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E. GARY EARLY

ORIG

June 19, 1998

Ms. Blanca Bayo
Director, Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

RE: PSC Docket No. 971056-TX

Dear Ms. Bayo:

On behalf of BellSouth BSE, Inc. enclosed for filing in the above referenced docket are the original and fifteen (15) copies of BellSouth BSE, Inc.'s Response to renewed Motion to Supplement Evidenciary Record with regard to the above referenced docket. Also enclosed is a diskette containing the same in Wordperfect 6.1.

If you have any questions please call me at (850) 222-3471. Thank you.

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Sincerely,

E. Gary Early

EGE/mcd
enclosure(s)
cc: All parties of record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for certificate to provide alternative local exchange telecommunications service by BellSouth BSE, Inc.

Docket No. 971055-TX

Filed: June 19, 1998

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BELLSOUTH BSE, INC.'S RESPONSE TO RENEWED MOTION TO SUPPLEMENT EVIDENTIARY RECORD

BellSouth BSE, Inc. (BSE) hereby files this response to the Renewed Motion to Supplement Evidentiary Record filed by the Florida Competitive Carriers Association (FCCA), AT&T Communications of the Southern States, Inc. (AT&T), MCI Telecommunications Corporation (MCIT) and MCImetro Access Transmission Services, Inc. (MCIm), requests that the Commission deny the motion to supplement the evidentiary record and in support thereof states:

The Renewed Motion to Supplement Evidentiary Record is Unsupported by Law

BSE hereby adopts and incorporates into this response its Response to FCCA's Motion to Compel Discovery and Motion for Leave to Supplement the Record filed with the PSC on May 29, 1998. A post-hearing filing as contemplated in Petitioners' and Intervenors' motion is not authorized by either the procedural rules of the PSC, Chapter 25-22, F.A.C., or the uniform rules, Chapter 28-106, F.A.C. As such, there is no authority under which the PSC may grant the Petitioners' and Intervenors' motion.

As set forth in the May 29, 1998 response, the question to be decided by the Commission is not whether the 29 pages of confidential information identified by Petitioners and Intervenors "are relevant to the issues and subjects developed in the pleadings," or whether they "are admissible for the purpose of supporting and/or proving the points made by Movant's witness,

Joe Gillan." (Renewed Motion at 3). If relevancy were the criteria for supplementing the record, then the close of an evidentiary hearing would have little effect other than to provide a line of demarkation between evidence properly placed in the record and evidence placed in the record as a post-hearing supplementary filing. As will be set forth in greater detail herein, the criteria for consideration is whether supplementing the record is authorized under the PSC's rules and if so, whether the report identified was responsive to FCCA's Request for Production of Documents.

The reliance placed by the FCCA on the action of the North Carolina PSC compelling production of the confidential marketing study in that state is entirely misplaced. As set forth in the May 29, 1998 response, in North Carolina, BSE was served with a request to "produce copies of all BSE marketing plans which were formulated internally or produced by a consultant." (e.s.) BSE responded to that very specific request by identifying the marketing study, but objecting to its production on the grounds that it was proprietary or irrelevant. The North Carolina Public Utility Commission granted the motion to compel not on any basis that is relevant in this proceeding, but on the basis that it was responsive to a specific request. In this docket, the FCCA made no specific request for a marketing plan, but rather requested documents describing the relationship between BSE's proposed ALEC operations "on BellSouth's overall...corporate financial performance." BSE truthfully and accurately replied that it had no documents responsive to that specific request. If the FCCA's request for production was intended to elicit information other than that specifically requested, it was its responsibility to formulate a request (as did the parties in North Carolina) that would advise BSE of any responsibility to produce the appropriate documents. It failed to do so.

BSE Did Not Stipulate to Supplementing the Record

On or about May 21, 1998, counsel for BSE was advised by counsel for FCCA of FCCA's belief that the confidential marketing study should have been produced in response to Request for Production of Documents No. 5. That conversation was followed with FCCA's Motion to Compel, filed with the PSC on May 22, 1998. Over the next several days, BSE counsel had discussions with PSC counsel in order to determine how best to respond to the motion without delaying the ultimate resolution of this proceeding. Counsel was advised that BSE should produce the documents unless it wanted to delay this proceeding to allow for a hearing on the motion to compel prior to the scheduled June 1, 1998 submission of post-hearing briefs. Based on this advice, BSE began negotiations with counsel for the FCCA, on behalf of Petitioners and Intervenors, to produce the document for inspection subject to sufficient disclosure protections, and agreed to a short extension of time for filing briefs with the understanding that such an extension would not push back the date for issuance of the standard order. Through discussions with counsel for the PSC it was always understood that the Prehearing Officer would ultimately enter a substantive ruling on FCCA's Motion to Supplement the Record. Nothing in the Stipulation for extension of time or in the Protective Agreement obviates the need for that ruling.

BSE's agreement to resolve this matter in a manner that would allow for the expeditious resolution of the issues should not be construed as an acquiescence to the admissibility of the documents. BSE has maintained both in oral discussions and written submissions that the marketing study was not responsive to the Request for Production of Documents. A review of the 29 pages identified by Petitioners and Intervenors confirms BSE's belief that the document

did not relate to the effect of BSE's ALEC operations on BellSouth's overall corporate financial performance. For the reasons set forth herein, Petitioners and Intervenors Renewed Motion to Supplement Evidentiary Record should be denied.

