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From: Elizabeth\_Carrero@fpl.com  
Sent: Monday, September 12, 2005 3:33 PM  
To: Filings@psc.state.fl.us  
Cc: Wade\_Litchfield@fpl.com; Ery\_Martin@fpl.com; Lynne\_Adams@fpl.com  
Subject: Electronic Filing for Docket No. 041269-TP - FPL FiberNet LLC's Objections and Motion to Quash BellSouth's Subpoena Duces Tecum Without Deposition

Attachments: Objections to BellSouth's Subpoena and Motion to Quash Subpoena.doc



Objections  
BellSouth's Su

a. Person responsible for this electronic filing:

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b. Docket No. 041269-TP

In re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law

c. Document being filed on behalf of FPL FiberNet LLC.

d. There are a total of 5 pages.

e. The document attached for electronic filing is FPL FiberNet, LLC's Objections and Motion to Quash BellSouth's Subpoena Duces Tecum Without Deposition.

(See attached file: Objections to BellSouth's Subpoena and Motion to Quash Subpoena.doc)

Thank you for your attention and cooperation to this request.

Elizabeth Carrero, Legal Asst  
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FPLSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to Establish Generic Docket to	)	Docket No. 041269-TP
Consider Amendments to Interconnection	)	
Agreements Resulting From Changes of Law	)	Filed: September 12, 2005
_____)		

**FPL FIBERNET, LLC'S OBJECTIONS AND  
MOTION TO QUASH BELLSOUTH'S  
SUBPOENA DUCES TECUM WITHOUT DEPOSITION**

FPL FiberNet, LLC ("FPL FiberNet"), by and through its undersigned counsel, hereby objects and moves to quash that certain Subpoena Duces Tecum Without Deposition (copy attached) directed to Brett H. Bayag, FPL FiberNet, by BellSouth Telecommunications, Inc. ("BellSouth"). FPL FiberNet is not a party to the above-numbered and entitled proceeding. The Non-party Subpoena was not personally served and, in any event, was not served on a registered agent for FPL FiberNet. Counsel for FPL FiberNet was not furnished a copy of the Subpoena. Finally, although styled a Subpoena Duces Tecum, the subpoena is not directed to the inspection of documents or for deposition; rather, it is a Request for Admission, the same discovery previously served improperly on FPL FiberNet, a non-party. Accordingly, FPL FiberNet objects to the Non-Party Subpoena pursuant to Rule 1.351 and 1.410, Florida Rules of Civil Procedure, and to the extent necessary, moves to quash that certain Subpoena Duces Tecum under Rule 1.280(c), Florida Rules of Civil Procedure. Nevertheless, notwithstanding and without waiving its objections, FPL will furnish an answer to BellSouth. FPL FiberNet states as follows:

1. On August 8, 2005, BellSouth served its First Requests for Admissions on FPL FiberNet. FPL FibertNet served its objections to the discovery as a matter of procedural courtesy to BellSouth, not because FPL FiberNet had any obligation to do so as a non-party.

2. On September 8, 2005 Mr. Bayag received by Federal Express Mail a copy of the Subpoena Duces Tecum Without Deposition. The Non-Party Subpoena was not personally served as required under rule 1.410(d), Florida Rules of Civil Procedure, Rule 28-106.212, Florida Administrative Code, and other applicable law. Further, Mr. Bayag is not a registered agent for FPL FiberNet. Traditional forms of discovery may not be sought from a non-party until jurisdiction of the court has been established over those non-parties; rather, discovery to the non-parties must be procured through means of a duly served subpoena. Far Out Music v. Jordan, 438 So.2d 912, 913 (Fla. 3<sup>rd</sup> DCS 1983). Service in this instance was not lawfully achieved.

3. Moreover, the discovery sought is neither for the inspection of documents nor for deposition. Although styled as a “subpoena duces tecum without deposition”, BellSouth seeks a request for admission, not the inspection of documents. As such, the request is not within the scope of Rules 1.351 and 1.410, Florida Rules of Civil Procedure. Indeed, the requested materials consist of the same First Requests for Admission improperly propounded on August 8. Effectively, BellSouth is attempting to do indirectly what it cannot do directly by attaching written discovery under Rule 1.370, Florida Rules of Civil Procedure, to a non-party, FPL FiberNet.

4. Rule 1.351, Florida Rules of Civil Procedure, states that a “party make seek inspection and copying of any documents or things within the scope of Rule 1.350(a) from a person who is not a party by issuance of a subpoena directing the production of the documents or things when the requesting party does not seek to depose the custodian or other person in possession of the documents or things.” Part (b) of Rule 1.350, however, requires a party to serve “notice on every other party of the intent to serve a subpoena under this rule at least 10

days before the subpoena is issued if service is by delivery and 15 days before the subpoena is issued if the service is by mail.” FPL FiberNet does not believe such notice was provided.

5. As indicated above, FPL FiberNet will furnish a response to BellSouth, reserving and without waiving the foregoing objections to the Non-Party Subpoena. FPL FiberNet is not a party of record in this proceeding. Neither FPL FiberNet’s objections filed in this docket nor any answer furnished as a courtesy to BellSouth should be construed as an intervention or appearance either as a party or an interested party in connection with this proceeding, or as FPL FiberNet’s agreement or consent to respond to further discovery in connection with this matter.

WHEREFORE, FPL FiberNet respectfully requests, to the extent necessary, that the Prehearing Officer to enter an Order quashing the Non-Party Subpoena in question and determining that the objections raised by FPL FiberNet to the Non-Party Subpoena support a finding by the Prehearing Officer that the discovery not be had.

Respectfully submitted,

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Attorney for FPL FiberNet LLC

s/R. Wade Litchfield  
R. Wade Litchfield

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Mail this 12<sup>th</sup> day of September 2005, to the following:

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