

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for certificate)	Docket No. 971056-TX
to provide alternative local)	
exchange telecommunications)	Filed: June 15, 1998
service by BellSouth BSE, Inc.)	
_____)	

RENEWED MOTION TO SUPPLEMENT EVIDENTIARY RECORD

The Florida Competitive Carriers Association ("FCCA"), AT&T Communications of the Southern States, Inc. ("AT&T"), MCI Telecommunications Corporation ("MCI") and MCImetro Access Transmission Services, Inc. ("MCI") (hereafter "MCI"), through their undersigned counsel, hereby renew FCCA's motion to supplement the evidentiary record and request the Commission to admit into evidence the attached exhibit consisting of excerpts from a marketing study performed for BellSouth BSE, Inc. ("BellSouth BSE"). In support, Movants state:

BACKGROUND

In this case, BellSouth BSE seeks authority to, inte: alia, provide service as an ALEC within the existing ILEC service area of BellSouth Telecommunications, Inc. ("BST"). Movants and other parties oppose this aspect of BellSouth BSE's application on the grounds that BellSouth BSE is simply the BellSouth ILEC in another form, and the grant of the requested authority, without conditions, would enable BellSouth to avoid the requirements that the Telecommunications Act of 1996 placed on ILECs and thus stifle competition in the BellSouth ILEC local exchange market.

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 FPSC-RECORDS/REPORTING

At an early point in the case, FCCA submitted its First Request to Produce Documents to BellSouth BSE. Item No. 5 stated:

"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."

(emphasis supplied)

In response, BellSouth BSE maintained that it had no documents that were responsive to the request.

Following the evidentiary hearing that was conducted on April 27, 1998, FCCA learned that in an analogous proceeding in North Carolina, the North Carolina Public Utility Commission granted a motion to compel filed by "New Entrants" with respect to a marketing study and plan commissioned by and prepared for BellSouth BSE. The New Entrants justified their demand for the document on the basis of potential anti-competitive connections between BellSouth BSE and BellSouth Telecommunications, Inc.

Based on the description of the marketing plan/study in the North Carolina Order, as it related to FCCA's Item No. 5, FCCA filed a motion to compel the production of the study and a motion for authority to supplement the record with relevant portions of the document. On May 29, 1998, BellSouth BSE responded to FCCA's motions. However, prior to the filing of that response, FCCA and BellSouth BSE entered negotiations, which culminated in the execution of a Stipulation of all parties governing access to and use of the document. The Stipulation was signed and

submitted to the Commission on the same date that BellSouth BSE filed its responses to FCCA's motions. The Stipulation included a joint request for an extension of time for the filing of posthearing briefs, which the Prehearing Officer granted on June 3, 1998. The Stipulation required the parties to develop an appropriate confidentiality agreement consistent with its terms.

RENEWED MOTION TO SUPPLEMENT THE EVIDENTIARY RECORD

GROUNDING FOR THE INSTANT MOTION TO SUPPLEMENT

The Commission should grant this Renewed Motion to Supplement the Evidentiary Record with the attached excerpts from the marketing plan/study on the following grounds:

1. Supplementing the record with relevant portions of the document is contemplated by and is consistent with the Stipulation to which all parties, including BellSouth BSE, agreed.

2. The excerpts from the document that have been submitted with this motion as a confidential exhibit are relevant to the issues and subjects developed in the pleadings and during the hearing, and are admissible for the purpose of supporting and/or proving the points made by Movants' witness, Joseph Gillan. Further, they are needed to avoid prejudice to the FCCA and to enable the Commission to make a fully informed decision in this case.

3. The document is responsive to the Request to Produce, Item No. 5, and should have been made available prior to the hearing. Had it been produced timely, the FCCA would have had the opportunity to offer the attached excerpts as an exhibit during the regular course of the proceeding, and the post-hearing complications would

have been avoided. Supplementing the record is the minimum action that should be taken to provide procedural due process under the circumstances and avoid prejudice to the parties.

ARGUMENT

I. Supplementing the Record with Relevant Portions of the Document is Provided for and Consistent With the Parties' Stipulation.

In its response to the Motion to Compel, BellSouth BSE did not object to supplementing the record per se. It responded first by outlining the procedures that BSE proposed to have in place (specifically, rebuttal briefs) in order to make the document available voluntarily and as a prerequisite to an order supplementing the record. BellSouth BSE followed this statement of position with arguments which were clearly intended to be contingent in nature, and operative in the event the Commission did not provide the procedures outlined by BSE. However, BellSouth BSE then executed the Stipulation with FCCA and other parties as to the procedures to be followed. Movants submit that the Stipulation supersedes the terms advocated by BSE in its response, and specifically provides for the supplementing of the record with relevant portions of the marketing study. The Stipulation states, at page 2:

WHEREAS . . . BellSouth BSE, Inc. is willing, for the purposes of compromise, to make the Anderson[sic] Study available to FCCA and other parties for review and possible use in this proceeding . . . and

WHEREAS, procedures for the review and use of the Anderson[sic] Study require that the parties provide for the supplementing of the record . . .

