

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into  
pricing of unbundled network  
elements.

DOCKET NO. 990649-TP  
ORDER NO. PSC-00-1688-PCO-TP  
ISSUED: September 21, 2000

ORDER GRANTING MOTION TO COMPEL

On December 10, 1998, in Docket No. 981834-TP, the Florida Competitive Carriers Association (FCCA), the Telecommunications Resellers, Inc. (TRA), AT&T Communications of the Southern States, Inc. (AT&T), MCIMetro Access Transmission Services, LLC and WorldCom Technologies, Inc. (MCI WorldCom), the Competitive Telecommunications Association (Comptel), MGC Communications, Inc. (MGC), Intermedia Communications Inc. (Intermedia), Supra Telecommunications and Information Systems (Supra), Florida Digital Network, Inc. (Florida Digital Network), and Northpoint Communications, Inc. (Northpoint) (collectively, "Competitive Carriers") filed their Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory. Among other matters, the Competitive Carriers' Petition asked that this Commission set deaveraged unbundled network element (UNE) rates.

On May 26, 1999, this Commission issued Order No. PSC-99-1078-PCO-TP, granting in part and denying in part the Competitive Carriers' petition. Specifically, the Commission granted the request to open a generic UNE pricing docket for the three major incumbent local exchange providers, BellSouth Telecommunications, Inc. (BellSouth), Sprint-Florida, Incorporated (Sprint), and GTE Florida Incorporated (GTEFL). Accordingly, this docket was opened to address the deaveraged pricing of UNEs, as well as the pricing of UNE combinations and nonrecurring charges. An administrative hearing was held on July 17, 2000, on the Part One issues identified in Order No. PSC-00-2015-PCO-TP, issued June 8, 2000. Part Two issues, also identified in Order No. PSC-00-2015-PCO-TP, are scheduled for an administrative hearing on September 19-22, 2000. On August 18, 2000, Order No. PSC-00-1486-PCO-TP was issued granting Verizon Florida Inc.'s (formerly GTE Florida Incorporated) Motion to Bifurcate and Suspend Proceedings, as well as Sprint-Florida Incorporated's and Sprint Communications Company Limited

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING 005851

Partnership's Motion to Bifurcate Proceedings, for a Continuance and Leave to Withdraw Cost Studies and Certain Testimony.

On September 11, 2000, BellSouth filed an Emergency Motion to Compel seeking an order compelling Supra Telecommunications and Information Systems, Inc. (Supra), Rhythms Links, Inc. (Rhythms), BlueStar Networks, Inc (BlueStar), and DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) to respond fully and completely to BellSouth's discovery requests. BlueStar, Covad and Rhythms (collectively Data ALECs) filed a Joint Response to BellSouth's Emergency Motion to Compel on September 13, 2000. To date, Supra has not filed a response, but such response is not due until September 18, 2000. However, since the Data ALECs filed their response, this Order addresses only the portion of the motion concerning the Data ALECs.

### Arguments

#### **BellSouth:**

In its Motion, BellSouth states that on August 22, 2000, it served its second set of interrogatories and requests for production of documents to the Data ALECs. BellSouth states that these discovery requests sought information concerning loop conditioning. In its Motion, BellSouth seeks responses to interrogatories numbers 46 and 48. In their response, the Data ALECs state that as of September 13, 2000, it has filed its response to interrogatories numbers 46 and 48, and therefore, the Motion to Compel is moot. Because the responses have been provided for these interrogatories, I find that this portion of the Motion is moot.

BellSouth also claims it requested the Data ALECs to "produce all documents referring or relating to multiple loop conditioning practices of any incumbent local exchange carrier" in its Second Request for Production of Documents, Item No. 13.

BellSouth states that on September 1, 2000, the Data ALECs objected to its Request for Production 13 "to the extent it seeks documents that may be subject to protective orders or other confidentiality agreements . . . ." BellSouth asserts that neither of these objections has merit.

BellSouth claims that the fact that documents "may be subject to protective orders or other confidentiality agreements" is hardly

grounds for not producing those documents here. BellSouth argues that the Protective Agreement executed by the parties in this docket expressly addresses the treatment of confidential information of third parties. BellSouth explains that paragraph 2 of the Protective Agreement in particular, provides that "information held by any party subject to existing, nondisclosure obligations to a third party" shall be treated as confidential consistent with the terms of the Protective Agreement. BellSouth concludes that it has produced information that is subject to a third-party confidentiality agreement, and the Data ALECs should be compelled to do likewise.

**Data ALECs:**

The request for Production No. 13 calls for the Data ALECs to:

Produce all documents referring or relating to multiple loop conditioning practices of any incumbent local exchange carrier.

The Data ALECs object to this request to the extent that it calls for documents which are in their possession subject to confidentiality agreements with the owners of the information (i.e. the other incumbent LECs). The Data ALECs state that they have produced certain non-confidential documents which are responses to this request; however, they are not free to produce other documents which they hold subject to confidentiality agreements with third parties.

The Data ALECs argue that the fact that they have an agreement with BellSouth regarding discovery in this docket under which the parties agree to hold certain discovery responses confidential does nothing to relieve the Data ALECs of their obligation not to disclose information that they have received in proceedings in other states and which they have agreed with the owners of the information not to disclose. For example, the Data ALECs assert that BellSouth would legitimately complain if confidential information that they obtained from BellSouth in this docket were disclosed to other ILECs in proceedings in other states -- a practice that the Data ALECs assert is prohibited by the confidentiality agreement.

