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Subject: Docket No. 040028-TP
Attachments: Motion to Compel Bell.pdf

Pursuant to the Commission's procedures for e-filing, NewSouth Communications Corp. (NewSouth) provides the following information:

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b. The document is to be filed in Docket No. 040028-TP

c. The document is filed on behalf of NewSouth.

d. The document is __ pages long.

e. The document is a motion to compel.

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

_____)		
Complaint and Request for Summary Disposition)		Docket No. 040028-TP
BellSouth Telecommunications, Inc. Against)		
NewSouth Communications Corp., To Enforce)		
Contract Audit Provisions)		Filed: March 17, 2005
_____)		

NEWSOUTH COMMUNICATIONS CORP.
MOTION TO COMPEL

NewSouth Communications Corp. (NewSouth), by and through its undersigned counsel, pursuant to rule 28-106.204, Florida Administrative Code, moves this Commission for an order requiring BellSouth Telecommunications, Inc. (BellSouth) to respond to NewSouth's First Set of Discovery (Interrogatory Nos. 1-5 and Production Request Nos. 1-6).¹ As grounds therefore, NewSouth states:

Introduction

1. On January 12, 2004, BellSouth filed a Complaint and Request for Summary Order regarding audit provisions in the parties' Interconnection Agreement (ICA). BellSouth asserts that it has the absolute right to audit NewSouth's request for conversion of special access circuits to Enhanced Extended Loops (EELs). It is NewSouth's position that the audit language in the ICA is not absolute and unqualified as BellSouth argues. Further, it is NewSouth's position that BellSouth has failed to comply with the requirements of the Federal Communications Commission's (FCC) *Supplemental Order Clarification*, even though that Order is expressly part of the ICA.

¹ NewSouth's discovery is attached hereto as Exhibit A.

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2. In Order No. PSC-04-0186-PCO-TP, the Commission sought briefs on certain legal issues and held this matter in abeyance pending receipt of such briefs. Briefs were filed on March 23, 2004.

3. On April 22, 2004, NewSouth served discovery on BellSouth. During the interim since discovery was served, the parties have discussed the case in an attempt to reach agreement. Thus far, such discussions have been unsuccessful. During this period of discussion, NewSouth agreed that BellSouth could refrain from responding to NewSouth's discovery requests. However, it now appears that no agreement will be reached. BellSouth was to provide answers to NewSouth's discovery no later than March 11, 2005. No answers have been received, thus NewSouth has been forced to file this Motion to Compel.

Standard for Ruling on Discovery Requests

4. 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.

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.'"

5. 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 discovery are applied, it is clear that BellSouth must respond to NewSouth’s discovery. The information NewSouth 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 NewSouth Discovery is Relevant

6. The discovery NewSouth seeks is directly related to allegations BellSouth made in its Complaint in an attempt to support its audit request. For example, NewSouth Interrogatory No. 1 seeks information regarding the allegation in ¶ 47 of the Complaint and ¶¶ 12 and 16 of the Hendrix Affidavit. Clearly, NewSouth is entitled to explore the basis for BellSouth’s allegation that NewSouth has been unable to “appropriately jurisdictionalize traffic. . . .”

7. Similarly, Interrogatory No. 2 specifically inquires about traffic studies referenced in ¶ 47 of the Complaint and ¶¶ 12 and 16 of the Hendrix affidavit that allegedly supports the allegations in the BellSouth Complaint, while Interrogatory No. 5 seeks information related to ¶ 48 of the Complaint and ¶¶ 5 and 16 of the Hendrix affidavit.

8. Finally, Interrogatory No. 3 seeks to discover information regarding the basis for the requested audits.

9. The related document requests go to the very same matters described above in the interrogatories.

10. NewSouth has contacted counsel for BellSouth and is authorized to represent that BellSouth opposes the motion.

WHEREFORE, NewSouth requests that the Commission enter an order requiring BellSouth to immediately respond to NewSouth's discovery requests.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Compel was served via electronic mail and US mail this 17th day of March, 2005 on the following parties of record:

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Tallahassee, FL 32301-1556

S/ Vicki Gordon Kaufman
Vicki Gordon Kaufman

**Before the
FLORIDA PUBLIC SERVICE COMMISSION**

Complaint and Request for Summary Disposition)	Docket No. 040028-TP
BellSouth Telecommunications, Inc. Against)	
NewSouth Communications Corp., To Enforce)	
Contract Audit Provisions)	Filed: April 22, 2004

**NEWSOUTH COMMUNICATIONS CORP.
FIRST SET OF INTERROGATORIES AND
FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

NewSouth Communications Corp. (“NewSouth”), by and through its undersigned counsel, hereby submits the following First Set of Interrogatories and First Set of Requests for Production of Documents to BellSouth Telecommunications, Inc. (“BellSouth”) (collectively, “the Parties”). Answers to Interrogatories, which must be under oath, and documents responsive to the Requests for Production of Documents must be served on NewSouth within 20 days of BellSouth’s receipt of the Interrogatories and Requests for Production of Documents, in accordance with Rule 28-106.206 of the Florida Administrative Code, and Rules 1.340 and 1.350 of the Florida Rules of Civil Procedure.

