

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Determination of the cost  
of basic local  
telecommunications service,  
pursuant to Section 364.025,  
Florida Statutes.

DOCKET NO. 980696-TP  
ORDER NO. PSC-98-1298-PCO-TP  
ISSUED: October 6, 1998

**ORDER ON BELL SOUTH'S MOTION TO COMPEL AND  
REQUEST FOR LEAVE TO FILE SUPPLEMENTAL REBUTTAL TESTIMONY**

I. BACKGROUND

Pursuant to Section 364.025, Florida Statutes, this proceeding in Docket No. 980696-TP addresses the Commission's determination of the cost of basic local telecommunications service, on a basis no greater than a wire center, for the entire state of Florida. On July 29, 1998, BellSouth Telecommunications, Inc. (BellSouth) served upon AT&T Communications of the Southern States, Inc. (AT&T), with its First Request for Production of Documents in this proceeding. BellSouth requested, through Production of Documents Request No. 1, the Database File (DBF) of customer points (geocoded information) used by PNR and Associates (PNR) in creating inputs for HAI 5.0, the cost proxy model that AT&T is sponsoring in this proceeding. On August 4, 1998, AT&T filed its objection to BellSouth's request on the grounds that the file requested is proprietary in nature and not in AT&T's custody, control, or possession. Also on this date, Sprint-Florida, Incorporated (Sprint-Florida) served its First Request for Production of Documents on AT&T, requesting the same information as BellSouth through its Interrogatories Nos. 1 and 2, and Production of Documents Request No. 1. Subsequently, AT&T filed a objection to Sprint-Florida's request.

On August 10, 1998, GTE Florida Incorporated (GTEFL) filed several interrogatories and requests for production of documents that related to the information in dispute. (GTEFL Interrogatory Nos. 3,5,6,7,8,23 and 24; Production of Documents Requests 10,12,13,15,16,17,18,19,20, and 34) On August 14, 1998, GTEFL requested the production of documents AT&T produced to BellSouth referenced above. On August 19, 1998, and again on September 1, 1998, AT&T objected to GTEFL's discovery requests on the grounds

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that the requested information is the property of third party vendors and is "only available from PNR."

On August 11, 1998, Sprint-Florida filed its Motion to Compel AT&T to Respond to Sprint-Florida's First Request for Interrogatories and First Request for Production of Documents. This request included the customer location information sought by BellSouth. Likewise on September 4, 1998, pursuant to Rule 1.380, Florida Rules of Civil Procedure, BellSouth filed a Motion to Compel AT&T to produce the DBF document in question. BellSouth also requests leave to supplement its rebuttal testimony to address the requested information. On September 11, 1998, Sprint-Florida filed its Response in Support of BellSouth's Motion to Compel AT&T to Produce Documents. On September 16, 1998, AT&T filed its response to BellSouth's Motion and Sprint-Florida's Response. In addition, AT&T moves that the Commission issue a protective order regarding the requested information. On September 24, 1998, GTEFL filed its Response in Support of BellSouth's Motion to Compel AT&T to Produce Documents.

## II. BELLSOUTH'S MOTION

BellSouth claims that it has requested from AT&T the production of the underlying data involving the customer location process of HAI 5.0, the model that AT&T advocates in this proceeding. BellSouth believes that AT&T's failure to provide this information renders the HAI 5.0 model unverifiable. BellSouth states that this information represents an integral and crucial part of the HAI 5.0 model. In support of its motion, BellSouth asserts that nothing in the statutes, rules of the Commission, or Florida law (i.e., Section 364.183, Florida Statutes), generally suggests that a claim of confidentiality by itself justifies a refusal to comply with a proper discovery request. BellSouth contends that if AT&T's position were well taken, then any party would be free to utilize "outside" experts to advocate a position, then to refuse to disclose any properly discoverable information about the work product of these experts, based on the contention that they are "third parties." BellSouth argues that it must have actual physical possession of the requested data in order to complete necessary validity tests to verify the appropriate use of this information in the HAI 5.0 model.

Moreover, BellSouth argues that AT&T's actions do not indicate that the requested information is beyond AT&T's control. BellSouth

states that AT&T has provided minimum spanning tree analysis (MST) of the data when requested and provided the data in its entirety when ordered to do so by the Washington Utilities and Transportation Commission (WUTC). BellSouth has since informed the Commission's staff that the latter statement is not completely accurate. The WUTC has issued an order to compel production of the requested information, but AT&T has not complied with the request to date.

