

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: May 10, 2005

**XO COMMUNICATIONS SERVICES, INC.'S
EMERGENCY MOTION TO COMPEL
BELL SOUTH TELECOMMUNICATIONS, INC.
TO RESPOND TO DISCOVERY**

XO Communications Services, Inc. (XO), pursuant to rule 28-106.204, Florida Administrative Code, moves this Commission for an order requiring BellSouth Telecommunications, Inc. (BellSouth) to respond immediately to XO's Second Set of Discovery (Interrogatory Nos. 10-16 and Production Request Nos. 8 and 14.¹ 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. This matter was originally set for hearing on March 3, 2005.

2. On March 1, 2005, BellSouth and XO filed a Joint Motion for Continuance in order to conduct limited discovery related to the appropriate amount of a true up and the circuits to which such a true up should apply. This motion was granted in Order No. PSC-05-0274-PCO-TP. This Order also set May 10, 2005 as the cut off for discovery, noting that the hearing had been rescheduled for May 19, 2005.

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

3. On March 18, 2005, BellSouth and XO filed a Joint Motion to Amend the Order on Procedure and Prehearing Order. As noted in the Order granting this motion, Order No. PSC-05-0337-PCO-TP, “the *Parties* request[ed] that any discovery limited to supplemental rebuttal testimony be answered on an expedited, 10-day basis.”² The Order required that “responses to discovery on the supplemental rebuttal testimony *shall be provided* within 10 calendar days of service of the request.”³

4. On April 29, 2005, XO served its Second Set of Discovery on BellSouth. Such discovery related to BellSouth’s supplemental rebuttal testimony. Because as noted above, responses to discovery directed to supplemental rebuttal testimony were due in a 10-day expedited time frame, BellSouth’s responses were due on May 9, 2005. BellSouth has failed to respond.

Interrogatory Nos. 10-16

5. XO received BellSouth’s “responses” on May 9, 2005. However, as to Interrogatory Nos. 10-16, BellSouth did not respond at all. Instead, as to each of these interrogatories, BellSouth stated:

This response requires significant amounts of work and despite diligent efforts, BellSouth needs additional time to respond to this request and will supplement this request no later than Monday, May 16, 2005.⁴

6. BellSouth’s failure to respond violates Order No. PSC-05-0337-PCO-TP. In essence, BellSouth, on the eve of trial, has granted itself an additional 7 days to respond to discovery that was to be answered on an expedited basis. BellSouth did not

² Order No. PSC-05-0337-PCO-TP at 2, emphasis supplied.

³ *Id.*

⁴ See Exhibit A.

seek relief from this Order from the Prehearing Officer nor did it contact XO. It simply unilaterally granted itself an extension of time.

7. BellSouth's failure to comply with the expedited discovery requirement severely prejudices XO's trial preparation. The hearing in this matter is set to begin in a little over a week; yet BellSouth wants to respond to relevant and probative discovery 3 days before the hearing is to begin, leaving XO with insufficient time to analyze the information. The entire reason that expedited discovery was ordered was because Staff and the parties realized that the additional round of rebuttal testimony and discovery related to it would put them very close to the hearing date. Thus, expedited discovery responses were necessary for trial preparation.

8. The interrogatories which BellSouth has not answered go to BellSouth's claim that it need not make the conversions XO has requested until it receives a "clean error-free spreadsheet" from XO. How clarifications and rejections are handled for other CLECs, which is the subject of these discovery requests, is directly related to BellSouth's claim.

Production Request No. 8

9. Production request no. 8 asks BellSouth to provide copies of all CLEC conversion requests for special access to UNE loops. BellSouth does not claim this request is irrelevant or in any other way objectionable. It simply states that it seeks confidential information that BellSouth cannot disclose. The issue of how BellSouth provides these conversion requests for other CLECs is germane to BellSouth's treatment (or lack of treatment) of XO's requests. While the information may be confidential, XO

and BellSouth have a Non-Disclosure Agreement applicable to this case and thus the confidential nature of the information is not a bar to the request.

Production Request No. 14

10. Production request no. 14 seeks any documents BellSouth relied upon in responding to XO's interrogatories. Without identifying in any way what information it is referring to, BellSouth objects to providing such documents because they are proprietary and confidential. As noted above, XO and BellSouth have a Non-Disclosure Agreement applicable to this case and thus the confidential nature of the information is not a bar to the request. Further, this blanket objection fails to comply with rule 1.280(b)(5), Florida Rules of Civil Procedure, which provides:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . *the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced* or disclosed in a manner, that without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.⁵

BellSouth has wholly failed to comply with this standard and identify in any way the documents it is withholding so that XO can gauge if the privilege is even applicable.

11. The parties are on the eve of trial in this matter and BellSouth's failure to respond to discovery has prejudiced XO. Thus, XO requests that the Prehearing Officer rule on this motion on an emergency basis.

12. Counsel for XO has attempted to confer with counsel for BellSouth via email regarding the above discovery. As of the time of filing this motion, counsel for BellSouth had not responded.

