

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs and for alleged violation of Section 364.16(3)(a), F.S., by Sprint-Florida, Incorporated.

DOCKET NO. 041144-TP  
ORDER NO. PSC-05-0837-PCO-TP  
ISSUED: August 18, 2005

ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION TO COMPEL  
AND REQUIRING *IN CAMERA* INSPECTION OF DOCUMENTS

I. Background

On September 24, 2004, Sprint-Florida, Incorporated (Sprint) filed its complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively KMC) for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs, and for alleged violation of Section 364.16(3)(a), F.S. On January 31, 2005, Order No. PSC-05-0125-PCO-TP was issued, establishing the procedures to govern the conduct of the parties in the resolution of this Docket. Thereafter, the schedule for this matter was modified by Order No. PSC-05-0402-PCO-TP, issued April 18, 2005. The hearing in this matter was conducted on July 12, 2005.

On June 15, 2005, KMC served its Fourth Set of Interrogatories (Nos. 83-90) and Fifth Request for Production of Documents (Nos. 74-81) on Sprint. On July 5, 2005, Sprint served its Responses. Thereafter, on July 8, 2005, KMC filed its Motion to Compel Responses to Fourth Set of Interrogatories and Fifth Production of Documents Requests (PODs). Sprint filed its response to the Motion on July 15, 2005, along with a Supplemental Response to POD 74. This Order addresses the Motion to Compel.

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

II. Motion to Compel

KMC argues generally that Sprint has improperly invoked privilege and provides only evasive unresponsive answers to the discovery requests. Sprint, however, contends that it has provided responsive answers to these requests, and notes that KMC did not contact Sprint with its concerns about the responses before filing the instant motion. The parties' specific arguments as to individual requests are as follows.

DOCUMENT NUMBER-DATE

08032 AUG 18 05

FPSC-COMMISSION CLERK

A. Interrogatory 83 and POD No. 74

KMC argues that these requests seek information supporting, as well as the methodology used to create Exhibit JRB-2. KMC emphasizes that it is particularly interested in the existence of other sample calls made as part of Sprint's investigation, and that it needs this information to determine whether the calls Sprint made are actually representative of the calls at issue in this case. KMC contends that Sprint generally invoked the attorney-client privilege and work product doctrine in failing to respond, but argues that these assertions are without merit. KMC maintains that this request merely seeks additional information about exhibits filed in this case, and additional information that may have been gained in the same search process used to develop the subject exhibit. KMC further argues that even if any privilege did apply, Sprint has now waived it by providing the information on the six sample calls it has now submitted as evidence.

Sprint contends that the investigation that lead to the development of JRB-2 was initiated at the direction of Sprint's attorneys in preparation for this case. Thus, Sprint had objected that the materials requested were prepared specifically for trial, and included the mental impressions, conclusions, or legal theories of Sprint's attorneys. Furthermore, any documents or information gathered in the context of this investigation, but not included in JRB-2 would fall under the protections of Rule 1.280(3), Florida Rules of Civil Procedure. Sprint adds, however, that there are no other documents or information. To the extent that KMC's discovery requests do go to the nature of the evidence itself, Sprint has provided a supplemental response.

B. Interrogatory 87 and POD 78

KMC argues that these requests seek information regarding the trend analyses that Sprint indicated it conducted on traffic being terminated to Sprint from various IXCs and CLECs. Sprint, however, objects to providing the information in 87(b), because it seeks customer specific information. Sprint further objects to providing the trend analyses requested, because it argues that it has already provided all pertinent documents. KMC argues that Sprint has, however, failed to invoke any privilege protecting the information. KMC further argues that Sprint should be required to provide the methods, data, and software used in the trending analyses, which KMC contends Sprint failed to do when it merely referenced the "tools" it used in its response.

Sprint emphasizes that it is prohibited by Section 364.24, Florida Statutes, from providing information pertaining to the other IXCs and CLECs obtained and used in its trend analyses. Furthermore, Sprint contends that the information is simply not relevant to this complaint. In response to KMC's contention that Sprint has already divulged this type of information when it suits Sprint's purposes, Sprint maintains that it has only divulged customer account information when it pertains to the KMC traffic at issue in this proceeding. Sprint adds that it has made available at its office confidential information pertaining to other carriers with whom Sprint has had similar traffic disputes, but KMC has declined to review the information.

C. Interrogatory 90

KMC argues that Sprint has failed to adequately explain how Sprint determined that Sprint's IXC affiliate was not involved in carrying any of the traffic in this case. KMC contends that Sprint only referenced its findings as they pertained to the correlated call records, but KMC contends that Witness Wiley's testimony reflects that there are correlated call records for only 2.5% of the traffic at issue in this proceeding. KMC argues that if Sprint does not have information as to whether Sprint's IXC affiliate carried any of the other 97% of the calls, then it should so state. Furthermore, KMC contends that Sprint has entirely failed to identify the process it used to determine its affiliate did not carry any of the traffic, nor how it reached its conclusions as to whether the originating customers were Sprint end-users.

In response, Sprint contends that it has already informed KMC that it has not identified Sprint IXC as a carrier on any of the traffic with correlated call records. Sprint indicates that perhaps KMC believes that Sprint needs to respond as to the traffic without correlated call records. Sprint maintains, however, that it cannot tell who the IXC is on calls that do not have correlated call records. Thus, Sprint has not been able to identify which IXCs, including Sprint IXC, may have been involved in traffic for which correlated call records are not available.