Finally, BellSouth is willing to enter into a proprietary agreement with AT&T and/or PNR to ensure the protection of the information from public disclosure. If the Commission grants BellSouth's Motion, BellSouth seeks leave to file supplemental rebuttal testimony to address the requested information.

III. SPRINT'S POSITION

Sprint-Florida joins in support of BellSouth's motion and argues that AT&T cannot refuse to respond to the discovery request on the basis that the information is the intellectual property of another. Sprint-Florida claims that it has provided information to AT&T similar to that which AT&T now refuses to provide to Sprint-Florida. Sprint-Florida further supports its position with a recent decision from the WUTC, where the WUTC ordered AT&T of the Pacific Northwest, Inc. to provide US West Communications, Inc. and GTE Northwest Incorporated the same geocoding and clustering data that Sprint-Florida is requesting in this proceeding.

IV. GTEFL'S POSITION

GTEFL similarly joins in support of BellSouth's Motion to Compel. In addition to the reasons supporting BellSouth and Sprint-Florida's Motions to Compel, GTEFL argues that the information requested will enable the parties to evaluate "the first fundamental step" (according to AT&T/MCI witness Wood) that a cost model must perform in order to accurately calculate costs, whether HAI 5.0 can accurately determine customer locations. GTEFL also supports its position with the WUTC decision, noting that the WUTC found that the failure to provide the requested information leaves a "blackhole" in the evaluation of the HAI 5.0 model.

V. AT&T's RESPONSE AND MOTION FOR PROTECTIVE ORDER

AT&T contends that it cannot produce the geocoded customer location information as requested by BellSouth and Sprint-Florida. AT&T explained at oral argument that it would produce Item 3 listed in PNR's attached letter, The Capital National Access Line Model, but AT&T claims that the other information sought is the intellectual property of an entity that is not a party to this proceeding, PNR. Further, PNR regards this as highly sensitive, proprietary information that is available to persons other than AT&T on a commercial basis. AT&T argues that PNR will not allow AT&T to remove the requested information from PNR's property. AT&T supports this contention with a letter from PNR dated September 9, 1998, found as Attachment 4 to its response. (Attachment A) Likewise, AT&T has never had in its custody, possession, or control the requested geocoded information. AT&T contends that Rule 1.350(a), Florida Rules of Civil Procedure, only permits parties to request through discovery documents that are in the possession, custody, or control of the party to whom the request is directed. As a result, AT&T states that it cannot provide the requested information and moves for a protective order.

In an effort to accommodate the parties who seek to obtain the information in question, AT&T arranged in April 1998, at its own expense for an open visit to PNR's premises. AT&T continues to offer to arrange for BellSouth and Sprint-Florida to visit the premises of PNR to allow the parties to review the requested data.

VI. DISCUSSION

Rule 1.350(a), Florida Rules of Civil Procedure, states in pertinent part:

(a) Request. Scope: Any party may request any other party (1) to produce and permit the party making the request, or someone acting in the requesting party's behalf, to inspect and copy any designated documents ... that constitute or contain matters within the scope of Rule 1.280(b) and that are in the possession, custody or control of the party to whom the request is directed; ...

As stated above, Rule 1.350(a) requires any party, in this case AT&T, to produce any designated document in its possession, custody, or control to the requesting party and allow that party to inspect and copy the documents. In this case, BellSouth, Sprint-Florida, and GTEFL have requested from AT&T specific geocoded customer location information that AT&T used in deriving inputs for its proffered cost proxy model, HAI 5.0. None of the parties dispute that the requested information is relevant to the subject matter of this proceeding as required by Rule 1.280(b), Florida Rules of Civil Procedure. As represented by BellSouth, Sprint-Florida, and AT&T, the requested information is contained on a single computer file (DBF) that belongs to a third party company, PNR. Thus, it appears that the information is not presently, nor has it ever been, in the custody or possession of AT&T.

The core issue then is whether AT&T has control over the information requested such that it should be required to produce it. Neither BellSouth, Sprint-Florida, nor GTEFL have provided any information indicating that AT&T has the ability to require PNR to produce the requested information to any of the relevant parties, including AT&T itself. Thus, there has been no showing that AT&T has any control over the requested information. Moreover, AT&T has made affirmative representations and provided evidence that it does not have control over the requested information. (Attachment A) Equity in this proceeding, however, dictates that AT&T should provide reasonable access to relevant information upon which it bases its filed cost proxy model in this proceeding. Thus BellSouth, Sprint, and GTEFL should have some reasonable access to review the information in question.

