

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs and for investigation of BellSouth's promotional pricing and marketing practices, by Florida Digital Network, Inc.

DOCKET NO. 020119-TP

In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs by Florida Competitive Carriers Association.

DOCKET NO. 020578-TP

In re: Petition for expedited review and cancellation or suspension of BellSouth Telecommunications, Inc.'s Key Customer tariff filed 12/16/02, by Florida Digital Network, Inc.

DOCKET NO. 021252-TP
ORDER NO. PSC-03-0203-PCO-TP
ISSUED: February 11, 2003

ORDER GRANTING IN PART, AND DENYING IN PART,
BELLSOUTH'S MOTION TO COMPEL

On February 14, 2002, Florida Digital Network, Inc. (FDN) filed a Petition for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs and For An Investigation of BellSouth Telecommunications, Inc.'s Promotional Pricing and Marketing Practices (January tariff filing). On March 5, 2002, BellSouth filed its Response and Answer to FDN's Petition.

On June 25, 2002, the Florida Competitive Carriers Association (FCCA) filed a Petition for Expedited Review and Cancellation Of BellSouth's Key Customer Promotional Tariffs (June tariff filing)

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in Docket No. 020578-TP. On June 28, 2002, Order No. PSC-02-0875-PAA-TP, was issued in Docket No. 020119-TP, and the Commission determined that BellSouth's 2002 Key Customer Program tariff was not unduly discriminatory.

On July 15, 2002, BellSouth filed a Motion to Dismiss or, in the alternative, Response to the "Petition of the Florida Competitive Carriers Association (FCCA) for Expedited Review and Cancellation Of BellSouth Telecommunications Inc.'s Key Customer Promotional Tariffs."

On July 19, 2002, FDN and the FCCA filed separate protests of Order No. PSC-02-0875-PAA-TP, each requesting an administrative hearing be convened in Docket No. 020119-TP. On July 22, 2002, the FCCA filed a Response to BellSouth's Motion to Dismiss. By Order No. PSC-02-1237-FOF-TP, issued September 9, 2002, BellSouth's Motion to Dismiss FCCA's complaint was denied and Docket Nos. 020119-TP and 020578-TP were consolidated for purposes of hearing. By Order No. PSC-02-1295-PCO-TP, issued September 23, 2002, the procedural and hearing dates were set for these dockets. I would note also that by Order No. PSC-03-0148-PAA-TP, issued January 28, 2003, Docket No. 021252-TP was consolidated with Docket Nos. 020119-TP and 020578-TP for hearing purposes.

By Order No. PSC-03-0065-PHO-TP, Prehearing Order and Second Order Modifying Procedure, issued January 8, 2003, all discovery pending, as well as the hearing schedule, was suspended to allow parties additional time to reach settlement negotiations. Parties had until January 28, 2003, to reach settlement, or the hearing schedule would presume. On January 28, 2003, parties filed a letter indicating that a settlement had not been reached and that parties were continuing to negotiate. The administrative hearing set in these dockets is scheduled for February 19-20, 2003.

Because parties have not reached a settlement, I find it necessary to rule on the pending motions to compel. On November 21, 2002, BellSouth filed a Motion to Compel. US LEC of Florida, Inc., Time Warner Telecom of Florida, L.P. and XO Florida, Inc. (collectively "Joint ALECs") filed a Response to BellSouth's Motion to Compel on December 5, 2002. Subsequently, on December 10, Joint

ALECs filed a Motion to for Extension of Time to file their Response to BellSouth's Motion to Compel, as it had not been filed on the due date of December 3, 2002. BellSouth did not respond to the Motion for Extension of Time.

ARGUMENTS

BellSouth's Motion to Compel

In its Motion to Compel, BellSouth seeks to compel the Joint ALECs to respond fully and completely to BellSouth's First Set of Interrogatories and BellSouth's First Requests for Production of Documents (collectively "discovery"). BellSouth states that on October 17, 2002, BellSouth served interrogatories and requests for production of documents on the Joint ALECs as well as other parties seeking to discover information concerning termination liability (Interrogatory 5; Document Request 5), limited service offerings (Interrogatory 7; Document Request 7), resale of promotions (Interrogatory 12; Document Request 12), claims concerning interaction between BellSouth's wholesale and retail divisions (Interrogatory 16, Document Request 16), non-tariffed offerings (Interrogatory 18; Document Request 18), comparative pricing analysis (Interrogatory 19; Document Request 19), contractual offerings (Interrogatory 20; Document Request 20), numbers of customers and market share (Interrogatories 26, 27, and 28; Document Requests 26-28, and 31), and capital funding (Interrogatory 29, Document Request 29).