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GILBERT
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NOW, THEREFORE, the parties hereto stipulate and agree as follows:

1. BellSouth BSE, Inc., FCCA, MCI Telecommunications Corporation ("MCI"), AT&T Communications of the Southern States, Inc. (AT&T), Time Warner AxS of Florida, L.P. ("Time Warner") and Teleport Communications Group, Inc. ("TCG") agree to expeditiously develop and enter into a confidentiality agreement that will . . . provide for the use of relevant portions of that document in this proceeding in a manner that will guard the asserted confidentiality of the materials.

(emphasis supplied)

Based on the Stipulation, Movants submit that BellSouth BSE waived objections other than those going to relevancy and confidentiality; further, the parties have signed and are proceeding under a confidentiality agreement. Accordingly, Movants submit the only pertinent issue is the relevancy of the attached exhibit.

II. The Exhibit is Relevant to the Issues in This Case and to the Subjects Developed During the Evidentiary Hearing.

In the North Carolina proceeding, the New Entrants supported their motion to compel the production of the marketing study with this statement:

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.

Subsequently, in the North Carolina case BellSouth BSE offered to allow the New Entrants limited access to the Andersen Study 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."

(See page 4 of the Order of the North Carolina Utilities Commission that was attached to FCCA's May 22, 1998, Motion to Compel.)

Accordingly, BellSouth BSE acknowledged in the North Carolina proceeding that the Andersen marketing study was relevant to an analysis of "potential anti-competitive effects" of BellSouth BSE's plan to provide ALEC services in BST's ILEC service area. The excerpts from the document that are attached to this motion are relevant to the issues in this case in the same manner.

The term "relevancy" ". . . describes evidence that has a legitimate tendency to prove or disprove a given proposition that is material as shown by the pleadings . . . [I]t has been defined as a tendency to establish a fact in controversy or to render a proposition in issue more or less probable." Graphic Associates v. Riviana Restaurant Corporation, 431 So. 2d 1011 (Fla. 4th DCA 1984)

The attached exhibit is relevant, because the information within it tends to establish facts in controversy and/or render propositions submitted by joint witness Joseph Gillan more probable in the following areas all of which are central to the issues in this case:

1. Certain pages of the exhibit support FCCA's contention that BellSouth would regard BST as a vehicle with which to attempt to avoid requirements of the Telecommunications Act of 1996. See pages 1-4 of the confidential exhibit attached hereto.

2. Certain pages of the exhibit support FCCA's contention that BellSouth may thwart competition by offering new capabilities through BellSouth BSE rather than through BellSouth BST. See page 2 of the Confidential Exhibit.

3. Certain excerpts from the document support FCCA's contention that the economics of resale do not apply to BellSouth BSE because BellSouth BSE would be the beneficiary of expenditures made by other BellSouth entities. See pages 16, 17, 23, 24 of the Confidential Exhibit.

4. Certain excerpts from the document support FCCA's contention that BellSouth BSE does not intend to "compete" with its affiliated ILEC. See pages 5, 19, 20, 25 of the Confidential Exhibit.

Throughout this case, BellSouth BSE has contended that the Commission is limited to a consideration of BellSouth BSE's financial and technical capabilities and management experience. Movants anticipate that BSE may object to the admission of the attached exhibit on the same basis. For purposes of building an evidentiary record, the Commission has recognized that BSE's argument in this regard is not the result, but instead is the basis of the dispute in this case. During the hearing, the Commission received testimony and evidence from the parties bearing on all of the subjects identified above. The issues have been framed by protests, petitions to intervene, and prehearing statements. The effect of granting the Renewed Motion would be to supplement the existing record with excerpts from a BellSouth document that, through no fault of FCCA, was unavailable to this point and that uses a BellSouth document to support the same points. To deny the Renewed Motion on the grounds

that the materials are unrelated to financial and technical capabilities would be to beg the central question in the case.

(The relevancy of the attached exhibit to the issues developed in pleadings and at hearing is detailed further in the confidential section of Movants' Joint Brief, which is being filed simultaneously with this motion. Rather than duplicate that exposition of relevancy, thus increasing the number of pages that must be treated as confidential, Movants adopt and incorporate that section of their Joint Brief by reference in support of this Renewed Motion.)

III. The Document is Responsive to FCCA's Request to Produce, Item No. 5

Following the execution of the Stipulation, the parties disagreed regarding the intent and effect of the Stipulation with respect to BellSouth BSE's contention that the marketing study is not responsive to FCCA's request to produce. As stated above, FCCA's position is that BellSouth BSE waived any argument concerning responsiveness to the Request to Produce when it signed the Stipulation that provided for the supplementing of the record with relevant portions of the document. However, in the event the Commission entertains an argument by BellSouth BSE relative to the parameters of Item No. 5, FCCA submits that the document falls within the scope of the category of documents identified in Item No. 5.

