

SUPREME COURT OF FLORIDA

CASE NOS.: SC04-9, SC04-10, SC04-946
Lower Tribunal Nos.: 030867-TL, 030868-TL
030869-TL, 030961-TL

CHARLES J. CRIST, JR., ETC. v. LILA A. JABER, ETC., ET AL.

HAROLD MCLEAN, ETC. v. LILA A. JABER, ETC., ET AL.

AARP v. LILA A. JABER, ETC., ET AL.

Appellants

Appellees

**SPRINT'S RESPONSE IN OPPOSITION TO ATTORNEY
GENERAL'S MOTION FOR DETERMINATION REGARDING
PUBLIC DISCLOSURE OF BRIEF AND COURT RECORD**

Sprint-Florida, Inc. and Sprint Communications Company Limited Partnership (collectively "Sprint"), pursuant to the Court's Order, dated September 9, 2004, respond in opposition to the Attorney General's Motion for Determination Regarding Public Disclosure of Brief and Court Record ("AG's Motion"),¹ stating as follows:

1. The AG's Motion asks that the Court "grant public access to all matters filed with the Court in this case, including all briefs and all aspects of the record." AG Motion at 8. In support of this request, the AG contends that "[t]he rationale for exempting them from the public record when they were before the

¹ The Court's Order also applies to the Brief filed by the Office of Public Counsel ("OPC"). Court Order at 1. OPC also filed a Motion to Maintain Confidentiality Pending Court Determination, and Joinder with Attorney General's Motion ("OPC Motion"). In that Motion, OPC simply joins in support of the AG's Motion, but offers no specific basis for supporting the AG's Motion.

PSC does not apply to proceedings before this Court." AG Motion at 8. The AG's Motion should be denied because it is legally wrong, is untimely, and is inconsistent with public policy. Moreover, as the Court has already determined, the AG's concerns about the use of confidential information in the appellate process (AG Motion at 6) can be addressed by procedural steps that appropriately balance the interests of the parties. Court Order at 1 and 2.

2. As rationale for the requested relief, the AG contends that "[t]he mere fact that the PSC deemed the documents exempt from the Public Records Act under Section 364.183, Florida Statutes (2003) is not sufficient to trump the Constitutional policy of access Section 364.183, however, does not make any documents confidential during appellate review by this Court." AG Motion at 4. This contention turns the Constitutional policy on its head. There is nothing in the Constitution or in the case law that supports the AG's contention. In fact, Article I, Section 24(c) provides the Legislature with the specific authority to establish the very exemptions in Section 364.183, Florida Statutes, that allegedly "trump" the unfettered access posited by the AG. This exemption is not "trumped" simply because the confidential information is contained in a record on appeal. The Legislature contemplated and addressed this issue by providing that the Florida Public Service Commission ("Commission" or "FPSC") must preserve discovery information it has deemed confidential during an appeal and may not return the documents to the producing party until the appeal is concluded. *See* Section 364.183(2), Florida Statutes.

3. The case cited by the AG - *In re: Amendments to the Florida Rules of Judicial Administration - Public Access to Judicial Records*, 608 So.2d 472 (Fla.

1992), undermines the AG's argument. Contrary to the AG's conclusions as to the holding in this case, Rule 2.051(c), Florida Rules of Judicial Administration, provides that certain records "shall be confidential," including: "(7) All records made confidential under the Florida and United States Constitutions and Florida and federal law;" and "(8) All records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of Judicial Qualifications Commission." The AG's erroneous interpretation of the Florida Rules of Judicial Administration is underscored by the Court's holding in *State v. Buenoano*, 707 So.2d 714, 718 (Fla. 1998) (Rule 2.051(c)(8) specifically adopts statutory public records exemptions). The information deemed confidential by the Commission pursuant to Section 364.183, Florida Statutes, satisfies the public records exemptions set forth at Rule 2.051(c), Florida Rules of Judicial Administration.

