

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for certificate)	Docket No. 971056-TX
to provide alternative local)	
exchange telecommunications)	Filed: May 22, 1998
service by BellSouth BSE, Inc.)	
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**FCCA'S MOTION TO COMPEL DISCOVERY AND
MOTION FOR LEAVE TO SUPPLEMENT THE RECORD
AND MOTION TO EXTEND DEADLINE FOR BRIEFS**

The Florida Competitive Carriers Association ("FCCA"), through its undersigned counsel, files its motion for an order compelling BellSouth BSE, Inc. ("BellSouth BSE") to produce for inspection a document which FCCA believes falls within the category of those requested by FCCA in a Request to Produce dated March 5, 1998, but which BellSouth BSE did not produce prior to the hearing in this docket. In addition, FCCA moves for an order authorizing FCCA to supplement the record in this case and extending the deadline for the filing of briefs. In support, FCCA states:

MOTION TO COMPEL DISCOVERY

1. Pursuant to Commission Rule 25-22.034, Florida Administrative Code, and Rule 1.350 of the Florida Rules of Civil Procedure, on March 5, 1998, FCCA served its First Request to Produce Documents on BellSouth BSE. Request No. 5 broadly asked for all documents bearing on the manner in which BellSouth BSE's planned ALEC operations in the BellSouth Telecommunications, Inc. ("BST") ILEC service area would affect BellSouth's overall profitability. The request stated:

DOCUMENT NUMBER-DATE

05706 MAY 22 88

FPSC-RECORDS/REPORTING

5. Please provide all correspondence, directives, instructions, orders, memoranda, and all other written documents comprising, discussing, referring to, or relating in any manner to the relationship between any ALEC operations BSE conducts in BellSouth's ILEC service area and the impact on BellSouth's overall (including parent and all subsidiaries) corporate financial performance.

Attachment A, emphasis supplied.

2. On April 3, 1998, BSE filed its response to the First Request to Produce. With respect to Request No. 5, BSE stated that it had no documents that were responsive to the request. Attachment B.

3. As the Commission is aware, BellSouth BSE has filed similar applications for authority to operate as an ALEC in BST's ILEC service area in other jurisdictions. Recently, it came to the attention of the undersigned that in North Carolina several competitive carriers ("New Entrants") served a similar request to produce documents on BellSouth BSE in a proceeding before the North Carolina Utilities Commission. The North Carolina Commission issued an order compelling BellSouth BSE to provide a consultant's study on marketing plans and strategies to the New Entrants. Based on the recitations in the North Carolina order, FCCA asserts the same document should have been provided to FCCA in response to its Request No. 5.

4. Attachment C to this motion is the order ruling on New Entrants' second data request that the Chairman of the North Carolina Utilities Commission issued in Docket No. P-691. The order demonstrates that the New Entrants filed a request to

produce documents to BellSouth BSE, in which they requested, inter alia, "Copies of all BSE's marketing plans, which were formulated internally or produced by a consultant." (Order at page 1) When BellSouth BSE was not forthcoming, the New Entrants submitted a motion to compel in which they stated:

BSE's projected growth rate makes it hard to understand how there could not be connections between BellSouth and BSE, which could be anti-competitive.

Order at page 4

5. Following the submission of the New Entrants' motion to compel, BellSouth BSE offered to allow them limited access to "a consultant's study relative to BSE's marketing plans and strategies," so that they could copy "those parts of the consultant's study pertinent to its investigation of any potential anti-competitive effect of BSE's proposed activities." Order at page 4.¹

6. As the Commission will recall, FCCA has asserted throughout this proceeding that granting BellSouth BSE's application will enable BellSouth BSE to conduct its business activities in a manner that will enhance BST's overall financial performance by making it impossible for other carriers to compete with BellSouth BSE. Significantly, this closely parallels the rationale of "anti-competitive connections" the New Entrants presented in the motion to compel that led to the entry of the North Carolina order.

¹ In the order, the North Carolina Chairman stated that the conditions on access specified by BSE were unduly restrictive. Order at page 5.

