

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Verizon Florida Inc. to reform intrastate network access and basic local telecommunications rates in accordance with Section 364.164, Florida Statutes.

DOCKET NO. 030867-TL

In re: Petition by Sprint-Florida, Incorporated to reduce intrastate switched network access rates to interstate parity in revenue-neutral manner pursuant to Section 364.164(1), Florida Statutes.

DOCKET NO. 030868-TL

In re: Petition for implementation of Section 364.164, Florida Statutes, by rebalancing rates in a revenue-neutral manner through decreases in intrastate switched access charges with offsetting rate adjustments for basic services, by BellSouth Telecommunications, Inc.

DOCKET NO. 030869-TL

In re: Flow-through of LEC switched access reductions by IXCs, pursuant to Section 364.163(2), Florida Statutes.

DOCKET NO. 030961-TI  
ORDER NO. PSC-03-1386-PCO-TL  
ISSUED: December 10, 2003

ORDER ON OPC'S MOTION TO COMPEL AGAINST AT&T; MOTION TO REQUIRE AT&T TO RESPOND BY MONDAY, DECEMBER 8, 2003; AND REQUEST FOR RULING OF PREHEARING OFFICER BY TUESDAY, DECEMBER 9, 2003

On November 18, 2003, AT&T Communications of the Southern States, LLC (AT&T) announced that "it is entering the Florida local residential phone market, focusing first on customers currently served by BellSouth." On November 19, 2003, the Office of Public

DOCUMENT NUMBER-DATE

12720 DEC 10 8

FPSC-COMMISSION CLERK

Counsel on behalf of the Citizens of Florida (OPC), in its second set of requests for production of documents, asked AT&T the following:

2. Please provide all documents in your possession, custody or control discussing or evaluating the decision of AT&T to offer local telephone service in all or part of the area served by BellSouth Telecommunications, Inc., in Florida.

3. Please provide all documents in your possession, custody or control comparing, contrasting, or evaluating providing local telephone service in part or all of the areas served by Verizon Florida Incorporated or by Sprint Florida in Florida.

4. Please provide all documents in your possession, custody or control discussing or evaluating the role of (a) the price of basic local telephone service in Florida, (b) the price of unbundled network elements in Florida, (c) the price of access charges in Florida, or (d) any other factor in the decision of AT&T to offer local telephone service in Florida.

On November 24, 2003, AT&T filed general objections to those requests, and, thereafter, filed specific objections. AT&T's specific objections apply equally to each of OPC's three articulated requests for documents.

On November 19, 2003, OPC filed its Motion to Compel Against AT&T; Motion to Require AT&T to Respond by Monday, December 8, 2003; and Request for Ruling of Prehearing Officer by Tuesday, December 9, 2003. In that Motion, OPC requests that the Prehearing Officer: (1) order AT&T to respond to this motion by Monday, December 9, 2003; (2) rule on this motion by Tuesday, December 9, 2003; and (3) require AT&T to produce all of the documents requested in OPC's second set of requests for production of documents to AT&T by no later than 5:00p.m. on Tuesday, December 9, 2003.

A. OPC's Motion

OPC alleges that none of the general objections related specifically to the requested documents but, rather, were "boiler plate" objections typically filed in all discovery request responses. OPC stated that it had previously filed responses to those types of general objections, and adopts those responses in response to the general objections made by AT&T in the present pleading.

OPC reports that the specific objection filed by AT&T objects to producing any document responsive to the requests for documents because, according to AT&T, the documents disclose "trade secrets." Citing various chapters of the Florida Statutes other than chapter 364 (which governs this proceeding), AT&T claims that it is entitled to totally withhold documents it claims as "trade secrets."

OPC argues that AT&T's objection is at odds with Chapter 364, Florida Statutes, the Commission's rules governing confidential information, and established practice at the Commission with which other companies abide. Importantly, OPC argues, subsection (3)(a) of Chapter 364 specifically includes trade secrets within the definition of "proprietary confidential business information," and subsection (2) contemplates access to such information by the OPC, subject to appropriate protective orders by this Commission.

