

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of XO Florida, Inc.
Against BellSouth Telecommunications,
Inc. for Refusal to Convert Circuits to
UNEs and for Expedited Processing

Docket No. 041114-TP

Filed: December 17, 2004

**XO FLORIDA, INC.'S MOTION TO COMPEL
BELLSOUTH TELECOMMUNICATIONS, INC.
TO RESPOND TO DISCOVERY**

XO Florida, Inc. (XO), pursuant to rule 28-106.204, Florida Administrative Code, moves this Commission for an order requiring BellSouth Telecommunications, Inc. (BellSouth) to respond to XO's First Set of Discovery (Interrogatory Nos. 1, 3, 4, 7, 8 and Production Request Nos. 1, 2, 4 and 6).¹ As grounds therefore, XO states:

Introduction

1. On September 22, 2004, XO filed a Complaint against BellSouth in which it alleged that BellSouth has refused to convert XO special access circuits to UNE pricing. It is XO's position, as expressed in its Complaint and in the direct testimony of its witness, Gary Case, filed on December 13, 2004, that BellSouth performs the very same "process" when it converts special access circuits to Enhanced Extended Loops (EELs). However, rather than the thousands of dollars BellSouth seeks to charge XO for the special access to UNE billing change, for the special access to EEL change, BellSouth charges \$8.98.

2. BellSouth has refused to provide answers to any XO discovery questions that relate to EEL conversions, claiming that such questions are "irrelevant." As

¹ XO's questions and BellSouth's responses are attached hereto as Attachment A.

discussed below, such questions are clearly relevant to the issues in this docket and well within the bounds of permissible discovery.

Standard for Ruling on Discovery Requests

3. The scope of discovery is broad. *See Allstate v. Boecher*, 733 So.2d 993, 935 (Fla. 1999).² Rule 1.280(b), Florida Rules of Civil Procedure, addresses the scope of discovery:

Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

- (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action . . . 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.

4. The purpose of discovery is “to simplify the issues of the case, to eliminate the element of surprise, . . . to avoid costly litigation, and to achieve a balanced search for the truth and achieve a fair trial.” *See Elkins v. Syken*, 672 So.2d 517, 522 (Fla. 1996). In *Dodson v. Persell*, 390 So.2d 704, 707 (Fla. 1980), the Florida Supreme Court stated that: “A search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal.” The Court also stated that a main purpose of discovery is “to provide each party with all available sources of proof as early as possible to facilitate trial preparation.” *Id.* at 706. When the above standards for

² "Our rules of civil procedure broadly allow parties to obtain discovery of "any matter, not privileged, that is relevant to the subject matter of the pending action," whether the discovery would be admissible at trial, or is merely 'reasonably calculated to lead to the discovery of admissible evidence.'"

discovery are applied to BellSouth's objections, they must fail. The information XO seeks is relevant and likely to lead to the admission of relevant evidence because the information bears directly on the issues before the Commission in this proceeding.

The XO Discovery is Relevant to the Issues

5. Via its refusal to answer legitimate discovery questions, BellSouth seeks to foreclose this Commission and XO from making the most obvious and relevant comparisons in this case:

- What process does BellSouth use to make a billing change involving the conversion of a special access circuit to a UNE?
- How does that compare to what BellSouth does to make a billing change the conversion of an EEL to a UNE?
- What are the cost-based charges for these processes?

BellSouth has already admitted that no physical change to the circuits at issue is required to convert them from special access to UNE pricing. (See BellSouth response to XO Request for Admission, No. 3). If, as XO has alleged, the processes used to make these conversions are essentially the same, the huge price difference BellSouth is attempting to charge XO for special access to UNE conversions simply lacks any justification.

6. To gain information on these issues, XO asked BellSouth a number of questions (reproduced in Exhibit A) going to these fundamental points. For example, XO Interrogatory No. 1 asks:

Provide a detailed description of BellSouth's current process for converting special access mileage circuits to Enhanced Extended Loops ("EELs"), or UNE combinations of loop and transport in Florida, and

indicate whether this process is the same as the conversion process for such circuits in the other states in BellSouth's region.

Interrogatory No. 3 asks:

Describe, in detail, any differences between the processes [for converting EELs and special access circuits] described in Interrogatory Nos. 1 and 2 above, including an explanation of the need for any difference in the two processes.

Interrogatory Nos. 7 and 8 ask for an explanation of the cost differences BellSouth seeks to charge for the processes. BellSouth refuses to answer the and similar questions, claiming the questions are “irrelevant and not likely to lead to the discovery of admissible evidence.” BellSouth further claims that the issue in this case is limited to “whether XO has the right to convert special access circuits to stand-alone UNEs *under the Current Agreement*.”³ That is BellSouth's formulation of the issue, not XO's nor this Commission's. Issue No. 1, contrary to BellSouth's claim, is: “Does BellSouth currently have an obligation to convert all XO special access circuits to standalone UNE recurring pricing?”⁴

7. Further, Issue No. 2 addresses the issue of what charges should apply to such conversions.⁵ Clearly, cost information regarding the special access to EEL conversion is relevant to pricing issues.

8. BellSouth makes similar “irrelevance” objections when asked to produce documents related to EEL conversions (POD No. 2), cost studies underlying the EEL “switch as is” price (POD No. 4), and other similar requests. As explained above, such information is critical to the issues that are the subject of this docket and necessary for an appropriate analysis of the disputes in this case.

³ Emphasis added.

⁴ Order Establishing Procedure, Order No. PSC-04-1147-PCO-TP, Attachment A.

⁵ *Id.*

9. XO's questions are highly relevant and without such information, which only BellSouth possesses, XO and the Commission will be hamstrung in their efforts in this case.

10. Counsel for XO has conferred with counsel for BellSouth regarding the above discovery and represents that BellSouth opposes this motion.

WHEREFORE, XO's Motion to Compel as to Interrogatory Nos. 1, 3, 4, 7, 8 and Production Request Nos. 1, 2, 4 and 6 should be granted and BellSouth should be required to respond immediately.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing XO Florida, Inc.'s Motion to Compel was served on the following by electronic mail and U.S. Mail this 17th day of December 2004:

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