BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint by Florida BellSouth customers who paid fees to BellSouth Telecommunications, Inc. related to Miami-Dade County Ordinance Section 21-44 ("Manhole Ordinance") and request that Florida Public Service Commission order BellSouth to comply with Section A.2.4.6 of General Subscriber Service Tariff and refund all fees collected in violation thereof.	DOCKET NO. 050194-TL ORDER NO. PSC-06-0240-PCO-TL ISSUED: March 21, 2006

ORDER GRANTING IN PART AND DENYING IN PART BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR PROTECTIVE ORDER AND DENYING ALTERNATIVE REQUEST FOR HEARING OR ORAL ARGUMENT

I. Case Background

On March 23, 2005, a Complaint of Florida BellSouth Customers Against BellSouth Telecommunications, Inc. and Request for Relief (Complaint) was filed by Karla Hightshoe, Timothy McCall, and Manuel Garcia, individually, and Best Investment Realty, Inc., a Florida Corporation, as well as all other BellSouth customers who have paid the Miami-Dade County Ordinance #83-3 (Manhole Ordinance) fee, (collectively as the Petitioners).[1] The Petitioners allege that BellSouth violated the terms of Section A.2.4.6 of its General Subscriber Service Tariff (Tariff). The Petitioners request that this Commission enforce the Tariff, and order BellSouth to comply with its Tariff and refund all fees collected in violation of the terms of the Tariff.[2] On April 18, 2005, BellSouth filed its Motion to Dismiss the Complaint. On April 28, 2005, the Petitioners filed their Response to BellSouth's Motion.

[1] Prior to filing the Complaint, the Petitioners served as representatives of a class of BellSouth customers in a class action suit before Judge Henry Harnage in the Eleventh Judicial Circuit for Miami-Dade County, Florida, concerning the same matters brought by the Complaint. See Hightshoe, et al. v. BellSouth Telecommunications, Inc., Case No. 03-26623-CA11. Judge Harnage dismissed the Petitioners' class action suit for failure to exhaust administrative remedies.

[2] BellSouth General Subscriber Service Tariff, Section A.2.4.6 states:

> When the Company [BellSouth] by virtue of its compliance with a municipal or county ordinance, incurs significant costs that would not otherwise normally be incurred, all such costs shall be billed, insofar as practical, pro rata, per exchange access line, to those subscribers receiving exchange service within the municipality or county as part of the price for exchange service.
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> An estimated monthly amount of such costs shall be billed to the affected subscribers each month and an adjustment to reconcile these estimates to the actual costs incurred for the six-month periods ending June 30 and December 31 of each year shall be applied.

By Order No. PSC-05-0762-PCO-TL issued on July 25, 2005, this Commission granted in part and denied in part BellSouth's Motion to Dismiss and held this Docket in abeyance while our staff conducts an investigation into the history of the Tariff. In the interim, our staff has served three sets of discovery on BellSouth as part of its investigation.

On September 12, 2005, the Petitioners served their First Request for Production to BellSouth (Request). On October 14, 2005, BellSouth filed its Objections and Motion for Protective Order in Response to Karla Kay Hightshoe's First Request for Production (Motion). The Petitioners have not responded to BellSouth's Motion; however, in its Motion, BellSouth states that it conferred with the Petitioners' who refuse to withdraw the Requests and objects to the Motion. Alternatively, BellSouth requests a hearing or oral argument in the event we deny its Motion.

II. BellSouth's Objections and Motion for Protective Order

In support of its Motion, BellSouth argues that we should issue an order protecting it from the Petitioners' Requests. BellSouth argues that in accordance with Order No. PSC-05-0762-PCO-TL, the proceedings in this matter have been held in abeyance. BellSouth further argues that the Petitioners' Requests are outside of the scope of that Order. In addition, BellSouth objects to Request Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, and 14 on the basis that these particular requests are overly broad in time and scope, unduly burdensome, and will not reasonably lead to the discovery of admissible evidence.

III. Analysis

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 the 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.

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. 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).

