

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and New Talk, Inc. by Digital Express, Inc.

DOCKET NO. 120169-TP
ORDER NO. PSC-13-0068-PCO-TP
ISSUED: February 1, 2013

ORDER GRANTING IN PART AND DENYING IN PART AT&T FLORIDA'S
MOTION TO COMPEL AND MODIFICATION OF DIRECT TESTIMONY DUE DATE

On January 10, 2013, BellSouth Telecommunications, LLC d/b/a AT&T Florida (AT&T Florida), filed a Motion to Compel Discovery from Digital Express, Inc. (Digital Express) (Motion). In its Motion, AT&T Florida states that Digital Express filed objections to AT&T Florida's First Set of Interrogatories, First Request for Production of Documents and First Request for Admissions on December 26, 2012 and filed partial responses on January 2, 2013. AT&T Florida maintains that Digital Express failed to produce any information or documentation in connection with certain interrogatories, production of document requests and requests for admissions relating to AT&T Florida's position that Digital Express is in breach of its Interconnection Agreement (ICA) terms and conditions. In its Motion, AT&T Florida asks the Florida Public Service Commission (Commission) to compel Digital Express to respond to AT&T Florida's First Set of Interrogatories Nos. 10-12, First Request for Production of Documents Nos. 5-10 and First Requests for Admissions Nos. 1-2. AT&T Florida states that it conferred with Digital Express's representative,¹ but the parties were unable to resolve their differences. Digital Express filed a late Response in Opposition to AT&T Florida's Motion to Compel (Response) on January 22, 2013.²

AT&T Florida states that Direct Testimony is due January 28, 2013, as established in Order No. PSC-12-0598-PCO-TP, Order Establishing Procedure, issued November 1, 2012. Therefore, AT&T Florida has requested that Digital Express be ordered to respond to the discovery requests by January 21, 2013, in order to have sufficient time to review the responses prior to the direct testimony due date.

In its Motion, AT&T Florida asserts that the documents and information it seeks to have produced are relevant to the subject matter of the issues in this proceeding and is reasonably calculated to lead to the discovery of admissible evidence. AT&T Florida argues that Digital Express has withheld information simply because the requested documents and information are not supportive of Digital Express's theory of the case. AT&T Florida asserts that the requested discovery goes towards issues in contention, specifically with regard to whether Digital Express

¹ At this time, Digital Express does not have legal representation.

² Pursuant to Rule 28-106.204 Florida Administrative Code, a response in opposition may be filed within 7 days of a Motion. Digital Express filed its Response in Opposition after 6:00 p.m. on Friday, January 18, 2013; therefore it was not considered filed with the Commission until January 22, 2013.

DOCUMENT NUMBER-DATE

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is in material breach of its ICA, including information regarding Lifeline eligibility, financial status and timing of the adoption request.

In its Motion, AT&T Florida has consolidated its arguments into three groups, which this Order tracks for convenience purposes. After having reviewed and considered the arguments of the parties, AT&T Florida's Motion is denied in part and granted in part as set forth below.

Interrogatories Nos. 10-12 and Requests for Production Nos. 8-10

Interrogatory 10: Describe with particularity the processes Digital Express followed from January 1, 2011 to the present to verify the eligibility of its end users customers for Lifeline benefits.

Interrogatory 11: Describe with particularity the processes Digital Express followed from January 1, 2011 to the present to recertify the continued eligibility of its end user customers for Lifeline benefits.

Interrogatory 12: Identify all persons with any responsibility on behalf of Digital Express relating to Lifeline from January 1, 2011 to the present, and describe with particularity each such person's responsibilities.

Request for Production No. 8: Produce all documents constituting or referring to any and all processes used by Digital Express to verify, or recertify, the eligibility of its end user customers for Lifeline benefits from January 1, 2011 to the present.

Request for Production No. 9: Produce all documents used by Digital Express any time from January 1, 2011 to the present to verify the eligibility of its end user customers for Lifeline benefits, including without limitation application forms, cover letters, letters denying benefits, and recertification requests.

Request for Production No. 10: Procure documents sufficient to show that each and every end user customer for which Digital Express sought a Lifetime credit from AT&T Florida was in fact eligible for Lifeline.

In its Motion, AT&T Florida argues that Digital Express's claims regarding Lifeline are relevant to the subject matter of the docket and are reasonably calculated to lead to the discovery of admissible evidence. AT&T Florida further argues that the requested information is relevant to Issue 1, which is whether or not Digital Express was in breach of its ICA with AT&T Florida. AT&T Florida asserts that Digital Express did not quantify how the requests are burdensome, which therefore negates Digital Express' objection and that its requests are not burdensome because each request is narrowly tailored and not improperly open-ended.

