STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS BELL TELEPHONE COMPANY	)	
	)	Docket No. 09-0188
	)	
Annual Rate Filing For Noncompetitive	)	
Services Under Alternative Form of Regulation	)	
	)	

INTERVENOR CLINTON A. KRISLOV'S RESPONSE IN OPPOSITION TO ILLINOIS BELL TELEPHONE COMPANY'S MOTION FOR A PROTECTIVE ORDER

Illinois Bell Telephone Company's ("Bell") Motion for Protective Order improperly seeks to conceal exhibits to its Annual Rate Filing for Noncompetitive Services Under an Alternative Form of Regulation ("Annual Rate Filing") that show its revenues and operating profits, which are neither confidential nor proprietary.

Bell's Annual Rate Filing is a public document for which Illinois public policy explicitly obligates the Commission to "print and keep open to public inspection." 220 ILCS 5/9-102. Bell's motion utterly fails to rebut the presumption that its revenues and operating profits are and should be public because Bell's Motion for Protective Order provides no "compelling interest" in concealing these presumptively public documents. The Commission should order their unsealing forthwith.

I. Illinois Law Presumes Public Access For All Filed Documents, Which May Be Overcome Only By The Moving Party Showing A "Compelling Interest" Or "Improper Purpose."

Based on common law, Illinois statute, and the First Amendment, Illinois courts presume that the public has a right to access all judicially filed documents. *Skolnick v. Altheimer & Gray,* 191 Ill. 2d 214, 230-232 (2000) (reversing lower courts' refusal to amend protective order because party did not rebut the presumption that counterclaim was public record) (citing *Nixon v.*

Warner Communications, Inc., 435 U.S. 589 (1978); 705 ILCS 105/16; *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994)). Pursuant to Illinois law, this presumption explicitly applies to *all* dockets. *Skolnick*, 191 Ill. 2d at 231 (quoting 705 ILCS 105/16).

The party seeking to withhold a document from public disclosure "bears the burden of establishing a compelling interest why access should be restricted." *Zielke v. Wagner*, 291 Ill. App. 3d 1037, 1042 (2d Dist. 1997) (Cowell, J., concurring) (parties' agreement that settlement documents should be filed under seal would not prevent the court from ordering the documents to be publicly filed because treating the documents as protected "undermines our judicial system and is directly contrary to the common-law right of access to public records"). That burden requires the moving party to show either a "compelling interest" or an "improper purpose…sufficient to justify" the sealing of a court document. *Skolnick*, 191 Ill. 2d at 233 (citing *Minneapolis Star & Tribune Co.*, 392 N.W.2d 197, 203 (Minn. 1986); *Nixon*, 435 U.S. at 598). "[T]he only documents that possibly could overcome such a presumption are those that are privileged and potentially seriously damaging or embarrassing." *Zielke*, 291 Ill. App. 3d at 1042 (citing *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1076 (4th Dist. 1992)).

Moreover, when a compelling interest is shown, "the court should limit sealing orders to particular documents or portions thereof which are directly relevant to the legitimate interest in confidentiality." *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 1001 (1st Dist. 2004) (reversing trial court's denial of newspaper's motion to file sealed briefs publicly, based on parties' failure to show the requisite compelling interest in sealing the court file).

The presumption that all filed judicial documents must be accessible to the public "is essential to the public's right to monitor the functioning of the court system to ensure quality,

honesty, and respect for our legal system." *Coy v. Washington County Hosp. Dist.*, 372 Ill. App. 3d 1077, 1079 (5th Dist. 2007) (holding court documents should be sealed because of patients had shown that they had a compelling interest in their right to privacy) (citing *Skolnick*, 191 Ill. 2d at 230).

Therefore, it is Bell's burden to show a *compelling interest* in withholding public access to *all* exhibits to its annual rate filing from public disclosure, in order to show that disclosure of every portion of these exhibits would seriously damage Bell's business.