This standard is not, however, without limit, as this Commission has recognized time and again. See Order Nos. PSC-03-0857-PCO-TP; PSC-03-1304-PCO-TL; and PSC-05-0096-PCO-TP. In accordance with Rules 1.280 and 1.350, Florida Rules of Civil Procedure, the scope of

discovery does not include the discovery of irrelevant information. See Travelers Indemnity Company v. Salido, 354 So. 2d 963(Fla. 3rd DCA 1978). Furthermore, Rule 1.350, Florida Rules of Civil Procedure, requires that the party from whom production is sought must have possession, custody or control of the documents. See also Henry P. Trawick, Florida Practice and Procedure, § 16-10, (1991). It is not proper to seek production of documents that do not exist and would, therefore, require preparation. See Bissell Bros. v. Fares, 611 So. 2d 620(Fla. 2nd DCA 1993)(discovery of nonexistent records cannot be had); Balzebre v. Anderson, 294 So. 2d 701(Fla. 3rd DCA 1974)(". . . a party may not be required to produce documents which it does not have. . ."); and Henry P. Trawick, Florida Practice and Procedure, § 16-10, (1991).

Although Order No. PSC-05-0762-PCO-TL holds this matter in abeyance during our staff's investigation, that Order does not explicitly preclude the parties from conducting discovery. Moreover, BellSouth fails to cite to any Commission rule, order, Florida statute, or Florida case law in support of its proposition that discovery is precluded while a proceeding is held in abeyance. However, upon reviewing the Petitioners' Requests, I find that there are certain Requests for Production that are unduly burdensome, overly broad, and irrelevant to this matter.

Upon consideration, Request Nos. 1, 6, 7, 8, 9, and 14 are either unduly burdensome, overly broad in scope and time, or in some cases irrelevant. Therefore, I find it reasonable and appropriate to grant BellSouth's Motion with respect to these particular Requests.

Request Nos. 2 and 3 are appropriate because each seeks documents regarding adjustments or audits regarding the Manhole fee, which is within the scope of the Complaint in this proceeding. Request No. 4 is appropriate because it seeks information regarding BellSouth's cost of compliance with the Manhole Ordinance. Request No. 5 is appropriate because it seeks documents to the per-line amounts billed for the Manhole Fee. In addition, Request Nos. 10, 11, 12, and 13 are also appropriate and within the context of the Complaint. Therefore, I find it reasonable and appropriate to deny BellSouth's Motion with respect to Request Nos. 2, 3, 4, 5, 10, 11, 12, and 13.

With regard to BellSouth's alternative request for hearing or oral argument, Rule 25-22.058, Florida Administrative Code, provides that this Commission may grant oral argument upon a party's request. Upon consideration of the foregoing, oral argument would not further assist this Commission in making a determination. Accordingly, I find that BellSouth's alternative request for hearing or oral argument is not warranted in this instance, because BellSouth's Motion sufficiently sets forth its arguments.

IV. Decision

Based upon the foregoing, I hereby grant in part and deny in part BellSouth's Objections and Motion for Protective Order. As such, BellSouth's Motion is granted with respect to the Petitioners' Request Nos. 1, 6, 7, 8, 9, and 14, because they are either overly broad, unduly burdensome, or in some cases irrelevant to this matter. However, BellSouth's Motion is denied with respect to Request Nos. 2, 3, 4, 5, 10, 11, 12, and 13, because these particular Requests are

appropriate within the context of the Complaint. Accordingly, BellSouth shall respond to these particular Requests for Production within 30 days from the date of issuance of this Order. Furthermore, BellSouth's request for hearing or oral argument is denied as the pleadings have sufficiently set forth its objections and arguments.

Based on the foregoing, it is

ORDERED by Commissioner Matthew M. Carter II, Prehearing Officer, that BellSouth Telecommunications, Inc.'s Objections and Motion for Protective Order in Response to Karla Kay Hightshoe's First Request for Production is hereby granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that BellSouth Telecommunications, Inc. shall comply with the Petitioners' Request for Production Nos. 2, 3, 4, 5, 10, 11, 12, and 13 within 30 days from the date of issuance of this Order. It is further

ORDERED that BellSouth Telecommunications, Inc.'s alternative request for hearing or oral argument is denied.

By ORDER of Commissioner Matthew M. Carter II, as Prehearing Officer, this 21st day of March, 2006.

MATTHEW M. CARTER II
Commissioner and Prehearing Officer

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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.