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Legal Department

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General Attorney

00 SEP 11 PM 4:39

BellSouth Telecommunications, Inc.  
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RECORDS AND  
REPORTING

September 11, 2000

Mrs. Blanca S. Bayo  
Director, Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399

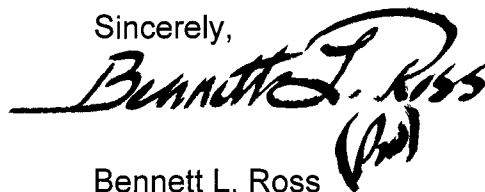
RE: Docket No. 990649-TP

Dear Mrs. Bayo:

Enclosed are an original and 15 copies of BellSouth Telecommunications, Inc.'s Emergency Motion to Compel. Please file this document in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely,



Bennett L. Ross

Enclosures

APP	_____	cc: - All Parties of Record
CAF	_____	
CMP	<u>_____</u>	M. M. Criser, III
COM	<u>_____</u>	N. B. White
CTR	_____	
ECR	_____	R. D. Lackey
LEG	<u>_____</u>	
OPC	_____	
PAI	_____	
RGO	_____	
SEC	<u>_____</u>	
SER	_____	
OTH	_____	

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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

11253 SEP 11 8

FPSC-RECORDS/REPORTING

**CERTIFICATE OF SERVICE  
Docket No. 990649-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via  
Electronic Mail and Federal Express this 11th day of September, 2000 to the following:

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Bennett L. Ross

**(+) Signed Protective Agreement**

219337

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into )  
Pricing of Unbundled Network ) Docket No. 990649-TP  
Elements )  
\_\_\_\_\_ ) Filed: September 11, 2000

**BELLSOUTH TELECOMMUNICATIONS, INC.'S**  
**EMERGENCY MOTION TO COMPEL**

**I. INTRODUCTION**

BellSouth Telecommunications, Inc. ("BellSouth") hereby files this emergency motion seeking an order from the Florida Public Service Commission ("Commission") compelling Supra Telecommunications and Information Systems, Inc. ("Supra"), Rhythms Links, Inc. ("Rhythms"), BlueStar Networks, Inc. ("BlueStar"), and DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad) to respond fully and completely to BellSouth's discovery requests. While BellSouth is reluctant to involve the Commission in discovery disputes, BellSouth is left with little choice in this case with the hearings scheduled to resume in only eight days.

Supra should be compelled to furnish responses to interrogatories and requests for production served by BellSouth in June 2000 seeking to discover the useful life of equipment used by Supra to provide telecommunications service in the State of Florida. Even though Supra represented to this Commission during the first phase of this proceeding that it would provide this information, BellSouth has never received Supra's responses to its discovery requests.<sup>1</sup>

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<sup>1</sup> BellSouth attempted to resolve the discovery dispute with Supra informally. In particular, counsel for BellSouth sent an e-mail to counsel for Supra on July 25, 2000 advising that BellSouth had not received Supra's discovery responses and requesting that a copy be sent "via telecopier or by federal express at your earliest convenience." See Exhibit 1. Supra never responded to this e-mail.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

Rhythms, BlueStar, and Covad have objected to three discovery requests served by BellSouth in August 2000 seeking to discover the basis of their loop conditioning proposals. Although Rhythms, BlueStar, and Covad objected to these requests on grounds that they seek “a legal conclusion of opinion” or seek information “subject to protective orders or other confidentiality agreements,” these objections are without merit. Accordingly, the Commission should grant BellSouth's motion to compel and order Rhythms, BlueStar, and Covad to provide complete responses to BellSouth’s discovery requests as more fully discussed below.<sup>2</sup>

## II. DISCUSSION

### A. Supra

In June 2000 BellSouth served comprehensive interrogatories and requests for production on various parties in this proceeding that generally were designed to discover information about the equipment used by Alternative Local Exchange Carriers (“ALECs”) in providing telecommunications service in Florida. Eventually, with the exception of Supra, all the ALECs to whom these discovery requests were propounded submitted responses, which were introduced into the record during Phase I of this proceeding. *See* Exhibits 30-37.

The status of Supra’s responses to BellSouth’s discovery was discussed when the Phase I hearings began on July 17, 2000:

MR. ROSS: Yes, sir. Chairman Deason. Bennett Ross on behalf of BellSouth. I am pleased to report that all of the parties have provided information in response to BellSouth’s discovery requests with the exception of Supra. Supra has advised BellSouth that it was going to provide the information that had been requested this past Friday. But as of today, BellSouth has not received that information.

...