II. The Late Payment Revenues Bell Seeks To Conceal Are Fundamentally Public.

Bell has no grounds to conceal *any* aspect of its Annual Rate Filing from the public because the Public Utility Act, 220 ILCS 5/9-102, requires Bell, as a regulated utility, to show its rates to be just and reasonable, and requires Bell to "keep open to public inspection" all rates and charges placed on customers:

> Every public utility shall file with the Commission and shall print and keep open to public inspection schedules showing all rates and other charges, and classifications, which are in force at the time for any product or commodity furnished or to be furnished by it, or for any service performed by it, or for any service in connection therewith, or performed by any public utility controlled or operated by it.

Id.

This duty of public disclosure extends to a regulated utility's revenues and operative profits because the "fundamental purpose" behind requiring a utility to disclose its rates and charges is to ensure that the utility's rate of return is reasonable. *Cerro Copper Products v. Illinois Commerce Commission*, 83 Ill. 2d 364, 371 (1980) (affirming ICC's grant of rate increase for public utility, in part, because the utility's rate of return was reasonable). Bell's customers, and, indeed, all Illinois citizens, have a bona fide interest in knowing the full contents of Bell's Annual Rate Filing, especially with respect to these revenues and profits, because the

Annual Rate Filing "binds both the utility and the customer and governs their relationship." *Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 55 (2004) (holding that a utility's filed tariff governs the relationship between the customer and utility with respect to the rates a utility may charge the customer) (citing *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 267 Kan. 760, 765 (1999)).

Therefore, the revenues and profits Bell received from customers are presumptively public record, and Bell has no basis to withhold these amounts from public scrutiny.

III. Bell Shows No Compelling Interest In Keeping Portions Of Its Annual Rate Filing Confidential.

Bell's motion to keep portions of its Annual Rate Filing confidential fails to specify a compelling interest for keeping the information restricted.

Of the two arguments Bell advances in its motion, only the "competition" argument relates to its burden to rebut that the information is presumptively public: "[t]he information contained in these three schedules would be valuable to AT&T Illinois' competitors in determining how to develop, price and market their services." Bell's Motion for Protective Order, ¶ 3. However, this conclusory basis neither specifies a legitimate basis to regard this information as secret, nor any unique damage to Bell's business that disclosing its revenues and profits would cause, nor gives the Commission any basis to determine whether this damage would outweigh the bona fide interest the public and Bell's customers have in accessing this information.

Bell's second argument, that the Commission previously treated this information as confidential, is irrelevant to the required finding of a "compelling interest" Bell must show, and ignores the fact that the Commission explicitly held that Bell must seek leave to seal this

information each year. (Memorandum to the Commission, ICC Dkt. No. 03-0230 (attached hereto as "Exhibit 1") at 1.)

A. **The Mere Fact That The Annual Rate Filing Exhibits Would Be "Valuable" To Bell's Competitors Does Not Explain Why They Should Be Withheld From The Public.**

Bell's simple assertion that disclosing the three schedules would harm Bell because the information would be "valuable" to Bell's customers (Bell's Motion for Protective Order, ¶ 3) does not explain why the information should be kept secret from the public.

Without specifying any *actual*, let alone inappropriate, harm, Bell fails to show a compelling interest in keeping these revenues and profits "confidential." *See, e.g., Hollinger Intern. Inc. v. Hollinger Inc.*, 2005 WL 3177880, at *2 (N.D. Ill. Jan. 19, 2005) (declining to treat defendants' "business and financial information" as confidential based on defendant's failure to show "a clearly defined and very serious injury") (quoting *Andrew Corp. v. Rossi*, 180 F.R.D. 338, 340 (N.D. Ill. 1998)); *Alexander Housing LLC v. Int'l Brotherhood of Elec. Workers*, 2004 WL 1718654, at *3 (N.D. Ill. July 29, 2004) (holding that a movant must show that disclosure would cause a "clearly defined and very serious injury"). As in *Hollinger*, Bell's failure to show a clearly defined and very serious injury flowing from disclosure demonstrates that Bell has not carried its burden to show a compelling interest in keeping these amounts private.

Moreover, the mere fact that these schedules might be valuable to competitors' business strategies is no basis to keep the documents concealed. If some other company is willing to charge consumers less than Bell's rates, the competitor *should* have that data for legitimate consumer-benefitting reasons. Bell provides no authority for protecting it from precisely the type of competitive market forces that must be encouraged.

