

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal Communications Commission's Triennial UNE Review: Location-Specific Review for DS1, DS3 and Dark Fiber Loops, and Route-Specific Review for DS1, DS3 and Dark Fiber Transport

Docket No. 030852-TP

COMMISSION CLERK

FEB 11 PM 4:00

RECEIVED-FPSC

MOTION TO COMPEL

The Florida Competitive Carriers Association ("FCCA"), through its undersigned counsel, respectfully moves for an order compelling BellSouth Telecommunications, Inc. ("BellSouth") to respond to Interrogatories FCCA-16, -17, -18, -19, -31 (subparts i, j, k, l, and q), -32 (subparts d, e, f, g, and k), and -33 (subparts n, o, p, and q).¹ Pursuant to Rule 28-106.204, Florida Administrative Code, and given the time constraints in this proceeding, FCCA also moves that BellSouth be required to respond to this Motion to Compel within three business days.² FCCA also respectfully requests that the Prehearing Officer expedite the ruling on this Motion. FCCA reserves the right to seek leave to supplement its testimony if review of the withheld information indicates such an opportunity is needed to protect its interests. In support of its Motion to Compel, FCCA states:

- AUS
CAF
CMP
COM 5
CTR
ECR
GCL
OPC
MMS
SEC I
OTH

1 We are continuing to review other BellSouth objections to FCCA's discovery requests, and we reserve the right to bring additional issues to the Commission's attention at a later time.

2 Rule 28-106.204, Florida Administrative Code, provides for a response period of 7 days "when time allows." Due to the tight deadlines in this proceeding, FCCA requests that the Commission shorten this time frame.

RECEIVED & FILED

[Handwritten signature]

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

01969 FEB 11 3

FPSC-COMMISSION CLERK

BACKGROUND

On December 31, 2003, FCCA served its First Set of Interrogatories and First Request for Production of Documents ("discovery requests") on BellSouth. FCCA sought to obtain data pertaining to the claims that BellSouth made in its testimony in this proceeding. On January 7, 2004, BellSouth filed objections to FCCA's discovery requests. On January 20, 2004, BellSouth responded to certain FCCA Discovery Requests, while maintaining its objections to the remaining requests.

FCCA has endeavored to work with BellSouth to resolve these outstanding disputes before bringing this issue to the Commission. After receiving BellSouth's objections to FCCA's Discovery Requests, counsel to FCCA contacted BellSouth in an effort to determine whether the parties could narrow their issues in dispute. At that time, BellSouth stated that it wanted to defer addressing its objections until after it answered FCCA's discovery requests. After receiving BellSouth's responses on January 20, 2004, FCCA again contacted BellSouth in an effort to narrow the remaining issues in dispute. Despite correspondence between the parties, BellSouth and CompSouth have been unable to resolve the outstanding discovery dispute.

ARGUMENT

The requested information falls into two categories: (1) information relevant to determining the identity of potential trigger candidates on the loop and transport routes that BellSouth lists in its testimony; and (2) information relevant to BellSouth's potential deployment analysis. As discussed below, the requested information is relevant the Commission's evaluation of whether, as BellSouth claims, the Federal Communications Commission's triggers for loops and transport have been satisfied at particular customer locations and on certain routes. The remaining information requests are relevant to BellSouth's claims that, under the potential

deployment analysis,³ the Commission should find no impairment on numerous other loops and routes.

1. Information Relevant to Potential Trigger Candidates – FCCA-16, 17, 18, and 19

FCCA Discovery Requests 16, 17, 18, and 19 request information regarding BellSouth's claims that the triggers have been satisfied at particular locations and on certain routes. As discussed below, the requested information would enable FCCA, among other things, to determine whether carriers are using their own facilities on the routes that BellSouth has identified as satisfying the triggers and whether there is any basis for BellSouth's contention that a carrier serves a particular customer location or locations. The Commission should reject BellSouth's objections, and should require BellSouth to respond to FCCA's discovery requests.