A. The Scope of Discovery in Florida is Broad.

Rule 1.280 of the Florida Rules of Civil Procedure delineates the scope of permissible discovery. It provides:

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, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. 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.

Rule 1.350 of the Florida Rules of Civil Procedure provides that a party may seek to discover information encompassed by the above scope through a request to produce documents designated by that party. Rule 1.350(b) states, in pertinent part:

The request shall set forth the items to be inspected, either by individual item or category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection or performing the related act. The party to whom the request is directed shall serve a written response within 30 days after service of the request, except that a defendant may serve a response within 45 days after service of the process and initial pleading on that defendant. The court may allow a shorter or longer time. For each item or category the response shall state that inspection and related activities will be permitted as requested unless the request is objected to, in which event the reasons for the objection shall be stated.

B. A Party Seeking Discovery, Pursuant to Rule 1.350, May Identify Specific Documents, Or Categories of Documents to be Produced.

Significantly, the rule provides that the request may designate documents by individual item or by category. It is not necessary to identify a specific document if the description of the category in the request is sufficient to enable the receiving party to reasonably identify the documents and comply or object to the request. Ormand Beach First National Bank v. Montgomery Roof, Co., 189 So. 2d 239 (Fla. 1st DCA 1966).

Further, the rules of discovery are to be liberally construed to accomplish their intended purpose. Brown v. Bridges, 327 So. 2d 874 (Fla. 2d DCA, 1976). The discovery rules "are remedial in nature and should be liberally construed." Torrence v. Sacred Heart Hospital, 251 So. 2d 899 (Fla. 1st DCA, 1971).

Applying these principles to the present issue, Movants submit that FCCA's Item No. 5 identified a category of relevant documents with sufficient particularity. Throughout this proceeding, FCCA has contended (as have others) that BellSouth intends to utilize BellSouth BSE in BST's ILEC service area in an anti-competitive manner, in order to avoid legal and regulatory requirements, thwart competition, and thereby protect BellSouth's market share, to the benefit and the interests of BellSouth Corporation's shareholders. To discover documentary information in the possession of BellSouth BSE relating to its contentions, FCCA asked BSE to produce documents that relate in any way to the relationship between BSE's business activities in BST's service area and BellSouth's overall financial performance. The request was not

confined to financial statements or documents that quantify, for instance, a rate of return. Rather, FCCA identified as a category the documents that would identify the nature of financial impacts and the manner in which they would be accomplished. In the context of the case, in which FCCA was articulating the potential for anti-competitive measures and effects, the category was reasonable. FCCA submits that the delineation of the category was sufficient to enable BSE to identify the Andersen Study as a requested document. Certainly, since the purpose of a marketing study/plan is to determine how BSE can be utilized to best financial advantage, and BSE's purpose is to maximize BellSouth Corporation's shareholder value, the marketing plan/study should have come to the fore.

FCCA submits its delineation was sufficient. If BellSouth thought it was overbroad or deficient in any other respect, BellSouth BSE had an obligation under the governing rule to object to the request. It did not, and accordingly, any objection to the request has been waived. American Funding, Ltd. v. Hill, 402 So. 2d 1369 (Fla. 1st DCA, 1981).

Instead, BellSouth BSE responded by saying it had no such documents. As a review of the materials attached to this Renewed Motion will establish, BellSouth's response was in error. Portions of the Andersen Study are responsive to Item No. 5.

Numerous pages within materials that FCCA has excerpted from the document demonstrate that the document falls within the category identified in the request. In order to demonstrate the relationship, it is necessary to disclose the nature of the documents. Accordingly, pursuant to the confidentiality agreement, Movants are

incorporating this portion of their argument in an attachment to the Renewed Motion that will be submitted as a confidential document pursuant to rule 25-22.006, Florida Administrative Code.

BellSouth BSE may argue that the request could have been answered by providing excerpts from the study that do not encompass the complete exhibit that has been attached to this motion. Such an argument would be unavailing. FCCA asked for documents, not portions of documents. Even if BSE had attempted to limit its response, timely disclosure of the existence of the Andersen Study could have elicited either a motion to compel or an immediate follow-up request for the entire document.

FCCA and the other Movants submit that FCCA did not receive the attached information prior to the hearing, either because BellSouth BSE imposed too narrow an interpretation on the request, or because the persons responsible for responding to FCCA were unaware that the voluminous Anderson document contained responsive material. In either event, BellSouth BSE's failure to make the pages of the exhibit available earlier must not be allowed to deny FCCA to obtain the information to which it was entitled and similarly must not be allowed to prevent the Commission from making a fully informed decision in this case.

WHEREFORE, Movants request the Commission to enter an order admitting the attached exhibit into the evidentiary record of this case.

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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 15th day of June, 1998, to the following:

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