BellSouth asserts that the Joint ALECs lodged various objections to providing the requested information, contending that the discovery is not relevant to the issues in this proceeding, while other information is proprietary. BellSouth argues that these arguments are without merit and should be summarily overruled. BellSouth states that the terms of the protective agreement with the Joint ALECs should alleviate any concerns relating to commercially sensitive information; thus, information withheld on such grounds should be produced forthwith. BellSouth asserts that in this proceeding the Commission must resolve whether BellSouth's offerings comply with certain Florida Statutes. BellSouth explains that one way for the Commission to determine the

level of competition and types of activities occurring in the marketplace is to compare BellSouth's offerings against the type of offerings by ALECs, to evaluate ALEC growth, particularly growth in the hot wire centers in which BellSouth's promotions were available over the same time periods during which BellSouth's promotions were offered.

BellSouth states that Rule 1.280, Florida Rules of Civil Procedure, proves that it is not grounds 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 contends that the Joint ALECs cannot assert that BellSouth's discovery is not relevant, because BellSouth is entitled to request information relating to defenses and relating to information that may lead to the discovery of admissible evidence.

BellSouth declares that its discovery is relevant. Interrogatory 16 seeks information about facts that ALECs may have concerning claims of sharing information between wholesale and retail divisions. BellSouth asserts that it should be able to discover from the ALECs facts that would shed light on BellSouth's defense of this case, that would be useful in rebutting the testimony of FCCA's witness Kennedy and that would demonstrate whether there is any basis in fact for the ALECs' allegations of inappropriate sharing of information between BellSouth's wholesale and retail divisions.

BellSouth states that Interrogatory 20 seeks information concerning whether ALECs offer services under contract. BellSouth asserts that whether or not ALECs offer term contracts that contain termination charges, discounted pricing, and other perks is directly related to BellSouth's defense of this case. To the extent that ALECs are actively marketing term agreements and BellSouth is responding to market pressures with similar term agreements, BellSouth asserts that it should have the opportunity to use the discovery responses at the hearing.

Request for Production 31 seeks specific ALEC line information, and Interrogatories 26-28 also seek customer data are

relevant to BellSouth's ability to present evidence regarding ALEC's line growth during th time the ALECs complain of BellSouth's Key Customer offerings.

BellSouth contends that FDN's witness Gallagher refers to limited liability of ALECs to counter BellSouth's price discounts. BellSouth argues that Interrogatories 7, 18 and 19 are all directly related to these claims. Interrogatory 7 requests information concerning offers available for limited times. Interrogatory 18 seeks information concerning whether ALECs have offered any "off tariff" promotions or services, while Interrogatory 19 seeks information relating to price comparisons. BellSouth explains that if ALECs claim that BellSouth's promotions are so damaging, BellSouth should be entitled to discover information about ALEC special promotions.

Interrogatory 5 seeks specific information concerning termination charges. BellSouth asserts that FCCA's witness Kennedy claims that BellSouth's contract termination provisions present an obstacle for ALECs. Interrogatory 12 seeks information regarding resale. BellSouth states that the direct testimony of FDN's witness Gallagher and FCCA's witness Kennedy address resale. Again, BellSouth asserts that it is entitled to discover ALEC specific facts regarding resale.

Interrogatory 29 seeks information relating to capital funding. BellSouth states that FDN's witness Gallagher contends that BellSouth promotions pose a chilling effect on ALEC investment. BellSouth argues that witness FDN's witness Gallagher's testimony illustrates that BellSouth's interrogatory request is relevant.

BellSouth concludes that the Joint ALECs' claim that responding to BellSouth's discovery requests is unduly burdensome can not be sustained because the Joint ALECs have not provided substantive support. Hence, BellSouth requests that its Motion to Compel be granted.

Joint ALECs' Response

Joint ALECs state that the sole purpose of these dockets are to determine the legality of BellSouth's Key Customer tariffs. Joint ALECs contend that BellSouth's discovery requests are not relevant to any issue in this docket. They state that BellSouth's discovery request are completely and totally unrelated to BellSouth's Key Customer tariff or any other BellSouth tariff. While the Joint ALECs have made general objections regarding BellSouth's First Set of Interrogatories and First Request for Production of Documents to Joint ALECs, only those discovery requests BellSouth seeks to be compelled are addressed herein.