Relevancy is not the Standard for Supplementing the Record After the Record is Closed

Petitioners and Intervenors devote approximately 3 pages of their motion to an analysis of the relevancy of the marketing study. BSE maintains its objection that the confidential marketing study is not relevant to a proper analysis of whether BSE has the requisite technical, financial and managerial capabilities to operate as an ALEC as set forth in Section 364.337(1), Fla. Stat. As set forth in the May 29, 1998 response, it is difficult to imagine that the Legislature contemplated that any company would be required to turn over its confidential business marketing plans to its direct competitors in order to be certificated. However, relevancy is not the issue to be decided in determining whether the record should be supplemented after the close of the record. A hearing before the Commission is intended to give all parties the opportunity to submit any evidence they believe to be appropriate. However, there is no provision in any rule of the PSC or in the Florida Uniform Rules of Procedure which allow for the record to be supplemented with information that could have been discovered by diligent and thorough prehearing discovery.

In this docket, Petitioners and Intervenors had every opportunity to discover the existence of the marketing study. Counsel for the "New Entrants" in North Carolina certainly had no difficulty in formulating a proper request for the production of such a marketing study. In addition, during the deposition of Robert C. Scheye, on April 2, 1998, the following exchange

occurred:

> Q. ...To follow up on some of the questions that had been asked specifically, one concerned the number of employees at BSE, and you mentioned there were some consultants. Can you tell us who those are?
>
> A. No, sir. We hold that information proprietary.

Exhibit 4, deposition of Scheye at p. 51

Petitioners and Intervenors, despite having direct knowledge of the existence of BSE consultants made no effort to follow-up on this question, to determine what type of consultants may have been involved, to ascertain the areas in which the consultants worked, or to elicit any answer other than the one given. Had Petitioners and Intervenors chosen to follow-up, the existence of the marketing report would, as it was in North Carolina, have been disclosed. The fact that there was no follow-up can not be blamed on BSE.

As set forth herein, the relevancy of the document is not the issue for determination in supplementing the record. There is no authority to supplement the record in this manner. Therefore the Petitioners' and Intervenors' Renewed Motion to Supplement Evidentiary Record should be denied.

The Marketing Study is not Responsive to FCCA's Request to Produce No. 5

BSE responds to Petitioners' and Intervenors' Renewed Motion by incorporating its Response to Motion to Compel Discovery filed on May 29, 1998. BSE does not disagree with Petitioner's and Intervenors' assertions that the rules of discovery in Florida are broad. However, the rules place an obligation on a person seeking discovery to "describe each item and category with reasonable particularity." Rule 1.350(b) Fla.R.Civ.P. (e.s.) In this case, the FCCA

identified documents specifically relating to the relationship between BSE's ALEC operations "on BellSouth's overall (including parent and all subsidiaries) corporate financial performance." Regardless of the manner in which Florida's rules of discovery are to be construed, the marketing study is simply not responsive to FCCA's request.

Given that the request had a specific subject matter, it was not, as Petitioners and Intervenors suggest, the duty of BSE to object on the basis that the request was overbroad or deficient. The request itself was not overbroad or deficient; rather it failed to identify documents that Petitioners and Intervenors now wish the FCCA had thought to request. The rules of discovery impose no duty on a party to guess as to whether a request should have some other meaning, or to provide information in excess of that requested.

Petitioners and Intervenors further claim that the pages of the marketing study identified and filed with Motion support their contention that the report relates to the relationship between BSE and operations and "BellSouth's overall . . . corporate financial performance." Those pages do not support such a contention. The 29 pages carefully culled from a document of several thousand pages in length (keeping in mind that even those 29 pages were not prepared or developed by BSE) deal with such topics as the governmental regulatory environment and options for operating within that environment, an analysis of the capabilities of two of BSE's primary competitors (both of which are parties to this proceeding) an analysis of vendors available to BSE, general aspirational business goals, the effect of various business, regulatory and marketing assumptions on BSE and its vendors and suppliers, and BSE's marketing and management objectives. While these documents setting forth the consultant's analysis are obviously of great interest to BSE's business competitors, they are not responsive to the specific

Request for Production filed by FCCA.

Conclusion

There is no provision in the PSC's rules or in the Uniform Rules of Procedure to supplement the record after the record has been closed. Even if such a procedure existed, to read Request for Production No. 5 in the ultra-broad manner suggested by Petitioners and Intervenors would, as stated in BSE's May 29, 1998 Response, require the production of records of every financial expenditure, from office supply invoices to worker W-2 forms. Such is not the intent of Florida's rules of discovery. If the FCCA wanted BSE's marketing study, it had an obligation to state that request "with reasonable particularity." Such a request was made in North Carolina, and the document was produced. Such a request was not made in Florida, and the document was not produced. BSE's failure to produce a document that has not been requested is not a violation of Rule 1.350, Fla.R.Civ.P., and does not warrant supplementing the record after the record has been closed.

WHEREFORE, for the reasons set forth herein, BellSouth BSE, Inc. respectfully requests that the Commision, through its Prehearing Officer enter an order denying the FCCA's Motion to Compel Discovery and Motion for Leave to Supplement the Record and Petitioners' and Intervenors' Renewed Motion to Supplement Evidenciary Record.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following parties by hand delivery or U.S. Mail this 19th day of June, 1998:

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