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<sup>2</sup> BellSouth’s discovery requests were served on August 22, 2000 to which Rhythms, BlueStar, and Covad’s responses were due fifteen days thereafter on September 5, 2000. However, Rhythms, BlueStar, and Covad requested an extension until September 13, 2000. BellSouth agreed, provided that Rhythms, BlueStar, and Covad identify any interrogatories or requests for production to which they were objecting and would not be furnishing responsive information by the original due date. Counsel for Covad sent BellSouth’s counsel an e-mail on September 7, 2000, identifying the three discovery requests that are the subject of this motion to compel. Exhibit 2.



MR. BUECHLE: It is my understanding that we weren't a part of that motion to compel, but we did voluntarily make an agreement with them. It was my understanding that it went out of Friday. If it didn't, we will get it to them posthaste.

CHARIMAN DEASON: So you are agreeing to provide the information?

MR. BUECHELE: Responses as we did – we agreed with them.

Tr. Vol. 1, at 11-12 (July 17, 2000). Notwithstanding Supra's representations to the Commission, BellSouth never received discovery responses from Supra. Accordingly, Supra should be compelled to provide BellSouth the information it voluntarily agreed to provide.

**B. Rhythms, BlueStar, and Covad**

On August 22, 2000, BellSouth served its second set of interrogatories and requests for production of documents on Rhythms, BlueStar, and Covad. In part, these discovery requests sought information concerning loop conditioning – an issue of critical importance in this case. In particular, BellSouth asked Rhythms, BlueStar, and Covad the following:

45. Referring to page 83 of the Direct and Rebuttal Testimony of Joseph Riolo dated July 31, 2000, is it your contention that the Commission should require that BellSouth “condition,” on average, 50 pairs at a time?

46. If the answer to the foregoing Interrogatory is in the affirmative, identify any statute, rule, case law, or commission order that you contend would authorize the Florida Public Service Commission to impose such a requirement.

47. Referring to page 83 of the Direct and Rebuttal Testimony of Joseph Riolo dated July 31, 2000, is it your contention that, while BellSouth may only condition multiple loops in increments of 10 pair on average at one time, the Commission should establish nonrecurring rates based on the assumption that BellSouth should “condition,” on average, 50 pairs at a time?

48. If the answer to foregoing Interrogatory is in the affirmative, please explain how your contention can be reconciled with *Iowa Utilities Board v. FCC*, 2000 U.S. App. LEXIS 17234 (8<sup>th</sup> Cir. July 18, 2000), in which the United States Court of Appeals for the Eighth Circuit held that rates must be based on “the cost to the ILEC of providing its existing facilities and equipment either through interconnection or by providing the specifically requested existing network elements that the competitor will in fact be obtaining ....”

BellSouth also requested that Rhythms, BlueStar, and Covad “produce all documents referring or relating to multiple loop conditioning practices of any incumbent local exchange carrier.” BellSouth’s Second Request for Production of Documents, Item No. 13.

On September 1, 2000, Rhythms, BlueStar, and Covad filed objections to BellSouth’s discovery requests. In particular, Rhythms, BlueStar, and Covad objected to Interrogatories 46 and 48 on grounds that they seek “a legal conclusion or opinion.” They also objected to BellSouth’s Request for Production 13 “to the extent it seeks documents that may be subject to protective orders or other confidentiality agreements ....” Neither of these objections has merit.

First, an interrogatory is proper even when the answer to it may involve an opinion or a contention of the responding party relating to fact or the application of law to fact. *See* Fla. R. Civ. P. 1.340(b) (“An interrogatory otherwise proper is not objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or calls for a conclusion or asks for information not within the personal knowledge of the party”); *Dickinson v. Dickinson*, 454 So.2d 758 (Fla. Ct. App. 1984) (interrogatories that sought legal opinion of a party as related to the facts in dispute were not objectionable).

Because the purpose of contention interrogatories is to permit the propounding party to discover the theory of the responding party’s case, the rule permitting interrogatories calling for opinions or contentions necessarily permits mixed questions of law and fact as well as questions seeking discovery of a party’s legal theories based on facts. *See, e.g., American Nurses’ Ass’n v. Illinois*, 783 F.2d 716, 723 (7<sup>th</sup> Cir. 1986) (defendant could serve contention interrogatories on the plaintiff to learn the theory behind the claim); *Hockley v. Zent, Inc.*, 89 F.R.D. 26, 31 (M.D. Pa. 1980) (federal rules allow litigants to ask for “definition of legal theories”); *Schapp v.*

*Executive Industries, Inc.*, 130 F.R.D. 384, 388 (N.D. Ill. 1990) (interrogatories calling for legal theories based on fact permitted).