7. The FCCA requested all documents referring to or relating in any manner to the relationship between BellSouth BSE's proposed ALEC operations in BellSouth's ILEC service area and the impact on corporate financial performance. In this proceeding, BellSouth BSE's witness acknowledged that BellSouth BSE will attempt to maximize shareholder value, and said by "shareholders" he means holders of shares of the parent BellSouth Corporation (Tr.-36). Obviously, BellSouth BSE will undertake to achieve that objective through its choice of marketing strategies. Therefore, virtually by definition, a consultant's study regarding "BSE's marketing plans and marketing strategies" would necessarily fall in FCCA's broad category of documents relating to BSE's ALEC operations and their impact on overall corporate financial performance. See FCCA Request to Produce, Item No. 5, supra. Based upon the descriptions and recitations in the North Carolina order, FCCA asserts that it should have been provided the document in this case, as it was ultimately provided to the New Entrants in the North Carolina proceeding.

8. If BellSouth BSE claims the document that is the subject of this motion is confidential, FCCA agrees to accept reasonable conditions designed to protect confidentiality as long as they provide FCCA the degree of access required to protect FCCA's rights as a party for purposes of assessing the information, supplementing the record and preparing briefs.

9. In the event BellSouth BSE opposes this motion and disputes that the document identified in the North Carolina order falls within the category of documents

delineated in FCCA's Request to Produce, FCCA asks the Presiding Officer to conduct an in camera review of the document prior to ruling on this motion.

MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

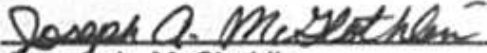
10. Subject to the disposition of FCCA's motion to compel and FCCA's review of the document, FCCA requests leave to supplement the record to the extent necessary to enable FCCA to address the import of the documents to this case. If, as FCCA asserts, BellSouth BSE should have furnished the document during discovery prior to the hearing, FCCA would have had the opportunity to offer the document as an exhibit, have its witness comment on the significance of it, and cross-examine BellSouth BSE's witness. At this point, FCCA will have been prejudiced severely unless steps are taken to rectify the unavailability of the information earlier in the proceeding. In cases in which a party failed to respond to discovery in a manner that had evidentiary implications, courts have fashioned remedies to avoid prejudice, including new trials. Nordyne, Inc. v. Florida Mobile Home Supply, Inc., 625 So.2d 1283 (Fla.App. 1st DCA 1993), review dismissed 630 So.2d 1100. FCCA does not request that the Commission reopen the hearing for further testimony of witnesses. At a minimum, however, if the motion to compel is granted, FCCA should be permitted to supplement the record with pertinent portions of the document and incorporate related arguments in FCCA's post-hearing brief.

**MOTION TO EXTEND DEADLINE FOR
FILING OF POST-HEARING BRIEFS**

FCCA filed this motion promptly upon learning of the existence of the document that is the subject of the motion to compel and after exploring the possibility of resolving the matter satisfactorily by stipulation. Given the proximity of the current deadline for filing post-hearing briefs, parties will be required to either file briefs that do not address the document on June 1, and possibly prepare a separate brief thereafter, or, alternatively, obtain an extension of time beyond the existing deadline for the preparation and filing of single, comprehensive briefs. FCCA submits that an extension of time to accommodate the ruling on FCCA's motions and, subject to those rulings, the inclusion of references to the document, as appropriate, will facilitate the orderly and efficient administration of this docket. Any revision of the schedule must take into account the time parties may need to coordinate the use of any material deemed proprietary in briefs in a manner that will satisfy conditions of confidentiality. FCCA suggests that a deadline of 30 days following the date FCCA receives the material that is the subject of this motion to compel would be an appropriate revision to the current deadline for the filing of briefs. Through a separate pleading filed this date, FCCA is requesting that the time for filing post-hearing briefs be tolled to accommodate the consideration of and the ruling on these motions.

WHEREFORE, FCCA requests the Commission to:

- GILBERT
- a) Compel BSE to produce the consultant's study described herein on terms that will assure that FCCA's rights will not have been prejudiced by the earlier omission;
 - b) Afford FCCA the opportunity to supplement the evidentiary record with portions or all of the document, as appropriate; and
 - c) Extend the deadline for filing briefs to and including 30 days after the date BellSouth BSE delivers the consultant's report to FCCA.



Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas
117 South Gadsden Street
Tallahassee, Florida 32301
(850) 222-2525

Attorneys for
Florida Competitive Carriers Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail or hand delivery(*) this 22nd day of May, 1998, to the following:

Martha Carter Brown*
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 390-M
Tallahassee, Florida 32399-0850

Mark Herron*
E. Gary Early
Akerman, Senterfitt & Eidson, P.A.
216 South Monroe Street
Suite 200
Tallahassee, FL 32301

Kenneth Hoffman
Rutledge Law Firm
Post Office Box 551
Tallahassee, FL 32302

Barbara D. Auger
Peter Dunbar
Pennington, Moore, Wilkinson
& Dunbar, P.A.
215 South Monroe Street
Tallahassee, FL 32301

Marsha Rule
AT&T
101 North Monroe Street
Suite 700
Tallahassee, Florida 32301

Richard Melson
Hopping Green Sams & Smith
Post Office Box 6526
Tallahassee, Florida 32314

Thomas K. Bond
MCI Telecommunications Corp.
780 Johnson Ferry Road
Suite 700
Atlanta, Georgia 30342

Michael McRae, Esq.
Teleport Communications Group, Inc.
Two Lafayette Centre
1133 Twenty-First Street, N.W.
Suite 400
Washington, D.C. 20036

Carolyn Marek
Time Warner Communications
Post Office Box 210706
Nashville, Tennessee 37221



Joseph A. McGlothlin

3. Please provide all correspondence, reports, studies, analyses, evaluations, written procedures, test results, and all other documents comprising, describing, or relating in any way to the operational testing of the billing system that BSE and BellSouth may use in BSE's business arrangements with BellSouth that have been conducted by BSE to date.

4. Please provide all correspondence, reports, studies, analyses, evaluations, written procedures, test results, and all other documents comprising, describing, or relating in any way to operational testing of the repair and maintenance system that BSE and BellSouth may use in BSE's business arrangements with BellSouth that have been conducted by BSE to date.

5. Please provide all correspondence, directives, instructions, orders, memoranda, and all other written documents comprising, discussing, referring to, or relating in any manner the relationship between any ALEC operations BSE conducts in BellSouth's ILEC service area and the impact on BellSouth's overall (including parent and all subsidiaries) corporate financial performance.



Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas
117 South Gadsden Street
Tallahassee, Florida 32301
(904) 222-2525

Attorneys for
Florida Competitive Carriers Association

REQUEST 5:

Please provide all correspondence, directives, instructions, orders, memoranda, and all other written documents comprising, discussing, referring to, or relating in any manner the relationship between any ALEC operations BSE conducts in BellSouth's ILEC service area and the impact on BellSouth's overall (including parent and all subsidiaries) corporate financial performance.

RESPONSE:

We do not have any correspondence, directives, instructions, orders, memoranda, and all other written documents comprising, discussing, referring to, or relating in any manner the relationship between any ALEC operations BSE conducts in BellSouth's ILEC service area and the impact on BellSouth's overall (including parent and all subsidiaries) corporate financial performance.

Response provided by:

Robert Scheye
BellSouth BSE, Inc
2727 Paces Ferry Road
Suite 1100
Atlanta, Georgia 30339

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-891

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Application of BellSouth BSE, Inc., for a)
Certificate of Public Convenience and)
Necessity to Provide Local Exchange and)
Exchange Access Service as a Competing)
Local Provider in North Carolina)

ORDER RULING ON
NEW ENTRANT'S
SECOND DATA REQUEST

BY THE CHAIR: On March 16, 1998, the New Entrants, consisting of KMC Telecom Group, TCG of the Carolinas Inc., ICG Telecom Group, Inc., Interpath Communications, Inc., and DeltaCom, Inc., submitted a second set of data requests to BellSouth BSE (BSE) consisting of 9 questions numbered 30 through 39.

On March 23, 1998, BSE filed objections to these data requests as follows:

31	Proprietary, irrelevant
32	Same; no consultant studies
33	Proprietary, irrelevant
34	Same
36	Same

The items read as follows:

31. State what assumptions were used in formulating said Income Statement. Alternatively, a copy of those assumptions may be produced.

