

Matilda Sanders

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From: Fatool, Vicki [Vicki.Fatool@BellSouth.COM]
Sent: Wednesday, July 19, 2006 3:27 PM
To: Filings@psc.state.fl.us
Subject: 050257-TP BellSouth's Motion to Compel and for Extension of Time to Complete Discovery
Importance: High
Attachments: 050257-T.pdf; ExhibitstoMotiontoCompel071806.pdf

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A. Vicki Fatool
 Legal Secretary to James Meza III
 BellSouth Telecommunications, Inc.
 150 South Monroe Street
 Suite 400
 Tallahassee, Florida 32301
 (305) 347-5560
vicki.fatool@bellsouth.com

B. Docket No. 050257-TP

Complaint by BellSouth Telecommunications, Inc., Regarding the Operation of a Telecommunications Company by Miami-Dade County in Violation of Florida Statutes and Commission Rules

C. BellSouth Telecommunications, Inc.
on behalf of James Meza III

D. 56 pages total (includes letter, pleading, certificate of service and exhibits A thru J)

E. BellSouth Telecommunications, Inc.'s Motion to Compel and for Extension of Time to Complete Discovery

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<<050257-T.pdf>> <<ExhibitstoMotiontoCompel071806.pdf>>

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MOTION

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FPSC-COMMISSION CLERK

Exhs A-J

DOCUMENT NUMBER-DATE

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Legal Department

James Meza III
General Counsel - Florida

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5558

July 19, 2006

Mrs. Blanca S. Bayó
Director, Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

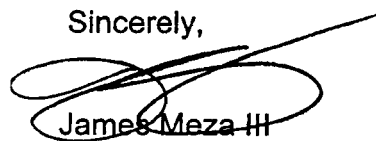
Re: **Docket No. 050257-TL: Complaint by BellSouth
Telecommunications, Inc., Regarding the Operation of a
Telecommunications Company by Miami-Dade County in Violation of
Florida Statutes and Commission Rules**

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Motion to Compel and for Extension of Time to Complete Discovery, which we ask that you file in the captioned docket.

Copies were served to the parties shown on the attached Certificate of Service on July 18, 2006.

Sincerely,



James Meza III

cc: All Parties of Record
Jerry D. Hendrix
E. Earl Edenfield, Jr.

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FLORIDA PUBLIC SERVICE COMMISSION

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by BellSouth Tele-)	
Communications, Inc., Regarding)	
The Operation of a Telecommunications)	DOCKET NO. 050257-TL
Company by Miami-Dade County in)	
Violation of Florida Statutes and)	
Commission Rules)	

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
 MOTION TO COMPEL AND
FOR EXTENSION OF TIME TO COMPLETE DISCOVERY**

BellSouth Telecommunications, Inc. ("BellSouth"), through undersigned counsel, moves for an Order compelling Miami-Dade County ("the County") to produce documents responsive to BellSouth's First Request for Production of Documents, subject to an appropriate Protective Agreement or Protective Order. BellSouth further moves for an extension of time to take any additional discovery made necessary by the documents produced as a result of the instant motion. In support of this motion, BellSouth states the following.

INTRODUCTION AND BACKGROUND

On June 7, 2006, pursuant to the Order Granting Proposed Joint Procedural Schedule No. PSC-06-0326-PCO-TL dated April 21, 2006 (the "Procedural Order"), BellSouth issued its First Request for Production enumerating 14 separate categories of documents to be produced by the County. See BellSouth's First Request for Production of Documents to Miami-Dade County, attached hereto as Exhibit A. On June 27, 2006, the County filed its written Responses to BellSouth Telecommunications, Inc.'s First Request for Production. See Miami-Dade County's

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Responses to BellSouth Telecommunications, Inc.'s First Request for Production attached hereto as Exhibit B. In its Responses, the County, for the first time, asserted the trade secret privilege as an objection to producing its current customer list which was otherwise responsive to BellSouth's Request for Production.