III. DECISION

The scope of discovery under the Florida Rules of Civil Procedure is liberal. Rule 1.280(b)(1), FRCP, 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 the 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.

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. 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. 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. 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. TIG Ins. Corp. of America v. Johnson, 799 So.2d 339 (Fla. 4th DCA 2001).

This standard is not, however, without limit, as this Commission has recognized time and again. See Orders Nos. PSC-03-0857-PCO-TP; PSC-03-1304-PCO-TL; and PSC-05-0096-PCO-

TP. In accordance with Rules 1.280 and 1.350, Florida Rules of Civil Procedure, the scope of discovery does not include the discovery of irrelevant information. See Travelers Indemnity Company v. Salido, 354 So. 2d 963(Fla. 3rd DCA 1978). Furthermore, Rule 1.350, Florida Rules of Civil Procedure, requires that the party from whom production is sought must have possession, custody or control of the documents. See also Henry P. Trawick, Florida Practice and Procedure, § 16-10, (1991). It is not proper to seek production of documents that do not exist and would, therefore, require preparation. See Bissell Bros. v. Fares, 611 So. 2d 620(Fla. 2nd DCA 1993)(discovery of nonexistent records cannot be had); Balzebre v. Anderson, 294 So. 2d 701(Fla. 3rd DCA 1974)(“. . . a party may not be required to produce documents which it does not have. . .”); and Henry P. Trawick, Florida Practice and Procedure, § 16-10, (1991).

A. Interrogatory 83 and POD No. 74

Upon consideration, KMC’s motion as it relates to these discovery requests is denied. The purpose of discovery is to prevent surprise at trial. However, information that reflects counsel’s mental preparation, legal theories, and evaluation of the evidence before trial generally falls within the scope of the work product doctrine. Furthermore, to fall within the work product doctrine’s protection, the information must not have been intended for use as evidence at trial. Anything intended to be offered as evidence is subject to discovery. See Northup v. Acken, 865 So. 2d 1267 (Fla. 2004); and Surf Drugs, Inc. v. Vermette, 236 So. 2d 108 (Fla. 1970). In this instance, I am persuaded that any information pertaining to Sprint’s investigation of call records that was not proffered as evidence in this proceeding falls squarely within the work product doctrine’s protections. Northup, 865 So. 2d at 1270. As for the information used in the development of JRB-2, it is not protected by the work product doctrine. However, I find that Sprint has now adequately responded to this aspect of the inquiry as reflected in Attachment A to its response to KMC’s Motion. Finally, with regard to the e-mails specifically withheld by Sprint and identified in its privilege log, it is necessary to conduct an *in camera* inspection with regard to these documents before a ruling can be made. Thus, Sprint shall be required to submit the e-mail documents at issue here for an *in camera* inspection within 7 days of the issuance of this Order. Thereafter, a ruling will be made with regard to these documents.

B. Interrogatory 87 and POD 78

As it pertains to these discovery requests, KMC’s Motion is also denied. While the scope of discovery is broad, it is not without boundaries. In this instance, information specifically pertaining to traffic terminated by other carriers does not appear likely to lead to the discovery of admissible evidence in this case. I am persuaded that the information, which Sprint maintains is gathered on a state-wide level across all states in which Sprint operates, is not relevant to Sprint’s more specific complaint against KMC. Furthermore, customer-specific account information is protected by Section 364.24, Florida Statutes. Thus, Sprint shall not be required to respond further to Interrogatory 87(a), (b), or (d).

However, Sprint did not respond to KMC’s assertions that Sprint’s response to 87(c) was inadequate, and upon review, Sprint’s mere reference to the tools it used does not appear fully responsive to the discovery request. Arguably, this information could lead to relevant



information regarding the methods Sprint used to analyze the traffic at issue in this case. Thus, Sprint shall be required to respond further to Interrogatory 87(c) to explain how it uses Excel, Access, CAIMS, and the Agilent acceSS7 Business Intelligence System to develop its trend analyses.

C. Interrogatory 90

Upon consideration, I find that Sprint has responded to this discovery request to the fullest extent possible. Thus, KMC's Motion as it pertains to Interrogatory 90 is denied.

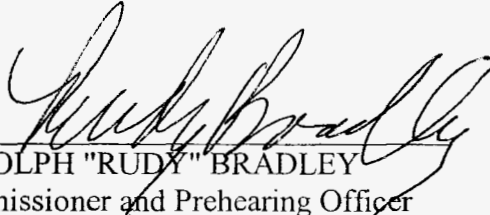
It is therefore

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that KMC's Motion to Compel Responses to Fourth Set of Interrogatories and Fifth Production of Documents Requests is granted, in part, and denied, in part, to the extent set forth in the body of this Order. It is further

ORDERED that Sprint shall provide the compelled response to Interrogatory 87(c) within 7 calendar days of the issuance of this Order. It is further

ORDERED that Sprint shall be required to submit for an *in camera* inspection the e-mail documents that it has identified on its privilege log as responsive to Interrogatory 83 and POD 74 within 7 days of the issuance of this Order.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this 18th day of August, 2005.

  
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 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.