32. Produce copies of all consultants' studies concerning BSE, its formation, its purposes and/or plans.

33. Produce copies of all BellSouth studies concerning BSE, its formation, its purposes and/or plans.

34. Produce copies of all BSE's marketing plans, which were formulated internally or produced by a consultant.

36. State by category (such as salaries, rent, and the like) the funds expended by BSE in 1997. Alternatively, an income and expense statement may be produced.

EXHIBIT "C"

With respect to relevancy, BSE maintained that the relevant issues in this docket are whether:

1. BSE is fit, capable and financially able to render local service;
2. The services to be provided will meet Commission standards;
3. The provision of services by BSE will not adversely affect the availability of reasonably affordable local service;
4. BSE will participate in the support of universal service to the extent required; and
5. The provision of local service will not otherwise adversely impact the public interest.

BSE maintained that the New Entrants are seeking information concerning the current, medium and long-range business activities, strategies, and plans of BSE—an anticipated competitor to them—and such information is not relevant to the above statutory standards for certification.

On March 27, 1998, the New Entrants filed their Responses to BSE's Objections. The New Entrants noted that BSE had not objected to a First Set of Data Requests consisting of 30 questions. The New Entrants also had taken the depositions of two BSE employees in Atlanta but no objections as to confidentiality or relevance had been lodged concerning these depositions. However, because the witnesses had been unable to answer certain questions, the New Entrants filed the Second Set of Data Requests.

Concerning specific items objected to, the New Entrants replied as follows:

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| 31 | Income statement is part of application. New Entrants want assumptions or a copy of those assumptions. Directly relevant. |
| 32 | Directly relevant. However, if there are no consultant studies, this item is moot. |
| 33 | Directly relevant. |
| 34 | Directly relevant. Will sign confidentiality agreement. |
| 36 | Directly relevant to inquire as to what business BSE had undertaken to date, its resources, and how it has spent its funds. |

On April 3, 1998, BSE filed a Reply to New Entrants' Response to BSE's Objections as follows:

- 31 BSE purports that New Entrants have limited their request as to "whether existing customers or contracts will migrate to BSE from BellSouth Telecommunications, whether customer referrals will be made or the like" and provided an answer on that basis.
- 32 BSE purports that the New Entrants have limited their request to "any more specific plans and, if so, whether those plans are anticompetitive in nature" and stated that it has already provided an answer. BSE reasserted its objection to providing any actual studies.
- 33 BSE purports that the New Entrants have limited their request to "internal BSE studies" as to "how" a new venture will operate," and contended that it has already responded.
- 34 BSE believes that it has already responded but reasserted its objection to providing any actual studies.
- 36 BSE purports that the New Entrants have clarified that they desire "what business BSE has undertaken to date, what its resources are, and how it spent its funds" and that BSE has already responded.

BSE also provided responses to Items 30, 35, 37, 38, and 39 in its Reply.

On April 8, 1998, the New Entrants filed a Motion to Compel Discovery. The New Entrants charged that BSE had erroneously stated that the New Entrants had narrowed the information sought in their data requests. The New Entrants also noted that they were willing to agree to a protective order that would have allowed only counsel for the New Entrants to review the information produced, but no further communication has been received from BSE. In its Motion to Compel, the New Entrants argued the following:

- 31 Relevant because they show how BSE plans to generate much business in a little time. Bear on issue of whether BSE's application is anticompetitive in nature.

- 32 Specific plans are necessary to assess whether those plans are anticompetitive. Willing to sign protective agreement.
- 33 Studies relevant to BSE's plans and whether anticompetitive. Willing to sign protective agreement.
- 34 BSE's projected growth rate makes it hard to understand how there could not be connections between BellSouth and BSE, which could be anticompetitive.
- 36 Expenditure information shows nature of business and whether substantial amounts have been spent on consultant studies.

Accordingly, BSE requested that BSE be compelled to respond to the above data requests fully and accurately. BSE further requested that the Commission the costs of this motion, including attorney's fees, against BSE.