BellSouth filed a Notice Concerning the County's Assertion of Florida's Trade Secret Privilege on July 3, 2006. See Exhibit C hereto. In that Notice, BellSouth objected to the County's assertion of the trade secret privilege and indicated its intent to try and resolve the issue with the County. In the course of the discussions with the County, BellSouth learned that the County had produced the requested customer list information to the PSC but refused to produce it to BellSouth. The County's stated reason for refusing to produce the documents to BellSouth was that it feared the information would be used by BellSouth for competitive business purposes. To eliminate this concern, BellSouth offered to enter into a Protective Agreement to limit the disclosure and use of the customer list information to "attorneys' eyes only." See Correspondence from Martin Goldberg to David Hope dated July 3, 2006 attached hereto as Exhibit D and Correspondence from Lawrence Lambert to David Hope dated July 12, 2006 attached hereto as Exhibit E. Even with this heightened level of protection, the County categorically rejected all such offers out of hand. See Correspondence from David Hope to Martin Goldberg dated July 17, 2006 attached hereto as Exhibit F.

As a result, the PSC now has the benefit of the requested customer information, while BellSouth is absolutely precluded from reviewing the same information. Limiting BellSouth's access to this information under these circumstances is highly prejudicial to

BellSouth's ability to formulate its arguments based on the information. Moreover, as demonstrated below, the County's assertion of the trade secret privilege was untimely and wholly inappropriate under the present circumstances. Accordingly, the PSC should overrule the objection, subject to an appropriate Protective Order.

Additionally, because the discovery cutoff set by the PSC's April 21, 2006 Order is July 20, 2006, BellSouth respectfully asks that the Florida Public Service Commission ("Commission") resolve this motion and order the County to produce the requested documents to BellSouth immediately and that BellSouth be granted a reasonable amount of additional time within which to seek any additional discovery made necessary by any documents produced pursuant to this motion.

ANALYSIS

I. THE REQUEST FOR PRODUCTION

The second category of documents requested by BellSouth's First Request for Production seeks the following documents:

- 2) Any and all documents which evidence and identify a list of customers at all County Airports which purchase telecommunications services (including STS) provided by the County as of the date of this request.

In its response dated June 27, 2006, the County stated that "the County's current list of customers constitutes a trade secret," and that, "the County objects to any production which violates this trade secret privilege." BellSouth objected to the County's assertion of the trade secret privilege in this regard and made a good faith effort to resolve this dispute directly with the County. As demonstrated below, given the relevance of the information requested by BellSouth, and based on the County's prior handling of this

type of customer information in the normal course of business, the County's reliance on the trade secret privilege is misplaced under these circumstances.

II. THE COUNTY'S CURRENT CUSTOMER LIST IS HIGHLY RELEVANT.

Two of the key issues in this proceeding are whether the County is operating as a telecommunications company (by virtue of its providing Shared Tenant Services ("STS") to airport tenants), and whether the County is exempt from the PSC's STS rules pursuant to applicable Florida Statutes and Commission rules. See List of Tentative Issues adopted by the PSC attached hereto as Exhibit G. Both of these issues require an evaluation and analysis of the County's current STS customers.

As to the first issue, one of the elements of being a "telecommunications company" is that the entity (including a county) offers telecommunications services "to the public for hire." In the context of an STS provider, the "public" would be the tenants served by the STS provider. It is this list of tenants to which the County provides STS at the County owned airports that BellSouth seeks by its Request for Production. The necessity of producing this information is thus clear.

As to the second issue, whether the County is exempt from the PSC's STS rules, particularly the certification requirements under the Airport Exemption, the key question is what type of customers are being served by the County's STS operation. As the Airport Exemption states, "The airport shall obtain a certificate as a shared tenant service provider before it provides shared local services to facilities such as hotels, shopping malls and industrial parks." (emphasis added). The PSC has long explained that the airport exemption is limited solely to the provision of services to those entities

that are materially necessary to the function of the airport. Provision of non-essential services to non-essential operations (such as hotels, shopping malls and industrial parks) are not be covered by the Airport Exemption. As the rule states, the County would be required to be certificated to provide STS to these types of tenants. Consequently, to determine if the County is exempt from the STS rules, including certification, it is imperative that the County identify its current list of customers.

