

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Competitive Carriers for Commission action to support local competition in BellSouth Telecommunications, Inc.'s service territory.

DOCKET NO. 981834-TP

In re: Petition of ACI Corp. d/b/a Accelerated Connections, Inc. for generic investigation to ensure that BellSouth Telecommunications, Inc., Sprint-Florida, Incorporated, and GTE Florida Incorporated comply with obligation to provide alternative local exchange carriers with flexible, timely, and cost-efficient physical collocation.

DOCKET NO. 990321-TP
ORDER NO. PSC-03-1294-PCO-TP
ISSUED: November 13, 2003

ORDER DENYING MOTION TO COMPEL

I. Background

By Proposed Agency Action Order No. PSC-99-1744-PAA-TP, issued September 7, 1999, we adopted a set of procedures and guidelines for collocation, focused largely on those situations in which an incumbent local exchange company (ILEC) believes there is no space for physical collocation. Thereafter, we conducted a hearing to further address collocation guidelines. By Order No. PSC-00-2190-PCO-TP, issued November 17, 2000, various motions for reconsideration and/or clarification of our post-hearing decision regarding collocation guidelines were addressed by the Commission. By that Order, this Docket was left open to address remaining issues associated with collocation, including pricing.

By Order No. PSC-02-1513-PCO-TP, issued November 4, 2002, the procedural schedule and hearing dates were established for this phase of this proceeding in which we will address the remaining technical and pricing issues regarding collocation. On February 7, 2003, the Commission Staff filed a Motion to Revise Order Establishing Procedure.

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By Order No. PSC-03-0288-PCO-TP, issued March 4, 2003, Staff's Motion to Revise Order Establishing Procedure was granted. By Order No. PSC-03-0702-FOF-TP, issued June 11, 2003, we approved the agreement reached between the parties and our staff to resolve the Joint Motion to Strike, or in the Alternative Grant an Extension of Time. By Order No. PSC-03-0776-PCO-TP, issued July 1, 2003, the procedural schedule was modified to reflect the agreement reached between the parties and our staff.

On August 27, 2003, AT&T Communications of the Southern States, Inc. (AT&T) served its Seventh Set of Interrogatories (Nos. 49-51) to BellSouth Telecommunications, Inc. (BellSouth). On September 8, 2003, BellSouth filed its Initial Objections to the Interrogatories that incorporated the general objections, as well as specific objections to each interrogatory. On September 16, 2003, Verizon served a response restating its objections and provided no responsive information to Interrogatories 49-51. On September 25, 2003, AT&T filed a Motion to Compel asking that BellSouth be directed to fully answer Interrogatories 49-51 in AT&T's Third Set of Interrogatories to BellSouth. BellSouth filed its response on October 2, 2003.

II. Arguments

AT&T seeks to compel BellSouth to respond to its Seventh Set of Interrogatories. AT&T believes the discovery requests are both relevant and likely to lead to the discovery of additional relevant and admissible information. AT&T concedes that the information sought would have been relevant to the technical phase of this proceeding, but is also relevant in the cost phase. AT&T contends the information it requests is integral to AT&T's case on pricing issues and is cost related.

Specifically, AT&T argues the information it seeks will provide BellSouth's usage and usable capacity and is essential in determining the existing utilization factor, as well as providing BellSouth's Manufacturer's Published List 1 Drain which will provide essential information regarding BellSouth's growth expectations. AT&T contends such information directly bears on the current and projected pricing of collocation and the overall cost to competitors seeking entry to the market.

In its response, BellSouth contends that the information AT&T seeks is not relevant to Issues 9-10, the only Issues for which the record remains open. Furthermore, BellSouth asserts that its power cost study does not make use of utilization factors in any direct way. BellSouth believes that AT&T had adequate opportunity to cross examine all ILEC witnesses at the August hearings and could have asked for the information it now seeks.

III. Decision

The scope of discovery under the Florida Rules of Civil Procedure is liberal. 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. 1995). Furthermore, objections to discovery that are "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).

Applying the above standard and upon consideration of the arguments set forth by the parties, I find that the information AT&T seeks is not relevant to the subject matter of the remaining

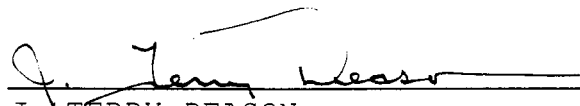
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issues in this proceeding. Although the scope of discovery is broad, the information AT&T seeks does not appear likely to lead to the discovery of admissible evidence in this Phase of the proceeding; rather, AT&T appears to seek information more germane to the August proceedings that could have been obtained during that portion of the proceeding. While AT&T argues that the information is cost related and integral to its case regarding pricing, the discovery requests at issue do not appear to seek cost information. Accordingly, the Motion to Compel is hereby denied.

It is therefore

ORDERED by J. Terry Deason, as Prehearing Officer, that AT&T Communications of the Southern States, Inc.'s Motion to Compel is denied.

By ORDER of Commissioner J. Terry Deason, as Prehearing Officer, this 13th day of November, 2003.



J. TERRY DEASON
Commissioner and Prehearing Officer

(S E A L)

JPR

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.