Each of these discovery requests asks BellSouth to identify the situations in which the carriers that it listed as trigger candidates were purchasing UNE transport, UNE dark fiber, or special access on all or part of the routes that BellSouth identified. BellSouth's objections to each interrogatory are identical: BellSouth claims that the requested information is not relevant to the dispute, that the request is overly broad, and that the request seeks information that BellSouth cannot disclose under the FCC's Customer Proprietary Network Information ("CPNI") rules. BellSouth's objections are meritless.

FCCA-16 through -19 are relevant to a central issue on which BellSouth bears the burden in this case: whether there any providers that are using their "own facilities" to provide transport between A to Z routes in Florida. In its testimony, BellSouth identified carriers as having their own facilities based on the existence of collocation arrangements. *See, e.g.*, Direct

³ The pertinent excerpts from FCCA's discovery requests and BellSouth's objections are attached as Attachment A for ease of reference.

Testimony of A. Wayne Gray at 8; Direct Testimony of Shelley W. Padgett at 15-16. BellSouth does not present evidence that traffic actually is flowing between these points. FCCA-16 through FCCA-19 relate to BellSouth's assertion that the carriers have transport facilities between the end points by asking for information about how the carriers are using the collocations. The requested information is relevant because if the carriers are purchasing UNEs or special access from BellSouth between the two locations, for example, then that fact would undermine BellSouth's claim that the carriers are using their own facilities for such transport. Similarly, if the carriers are using collocations for other purposes, *i.e.*, to transport traffic to other locations, then such information would be relevant to BellSouth's claim that the collocations represent facilities on that route.⁴

Because this information is relevant to BellSouth's trigger claims, BellSouth's objection is improper. Moreover, BellSouth has not presented any reason why it would be burdensome to search its internal bases for the requested information. BellSouth is the provider of collocation in its wire centers, and, thus, has detailed and extensive access to information regarding collocation. Accordingly, producing such information is not burdensome. BellSouth bears the burden of proof in this case, and should not be permitted to subject FCCA members to the cumbersome task of tracking this down from the numerous carriers that BellSouth has identified.

The Commission also must reject BellSouth's objection that disclosing the requested information would violate the FCC's CPNI rules. Simply put, fundamental fairness will not allow BellSouth to "have it both ways." If the requested information is CPNI, then

⁴ The New Jersey Board recently granted a carrier's motion to compel identical discovery responses noting that they were directly relevant to the issues raised in the proceeding. *See Implementation of the Federal Communications Commission's Triennial Review Order*, Docket No. TO03090705, Order (Jan. 22, 2004). (Attachment B).

under section 222 of the Act and the FCC's rules BellSouth is prohibited from using the information to demonstrate that a trigger has been satisfied. On the other hand, if BellSouth is permitted to rely on such information, then it must disclose the same to the FCCA.

FCCA asserts the requested information does not constitute CPNI. CPNI includes information about the quantity, type, destination, and use of telecommunications services that a carrier obtains by virtue of the carrier/customer relationship.⁵

Moreover, section 222 of the Act explicitly provides that carriers are permitted to disclose CPNI as required by law; therefore, the Commission has the authority to require BellSouth to disclose the requested information to FCCA. Indeed, in other states, BellSouth has agreed to provide data that it claims includes CPNI upon an order from the Commission directing it to provide such information.⁶

2. Potential Deployment

In interrogatories FCCA-31, -32, and -33, FCCA has sought information pertaining to BellSouth's potential deployment claim. At this time, FCCA has moved to compel only the following portions of these interrogatories: FCCA-31: subparts i, j, k, l, and q; FCCA-32: subparts d, e, f, g, and k; and FCCA-33: subparts n, o, p, and q. BellSouth objects to these requests on the ground that they are not relevant to the subject matter in dispute, overly broad, and request CPNI. BellSouth's objections are without merit and should be rejected.

In these interrogatories, FCCA seeks information pertaining to the demand for high capacity loops and the costs incurred to provide service to those buildings. In its testimony,

⁵ 47 U.S.C. § 222(h)(1).


⁶ See *Triennial Review Order – UNE-P, Order Granting AT&T's Motion to Require BellSouth to Respond to Discovery*, Docket No. P-100, SUB 133Q (North Carolina Utilities Commission, Jan. 23, 2004). (Attachment C).