III. THE COUNTY'S CUSTOMER LIST IS NOT A TRADE SECRET.

Given the importance of the information to the issues in the case, the next question is whether the information is legitimately subject to protection pursuant to the trade secret privilege. It is not. The County's customer lists are not trade secrets as defined in §812.081, Fla. Stat. or §688.02, Fla. Stat. Under §812.081, Fla. Stat., to be a trade secret, the owner of the purported trade secret must take "measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes." §812.081(1)(c)(4) (emphasis added). Likewise, the Uniform Trade Secrets Act, §688.002, Fla. Stat., defines a trade secret as information 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.

§ 688.02(4), Fla. Stat. (emphasis added).

The County has never taken the precautions necessary to demonstrate that its customer list is a trade secret. First, on or about March 17, 2003, in response to a

request from the PSC, the County produced its customer list to the Florida Public Service Commission. See E-mail and attachments attached hereto as Composite Exhibit H bates numbered BST 1505-07. Both the County and the PSC are government entities governed by Florida's public records disclosure laws. Indeed, the e-mail from the County's representative to the PSC, to which the Customer List was attached explicitly states:

The Miami-Dade County Aviation Department is a public agency subject to Chapter 119 of the Florida Statutes concerning public records. E-mail messages are covered under such laws and thus subject to disclosure. All e-mail sent and received is captured by our server and kept as a public record.

See E-mail from Pedro Garcia to Rick Moses, bates numbered BST 1506. The County did not designate the e-mail or its attachment as confidential trade secrets as required by §364.183(1), Fla. Stat.

On a second occasion, the County likewise failed to treat its customer list as privileged from public disclosure. BellSouth obtained, by proper request from the Miami-Dade County Clerk's Office, Clerk of the Board of County Commissioners Division, a customer list that was attached as an exhibit to the Agreement between the County and NextiraOne LLC which the County Commission approved by Resolution R-31-02. A copy of this Customer List is attached hereto as Exhibit I.

Finally, in the companion litigation in Miami-Dade County Circuit Court, the County filed its customer lists in the Court record in connection with a Motion for Protective Order without seeking to have the submission filed under seal. Any member of the public can thus obtain a copy of the County's customer list by visiting the Clerk's office. The Court thereafter rejected the County's arguments, found the trade secret

privilege did not apply to the County's customer lists, and denied the County's motion for protective order. See Order dated April 11, 2005 attached hereto as Exhibit J.

Having produced its customer lists, (1) to the PSC, (2) in the official public records of Miami-Dade County Commission, and (3) with the Clerk of Courts, the County has not treated these documents or the information contained therein as trade secrets. See Hamilton v. Hamilton Steel Corp., 409 So.2d 1111, 1114 (Fla. 4th DCA 1982) (holding that attorney client privilege was waived by attorney's public disclosure of the terms of a settlement in open court); see also Sepro Corp. v. Florida Dept. of Environmental Protection, 839 So.2d 781, 783-84 (Fla. 1st DCA 2003). Quite simply, the County has not made the statutory required reasonable efforts to ensure the secrecy of these documents to declare them trade secrets. For this reason alone, the County has not and cannot meet its burden of showing the documents are trade secrets under §812.081, §688.002 or §815.045, Fla. Stat. Id. BellSouth is thus entitled to these documents through normal discovery channels as authorized by the PSC in this proceeding.

IV. THE TRADE SECRET PRIVILEGE IS NOT ABSOLUTE.

Even if, arguendo, the trade secret privilege applied with respect to the documents at issue, the privilege is not absolute. Section 90.506, Fla. Stat., which creates the trade secret privilege, provides:

A person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice. When the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require. (emphasis added).