The Joint ALECS argue that they object to the discovery request to the extent that the requests seek information that is privileged or otherwise exempt from discovery, including but not limited to documents or information protected by the attorney-client privilege, the work-product doctrine, or the trade-secrets doctrine. They argue that BellSouth asserts that "these interrogatories are continuing in nature and require supplemental responses should information unknown to you at the time you serve your responses to these interrogatories subsequently become known or should your initial response be incorrect or untrue. Joint ALECs object to BellSouth's request to require supplemental responses. The Joint ALECs contend that Rule 1.280(e), Florida Rules of Civil Procedure, provides that:

a party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement response to include information thereafter acquired.

The Joint ALECs state further that BellSouth's requests for production of documents ask only for documents that are identified or supporting the Joint ALECs' responses to the interrogatories. Therefore, the Joint ALECs incorporate all of their objections to BellSouth's interrogatories in all of their objections to BellSouth's corresponding requests for production of documents.

The Joint ALECS state that Interrogatories 12, 18-20, 26-29, are overly broad and burdensome. Further, they state that information requested in Interrogatories 20, 26-29 is irrelevant to any issue to be determined by the Commission in this proceeding and is not reasonably calculated to lead to discovery of relevant information and infers that it not likely to lead to admissible evidence.

The Joint ALECs argue also that Interrogatories 16 seeks information that would reveal "mental impressions, conclusions, opinions and legal theories" that are protected from disclosure to discovery requests pursuant to 1.280 (b) (3), Florida Rule of Civil Procedure. The Joint ALECS contend that Interrogatory 5 is also irrelevant.

Interrogatory 5 requests all sections of the Joint ALECs' tariffs that set forth termination liability terms and conditions effective after January 1, 2001. Interrogatory 7 relates to information regarding service offerings to end users. They contend that this request is unduly burdensome, vague and ambiguous, overly broad and seeks discovery of work product and commercially sensitive, proprietary and confidential information.

The Joint ALECs state that Interrogatory 12 regarding resale is vague and ambiguous and that BellSouth already has access to the requested information. The Joint ALECs respond that Interrogatory 16 regarding sharing of information calls for a legal conclusion. As support, the Joint ALECs state that Rule 1.280(b)(3), Fla.R.Civ.P. specifically prohibits disclosure of the information requested and states, in pertinent part:

In ordering discovery of the materials when the required showing has been made, the court shall protect against the disclosure of the mental impressions, conclusion, opinions, or legal theories of an attorney or other representative of a party concerning litigation.

Therefore, the Joint ALECs assert that Interrogatory 16 is protected from disclosure.

The Joint ALECS opine that Interrogatory 18 regarding rates for tariff service offerings in Florida is vague and ambiguous, unduly burdensome, and seeks discovery of commercially sensitive proprietary and confidential information. Further, they state that to the extent that tariff information is filed with the Commission, BellSouth already has access to the requested information. Interrogatory 19 seeks information about comparison in rates for tariff service offerings. The Joint ALECs respond that this request is irrelevant to any issue in this proceeding and unduly burdensome.

The Joint ALECs explain that Interrogatory 20 regarding contractual offerings is irrelevant to the extent that BellSouth seeks information regarding product services. Further, they contend that this request is unduly burdensome.

Interrogatories 26-28 also seek customer data which the Joint ALECs assert that this information is irrelevant to any issue in this proceeding and not reasonably calculated to lead to discovery of relevant information.

The Joint ALECs conclude generally that the information that BellSouth seeks is irrelevant, vague and ambiguous as well as unduly burdensome. Therefore, the Joint ALECs request that the Commission deny BellSouth's Motion to Compel.

DECISION

After reviewing the parties' motions and response, as well as the interrogatories and PODs in questions, BellSouth's Motion to Compel shall be granted in part and denied in part in the manner and for the reasons set forth below.

Rule 1.280(b) states that:

It is not ground for objection that the information sought will be inadmissible at the trial if the information appears reasonably calculated to lead to the discovery of admissible evidence.