⁵ Emphasis supplied.

WHEREFORE, XO's Motion to Compel as to Interrogatory Nos. 10-16 and Production Request Nos. 8 and 14 should be granted and BellSouth should be required to respond immediately.

S/Vicki Gordon Kaufman
Vicki Gordon Kaufman
Moyle Flanigan Katz Raymond & Sheehan,
PA
118 North Gadsden Street
Tallahassee, Florida 32301
850.681.3828
850.681.8788 fax
vkaufman@moylelaw.com

Attorneys for XO Communications
Services, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing XO Communications Services, Inc.'s Emergency Motion to Compel was served on the following by electronic mail and U.S. Mail this 10th day of May 2005:

Jason Rojas
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

James Meza
Andrew Shore
BellSouth Telecommunications, Inc.
675 W. Peachtree Street, NE, Suite 4300
Atlanta, Georgia 30375

S/Vicki Gordon Kaufman
Vicki Gordon Kaufman

ATTACHMENT A

INTERROGATORIES

10. REQUEST: How many initial LSRs from CLECs did BellSouth receive in Florida in 2002?

RESPONSE: This response requires significant amounts of work and despite diligent efforts, BellSouth needs additional time to respond to this request and will supplement this request no later than Monday, May 16, 2005.

RESPONSE PROVIDED BY: Ronald E. Moore

11. REQUEST: How many initial LSRs from CLECs did BellSouth receive in Florida in 2003?

RESPONSE: This response requires significant amounts of work and despite diligent efforts, BellSouth needs additional time to respond to this request and will supplement this request no later than Monday, May 16, 2005.

RESPONSE PROVIDED BY: Ronald E. Moore

12. REQUEST: How many initial LSRs from CLECs did BellSouth receive in Florida in 2004?

RESPONSE: This response requires significant amounts of work and despite diligent efforts, BellSouth needs additional time to respond to this request and will supplement this request no later than Monday, May 16, 2005.

RESPONSE PROVIDED BY: Ronald E. Moore

13. REQUEST: For each of the years identified in Interrogatory Nos. 10-12 above, identify by year, how many of the LSRs identified were rejected, or "clarified" due to the errors on the order.

RESPONSE: This response requires significant amounts of work and despite diligent efforts, BellSouth needs additional time to respond to this request and will supplement this request no later than Monday, May 16, 2005.

RESPONSE PROVIDED BY: Ronald E. Moore

ATTACHMENT A

14. REQUEST: Of the number of initial LSRs rejected for clarification for each year listed in Interrogatory No. 13 above, how many of the rejected LSRs were resubmitted for processing by the requesting CLECs?

RESPONSE: This response requires significant amounts of work and despite diligent efforts, BellSouth needs additional time to respond to this request and will supplement this request no later than Monday, May 16, 2005.

RESPONSE PROVIDED BY: Ronald E. Moore

15. REQUEST: In each of the years identified in Interrogatory No. 13, what was the average number of days from receipt of an initial LSR by BellSouth to rejection or clarification back to the CLEC?

RESPONSE: This response requires significant amounts of work and despite diligent efforts, BellSouth needs additional time to respond to this request and will supplement this request no later than Monday, May 16, 2005.

RESPONSE PROVIDED BY: Ronald E. Moore

16. REQUEST: Of all LSRs submitted to BellSouth in each year identified in Interrogatory No. 13, were any LSRs simply not provisioned due to errors; in other words, were there any LSRs for which Bell South failed to either send an FOC or a rejection into the CLEC, but simply refused to take any action on the LSR? If so, in how many instances did this occur?

RESPONSE: This response requires significant amounts of work and despite diligent efforts, BellSouth needs additional time to respond to this request and will supplement this request no later than Monday, May 16, 2005.

RESPONSE PROVIDED BY: Ronald E. Moore

PRODUCTION REQUEST

8. REQUEST: Provide copies of any and all CLEC special access to UNE loop conversion requests identified in response to XO's Second Set of Interrogatories, No. 9.

RESPONSE: BellSouth objects to Request for Production No. 8 on the grounds that it seeks proprietary, confidential information that BellSouth cannot disclose under protective agreements with CLECs to which BellSouth is a party. BellSouth will only provide CLEC proprietary, confidential information consistent with the FCC's rules and BellSouth-executed protective agreements.

ATTACHMENT A

14. REQUEST: Produce all documents relied upon in responding to XO's Second Set of Interrogatories, Nos. 9-26.

RESPONSE: BellSouth objects to Request for Production No. 14 to the extent that it seeks proprietary, confidential information that BellSouth cannot disclose under protective agreements with CLECs to which BellSouth is a party. BellSouth will only provide CLEC proprietary, confidential information consistent with the FCC's rules and BellSouth-executed protective agreements. Subject to this objection and without waiving this objection, responsive documents are provided. Documents responsive to XO's Second Set of Interrogatories, Item No. 25 are proprietary and are being provided pursuant to the terms of the parties protective agreement.