4. The Commission's Order (Order No. PSC-03-1469-FOF-TL), which is the subject of the AG's appeal, is bottomed on the Florida 2003 "Tele-Competition Innovation and Infrastructure Enhancement Act" (2003 Act). The relevant section of the 2003 Act is titled "Competitive market enhancement." Section 364.164, Florida Statutes 2003. Thus, unlike historical monopoly regulation, the focus of the 2003 Act is local competition, and, necessarily, competitors. This is also true of Section 364.163, Florida Statutes, dealing with the requirements imposed on interexchange carriers as the result of Commission action on the Petition filed by Sprint-Florida, Inc. pursuant to Section 364.164(1), Florida Statutes. The information provided at the direction of the Commission in support of Sprint-Florida, Inc.'s Petition and in discovery responses - for which confidential

treatment was sought and received - was information which the Commission determined - after full briefing and in compliance with Section 364.183, Florida Statutes, and Section 25-22.006, Florida Administrative Code² - was of a competitively sensitive nature. In other words, it is information which, if publicly disclosed, would hamper and harm Sprint's ability to compete in local, statewide and national markets.

5. Contrary to the AG's unsupported assertion that Sprint "would rather operate in the back room and deny the People access to the whole truth" (AG Motion at 1), Sprint has not sought to keep the information confidential in order to deny the public access per se, but rather to protect the viability of the competitive marketplace to the benefit of consumers by keeping it out of the hands of Sprint's competitors.³ In fact, the representatives of the public - the AG and OPC - had full and complete access to the information as is evidenced by their inclusion of confidential information in their briefs.⁴

² A copy of Section 364.183, Florida Statutes, is Attachment A, and a copy of Section 25-22.006, Florida Administrative Code, is Attachment B.

³ It would be ironic indeed if such information - after having been found to be confidential by the Commission - were to be publicly disclosed and thereby made available to competitors solely because a party appeals the Commission's decision. Such a result would have a chilling effect on the State's regulators' ability to obtain confidential information otherwise essential to the regulators' duties. It would also send a strong signal to the competitive market that Florida is a risky place to do business.

⁴ The AG contends that "the People have every right to access all information relative to this decision" (AG Motion at 1), and, further, that "[t]he telephone companies would refuse the Citizens of Florida access to the basis for the Court's decision and ban them from oral argument, the final public hearing on the issue." (AG Motion at 7). The AG conveniently ignores his stated role and the stated role of the OPC as representing the Citizens of Florida. He also attributes to Sprint a procedure Sprint has never advocated. As discussed below, Sprint is recommending procedures which this Court can implement that will assure total public access to the Court's oral argument while maintaining the confidentiality of the information which the AG asserts is essential to his prosecution of this appeal.

6. Not only does the AG's Motion inappropriately demean the Commission's statutory process for determining confidentiality and the legality of its determination, it also overlooks the fact that the AG was a party to that process. The AG had full opportunity to challenge the Commission's determination of confidentiality of the very documents and information which the AG is now challenging, but did not do so. The proper procedure to challenge the Commission's determination of confidentiality is set forth in the Commission's rules. *See* Section 25-22.006, Florida Administrative Code. These procedures specify each step that the person seeking confidentiality must take to convince the Commission that the information or document satisfies the statutory requirements for exemption from Section 119.07(1), Florida Statutes, and Section 24(a), Article I of the Florida Constitution. At every step, the AG had full opportunity to challenge the request for confidential treatment. Having chosen not to avail himself of the procedures to timely challenge a party's claims of confidentiality or the Commission's findings of confidentiality, the AG should not now be permitted to collaterally attack the Commission's determination that the documents are exempt from the Public Records Act under Section 364.183, Florida Statutes.

7. In any event, the relief sought by the AG to open "all matters filed with the Court in this case, including all briefs and all aspects of the record" (AG Motion at 8, emphasis added) is unnecessary and unwarranted. The ability of the Court, and the parties before the Court, to handle confidential information in briefs and oral argument is simple and straightforward. As the Court has already determined, if the AG or any party's brief is relying upon confidential information in support of an argument or a factual point, the confidential information should be

placed in an appendix - with appropriate citations to the confidential record on appeal - the brief referring to the page and line of the appendix at which the confidential information appears. Order at 1 and 2. Likewise, during oral argument, use of the confidential information would also be handled by reference to the page and line of the appendix which the Justices will have before them. This is not unlike the procedures used by the Commission in handling confidential information in the hearings below, or the procedures approved for use by this Court in *Florida Industrial Group v. Jaber*, Case No. SC02-187, on September 19, 2002. At all times, the Commission's hearings were open to the public, while access to the confidential information was limited to parties - including the AG and OPC - that were subject to protective orders and non-disclosure agreements, as well as the Commission and its Staff.

WHEREFORE, Sprint respectfully urges that the Court deny the AG's request and, instead, impose the procedures outlined herein on the parties' use of confidential information in this appellate proceeding.

DATED this ____ day of September, 2004.

Respectfully submitted,

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