OPC further asserts that Rule 25-22.006, Florida Administrative Code, details the procedures to be used to handle proprietary confidential business information, as defined in Section 364.183, Florida Statutes (2003). Subsection (6) of the rule deals with discovery and sets forth a manner by which the OPC may take possession of such information. OPC alleges that those provisions are well known to AT&T, but AT&T has chosen to ignore them. OPC urges that the Prehearing Officer should not allow AT&T to flout the same rules and procedures that are followed by other companies before this Commission.

B. Intermediate Action

Based on OPC's request, in an attempt to find a resolution of this matter within the extremely limited time remaining for

preparation, this Commissioner orally granted a portion of OPC's Motion, and on December 5, 2003, made the following oral rulings:

1. AT&T shall respond to OPC's Motion to Compel by Monday, December 8;

2. Staff shall be prepared to provide analysis and recommendations regarding the Motion to Compel by Tuesday, December 9 at 12:00 PM;

3. The Prehearing Officer will issue a ruling on OPC's Motion on December 9, 2003;

4. In the event that the Prehearing Officer determines to grant OPC's Motion to Compel, or any part thereof, AT&T shall be prepared to provide such discovery to OPC no later than close of business on Tuesday, December 9, 2003.

C. AT&T's Response

Pursuant to that ruling, on December 8, 2003, AT&T filed its response to OPC's Motion. The argument contained in that response applied equally to each of the three requests at issue. AT&T argued in that response that OPC was seeking information that is not based on objective measures of costs or revenues, but rather subjective business decision making processes used to determine whether AT&T will or will not enter a market. AT&T urges that such information is the most sensitive imaginable for a competitive provider of long distance service.

Next, AT&T argues that Section 364.164, Florida Statutes (2003) recognized that the rebalancing dockets were not to be turned into telecommunications "free-for-all" by providing that

Any discovery or information requests under this section must be limited to a verification of historical pricing units necessary to fulfill the Commission's specific responsibilities under this section of ensuring that the company's rate adjustments make the revenue category revenue neutral for each annual filing.

AT&T claims OPC is not seeking "verification of historical pricing units," as provided for in Section 364.164(3), Florida Statutes. Accordingly, AT&T argues that OPC's request exceeds the scope of discovery as established by Section 364.164, Florida Statutes (2003).

AT&T also argues that it is not the purpose of discovery to "afford litigant avenue to pry into Adversary's business or to go on fishing expedition to uncover business methods, confidential relations, or other facts pertaining its business." Grooms v. Distinctive Cabinet Designs, Inc. 846 So.2d 652, 655(Fla. 2<sup>nd</sup> DCA 2003) AT&T urges that "the burden is on the party seeking discovery of confidential commercial information to establish information is sufficiently relevant and necessary to the case to outweigh harm disclosure would cause to opposing party." Grooms, supra at 655.

Further, argues AT&T, the statute does not allow the Commission to apply the role of the IXCs to its decision-making process. Rather, AT&T states that the process is to be based solely on the ILEC's balancing of local service rates and access charges. AT&T's position is that the only possible issue that could apply to IXCs is whether the savings from lowered access charges are properly flowed through to the consumer.

AT&T asserts that, in this case, OPC has failed to demonstrate a "reasonable necessity" for the production of AT&T's trade secret marketing decision making process. Therefore, OPC's Motion to Compel should be denied.

#### Decision

Rule 1.280(b)(1), Florida Rules of Civil Procedure, states that:

. . . 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 party seeking discovery or the claim or defense of any other party. . . . 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.

