

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal Communications Commission's triennial UNE review: Local Circuit Switching for Mass Market Customers.

DOCKET NO. 030851-TP
ORDER NO. PSC-04-0173-PCO-TP
ISSUED: February 19, 2004

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

I. Case Background

In response to the Federal Communications Commission's (FCC) August 21, 2003, Triennial Review Order (TRO), this Commission opened two dockets to ascertain whether a requesting carrier is impaired by lack of access to certain incumbent local exchange companies' network elements.

On February 9, 2004, BellSouth filed an Emergency Motion to Compel AT&T to respond to its Requests for Admissions and Interrogatories Nos. 191, 192, 193(c)-(e), 199, 200, 208, 209, 210, 213, 215, 216, 217, 218, 219, 228, 236, 237, 239(b)-(c), and 241, as well as its Requests for Production of Documents Nos. 34 through 37. BellSouth contends that although AT&T did provide initial responses to these requests, the responses are incomplete and do not provide the information requested. On February 16, 2004, AT&T filed its Response in Opposition to the Motion. Thereafter, on February 18, 2004, AT&T served its Supplemental Responses to the discovery at issue.

II. Standard of Review

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.

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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. 4th 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. 4th DCA 2001).

III. Disputed Requests

At the outset, I note that AT&T indicated in its Response that it agrees to provide supplemental responses to Interrogatories Nos. 191, 192, 193, 199, 200, 208, 215, 216, 217, 218, 219, 228, 236, 237, 239, 241, and Request for Production No. 37. In addition, with regard to Requests for Production Nos. 34 and 35, AT&T stated that it will supplement its responses to those requests to confirm that it does not have any responsive information to provide that is not privileged or protected by the work product doctrine. AT&T added that it would attach a privilege log to its response to those requests.

In its supplemental responses to the discovery requests, AT&T provided responses to all Requests for Production, except for Requests 34 and 35, for which it referenced a privilege log. Because it appears that AT&T, without waiving its objections, has produced documentation or stated that such documentation does not exist with respect to Requests 36 and 37, those requests are not addressed herein. As for the Interrogatories, AT&T supplemented its responses to Interrogatories 191, 192, 193, 199, 200, 208, 213, 215, 216, 217, 218, 219, 228, 236, 237, 239, 240, and 241, but did not respond to Interrogatories 209 and 210. As such, it appears that the remaining requests at issue are Interrogatories Nos. 209 and 210, and Requests for Production Nos. 34 and 35, to which AT&T maintains its objections. As such, only these requests are specifically addressed herein.

A. INTERROGATORIES 209 AND 210

The disputed interrogatories are framed as follows:

Interrogatory 209: If the foregoing Request for admission is denied¹, state all facts and identify all documents, including providing specific references to the hearing transcript from Docket 000731-TP that support such denial.

Interrogatory 210: Is it your contention that in Docket 000731-TP before the Florida Public Service Commission AT&T was merely testifying that it

¹ Request 208: Admit that in Docket 000731-TP before the Florida Public Service Commission, AT&T’s witness(es) testified under oath that AT&T could serve customers in every “nook and cranny” of Florida using its existing local switches and long loops.

“could” or “was capable” of providing local service to every BellSouth customer in Florida using its existing switches, but that there was no implication or suggestion that it would be economic for AT&T to do so? If the answer to this Interrogatory is in the affirmative, state all facts and identify all documents, including providing specific references to the hearing transcript from Docket 000731-TP, that support this contention.

BellSouth argues that these requests seek information about AT&T’s stated position in Docket No. 000731-TP, which BellSouth argues is “irreconcilable” with AT&T’s position in this proceeding. BellSouth contends that AT&T simply stated that requests 208 and 209 were “not applicable,” while AT&T did not provide the requisite “yes” or “no” answer to request 210.

AT&T initially responded to Interrogatory No. 209 as follows:

The issue involved in Docket 000731-TP was whether AT&T was or is entitled to receive reciprocal compensation at the tandem rate level based on whether AT&T’s local network serves or is capable of serving a geographic area comparable to the geographic area served by BellSouth’s tandem network. The issue involved in that proceeding did not involve whether it is profitable or economic to serve mass market customers (as opposed to enterprise customers) with its own network and switch, which is the issue in this Docket 0308510TP. The transcript of the hearings in Docket 000731-TP will reflect what the AT&T witnesses testified to.

AT&T contends that the request is improper because: (1) it asks AT&T to compile a digest of information that BellSouth has equal access to and which would be unduly burdensome for AT&T complete; and (2) the request seeks information that is privileged work product of AT&T’s attorneys without the requisite showing of substantial need in accordance with Rule 1.280(b)(3), Florida Rules of Civil Procedure. AT&T emphasizes that this request seeks information about testimony filed in another proceeding, which BellSouth apparently already has copies of in view of its Request for Admission No. 208.