Here, the County provided its current customer list to the PSC -- thereby conceding that the information is relevant to the issues in the proceeding -- but concealed the evidence from BellSouth. Precluding disclosure of the customer lists to BellSouth based on the trade secret privilege under these circumstances would clearly work an injustice by inhibiting BellSouth's ability to argue its case. Accordingly, under these circumstances, the trade secret privilege, even if it did apply, is properly limited.

In fact, BellSouth offered the County the types of "protective measures" contemplated by the statute. In its proposed Protective Agreement, BellSouth offered to restrict the disclosure and use of the documents produced to "attorneys' eyes only." A copy of the proposed Protective Agreement is attached hereto as Exhibit E. BellSouth thereby offered to ensure that these documents would not be viewed or used by any business operations within BellSouth for any competitive purpose. The County categorically rejected this offer and made no counterproposal.

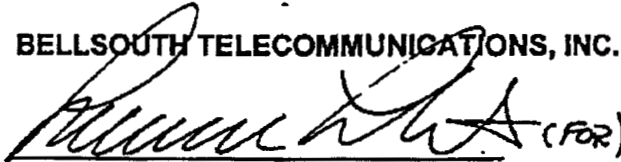
Accordingly, it is abundantly clear that the County's goal by its assertion of the trade secret privilege is not to protect the proprietary and competitive value of the documents. Instead, the County seeks to absolutely preclude BellSouth's use of the documents to avoid the devastating legal effect they would have on the County's defense of this action. It is also apparent that the County's absolute refusal to produce the documents, even subject to a Protective Agreement, is for purposes of delay to limit BellSouth's ability to use the information in this proceeding. Using the trade secret privilege for such purposes is clearly prohibited.

WHEREFORE, BellSouth Telecommunications, Inc. requests that this Commission enter an Order compelling the County to produce its current customer list,

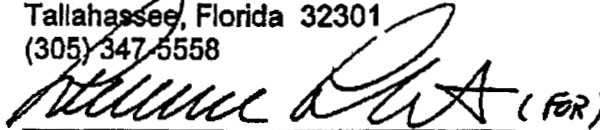
subject to an appropriate Protective Order, and that the PSC grant BellSouth an extension of time to complete any additional discovery necessitated by the production of these additional documents.

Respectfully submitted:

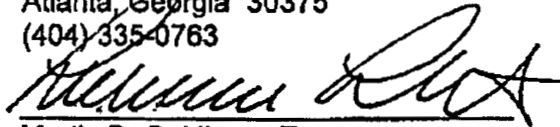
BELLSOUTH TELECOMMUNICATIONS, INC.



James Meza, Esq.
Sharon R. Liebman, Esq.
c/o Nancy H. Sims
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301
(305) 347-5558



E. Earl Edenfield, Jr.
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, Georgia 30375
(404) 335-0763



Martin B. Goldberg, Esq.
Lawrence B. Lambert, Esq.
LASH & GOLDBERG LLP
Bank of America Tower, Suite 1200
100 Southeast Second Street
Miami, Florida 33131
(305) 347-4040

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been served via Electronic Mail and First Class U.S. Mail this 18 day of July, 2006 to the following:

Adam Teitzman
Staff Counsel
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
Tel. No. (850) 413-6175
ateitzma@psc.state.fl.us

Murray A. Greenberg
Miami-Dade County Attorney
David Stephen Hope, Esq.
Assistant County Attorney
Miami-Dade County Attorney's Office
Aviation Division
P.O. Box 592075 AMF
Miami, Florida 33159-2075

Jean L. Kiddo, Esq.
Danielle C. Burt, Est.
Bingham McCutchen LLP
3000 K Street NW, Suite 300
Washington, D.C. 20007-5116


MARTIN B. GOLDBERG (FOR)