INSTRUCTIONS AND DEFINITIONS

1. These Interrogatories and Requests seek answers as of the date of the response, but are deemed continuing so that any additional information that is acquired by or becomes known to BellSouth or BellSouth’s counsel up to and including the time of hearing shall be furnished to NewSouth promptly after such information is acquired or becomes known.
2. In the event any Interrogatory or Request herein calls for information or for the identification of a document which you deem to be privileged, in whole or in part, the



information should be given or the document identified to the fullest extent possible consistent with such claim of privilege and BellSouth should specify the grounds relied upon for the claim of privilege.

3. As used herein, "BellSouth" refers to BellSouth Telecommunications, Inc. and any affiliate, subsidiary, parent, or holding company of BellSouth Telecommunications, Inc.

4. These Interrogatories and Requests seek all information known to BellSouth, its representatives, employees, agents, servants, consultants, investigators, or anyone acting for or on BellSouth's behalf.

5. As used herein, the pronoun "it" refers to BellSouth and the persons mentioned in Instructions 3 and 4 above.

6. As used herein, the term "person" or "persons" shall mean and include natural persons, corporations, partnerships, associations, joint ventures, proprietorships, entities, and all other forms of organizations or associations.

7. As used herein, the term "document" means any item that is in written, typed, recorded, filed, printed, electronic or reproduced form, including photographs and drawings and any other documents as defined in Rule 1.350 of the Florida Rules of Civil Procedure, as well as each and every copy to the extent that the copy differs in any way from any other copy or the original, regardless of whether the document is claimed to be privileged against discovery on any ground.

8. As used herein, a request to "identify" a document is a request to state when and where the document was prepared and by whom, its title or description of the general nature of its subject matter, its dates of distribution, location of each copy (whether a duplicate of other copies), the identity of the present custodian and the specific basis supporting any claim of

privilege relating to said document. If such writing or document was, but no longer is in BellSouth's possession or subject to BellSouth's control, state the disposition of the writing or document.

9. As used herein, "or" shall mean and/or, and "and" shall mean and/or.

10. For each Interrogatory, identify the name, address, telephone number, and position of the person responsible for providing the answer.

11. With respect to the documents produced, please produce them as they are kept in the usual course of business, labeling them to correspond with each numbered paragraph of the Request in response to which such documents are produced. All pages now stapled or fastened together and all documents that cannot be copied legibly should be produced in their original form.

INTERROGATORIES

1. With respect to BellSouth's allegation in Paragraph 47 of the Complaint and Paragraphs 12 and 16 of the Hendrix Affidavit (attached as Exhibit E to the Complaint), that it had a concern because BellSouth has previously had issues with NewSouth regarding NewSouth's inability "to appropriately jurisdictionalize traffic its sends to BellSouth," please:

- a. Identify or explain when the alleged inappropriate jurisdictionalization of traffic occurred and over what period of time.
- b. Identify or explain what the precise nature of the purported problems was.
- c. Identify or explain what specific traffic BellSouth contends was affected by the purported jurisdictionalization problems.

- d. If the alleged inappropriate jurisdictionalization of traffic occurred in any report(s) or document(s) submitted by NewSouth to Bellsouth, identify such report(s) or document(s).
- e. Describe what actions BellSouth took to inform NewSouth of the purported inappropriate jurisdictionalization.
- f. State the extent to which the allegedly inappropriately jurisdictionalized traffic was routed over EELs.
- g. In what states did such purported jurisdictionalization problems exist?
- h. Identify any and all documents relating to the alleged inappropriate jurisdictionalization of traffic.
- i. Identify any and all persons with knowledge of the alleged inappropriate jurisdictionalization of traffic.