In its Response, Digital Express argues that AT&T Florida incorrectly identified a citation for a Commission decision, which should not be applicable, and is "a textbook example of the use of surprise, trickery, bluff and legal gymnastics by AT&T Florida." Digital Express

asserts that the information requested in AT&T Florida's Interrogatories Nos. 10-12 and Requests for Production Nos. 8-10 are issues that are not reasonably calculated to lead to admissible evidence. Digital Express avers that these issues are attempts to "tee up" possible underlying issues outside of this proceeding hearing and therefore AT&T Florida should do so in separate proceedings before the Commission. Digital Express further asserts that there are only two exceptions provided in 47 C.F.R. Section 5.809 that may prevent an ICA adoption. Digital Express contends that the disputes are not relevant to the Notice of Adoption at issue in this docket and should only be addressed in a separate Chapter 120 hearing. Furthermore, Digital Express argues that Interrogatories 10-12 are burdensome and overly broad because the interrogatories are unclear and vague, the information is "readily available" to AT&T Florida and is protected under the work product privilege.

Similar to its objections to Interrogatories Nos. 10-12, Digital Express argues that Requests for Production Nos. 8 and 9 are not relevant, overly broad, and are protected under the work product doctrine. Digital Express further asserts that Digital Express uses an "inordinate number" of documents. Digital Express states that a review of this information is "extraordinarily burdensome" and that it is incapable of interpreting AT&T Florida's requests.

In its objection to Request for Production No. 10, Digital Express stresses that the cost for reproducing and shipping a copy of each and every certification form for the 5,640 customers that it had from November 2011 to July 2012 would be over \$2,500.00. In addition, Digital Express states that it suffered the loss of a majority of its archived records on June 9, 2012, due to interior flooding up to 24 inches, and the records are therefore unavailable.

Analysis and Ruling

In its Response in Opposition to the Notice of Adoption, filed July 9, 2012, AT&T Florida states that it believes that Digital Express was in breach of its ICA. AT&T Florida further states that Digital Express believes that it is entitled to and, therefore, withheld amounts of certain credits associated with long distance promotions offered by BellSouth Long Distance, Inc, a long distance affiliate of AT&T Florida and certain credits in connection with the funding of the state portion of the Lifeline assistance program. The Commission has previously determined that a material breach of an existing interconnection agreement can be considered in determining whether a company is eligible to adopt an alternate interconnection agreement. *See In re: Notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Service, Inc.*, Order No. PSC-12-0390-FOF-TP, issued July 30, 2012, in Docket No. 110087-TP.³

Rule 1.280(b)(1), Florida Rules of Civil Procedure, states that "[p]arties 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

³ This Order is currently under appeal in the U.S. District Court, Northern District of Florida, *Express Phone v. FPSC, et al.*, Case No. 1:12-cv-00197-MP-GRJ.

claim or defense of any other party.” Upon review, it appears that these six discovery requests are germane to the subject matter of this docket. Further, these discovery requests relate directly to Issue 1, which is whether or not Digital Express was in breach of its ICA with AT&T Florida.

Information that is "trade secret" or "confidential proprietary business information" is protected under Section 364.183, Florida Statutes. Such information may be claimed as confidential and given confidential treatment under Rule 25-22.006(5), Florida Administrative Code (F.A.C.). Information that is attorney-client or attorney work product (information prepared in anticipation of litigation) is also protected. However, to receive the appropriate protections, the documents must be specified and the appropriate claim must be made. In addition, being confidential does not prevent information from being relevant. Until such objection is made more specific, this objection shall be denied. Should Express Phone continue to assert that Interrogatories Nos. 10-12 and Requests for Production Nos. 8-9 call for work product information, it must describe the nature of the information not produced or disclosed in a manner that, without revealing the privileged or protected information, will enable Commission Staff to assess the applicability of the privilege, pursuant to Rule 1.280(b)(5), Florida Rules of Civil Procedure. Should Digital Express believe that any information requested contains confidential information, Digital Express may file a request for confidentiality along with its response in accordance with Rule 25-22.006, F.A.C.

With respect to the Requests for Production Nos. 8-10, the information requested is not ambiguous and the requests are narrowly tailored to addresses documents that pertain to the Lifeline assistance program. Digital Express asserts that the information is readily available and it should have no problem providing the requested documents. Since Request for Production No. 10 specifically asks for only Digital Express’s end user customers that were resale Lifeline customers, therefore this request is found to not to be burdensome. It is noted that this information is already kept pursuant to 47 C.F.R. Section 54.417(c).⁴ As noted, Digital Express stated that due to flooding, not all of its records are available. Therefore, to the extent Digital Express has access to the requested information; it shall provide a response to the Requests for Production Nos. 8-10.

However, given that the ICA between AT&T Florida and Digital Express did not go into effect until July 21, 2011, the time period of Digital Express’s responses is limited from July 21, 2011, to the present for Interrogatories Nos. 10-12 and Requests for Production Nos. 8-10. Accordingly, AT&T Florida’s Motion to Compel a response for Interrogatories Nos. 10-12 and Requests for Production Nos. 8-20 is granted, as set forth herein.

⁴ (c) Non-eligible-telecommunications-carrier resellers that purchase Lifeline discounted wholesale services to offer discounted services to low-income consumers must maintain records to document compliance with all Commission requirements governing the Lifeline and Tribal Link Up program for the three full preceding calendar years and provide that documentation to the Commission or Administrator upon request. To the extent such a reseller provides discounted services to low-income consumers, it must fulfill the obligations of an eligible telecommunications carrier in §§ 54.405 and 54.410

Request for Production Nos. 5-7

Request for Production No. 5: For the period from January 1, 2011, through the present, produce Digital Express's audited and interim financial statements, balance sheets, income statements and cash flow statements, and any and all documents relating to or referring to such documents.

