

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of Vilaire Communications, Inc.'s eligible telecommunications carrier status and competitive local exchange company certificate status in the State of Florida.

DOCKET NO. 080065-TX

DATED: APRIL 22, 2008

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MOTION TO COMPEL DISCOVERY
FROM VILAIRE COMMUNICATIONS, INC.

The staff of the Florida Public Service Commission, by and through its undersigned counsel, and pursuant to Rules 28-106.204 and 28-106.211, Florida Administrative Code, moves the Florida Public Service Commission (Commission) or the prehearing officer to enter an order compelling Vilaire Communications, Inc. (VCI) to fully respond to the Commission Staff's First Set of Interrogatories Nos. 1 - 13, 15 - 36 and 39 and Production of Documents (POD) 1-10, no later than 12:00 noon, Wednesday, April 30, 2008. Staff served VCI with its discovery requests on March 31, 2008. As grounds therefore, staff states:

This docket is an investigation into whether VCI has failed to properly conduct themselves pursuant to its obligations as an eligible telecommunications carrier (ETC). The Commission granted VCI's Petition for ETC Designation by Order No. PSC-06-0436-PAA-TX, issued May 22, 2006.¹ VCI's purpose for acquiring ETC status was solely to provide Link Up and Lifeline services to low-income Florida consumers. By Proposed Agency Action Order No. PSC-08-0090-PAA-TX (PAA Order), issued on February 13, 2008, the Commission proposed to rescind VCI's ETC status and to cancel its competitive local exchange company certificate (CLEC).

On March 5, 2008, VCI filed a Protest of the PAA Order and Petition for Formal Hearing, requesting the Commission rescind the PAA Order and close the docket, or, alternatively, set this matter for a Section 120.57(1), Florida Statutes, hearing. VCI stated a hearing was necessary to resolve any disputed issues of fact and law, and to allow VCI a full opportunity to present evidence and arguments as to why the PAA Order should be rescinded.

On March 13, 2008, VCI and staff participated in an Issue Identification Conference, where both parties reached agreement on the inclusion of 11 issues to be considered by the Commission.² An Order Establishing Procedure No. PSC-08-0194-PCO-TX (OEP) was issued by advisory staff on March 26, 2008, setting this matter for hearing on June 4, 2008.

On March 31, 2008, staff served VCI with Commission Staff's First Set of Interrogatories (Nos. 1 - 39) and Production of Documents Nos. (1-10), requesting that the documents be produced with 15 days of service, pursuant to Rules 1.340 and 1.350, Florida

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¹ Docket No. 060144-TX, *In re: Petition for designation as eligible telecommunications carrier (ETC) by Vilaire Communications, Inc.*

² Staff notes that it was during this meeting where it first notified VCI that it would be seeking production of all customers and company bills through discovery.

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Rules of Civil Procedure.³ On April 7, 2008, VCI filed their Objections to Commission Staff's First Set of Discovery. VCI asserted both general and specific objections which will be addressed by staff below.

Staff counsel has conducted several phone calls with counsel for VCI in an attempt to resolve VCI's objections however, the parties were unable to reach resolution.

Relevancy

The Commission has consistently recognized that discovery is proper and may be compelled if it is not privileged and is or likely will lead to relevant and admissible information.⁴ Specifically, the Commission has ruled that:

The test for determining whether discovery is appropriate is set forth in Rule 1.280(b)(1) of the Florida Rules of Civil Procedure, providing that "parties may obtain discovery regarding any matter, not privileged, that is relevant for the subject matter of the pending action...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." Section 90.401 of the Florida Evidence Code defines "relevance" as evidence tending to prove or disprove a material fact.⁵

VCI objects that Commission staff seeks through discovery information that is irrelevant and not likely to lead to the discovery of admissible evidence. VCI's general objection that staff's requests are "irrelevant" or "not reasonably calculated to lead to the discovery of admissible evidence" provide little or no basis for refusing to respond to staff's discovery requests. Relying on these objections, VCI has produced minimal information regarding its costs and has failed to provide its Lifeline, Link Up and Retail billing data. Similarly, VCI refuses to provide any information regarding the technical and managerial functions utilized in provisioning Lifeline and Link Up services to Florida consumers, claiming such information is

³ Fla. R. Civ. Pro., Rule 1.340, Interrogatories to Parties, and Rule 1.350, Production of Documents.

⁴ Order No. PSC-07-0787-PHO-TP, *In re: Complaint by DPI-Teleconnect, L.L.C. against BellSouth Telecommunications, Inc. for dispute arising under interconnection agreement.* (information sought appears reasonably calculated to lead to the discovery of admissible evidence and is, therefore, compelled) and Order No. PSC-02-0274-PCO-TP, *In re: Request for arbitration concerning complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information System, Inc for resolution of billing disputes,* and *In re: Request for arbitration concerning complaint of TCG South Florida and Teleport Communications Group against BellSouth Telecommunications, Inc. for breach of terms of interconnection agreement,* Order No. PSC-01-1300-PCO-TP (where the Commission found that information requested was reasonable calculated to lead to the discovery of admissible evidence and is, therefore, relevant).

⁵ Order No. PSC-93-0652-PCO-WS, *In Re Jasmine Lakes Utilities Corporation*, Docket No. 920148-WS, dated April 28, 1993.

irrelevant to this proceeding. Specifically, VCI objected to Interrogatory Nos. 1, 4 - 13, 15 - 36, and 39 and POD Nos. 2 - 10.