The Data ALECs argue that the fact that BellSouth may have obtained permission from certain of its vendors to produce their

confidential information subject to the confidentiality agreement in this docket in no way requires the Data ALECs to breach their confidentiality agreements with other ILECs by disclosing third party information that they are contractually obligated to hold confidential. Therefore, the ALECs assert that the Motion to compel related to Request to produce No. 13 should be denied to the extent that the information sought is held by the Data ALECs under confidentiality agreements with third parties which prohibits its disclosure.

**Determination**

Rule 1.280, Florida Rules of Civil Procedure, is applicable in this case. See Section 364.183(2), Florida Statutes, and Rules 28-106.206 and 25-22.006(6)(a), Florida Administrative Code. Fla. Rule Civ. Pro 1.280(b)(1) provides:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the part seeking discovery of the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

BellSouth is requesting the Data ALECS to "produce all documents referring or relating to multiple loop condition practices of any incumbent local exchange carrier." I believe that such information requested is relevant to the subject matter of the pending action based upon the issues to be decided by this Commission. Therefore, I find that the information is generally discoverable within the

context of the Rule. However, an exception is allowed by the rule when the information is "privileged."

Florida Rule of Civil Procedure 1.280(b)(5), Claims of Privilege or Protection of Trial Preparation Materials, provides:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

The Data ALECs argue that they cannot produce the documents sought because the documents are protected by a confidentiality agreement with third parties. Thus, I must decide whether such information subject to a confidentiality agreement is privileged as contemplated by the Rule. The status of this information as proprietary confidential information must be specifically pled. Because the Data ALECs fail to make the necessary arguments, I must, at this time, find that the information is not privileged. The Data ALECs only argue that they have produced certain non-confidential documents which are responsive, but are not free to produce other documents which they hold subject to confidentiality agreements with third parties.

Florida Rule of Civil Procedure 1.280(c) provides that:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that just requires, including one or more of the following: . . . (7) that a trade secret or their confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way. . . .

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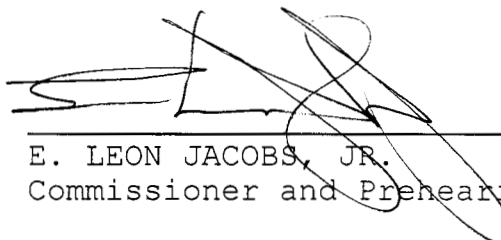
Based upon the Motion filed by BellSouth and the Data ALEC's Response, I find that BellSouth's Motion to Compel should be granted and the Data ALECs should produce the documents requested. The Data ALECs did not allege that the information sought is confidential by virtue of being a trade secret or some other type of confidential commercial information. Had such a demonstration been made by the Data ALECS, the burden would have then shifted to BellSouth to establish that its need for the information outweighs the countervailing interests in withholding production.

It is therefore

ORDERED by Commissioner E. Leon Jacobs, as Prehearing Officer, that BellSouth Telecommunications Inc.'s Motion to Compel is granted to the extent that Information Systems, Inc., Rhythms Links, Inc., BlueStar Networks, Inc, and DIECA Communications, Inc d/b/a Covad Communications Company are compelled to respond to Production of Documents No. 13. It is further

ORDERED that BellSouth Telecommunications Inc.'s Motion to Compel Information Systems, Inc., Rhythms Links, Inc., BlueStar Networks, Inc, and DIECA Communications, Inc d/b/a Covad Communications Company to respond to Interrogatories Numbers 46 and 48 is moot.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 21st day of September, 2000.

  
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E. LEON JACOBS, JR.  
Commissioner and Prehearing Officer

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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.

005857

FLORIDA PUBLIC SERVICE COMMISSION - RECORDS AND REPORTING

Requisition for Photocopying and Mailing

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Requested By Ruth

Item Presented

Agenda For (Date) \_\_\_\_\_ Order No. 00-1688 In Docket No. 990649  
Notice of \_\_\_\_\_ For (Date) \_\_\_\_\_ In Docket No. \_\_\_\_\_  
Other \_\_\_\_\_

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00 SEP 20 PM 3:38

September 18, 2000

RECORDS AND  
REPORTING

TO: COMMISSIONER JACOBS

FROM: DIVISION OF LEGAL SERVICES (CALDWELL) *DWC PL*

RE: DOCKET NO. 990649-TP - INVESTIGATION INTO PRICING OF  
UNBUNDLED NETWORK ELEMENTS

1688-PC

Attached is an ORDER GRANTING MOTION TO COMPEL which is ready for your review and signature. Please call Diana Caldwell at 413-6175 or Dorothy Menasco at 413-6243 when it has been signed. (Number of pages in order - 7)

DWC

Attachment

cc: Division of Economic Regulation (Iyamu, Lee, Lester)  
Division of Competitive Services (Ollila, Arant,  
Davis, Dowds, King, Marsh)  
Division of Policy Analysis & Interagency Liaison  
(Fogleman, Smitha, Watts, Yu)

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*ps!*

**MUST GO TODAY**

*Filed  
Mailed. 30/2*