

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

October 11, 2012

**IN RE:
PETITION OF TELMATE, LLC FOR
CERTIFICATE OF AUTHORITY TO
RESELL TELECOMMUNICATIONS
SERVICES IN TENNESSEE**

Docket No. 11-00181

**IN RE:
PETITION OF TELMATE, LLC FOR
AUTHORITY TO PROVIDE COCOT IN
TENNESSEE**

Docket No. 11-00182

**RESPONSE OF TELMATE, LLC TO PAY-TEL COMMUNICATIONS, INC.'S
MOTION TO REMOVE CONFIDENTIAL DESIGNATION**

Pursuant to the Hearing Officer's direction to the parties by e-mail on October 10, 2012, Telmate, LLC hereby responds to the motion to remove confidential designation filed by limited intervenor Pay-Tel Communications, Inc. Pay-Tel's motion is not well founded, and should be denied.

Pay-Tel is Telmate's chief competitor in the inmate services market. By Order dated August 9, 2012, the Hearing Officer denied Pay-Tel's request to intervene in this docket, specifically rejecting Pay-Tel's argument that as a competitor of Telmate, it had the legal right to intervene to ensure Telmate's application meets all legal requirements.¹ Despite holding that Pay-Tel has no legal right to intervene in this docket, the Hearing Officer exercised her discretionary authority to grant Pay-Tel **limited intervention** because, in the Hearing Officer's

¹ August 9, 2012 Initial Order, p. 18.

opinion, such limited intervention "will not impair the orderly and prompt conduct of these proceedings."² Pay-Tel's intervention is limited to "the specific and discrete issue" of whether the reseller/COCOT rules were impliedly repealed by the 1995 CLEC statute (Tenn. Code Ann. § 65-4-201), and whether, in October 2011, TRA Staff erred by directing Telmate to submit its application under those rules instead of the CLEC rules.³

Recognizing the potential anti-competitive impact of granting Pay-Tel's intervention,⁴ the Hearing Officer also specifically held that Telmate's proprietary information must be subject to a protective order preserving confidentiality and limiting access solely to TRA Staff and Pay-Tel's counsel:

Pay-Tel Communications, Inc. company representatives and personnel are prohibited access to and shall not review any proprietary information filed by Telmate, LLC pursuant to a protective order in this docket. Pay-Tel Communications, Inc.'s legal counsel, after executing the protective order, will be allowed to review such information, and is prohibited from sharing such proprietary information directly or indirectly with any Pay-Tel Communications, Inc. company representative or personnel, or any other person or entity in accordance with the provisions of the protective order.⁵

On appeal, the panel in this docket affirmed the Hearing Officer's order in all respects at the September 10, 2012 TRA agenda conference. The Hearing Officer entered the previously referenced protective order on October 5, 2012.

² August 9, 2012 Initial Order, pp. 18-19.

³ August 9, 2012 Initial Order, p. 19.

⁴ See August 9, 2012 Initial Order, p. 12.

⁵ August 9, 2012 Initial Order, pp. 20-21.

The Hearing Officer's August 9 Initial Order offered Pay-Tel the opportunity to serve limited discovery solely on the one issue Pay-Tel is entitled to raise in this docket, *i.e.*, whether the reseller/COCOT rules were impliedly repealed by the 1995 CLEC statute.⁶ In a telephone conference with the Hearing Officer on August 16, 2012, Pay-Tel agreed that because the CLEC issue it had raised was purely a legal issue, no discovery or fact finding is necessary. Consequently, the Hearing Officer revised her Order to dispense with discovery and testimony regarding the CLEC issue, and proceed instead directly to briefing.⁷ Briefs were filed on August 24 and August 28, and oral argument on the CLEC issue was presented to the panel at the September 10, 2012 TRA agenda conference.

Following this briefing and oral argument, Pay-Tel changed its mind, and submitted discovery requests to Telmate seeking, among other things, copies of Telmate's contracts with its underlying wholesale carrier and its collect call operator/billing services provider.⁸ Eight business days later, Telmate produced all of the requested information. The two contracts were the only items marked confidential under the protective order.⁹ Pursuant to the terms of the protective order, the contracts were made available to TRA Staff and to Pay-Tel's counsel, but were not posted on the TRA website and may not be shared directly with Pay-Tel.