On April 14, 1998, BSE faxed a letter to Mr. Daniel Long, Assistant Commission Attorney, and copied to the New Entrants which indicated the following:

- 31 BSE is preparing a summary of assumptions used in formulating its income statement and will forward a copy to New Entrants. Should resolve the dispute.
- 32 BSE stated that are no consultants' studies concerning BSE. Question is moot.
- 33 BSE stated that there are no BellSouth studies concerning BSE. Question is moot.
- 36 BSE is breaking down into major expense categories its 1997 expenses. Should resolve dispute

However, with respect to item 34, BSE stated that it and the New Entrants have reached an impasse concerning the production of a consultant's study relative to BSE's marketing plans and strategies. The impasse concerns the location of production and the terms under which the New Entrants' counsel can copy needed portions of the consultant study. BSE's proposal is that the consultant study should be available for review by New Entrants' counsel at the Raleigh offices of Kilpatrick Stockton. New Entrants counsel may mark for copying those parts of the consultant study pertinent to its investigation of any potential anti-competitive effect of BSE's proposed activities. BSE would copy those

portions and provide them to New Entrants' counsel within 24 hours. BSE characterized the New Entrants' position as being that BSE should release a complete copy of the consultant study to the custody and control of New Entrants' counsel for a period of seven to ten days whereupon portions of the consultant study not deemed pertinent to the inquiry would be returned to BSE. New Entrants' counsel would identify those portions of the consultant study he planned to use during the hearing within a week to ten days prior to the hearing.

BSE is not amenable to New Entrants' proposal. BSE believes the consultant study to be highly confidential and that it has offered reasonable accommodation to the New Entrants for access to the information.

On April 15, 1998, the New Entrants delivered a letter to Mr. Daniel Long and Ms. Mary Steel concerning the confidentiality dispute. The New Entrants stated that they favored a protective agreement similar to the one concluded with BellSouth in Docket No. P-100, Sub 133d. Those materials were also highly confidential but BellSouth was willing to produce a full copy of the confidential materials to New Entrants' counsel. The parties were able to use the confidential information at the hearing in a way that was not disruptive.

The New Entrants maintained that BSE's position on this matter has been and continues to be unreasonable. At first, BSE demanded that counsel for the New Entrants travel to Atlanta to review a copy of the study. He could take notes but would not be allowed to make copies. Later, BSE said that it would provide a copy of the study in Raleigh and copies could be made of portions of that study. The New Entrants argue that there is simply no reason not to provide a full copy of the study at their own offices for review. The New Entrants also identified what it called unacceptable provisions to the protective agreement BSE has proposed which, it contends, are either not true, require burdensome procedures, or purport to tell the Commission how to run its hearings.

On April 20, 1998, the New Entrants advised Mr. Long by telephone that BSE's responses to Items 31 and 38 were satisfactory. Since Items 32 and 33 are moot, this left as the sole issue the mode in which confidential information will be provided concerning Item 34.

Whereupon the Chair reaches the following

CONCLUSIONS

While the Chair appreciates the sensitivity with which BSE views the consultant's study requested in Item 34, the Chair also views the conditions that BSE has requested for New Entrant access to that information to be excessively burdensome. Parties have already agreed that only the New Entrant's counsel would have access to this information.

The fundamental logistical question remaining is whether BSE retains custody and control and New Entrants' attorney must view the materials at the Raleigh offices of BSE's counsel. The more fundamental question is whether it would be more appropriate to allow the New Entrants' counsel to view the materials outside of such confinement.

The Chair believes that New Entrants' counsel should be able to view and copy the materials outside of the confinement proposed by BSE. The Chair therefore concludes that the parties enter into a protective agreement along the lines of the terms previously used by BellSouth in Docket No. P-100, Sub 133d, as reasonably modified to fit the circumstances of this case. The New Entrants are, of course, expected to take the utmost care that the subject material not be seen or read by unauthorized persons and to strictly abide by the protective agreement.

IT IS, THEREFORE, ORDERED that BSE and the New Entrants enter into a protective agreement as stated above such that the New Entrants' counsel receives the information requested within 10 days of the issuance of this Order.

ISSUED BY ORDER OF THE CHAIR.

This the 24th day of April, 1998.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

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