality and may not now collaterally challenge these findings. See, e.g., Arena Parking,

¹ For example, the AT&T Request for Confidential Classification was granted by Order No. PSC-04-0242-CFO-TL, issued March 4, 2004, and the MCI Request for Confidential Classification was granted by Order No. 04-0243-CFO-TL, also issued March 4, 2004.

Inc. v. Lon Worth Crow Ins. Agency, 768 So. 2d 1107, 1110 (Fla. 3d DCA 2000) (“[Cross-appellant] never objected to the introduction of the redacted [evidence] and may not now do so for the first time on appeal.”); Marks v. Delcastillo, 386 So. 2d 1259, 1267 (“There is no question that such a failure to object to evidence at trial precludes appellate review of the propriety of its admission.”). Accordingly, the instant motion must be denied.

II. The Confidential Information is Exempt from Disclosure under Rule 2.051(c)(7), Florida Rules of Judicial Administration.

The Attorney General argues that the confidential records have become public “records of the judicial branch” under Rule 2.051 of the Florida Rules of Judicial Administration. The Attorney General further argues that the public policy of Florida, as embodied in Florida’s broad public records laws, trumps the PSC’s Order now that this is an appellate matter. The Attorney General has failed to present to this Court all of the applicable rules.

The Attorney General’s argument overlooks two specific provisions of Rule 2.051 of the Florida Rules of Judicial administration. First, the confidential information at issue is confidential under Florida law, and is therefore exempt under Rule 2.051(c)(7), Florida Rules of Judicial Administration. Rule 2.051(c)(7) exempts from public disclosure as

“records of the judicial branch” “[a]ll records made confidential under the Florida and United States Constitutions and Florida and federal law[.]”

Section 364.183, Florida Statutes, specifically makes records that have been found by the PSC to be “proprietary confidential business information” exempt from the public records requirements of Section 119.07(1), Florida Statutes and Article I, Section 24 of the Florida Constitution. Thus, under Rule 2.051(c)(7), the information at issue, having already been held to be “proprietary confidential business information” pursuant to Section 364.183 by the PSC, is exempt from public disclosure as a record of the judicial branch.

III. The Confidential Information Falls Within the “Trade Secret” Exemption to Rule 2.051, Florida Rules of Judicial Administration.

The second provision of Rule 2.051 of the Florida Rules of Judicial Administration that the Attorney General overlooks is Rule 2.051(c)(9)(A)(ii), which states:

(c) Exemptions. The following records of the judicial shall be confidential:

(9) Any court record determined to be confidential in case decision or court rule on the ground that:

(A) Confidentiality is required to

(ii) protect trade secrets[.]

Thus, under Rule 2.051, a decision of the PSC that this information constitutes trade secrets serves to exempt such information from public disclosure as a record of the judicial branch. The committee notes to this Rule indicate that this Rule was adopted to conform to the 1992 addition of Article I, Section 24 to the Florida Constitution, which the Attorney General also cites as authority for the disclosure of the information. However, it is clear from Rule 2.051 that a decision to protect the confidentiality of, *inter alia*, trade secrets, is expressly exempt from the public disclosure requirements of Florida law. The PSC orders granting confidentiality hold that the information at issue contains trade secrets; therefore this information should remain confidential throughout this appeal.

IV. The Confidential Information Sought to be Declared Public by the Attorney General is Trade Secret Information, and this Court can Decide the Instant Appeal Without the Need to Make this Information Public.

This Court does not need to overrule the PSC's confidentiality order and order the confidential trade secret information of AT&T and MCI to become public record to decide the instant appeal. This Court, and all parties to this appeal, have full ability to consult the full, unredacted record, as did the PSC below. Therefore no party is placed at a disadvantage in presenting its arguments to the Court, and the Court is under no restriction in its ability to review the record in rendering its decision.

The confidential information the Attorney General seeks to make public is, as found by the PSC, the heart and soul of trade secret, competitive information. If disclosed, this information would be of benefit to competitors and cause harm to AT&T and MCI, as well as their customers. Such information provides AT&T and MCI an economic benefit, and is not known nor readily ascertainable to other persons. Such information is economically valuable to AT&T and MCI, as well as its competitors, and AT&T and MCI treat such information as confidential and they maintain many processes and procedures to maintain its secrecy.

As was recognized throughout the hearing before the PSC, the long distance market in Florida is highly competitive, and the level of competition among interexchange carriers (“IXCs”) is undisputed. Given the intensity of the Florida long distance market, any information or data that reveals or can be used to reveal customers, types of customers, or the percentages of residential and business customers is a trade secret and highly confidential. Over the years, AT&T and MCI have spent millions of dollars developing and implementing its marketing strategies. Such information, if publicly available, would reveal to their competitors the business plans and the success of their marketing strategy. In the long distance business, a company’s most valuable asset is its customer base, and any public

disclosure of their customer base would be unfair, competitively adverse, and extremely damaging to their business position. This damage would be compounded in this situation by the fact that since there are only a few IXCs that participated in this case at the PSC, other IXCs would have the benefit of this information while keeping their own information secret.

The information also includes the amount of savings AT&T and MCI enjoys, which reveals not only their usage of access services, but discloses amounts that can be used by them to offer reductions or new services to current and potential customers. In both instances, the information is valuable to AT&T and MCI because it is used in formulating plans and strategies, and it is also valuable to competitors because it provides them with better information as to their ability to compete. Although AT&T's and MCI's service offerings and products are public and advertised, the information for which confidential treatment is sought is not readily or easily ascertainable by other parties, and it is not disclosed by them in a public manner. Indeed, any disclosure of the subject trade secret, confidential information would be especially damaging because the information at issue pertains to future expected company actions. In this instance, public disclosure of future business plans is extremely anti-competitive because it signals how AT&T and MCI are going to set future rates, months in

advance. The antitrust laws recognize that information about future business conduct, especially a company's future prices for services to customers, is extremely valuable to competitors and can lead to a market where customers are subject to inappropriate conduct. While the instant situation is not an antitrust problem, the consequences of a public disclosure of AT&T's and MCI's future business plans can have the same type of consequences and place them at a huge marketing disadvantage because all the other IXCs would be able to continue to retain their information as secret.

A trade secret is defined in section 688.002 (4), Florida Statutes, the Uniform Trade Secrets Act, to mean:

. . . information, including a formula, pattern, compilation, program, devise, 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.

The information at issue fits plainly in this definition as set forth above, and the efforts taken to maintain trade secret status clearly meet or exceed those set forth in Sepro Corp. v. Florida Dep't of Environmental Protection, 839 So. 2d 781 (Fla. 1st DCA 2003).

Finally, if this Court is inclined to agree with the Attorney General on this issue, the parties should be accorded the opportunity to present the confidential information to the Court for an *in camera* inspection, and to provide detailed argument and reasoning why each piece of information adjudged confidential by the PSC should retain that confidentiality.

CONCLUSION

Based on the foregoing, Appellees AT&T and MCI respectfully request that this Court deny the Attorney General's Motion for Determination Regarding Public Disclosure of Brief and Court Record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by U.S.

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I HEREBY CERTIFY that the foregoing Response of AT&T and MCI In Opposition to Attorney General's Motion for Determination Regarding Public Disclosure of Brief and Court Record has been prepared using Times New Roman 14-point font.

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