By its motion filed October 9, Pay-Tel is now requesting that the Hearing Officer remove the confidential designation on the contracts. Pay-Tel's motive for filing such a motion is suspect. Because the contracts have already been provided to Pay-Tel's counsel and to TRA

⁶ August 9, 2012 Initial Order, p. 20.

⁷ August 16, 2012 Order Revising Procedural Schedule, p. 1.

⁸ See September 27, 2012 Order Granting Petition to Submit Discovery.

⁹ See October 9, 2012 Response of Telmate to Pay-Tel's Discovery Requests.

Staff, there is only one possible reason for Pay-Tel to file such a motion: so that Pay-Tel can have access to the contracts directly. This is precisely what the TRA has already ruled may not happen in this case.

Pay-Tel's two-page motion cites no facts or legal authority whatsoever in support of the requested relief; Pay-Tel simply makes the wholly unsupported statement that the contracts Telmate produced contain "little or no confidential information." Even a cursory glance at the contracts immediately reveals that Pay-Tel is wrong - **the contracts themselves expressly specify that the terms and conditions of the contract are confidential.** As a party to the contracts, Telmate is contractually obligated to maintain the contracts' confidentiality, and is specifically prohibited from sharing the terms and conditions with third parties without the prior written consent of the other contracting party. If Telmate breaches its contractual confidentiality obligations, it risks lawsuits, penalties, and other damages, including possible termination of the contract.

The determinative issue for purposes of Pay-Tel's motion is the definition of "proprietary." The Hearing Officer's August 9 Initial Order, the protective order entered in this docket, and the TRA rules all provide that the TRA will maintain the confidentiality of parties' "proprietary information."¹⁰ The TRA rules state that

(g) "Proprietary information" means documents and information in whatever form which, pursuant to a protective order in a contested case, have been specifically designated by the producing party as proprietary information and which the producing party in good faith deems to contain or constitute trade secrets, confidential research or development or commercially sensitive information.

¹⁰ See August 9, 2012 Initial Order, pp. 20-21 (because Pay-Tel is a competitor of Telmate "Pay-Tel Communications, Inc. company representatives and personnel are prohibited access to and shall not review any **proprietary information** filed by Telmate, LLC pursuant to a protective order in this docket.").

Tenn. Rules & Regs. § 1220-1-1-.01(3)(g); *see also* October 9, 2012 Protective Order ¶ 1 (using same definition of proprietary information).

The vendor contracts at issue meet the definition of proprietary information under the TRA rules, the Protective Order in this docket and Tennessee law: Telmate designated the contracts as confidential, and that designation was made in good faith, based upon Telmate's contractual obligations to maintain the contracts as confidential, and the fact that, consistent with this obligation, Telmate does not and has never made the contracts available to the public or other third parties. Pay-Tel implies in its motion that Telmate has somehow not acted in good faith in making the confidential designation because this will represent the "third time" in this docket the TRA has found that Telmate improperly designated an item confidential. Pay-Tel's assertions are simply incorrect.

Contrary to Pay-Tel's spurious accusations, at no time has the Hearing Officer, TRA Staff, or the Hearing Panel **ever** made any prior determinations regarding the confidentiality of any of Telmate's filings. Rather, on at least two prior occasions in this docket, Pay-Tel has objected to one of Telmate's confidential designations, and Telmate, in response, has voluntarily agreed to waive its right to protect the confidentiality of the information and consented to its public release. Proving that no good deed goes unpunished, Pay-Tel is now attempting to use Telmate's prior cooperation against it.