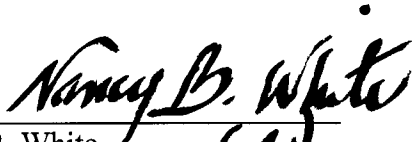
Here, BellSouth's interrogatories seek discovery of Rhythms, BlueStar's, and Covad's legal theories concerning the treatment of loop conditioning as they relate to the facts in their own testimony. In their prefiled testimony, Rhythms, BlueStar, and Covad request that this Commission establish costs for loop conditioning based upon the assumption that BellSouth will condition fifty (50) loops at a time. Direct and Rebuttal Testimony of Joseph Riolo dated July 31, 2000, at 83. BellSouth is entitled to discover: (1) whether Rhythms, BlueStar, and Covad contend that BellSouth should be required to condition fifty (50) loops at a time or that loop conditioning should be developed based upon the fifty (50) loop assumption, regardless of how many loops BellSouth conditions at a time; and (2) the legal theory supporting either of these contentions. Such discovery is completely proper, particularly given the importance of loop conditioning in this proceeding.

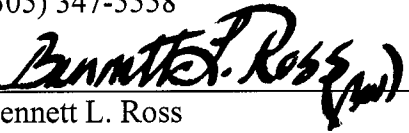
Second, the fact that documents "may be subject to protective orders or other confidentiality agreements" is hardly grounds for not producing those documents here. In fact, the Protective Agreement executed by the parties in this docket expressly addresses the treatment of confidential information of third parties. In particular, Paragraph 2 provides that "information held by any party subject to existing, nondisclosure obligations to a third party" shall be treated as confidential consistent with the terms of the Protective Agreement. BellSouth has produced information that is subject to third-party confidentiality agreements, and Rhythms, BlueStar, and Covad should be compelled to do likewise.

**III. CONCLUSION**

For the foregoing reasons, the Commission should grant BellSouth's Emergency Motion To Compel and should order Supra, Rhythms, BlueStar, and Covad to respond fully and completely to BellSouth's discovery requests.

Respectfully submitted this 11th day of September, 2000.

  
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COUNSEL FOR BELL SOUTH  
TELECOMMUNICATIONS, INC.

**Ross, Bennett**

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**From:** Ross, Bennett  
**Sent:** Tuesday, July 25, 2000 8:17 PM  
**To:** Mark Buechele  
**Cc:** Edenfield, Kip ; White, Nancy  
**Subject:** Docket 990649-TP

Mark,

At the hearing last week, you indicated that Supra had served its responses to BellSouth's first set of interrogatories and requests for production of documents. To date, BellSouth has not received anything from Supra. I would appreciate your sending me a copy of Supra's responses either via telecopier or by federal express at your earliest convenience. Thank you.

Bennett

Exhibit 1

**Ross, Bennett**

---

**From:** Boone, Catherine [cboone@Covad.COM]  
**Sent:** Thursday, September 07, 2000 6:55 PM  
**To:** 'Ross, Bennett '  
**Subject:** RE: Docket 990649-TP

Bennett

Covad will not be responding to Interrogatories No. 46 and 48 and RPD 13.

Thank you for the extension.

Cathy

-----Original Message-----

**From:** Ross, Bennett [mailto:Bennett.Ross@BellSouth.COM]  
**Sent:** Friday, September 01, 2000 5:26 PM  
**To:** Boone, Catherine; 'Jeremy Marcus'; 'Michael Bressman'; 'Norton Cutler'; 'Rick Melson'  
**Cc:** Sims, Nancy H; White, Nancy ; Goggin, Michael ; Edenfield, Kip  
**Subject:** Docket 990649-TP  
**Importance:** High

Dear Counsel,

To confirm my conversation with Jeremy this afternoon, BellSouth is willing to give Rhythms, Covad, and BlueStar additional time until Wednesday, September 13 to respond to BellSouth's second set of interrogatories and requests for production of documents, given that Ms. Murray is out of the country. However, if there are discovery requests to which Rhythms, Covad, and BlueStar have objected and know now that they will not be answering, I would appreciate your advising me by the original time for responding to BellSouth's discovery. This will give us sufficient time to bring any discovery disputes to the Commission's attention.

Also, in response to your request to depose Jerry Latham and H.B. Greer, it looks like Thursday, September 14 or Friday, September 15 will work best. At Jeremy's request, I am trying to coordinate the two so we can do them both the same day in the same location. I will let you know as soon as I have a firm date.

Please let me know if you have any questions or need additional information.

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Exhibit 2