Request for Production No. 6: For the period from January 1, 2011 through the present, produce Digital Express's business plan(s), and any and all documents relating to or referring to its business plan(s) during that period.

Request for Production 7: For the period from January 1, 2011 through the present, produce all documents referencing any projections for: (a) volume of services to be purchases from AT&T Florida, including the type of services; and (b) number of end user customers.

In its Motion, AT&T Florida asserts that Digital Express's objections, which include attorney-client privilege, confidential business information, relevance, overly broad and burdensome and outside the Commission's jurisdiction, are not valid. AT&T Florida states that it has not asked for any attorney-client privileged communications or attorney work product. Further, AT&T Florida asserts that a confidentiality agreement can be entered into if Digital Express is concerned that the documents are confidential business information and, therefore, is not a valid objection. AT&T Florida argues that the requested documents are not outside the Commission's jurisdiction, are relevant, and are likely to lead to the discovery of admissible evidence.

Digital Express objects to Requests for Production Nos. 5-7 as being overly broad and burdensome, outside of the Commission's jurisdiction, not relevant to the subject matter of this docket, and are not reasonably calculated to lead to the discovery of admissible evidence. Digital Express contends that the requested documents are exempt from discovery and are protected by attorney-client, the accountant-client, and trade secret privileges and the work product doctrine. Digital Express also states that after a review of its documents, it does not have any documents that it considers to be its business plans. Digital Express noted that it conducts business discussions between shareholders verbally and does not maintain transcripts.

Analysis and Ruling

A business plan generally projects and outlines a company's future actions. Business plans are not necessary to identify whether a breach of the ICA occurred prior to the Notice of Adoption as it relates to non-payment because the financial records can provide the relevant information. In addition, Digital Express avers that it does not have any documents that are responsive to AT&T Florida's request as it relates to business plans. Therefore, Requests No. 5 and 6 are not reasonably calculated to lead to the discovery of admissible evidence. However, projections for volume of services and number of end user customers are relevant to the issues in this case as it relates to the security deposit. Accordingly, AT&T Florida's Motion to Compel its Requests for Production Nos. 5 and 6 is denied and the Request for Production No. 7 is granted.

Requests for Admissions Nos. 1-2

Request for Admission No. 1: Admit that prior to June 5, 2012, bills were sent on behalf of AT&T Florida to Digital Express for resale services provided in the State of Florida, which Digital Express did not pay the billed amount in full.

Request for Admission No. 2: Admit that prior to June 5, 2012, AT&T Florida made a request to Digital Express to increase its security deposit, and Digital Express failed to do so.

AT&T Florida asserts that its Requests for Admissions are relevant to the timing of the Notice of Adoption and the issue of material breach of the interconnection agreement and are therefore relevant to the subject matter of this docket. AT&T Florida further asserts the Requests are reasonably calculated to lead to the discovery of admissible evidence. Digital Express objects and argues that the requests are not relevant to the subject matter of the docket and are not reasonably calculated to lead to admissible evidence.

Analysis and Ruling

At issue in this case is whether Digital Express was in breach of its ICA at the time that Digital Express filed a Notice of Adoption of a new ICA. Both requests appear to be seeking factual admissions regarding actions by Digital Express that are at issue in this case and are within the scope of discovery permitted by Rule 1.280(b), Florida Rules of Civil Procedure, because they are reasonably calculated to lead to the discovery of admissible evidence. Rule 1.370(a), Florida Rules of Civil Procedure, provides that “[u]nless the court determines that the objection is justified, it shall order that an answer be served.” Therefore, Digital Express is directed to answer both requests.

Modification of Order Establishing Procedure

Digital Express is directed to respond to the discovery directed by this Order to AT&T Florida, no later than January 31, 2013. Pursuant to Rule 28-106.211, F.A.C., a prehearing officer has the ability to “issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case. Given that the direct testimony in this docket is due January 28, 2013, it is appropriate to establish a new direct testimony date of February 7, 2013. All other procedural dates in this docket shall remain the same.

Based on the foregoing, it is

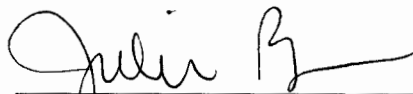
ORDERED by Commissioner Julie I. Brown as Prehearing Officer, that BellSouth Telecommunications, LLC d/b/a AT&T Florida’s Motion to Compel Discovery Responses is granted in part and denied in part, as set forth herein. It is further

ORDERED that Digital Express shall respond to those discovery requests no later than January 31, 2013. It is further

ORDERED that the Direct Testimony date is hereby modified to February 7, 2013. It is further

ORDERED that all other provisions of Order No. PSC-12-0598-PCO-TP is reaffirmed in all other respects.

By ORDER of Commissioner Julie I. Brown, as Prehearing Officer, this 1st day of February, 2013.



JULIE I. BROWN
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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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

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of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, 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.