Telmate consented to the public release of confidential information in the prior instances in a show of good faith, and in the hopes of avoiding additional time, expense, and delay in this docket. Due to the contractual obligations and significant harm Telmate could suffer if the vendor contracts were made available to Pay-Tel and Telmate's other competitors, Telmate cannot agree to waive its rights in this instance. Although Telmate does not wish to be overly

litigious, in order to meet its contractual obligations and protect its business interests, Telmate must insist that the terms of the protective order be enforced and the vendor contracts it has been produced be kept confidential..¹¹

Although Pay-Tel has cited no legal authority in support of its contention that Telmate's contracts are not entitled to confidential treatment under the law, there is ample authority to the contrary: vendor contracts are exactly the type of competitively sensitive information that is routinely held to constitute protectable proprietary information under Tennessee law. The Tennessee legislature has recognized as much by statute: Tenn. Code Ann. § 65-3-109, which applies to the TRA,¹² expressly states that the agency "shall not give publicity to any contracts, leases, or engagements obtained by it in its official capacity, if the interests of the company would thereby be injuriously affected." The TRA routinely protects confidential information from being disclosed to competitors or others engaged in marketing or providing the same services.

Proprietary information protected under Tennessee law includes information which (1) derives actual or potential economic value from not being generally known and readily ascertainable by other persons who can obtain economic value from its disclosure or use; and (2) is the subject of reasonable efforts to maintain its secrecy. Tenn. Code Ann. § 47-25-1702(4). Telmate's vendor contracts qualify for protection under these factors. The identity of Telmate's vendors and the terms of those business relationships is valuable information that is not generally

¹¹ Consistent with the Hearing Officer's suggestion in the October 9 e-mail, undersigned counsel contacted Pay-Tel's counsel that same day in an attempt to come to some agreement on these issues. Because Pay-Tel insisted that the terms and conditions of one of the two contracts be made public and disclosed to Pay-Tel, this attempt was unsuccessful, and Telmate had no choice but to file this response.

¹² See 1995 Tenn. Pub. Acts Ch. 305 § 11 (providing that Chapter 3 of Title 65 continues to apply the TRA following the abolition of the Public Service Commission).

known by Telmate's competitors. Telmate provides services solely through publicly-bid contracts with federal, state and local correction departments. Telmate's vendor relationships provide a key element underlying Telmate's bids. Telmate has been successfully underbidding Pay-Tel for such contracts nationwide, due in large part to Telmate's lower service costs and negotiated vendor relationships. Pay-Tel obviously wants these contracts so it can figure out how Telmate is able to provide superior services at a lower cost.

Removing the confidential designation from Telmate's vendor contracts would put Telmate at a disadvantage when bidding on facility contracts and provide Telmate's competitors with information they do not currently possess, and which the competitors themselves do not have to disclose, destroying the level playing field of the public bidding process. The public bidding process for correction facility contracts is "blind": each provider must create and submit its bid without knowing the details of its competitors' bids, and never being able to know for sure whether its bid is higher or lower than its competitors. Pay-Tel wants Telmate's vendor contracts so it will have an advantage nobody else has in knowing Telmate's exact pricing and bidding structure. Granting Pay-Tel's motion would create a dangerous incentive for competitors to intervene in TRA proceedings solely for the purpose of obtaining confidential information they would otherwise not have. The TRA, an agency charged with upholding the state policy to foster and encourage a competitive and technologically advanced telecommunications market in the state, should not allow its proceedings to be hi-jacked for such anti-competitive purposes.

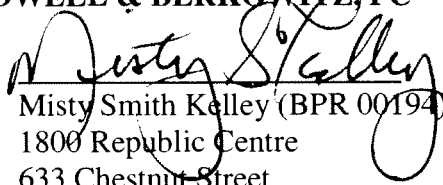
Telmate's vendor contracts are, by their very express terms, confidential. Telmate has a contractual duty to ensure the terms and conditions are not shared with third parties. Telmate's contracts clearly meet the definition of proprietary information under the TRA rules, the protective order in this docket, and Tennessee law. The contracts have been made available to

Pay-Tel's counsel and TRA Staff, leading to the obvious conclusion that Pay-Tel's motion to remove the confidential designation is motivated solely by an anti-competitive agenda. Pay-Tel has cited no authority whatsoever in support of its contention that the contracts "contain little or no confidential information." Pay-Tel's motion should be denied.

Respectfully submitted,

**BAKER, DONELSON, BEARMAN,
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via email and U.S. Mail upon the following on the 11th day of October, 2012:

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