BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint of XO Florida, Inc. against BellSouth Telecommunications, Inc. for alleged refusal to convert circuits to UNEs; and request for expedited processing.	DOCKET NO. 041114-TP ORDER NO. PSC-05-0546-PCO-TP ISSUED: May 17, 2005

ORDER GRANTING IN PART AND DENYING IN PART XO FLORIDA, INC.'S EMERGENCY MOTION TO COMPEL

Case Background

On September 22, 2004, XO Florida, Inc. filed a complaint against BellSouth Telecommunications, Inc. for alleged refusal to convert special access circuits to UNEs and requested expedited processing of its complaint. By Order No. PSC-04-1068-PCO-TP, XO's request for expedited processing was denied. Subsequently, pursuant to Order No. PSC-04-1147-PCO-TP, this matter has been set for an administrative hearing.

On May 10, 2005, XO filed a Motion to Compel BellSouth to Respond to Discovery. XO seeks to compel discovery as it relates to the process of converting special access circuits to Enhanced Extended Loops (EELs). BellSouth informed staff counsel that it has chosen not to file a Response to the Motion to Compel. BellSouth initially failed to respond to XO Interrogatories Nos. 10-16 and objected to XO's Requests for Production of Documents Nos. 8 and 14.

On May 16, 2005, BellSouth provided responses to BellSouth XO Interrogatories Nos. 10-16. BellSouth still maintains its objections to XO's Requests for Production of Documents Nos. 8 and 14, claiming that the information sought by XO requires BellSouth to divulge third party information that is confidential and proprietary in nature.

Standard of Review

Under Florida law, what is relevant for purposes of discovery is a broader matter than what is relevant and admissible at hearing. Rule 1.280(b)(1), Florida Rules of Civil Procedure, states in part 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 any 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. Rule 1.350(b) Florida Rules of Civil Procedure, governs the procedure for a request for production of documents, and specifically requires that the request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity.

This standard is not, however, without limit. 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. Also see Allstate Insurance Co. v. Langston, 655 So.2d 91 (Fla. 1995). While liberal construction is to be given to rules of discovery, the request must still seek relative matters and must not be so excessive so as to be unduly burdensome to the party ordered to produce. Riddle Airlines, Inc. v. Mann, 123 So.2d 685 (Fla.3d DCA 1960); International Business Machines Corporation v. Elder, 187 So.2d 82 (Fla.3d DCA 1966); Jones v. Seaboard Coast Line Railroad Company, 297 So.2d 861 (Fla.2d DCA 1974). However, objections to discovery that is "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).

Last, it should be noted that pretrial discovery was implemented to simplify the issues in a case, to eliminate the element of surprise, to encourage the settlement of cases, to avoid costly litigation, and to achieve a balanced search for the truth to ensure a fair trial. Dodson v. Persell, 390 So. 2d 704 (Fla. 1980); Surf Drugs, Inc. v. Vermette, 236 So. 2d 108 (Fla. 1970).

Ruling

While liberal construction is to be given to rules of discovery, the request must still seek relative matters and must not be so excessive so as to be unduly burdensome to the party ordered to produce. See Allstate Insurance Co. v. Langston, 655 So.2d 91 (Fla. 1995).

While the XO discovery requests were timely filed, they were filed on the eve of the discovery cutoff and subject to an abbreviated discovery response time. The voluminous nature of XO's Request for Production of Documents No. 8, combined with the shortened response time, would unduly burden BellSouth at this point in the proceeding. It should be noted that had this request been filed earlier, particularly during the extended continuance granted in this proceeding, that the weight given to the burden of the request might have differed.

As for XO's Request for Production of Documents No. 14, this requests that BellSouth make available any documents relied upon in responding to XO's Second Set of Interrogatories, Nos. 9-26. The XO discovery requests were timely filed. Similarly they were filed on the eve of the discovery cutoff and subject to an abbreviated discovery response time. However, BellSouth relied upon them in response to XO's Second Set of Interrogatories, Nos. 9-26. As such, they should still be readily available. Thus, providing these documents should not be unduly burdensome. I acknowledge that BellSouth has claimed these documents are proprietary, but BellSouth has not elucidated on that claim, nor has it explained why the protective agreement between the parties does not provide sufficient protection.

Upon consideration of the arguments, I find that the voluminous nature of XO's Request for Production of Documents No. 8, in view of the timing and proximity of the hearing, would unduly burden BellSouth. I further find that it would not unduly burden BellSouth to respond to XO's Request for Production of Documents No. 14. As such, XO's Motion to Compel, as it

relates to the two discovery requests still outstanding is granted in part, and denied in part. Therefore, BellSouth shall provide responses to XO's Request for Production of Documents No. 14 by 9:30 a.m., May 19, 2005.

Based on the foregoing, it is

ORDERED by J. Terry Deason, as Prehearing Officer, that XO Florida, Inc.'s Motion to Compel is granted in part and denied in part as stated in the body of this Order. It is further

ORDERED that BellSouth Telecommunications, Inc. must provide responses to XO's Request for Production of Documents No. 14 by 9:30 a.m., May 19, 2005.

By ORDER of Commissioner J. Terry Deason, as Prehearing Officer, this 17th day of May, 2005

J. TERRY DEASON
Commissioner and Prehearing Officer

(SEAL)

JPR

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.