The central issue in this case is whether BellSouth's Key Customer tariffs are anticompetitive and therefore violative of Florida Statutes. The Joint ALEC claim that the information sought by BellSouth is not relevant to any issue in this docket. The Joint ALECs contend further that the information sought is vague and ambiguous and overly broad and burdensome. BellSouth argues that the information it seeks is relevant to issues in the case and its defenses.

BellSouth states that one way for this Commission to determine the level of competition occurring in the marketplace is to compare BellSouth offerings against those offered by the Joint ALECs. However, the Joint ALECs respond that their offerings are not at issue and therefore not relevant to this proceeding.

BellSouth states that discovery rules are to be liberally construed so as to permit any form of discovery within the scope of the rules. Weyant v. Rawlings, 389 So. 2d 710 (Fla. Dist. Ct. App. 1980). I agree. However, the Joint ALECs argue that the information BellSouth is seeking is irrelevant, vague and ambiguous. Further, the Joint ALECs conclude that the discovery requests which seek a legal opinion are protected from disclosure pursuant to Rule 1.280(b)(3), Florida Rules of Civil Procedure.

While I find the Joint ALECs' arguments somewhat persuasive, I believe that the discovery rule permits discovery of some of the information that BellSouth is seeking. The central issue in this case revolves around whether BellSouth's Key Customer tariffs are anticompetitive. In consideration of this issue, BellSouth attempts to discover information regarding other tariff offerings which may be related and helpful to BellSouth preparing its defense in this case. It has been established that information sought that is reasonably calculated to lead to the discovery of admissible evidence is discoverable. The only exceptions apply when that information is protected by a privilege or when the information sought is overly broad or unduly burdensome. Therefore, I find it appropriate to grant in part and deny in part, BellSouth's Motion to Compel as set forth below.

<u>Interrogatory Nos.</u>	<u>Production of Documents Nos.</u>	<u>Decision</u>	<u>Reason/Limitation</u>
No. 5	No. 5	Grant in part	a) Limit to 2002 tariffs b) deny-duplicative
No. 7	No. 7	Grant in part	relevant- Limit to offerings in 2002
No. 12	No. 12	Deny	irrelevant; not likely to lead to the discovery of admissible evidence
No. 16	No. 16	Grant	relevant
No. 18	No. 18	Grant	relevant
No. 19	No. 19	Deny	irrelevant; not likely to lead to the discovery of admissible evidence
No. 20	No. 20	Grant-in part	a) relevant- limit to 2002 offerings b) deny -duplicative
No. 26	No. 26	Deny	Overly broad and unduly burdensome- Duplicative of Interrogatory 27
No. 27	No. 27	Grant-in part	relevant- limit to 2002
No. 28	No. 28	Deny	irrelevant; not likely to lead to the discovery of admissible evidence

No. 29	No. 29	Deny	irrelevant; not likely to lead to the discovery of admissible evidence
	No. 31	Deny	irrelevant; not likely to lead to the discovery of admissible evidence

In view of the short time remaining before the hearing, the Joint ALECs are directed to respond to the interrogatories and PODs for which the Motion to Compel has been granted within 7 days of the date of this Order. The responses shall be provided to BellSouth with a copy to staff, by hand delivery or facsimile, to be received no later than 5:00 p.m. on that date. Further, the Joint ALECs' Motion for Extension of Time to file Response to BellSouth's Motion is granted.

Based on the foregoing, it is

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that BellSouth Telecommunications, Inc.'s Motion to Compel is granted in part and denied in part as set forth in the body of this Order. It is further

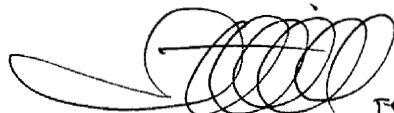
ORDERED that US LEC of Florida, Inc., Time Warner Telecom of Florida, L.P., and XO Florida, Inc. shall respond to the discovery requests set forth in the body of this Order within the time limits and in the manner described in the body of this Order. It is further

ORDERED that US LEC of Florida, Inc., Time Warner Telecom of Florida, L.P., and XO Florida, Inc.'s Motion for Extension of Time to file a Response to BellSouth Telecommunications, Inc.'s Motion to Compel is granted.

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ORDERED that these Dockets shall remain open pending the resolution of the matters to be addressed at hearing.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 11th day of February, 2003.



BRAULIO L. BAEZ
Commissioner and Prehearing Officer

(S E A L)

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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

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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 the Commission Clerk and Administrative Services, 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.