B. **Bell's Unsubstantiated Claim that the Commission Treated the Information as Confidential Provides No Substitute for Bell's Failure to Carry Its Burden in this Proceeding.**

Bell next argues, without attaching a single order or even citing to a specific docket, that the Commission treated the "same information" as confidential in "previous Annual Rate Filings." (Bell's Motion for Protective Order, ¶ 4.) The Commission should reject Bell's argument outright for its failure to substantiate its claim in any way without actual evidence. *See, e.g., City of Chicago v. Westphalen*, 93 Ill. App. 3d 1110, 1131 (1st Dist. 1981) (rejecting argument because it was unsubstantiated by the record); *Hart v. F.B.I.*, 91 F.3d 146, 1996 WL 403016, at *3 n. 8 (7th Cir. 1996) (same).

Nonetheless, the ICC's previous rulings, on unopposed dockets, do not suffice Bell's failure to carry its burden of specifying harm in this proceeding. First, if Bell's assertion is correct, it should carry its burden and specify a harm that will result from disclosure in *this* proceeding. Second, the Commission explicitly held, in denying Bell's 2003 request for confidential treatment for portions of its future Annual Rate Filings, that Bell "should be able to demonstrate that standards of Section 200.430 [governing confidential treatment of documents] apply." (Memorandum to the Commission, ICC Dkt. No. 03-0230, at 1.) If Bell's motion were granted without requiring this showing from Bell, that order would conflict with the Commission's prior ruling.

Finally, the Commission should note that Bell has faced *no opposition* in the ICC to its previous motions to keep the exhibits to its Annual Rate Filing confidential. *See* ICC Docket Nos. 08-0250, 07-0238, 06-0269, 05-0231, 04-0310, 03-0230. Thus, Bell's argument that the Commission should follow its previous rulings here merits no weight.

III. Bell's Use Of The Commission's Confidential Treatment Of This Revenue And Profit Information In Collateral Proceedings Warrants A Limited Sealing Of Bell's Annual Rate Filing Schedules, If The Commission Treats Any Schedules As Confidential.

Bell's recent use of this Commission's rulings in *In re Illinois Bell Telephone Link-Up II and Late Charge Litigation* case before the Illinois Chancery Court (No. 05 CH 013088, Palmer, J.) shows the importance of the Commission making the most limited sealing order practicable, sealing only those portions of the exhibits which Bell can show a compelling interest in not disclosing. *See A.P.*, 354 Ill. App. 3d at 1001 (holding that "the court should limit sealing orders to particular documents or portions thereof which are directly relevant to the legitimate interest in confidentiality").

In the Chancery Court case, Bell argued that the revenues it received from late payment charges attached to Bell's Annual Rate Filing before this Commission were submitted "as confidential and [Bell] requested proprietary treatment of the information, and the ICC explicitly granted this request, ordering that the information be designated proprietary pursuant to 220 ILCS section 5/404." (Bell's Motion to Confirm Confidential Designation of Non-Public Financial Information, p. 3 (attached hereto as "Exhibit 2").) Thus, despite Bell's failure to specify any need to keep the amount of late payment charge revenue it received as "confidential" in this or prior Annual Rate Filing dockets, the Commission's blanket confidentiality designation over Bell's exhibits has allowed these presumptively public revenues to be deemed authoritatively confidential.

If Bell seeks to keep the relevant exhibits entirely confidential, it must show how disclosing every portion of these exhibits would cause Bell's business a specific harm. Bell has not shown a specific harm attributable to disclosing *any* of these exhibits. If some information contained in the exhibits will actually meet this compelling interest standard, then the

Commission must limit its sealing of information to only those portions of Bell's Annual Rate Filing exhibits that warrant confidential treatment.

CONCLUSION

The documents at issue are explicitly public documents for which Bell has failed to carry its burden to show a compelling interest in not publicly disclosing the revenue and operative profit information contained in the sealed exhibits to its Annual Rate Filing. The Commission should thus reject Bell's motion to designate the exhibits to its Annual Rate Filing as confidential.

Dated: June 8, 2009

Respectfully submitted,

/s/ M. Reas Bowman

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Response in Opposition to Illinois Bell Telephone Company's Motion for Protective Order to be served electronically on the following persons on June 8, 2009:

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