AT&T argues that case law in Florida consistently supports the notion that if parties have equal access to information, one party should not be compelled to prepare material on the other parties’ behalf.² AT&T contends that BellSouth is, nevertheless, asking that AT&T be compelled to compile and provide this information, as well as documents that would fall under the definition of “work product,” because they include counsels’ assimilations of information that was never expected to be used at trial.³ (emphasis added). AT&T argues that by asking it to point out portions of the transcript from Docket 000731-TP that it finds relevant to the issues in

² Citing Liberty Mutual Fire Insurance Company v. Hanson, 824 So. 2d 1013 (2002); and Southern Bell Telephone and Telegraph Company v. Deason, 632 So. 2d 1377(1994).

³ Citing Northup v. Howard W. Acken, M.D., P.A., No. SC02-2435, 2004 WL 178589 (Jan. 29, 2004).

Interrogatories 209 and 210, BellSouth is asking it to provide information protected by the work product doctrine, in spite of the fact that AT&T has no intention of referring to the 000731 proceeding at all in this case. AT&T specifically states, "This request necessarily requires AT&T to provide information that is protected by the work product doctrine and to which BellSouth has equal access."

B. DECISION

With the standard for discovery in mind, I find that AT&T shall be required to respond to Interrogatories 209 and 210 to the extent these interrogatories ask AT&T to state facts and identify documents.⁴ AT&T shall not be required to provide transcript references in view of the fact that BellSouth has equal access to the record of the referenced case.

BellSouth is not, however, entitled to the discovery of attorney work product or information subject to the attorney-client privilege. Therefore, any information withheld on the basis of attorney-client privilege or the work product doctrine, AT&T shall, by close of business on Friday, February 20, 2004, provide a privilege log and a copy of the documents at issue to this office so that I can conduct a review to determine if the asserted exemption from discovery applies. Otherwise, AT&T shall provide the compelled responses by noon on Monday, February 23, 2004.

C. REQUESTS FOR PRODUCTION NOS. 34 AND 35

These requests are framed as follows:

Request for Production 34: Produce all documents created since January 1, 2000 referring or relating to the financial benefits to AT&T of providing local service using UNE-P instead of using UNE-L loops, collocation arrangements, and its own local switches.

Request for Production 35: Produce all documents created since January 1, 2000 referring or relating to the financial disadvantages to AT&T of providing local service using UNE-L loops, collocation arrangements, and its own local switches rather than UNE-P.

BellSouth argues that AT&T had indicated it would provide supplemental responses to these requests at a later date, but to date, has failed to do so.

⁴ I note that AT&T responded to Request for Admission 208 in such a way that makes it somewhat unclear as to whether a response to Interrogatories 209 and 210 is necessary. Thus, to the extent BellSouth and AT&T agree that no further response to Interrogatories 209 and 210 is necessary, then AT&T shall not be required to comply with the requirements in this Order pertaining to Interrogatories 209 and 210.

AT&T, however, argues that the information sought through these requests also includes attorney work product or information subject to the attorney-client privilege as with the requests previously discussed. AT&T notes in its supplemental response to these Requests that it has prepared a privilege log consisting of the following: UNE-P planning assumptions document prepared by attorney Thomas G. Dagger, Network, Access and Local Services Law Vice President, dated October 17, 2003.

D. DECISION

As previously stated herein, BellSouth is not entitled to production and discovery of materials that are subject to attorney-client privilege. These requests do, however, appear relevant to the issues in this proceeding. Without reviewing the documents at issue, I am unable to determine whether the documents claimed by AT&T to be work product are, in fact, work product that is not subject to discovery. Therefore, AT&T shall produce a more specific privilege log identifying the documents responsive to BellSouth's Requests 34 and 35, as well as confidential copies of the documents at issue, to this office by close of business on Friday, February 20, 2004, so that I can review and determine whether the documents at issue are subject to discovery.

IV. Conclusion

Based on the foregoing, BellSouth's Emergency Motion to Compel is granted, in part, and denied, in part, to the extent set forth herein.

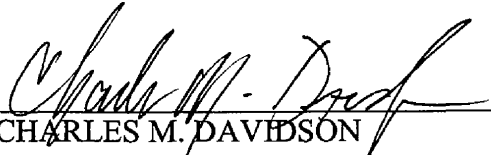
It is therefore

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that BellSouth's Emergency 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 AT&T shall either provide the required documents and privilege log to this office by close of business on Friday, February 20, 2004, or provide the responses compelled herein by close of business on Monday, February 23, 2004, as set forth in the body of this Order.

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By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 19th
day of February, 2004.



CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

(SEAL)

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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; 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.