#### VII. RULING

Accordingly, BellSouth's Motion to Compel is denied in part and granted in part. AT&T is not required to produce the requested information directly to BellSouth, Sprint-Florida, or GTEFL. AT&T must, however, provide reasonable access to the requested information at the PNR premises commencing October 6, 1998, to BellSouth, Sprint-Florida, and GTEFL; at which time, BellSouth, Sprint-Florida, and GTEFL shall be allowed to review and analyze the relevant information on the PNR premises. BellSouth, Sprint-Florida, and GTEFL shall not be permitted to remove the requested information from the PNR premises, but shall be allowed to remove with them any analytical notes, charts, or graphs that they produce during the review of the information, short of the actual requested

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information itself. AT&T's Motion for Protective Order, likewise, is granted to the extent that this ruling provides.

In an effort to allow the requesting parties an adequate opportunity to address the PNR geocoded customer location information, BellSouth, Sprint-Florida, and GTEFL shall be allowed to file supplemental rebuttal testimony with the Commission's Division of Records and Reporting no later than Friday, October 9, 1998, at 12:00 p.m. This supplemental testimony shall only address the specific information which is the subject of this discovery dispute. Neither AT&T nor any other party shall be afforded the opportunity to file supplemental testimony on this subject matter or any other at this time.

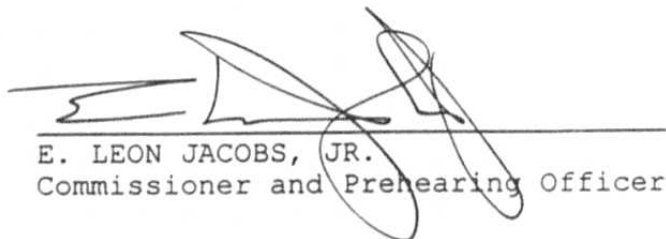
Based on the foregoing, it is

ORDERED by the Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, that BellSouth Telecommunications, Inc.'s Motion to Compel the Production of Documents by AT&T Communications of the Southern States, Inc., is denied in part and granted in part as specified in the body of this Order. It is further

ORDERED that AT&T's Motion for a Protective Order is granted to the extent specified in the body of this Order. It is further

ORDERED that BellSouth Telecommunications, Inc.'s request for leave to file rebuttal testimony is granted as specified in the body of this Order.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 6th day of October, 1998.

  
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E. LEON JACOBS, JR.  
Commissioner and Prehearing Officer

( S E A L )

WPC



NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.



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September 9, 1998

AT&T Communications of the Northwest, Inc.  
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MCI Telecommunications Pacific Corporation  
Rogelio Pena  
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707 17<sup>th</sup> Street, Room 600  
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VIA FACSIMILE (360-586-1150)

Dear Ms. Proctor and Mr. Pena,

The purpose of this letter is to respond to the requests of GTE Northwest Incorporated ("GTE") and U S WEST Communications, Inc. ("U S WEST") for the data underlying the HAI Model which has been submitted to the Washington Utilities and Transportation Commission. GTE and U S WEST are requesting electronic copies of the following:

1. Dun and Bradstreet National Database
2. Metromail, Inc. National Database
3. PNR National Access Line Model ("NALM"), Version 2.0. along with all associated inputs used to run the HAI model for Washington
4. CENTRUS Geocoding Software
5. Point-Coding Reference Data for that Software
6. Wire Center Mapping Boundaries

All items, with the exception of item 3, are publicly available from their respective owners. PNR has the right to use each item either via purchase or special contractual arrangements. However, this information is proprietary to our vendors and cannot be resold or provided by PNR to any third party. Item 3, PNR's NALM, is a custom version of a commercially available product. This custom version is proprietary to AT&T and MCI.

In the past, other companies have requested this or similar information and we have been consistent in our response. To accommodate these requests without violating the agreements with our data vendors, PNR has hosted two opportunities for companies to come to our offices and review the above data in the form in which it is input into the HAI model. This arrangement was the only one to which our vendors would agree. GTE took advantage of this review opportunity on both occasions (first on April 16<sup>th</sup> and again

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ATTACHMENT A

on May 12<sup>th</sup> and 13<sup>th</sup>), and U S WEST participated in just the second meeting. While the sessions were originally established to examine data for Nevada and Minnesota, other companies requested and received access to review the data from other states.

Representatives from GTE and U S WEST are welcome to visit our offices at their convenience. If you have any questions please call me on (215) 886-9200.

Sincerely,



William M. Newman