2. With respect to the traffic studies referred to in Paragraph 47 of BellSouth's Complaint and Paragraphs 12 and 16 of the Hendrix Affidavit (attached as Exhibit E to the Complaint), that BellSouth contends form the basis of its concern, please fully describe or identify:

- a. the persons conducting those studies;
- b. the results of those studies;
- c. the specific types of traffic and circuits covered (*e.g.*, inter/intrastate, EELs) by the studies;
- d. how "local" traffic was defined for purposes of the studies and BellSouth's claim that the traffic studies show the traffic was "largely non-local."
- e. the states included in the studies;

- f. the timeframe covered by the studies;
- g. the methodology used to conduct the studies;
- h. any and all materials, information and documents relied upon in conducting those studies, including but not limited to, all underlying data used or collected in the studies;
- i. persons controlling or providing the information requested in interrogatory 2(h);

3. Please identify the concern(s) that led to BellSouth's audit requests for each of the thirteen carriers listed in BellSouth's June 20, 2002 Letter to the FCC (attached as Exhibit C to the Answer), all persons with knowledge of the concerns identified, and all information or documents relating to the decision to initiate such audits for each of the carriers listed in BellSouth's June 20, 2002 Letter.

4. Please identify, on a state-by-state and region-wide basis, the percentage of EELs provided by BellSouth to the carriers listed in BellSouth's June 20, 2002 Letter (attached as Exhibit C to the Answer) as compared to the total number of EELs provided by BellSouth to all CLECs (formerly known as alternative local exchange carriers ("ALECs") under Florida statutes) during the period or periods for which the audits were requested.

5. With respect to BellSouth's assertion in Paragraph 48 of its Complaint and Paragraphs 5 and 16 of the Hendrix Affidavit (Attached as Exhibit E to the Complaint), that American Consultants Alliance ("ACA") constitutes an "independent auditor" as required by the *Supplemental Order Clarification*^{1/} because it "is not related to BellSouth nor affiliated with

^{1/} *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, ¶ 31 (2000) ("*Supplemental Order Clarification*"), *aff'd sub nom. Competitive Telecommunications Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).

BellSouth in any way,” “subject to the control or influence of BellSouth,” or “dependent on BellSouth,” please fully explain or identify:

- a. the basis for Mr. Hendrix’s assertion of personal knowledge with respect to the question of the absence of ACA’s financial dependence on BellSouth;
- b. whether BellSouth has any personal knowledge regarding ACA’s financial dependence on its incumbent local exchange carrier client base in general;
- c. how many audits for which BellSouth has selected ACA as the auditor and the actual or expected revenues to ACA for conducting said audits and to BellSouth as a result of those audits;
- d. the basis on which ACA is generally paid by BellSouth (*e.g.*, flat fee, hourly rate, contingency, etc.) and the payment arrangements that have been agreed to specifically with reference to the NewSouth audit being sought here;
- e. how BellSouth became aware of ACA, the mechanism by which and the reasons for which ACA was selected, and whether any other auditors were considered and – if so – why they were rejected;
- f. whether ACA conducts audits in accordance with American Institute for Certified Public Accountants (“AICPA”) standards;
- g. whether ACA is an AICPA-certified auditor;
- h. whether BellSouth considered in its selection process advertising or other communications by ACA that marketed audits as a revenue-generating tool;
- i. whether BellSouth is aware of the results of audits previously conducted by ACA and, if so, what they were.

- j. all instances in which BellSouth has hired or retained ACA for any purpose and the amount paid or billed to ACA or agreed to pay or bill ACA for such work.

DOCUMENT REQUESTS

1. Please provide copies of any and all documents identified or described in response to the above interrogatories.
2. Please provide copies of the traffic studies identified in paragraph 47 of BellSouth's Complaint and Paragraphs 12 and 16 of the Hendrix Affidavit (attached as Exhibit E to the Complaint) and copies of any and all related or underlying documents.
3. Please provide copies of any and all documents related to BellSouth's assertion in paragraph 47 of its Complaint and Paragraphs 12 and 16 of the Hendrix Affidavit (attached as Exhibit E to the Complaint) of problems with NewSouth jurisdictionalization of traffic in addition to any and all documents identified in response to the interrogatories set forth above.
4. Please provide copies of any and all documents relating to the retention by, compensation of, and work of ACA on behalf of BellSouth, in addition to all documents identified in response to the interrogatories set forth above.
5. Please provide copies of any and all marketing and other materials relating to ACA that are in BellSouth's possession.
6. Please provide copies of any and all documents relating to BellSouth's initiation of audits with any and all of the carriers listed in BellSouth's letter of June 20, 2002 to the FCC (attached as Exhibit C to the Answer).