BellSouth has claimed that a large number of loops (customer locations) satisfy the FCC's potential deployment trigger. To demonstrate that a building satisfies the potential deployment test, BellSouth must demonstrate that there is sufficient demand for high capacity loops for that building such that multiple competitors could justify the investment to build loop facilities into that building. For example, if BellSouth currently provides a single DS3 into a building, then there is no basis to claim that a building could support multiple suppliers. The requested information is necessary to determine whether demand exists – as BellSouth claims – such that the potential deployment test could be satisfied at those locations.

Because the information is relevant – indeed, critical – to BellSouth's potential deployment claim, BellSouth's objection is meritless. Presumably, BellSouth was required to obtain, assemble and evaluate such information before asserting its position regarding whether each such location satisfies the “potential deployment” criteria. BellSouth has not demonstrated why it would be unduly burdensome to produce the requested information; however, the prejudicial effect on FCCA of an inability to assess the information upon which BellSouth relies is unmistakably clear. Lastly, the requested information, which seeks information such as the total number of loops that BellSouth provides to a certain location, and does not pertain to specific services, does not constitute CPNI. To the extent that the requested information constitutes CPNI, BellSouth cannot use the FCC's CPNI rules to shield itself from responding to FCCA's discovery requests while relying on that same information to attempt that a trigger has been satisfied.

CONCLUSION

For the foregoing reasons, FCCA respectfully requests that the Commission grant its motion and order BellSouth to respond to the discovery requests identified herein.


Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Kaufman & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
(850) 222-2525
(850) 222-5606 (fax)
jmcglothlin@mac-law.com
vkaufman@mac-law.com

Attorneys for Florida Competitive Carriers
Association

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Motion to Compel has been provided by (*) hand delivery, (**) email and U.S. Mail this 11th day of February 2004, to the following:

(**)Adam Teitzman, Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

(*) (**) Nancy White
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301-1556

(**) Richard Chapkis
Verizon Florida, Inc.
201 North Franklin Street
MC: FLTC0717
Tampa, Florida 33602

(**) Susan Masterton
Sprint Communications Company
1313 Blairstone Road
Post Office Box 2214
MC: FLTLHO0107
Tallahassee, Florida 32301

(**) Donna Canzano McNulty
MCI WorldCom
1203 Governors Square Boulevard
Suite 201
Tallahassee, Florida 32301

(**) Norman H. Horton, Jr.
215 South Mornoe Street
Tallahassee, Florida 32302-1876

(**) Tracy Hatch
AT&T Communications of the
Southern States, LLC
101 North Monroe Street
Suite 700
Tallahassee, Florida 32301

(**) Michael Gross
Florida Cable Telecommunications
246 East 6th Avenue
Tallahassee, Florida 32302

(**) Matthew Feil
Florida Digital Network, Inc.
2300 Lucien Way, Suite 200
Maitland, Florida 32751

(**) Jeffrey J. Binder
Allegiance Telecom, Inc.
1919 M Street, NW
Washington, DC 20037

(**) Floyd R. Self
Messer, Caparello & Self
215 South Monroe Street, Suite 701
Tallahassee, FL 32301

(**) Nanette Edwards
ITC^DeltaCom
4092 S. Memorial Parkway
Huntsville, Alabama 35802

(**) Jake E. Jennings
Senior Vice-President
Regulatory Affairs & Carrier Relations
NewSouth Communications Corp.
NewSouth Center
Two N. Main Center
Greenville, SC 29601

(**) Jon C. Moyle, Jr.
Moyle, Flanigan, Katz, Raymond
& Sheehan, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, FL 32301

(**) Bo Russell
Regulatory and Legal Affairs
Vice-President
NuVox Communications, Inc.
301 North Main Street
Greenville, SC 29601

(**) Rand Currier
Geoff Cookman
Granite Telecommunications, LLC
234 Copeland Street
Quincy, MA

(**) Andrew O. Isar
Miller Isar, Inc.
2901 Skansie Avenue, Suite 240
Gig Harbor, WA 98335

(**) Scott A. Kassman
FDN Communications
390 North Orange Avenue
Suite 2000
Orlando, FL 32801

(**) Rabinai Carson
Xspedius Communications
5555 Wingham Blvd., Suite 3000
O'Fallon, MO 63366-3868


Joseph A. McGlothlin