This standard is not, however, without limit. What is relevant for purposes of discovery is a broader matter than what is relevant and admissible at hearing. Discovery may be permitted on information that would be inadmissible at trial, if it would likely lead to the discovery of relevant, admissible evidence. Also see Allstate Insurance Co. v. Langston, 655 So.2d 91 (Fla. 1995). Furthermore, objections to discovery that is "burdensome" or "overly broad" must be quantified. First City Developments of Florida, Inc. v. Hallmark of Hollywood Condominium Ass'n, Inc., 545 So. 2d 502, 503 (Fla. 4<sup>th</sup> DCA 1989) Finally, assertions that information sought is subject to privilege as a "trade secret" must be set forth in such a way that parties can assess the applicability of the alleged privilege. See TIG Ins. Corp. of America v. Johnson, 799 So. 2d 339 (Fla. 4<sup>th</sup> DCA 2001).

AT&T is correct in arguing that the OPC request, as worded, exceed the scope of discovery as established by Section 364.164, Florida Statutes (2003). In Order NO. PSC-03-1155-PCO-TL, issued on October 20, 2003, it was determined that open-ended requests for data beyond the 12 month historical pricing units were in violation of the provisions of the Statute, as quoted by AT&T. Accordingly, I find that the requests of OPC which are the subject of this Order shall be limited to the immediate 12 month period preceding date of the requests. In addition, the requested data shall be limited to that which relates specifically to Florida's new Telecommunications Act. However, I find that AT&T is not correct in its assertion that because it is not an ILEC and has no comparable historical pricing data it is exempt from the production of other categories of confidential information.

It cannot be denied that the information sought by OPC in this matter is trade secret information. However, Florida Statutes and the Rules of this Commission provide protections for the safe handling of such privileged information. I find that the information provided by AT&T pursuant to this Order is protected under the cloak of Order No. PSC-03-1268-PCO-TL, the generic protective order governing the handling of confidential materials in this Docket.

The general tone of AT&T's response to OPC's Motion to Compel is that AT&T has, essentially, no role or involvement in these dockets other than the flow-through of the rate reductions, and, accordingly, should be exempt from the criteria applied to the ILECs. However, AT&T petitioned this Commission to intervene in these proceedings, and there were certain obligations which accompanied the right to participate as a party in the resolution of the petitions. On November 18, 2003, when AT&T announced that "it is entering the Florida local residential phone market, focusing first on customers currently served by BellSouth," it became subject to scrutiny concerning the dynamics and impact of the proposed rate reductions on the local telecommunications markets in Florida.

I emphasize that in resolving this Motion, I do not make any determination on whether, in fact, this information should be a part of our final decision in this matter.

Based on the foregoing, it is

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that AT&T Communications of the Southern States, LLC shall respond to OPC's Motion to Compel by Monday, December 9, 2003. It is further

ORDERED that, in the event it should be so ordered, AT&T Communications of the Southern States, LLC be prepared to produce all of the documents requested in the Office of Public Counsel's second set of requests for production of documents by no later than 5:00p.m. on Tuesday, December 9, 2003. It is further

ORDERED that AT&T shall produce all documents discussing or evaluating the decision of AT&T to offer local telephone service in all or part of the area served by BellSouth Telecommunications, Inc., in Florida originating within the past 12 months based on the new Telecommunications Act. It is further

ORDERED that AT&T shall produce all documents comparing, contrasting, or evaluating providing local telephone service in part or all of the areas served by Verizon Florida Incorporated or by Sprint Florida in Florida originating within the past 12 months based on the new Telecommunications Act. It is further


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ORDERED that AT&T shall produce all documents which discuss or evaluate the role of the following factors in AT&T's decision to offer local telecommunications service in Florida for the past 12 months or in relation to the new Telecommunications Act: (a) The price of basic local telephone service in Florida, (b) The price of unbundled network elements in Florida, (c) The price of access charges in Florida, or (d) any other factor in the decision of AT&T to offer local telephone service in Florida. It is further

ORDERED that all materials provided pursuant to this request shall be produced under the protection of Order No. PSC-03-1268-PCO-TL, the generic protective order governing the handling of confidential materials in this Docket. It is further

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

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this 10th Day of December, 2003.

  
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RUDOLPH "RUDY" BRADLEY  
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



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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; or (2) 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 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.