Staff believes VCI's responses to staff's discovery requests will produce information that directly impacts the Commission's consideration of the issues agreed upon by both parties in the instant proceeding. Specifically, staff's requests seek information that is directly related to VCI's operation as an ETC and should to be available for review by the Commission.⁶

VCI's general objection that staff's requests are "irrelevant" and not "reasonably calculated to lead to the discovery of admissible evidence" could not be any further from the truth. Staff firmly believes that the information it seeks through discovery will lead to admissible evidence that directly addresses the matters at issue in this case. As discussed above, staff's discovery requests seek information that will allow the Commission to review exactly how VCI has provisioned Lifeline and Link Up service since it was granted ETC status by the Commission. Such information goes directly to the heart of the matters at issue in this proceeding. Staff believes that without this information, the Commission will be significantly handicapped in reaching a determination of whether VCI is provisioning Lifeline and Link Up services to Florida consumers in compliance with applicable state and federal law. Staff notes that the information it seeks through its discovery requests may actually exonerate VCI by providing the Commission with a complete picture of how VCI provisions Lifeline and Link Up services. Accordingly, staff finds it curious that VCI refuses to provide such information by claiming a lack of relevancy.

Based on the arguments set forth above, staff respectfully requests the Commission reject VCI's relevancy objections and compel responses to Interrogatory Nos. 1, 4 - 13, 15 - 36, and 39 and POD Nos. 2 - 10.

Jurisdiction

In addition to relevancy, VCI objects to several requests on jurisdictional grounds. Specifically, VCI objects to Interrogatory Nos. 4 - 13, 15 - 29, 31 - 32, 34 - 36, and 39 and POD Nos. 2 - 6, 7, 9 on the grounds that VCI's operations as an ETC are governed solely by federal law and regulation. VCI states that the Commission's assertion of jurisdiction over these matters raises federal questions to be adjudicated in Federal District Court. Staff acknowledges that the question of the Commission's jurisdiction is an issue in this case. However, staff does not believe that it is appropriately raised as an objection to staff's discovery. Currently, the Commission will resolve the jurisdictional matters at issue in this case subsequent to the evidentiary hearing. Staff notes that as of the filing of this Motion, VCI has not requested the

⁶ In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Released March 17, 2005, FCC 05-46 (¶ 71-72) (stating that individual state commissions are uniquely qualified to determine what information is necessary to ensure that ETCs are complying with all applicable requirements, including state-specific ETC eligibility requirements.)

Commission address the jurisdictional issues as threshold legal matters prior to the hearing, nor has VCI indicated any intention to do so.⁷ Therefore, staff believes that VCI's objections to staff's discovery on jurisdictional grounds are nothing more than an attempt to delay the ultimate resolution of this case by the Commission.

If VCI's jurisdictional objections to staff's discovery requests are upheld and the Commission determines it does have authority to rescind VCI's ETC status, the Commission would ultimately lack the factual information in the evidentiary record to address the remaining substantive issues. Such a result would require the re-opening of the evidentiary record and several additional months of delay to conduct discovery before the Commission could resolve this case. Furthermore, VCI has already indicated its intention to appeal a Commission finding of authority to the Federal District Court, potentially creating further delay of the Commission's ultimate resolution of the issues in this proceeding if VCI's jurisdictional objections are upheld.

As discussed above, VCI could have requested the Commission address the legal issues as threshold issues prior to the evidentiary hearing, but it chose not to. Therefore, VCI should not be allowed to refuse to respond to staff's discovery citing the lack of Commission authority over the matters at issue in this proceeding. Stated once again, staff firmly believes the information it seeks through discovery is vital to the Commission's resolution of the agreed upon issues and respectfully request the Commission reject VCI's objections on jurisdictional grounds and compel responses to Interrogatory Nos. 4 - 13, 15 - 29, 31 - 32, 34 - 36, and 39 and POD Nos. 2 - 6, 7, 9.

Burdensome or Overly Broad

VCI also objects to Interrogatory No. 2, 30, 32 and POD Nos. 1 and 10 on the grounds that they are "burdensome" or "overly broad." VCI has stated the preparation, review and production of the requested information would require excessive time to produce and review.

In order to object to discovery on the grounds that it is "burdensome" or "overly broad", a party must delineate the manner in which discovery qualifies as such; First City Developments of Florida, Inc. v. Hallmark of Hollywood Condominium Ass'n, Inc., 545 So. 2d 502, 503 (Fla. 4th DCA 1989). As noted above, staff notified VCI at the Issue I.D. of its intention to request the production of these records in order to provide VCI with as much up front notice as feasibly possible. Arguably, upon requesting a hearing, VCI should have expected that such information would be requested. Consequently, staff respectfully requests that VCI's objection that staff's requests are burdensome or overly broad be rejected and that VCI be compelled to fully respond to staff's discovery. Staff notes that it is willing to accept the information in an electronic format to further alleviate any alleged burden on VCI.

⁷ It is staff's belief that such a request should have been made prior to the issuance of the OEP and that if VCI was to make such a request at this time it would only serve to delay resolution of this case.

In the alternative, if the Commission finds that staff's requests are burdensome or overly broad, staff respectfully requests the Commission require VCI to provide 4 complete months of billing, with the specific months to be provided by staff.

Attorney-Client privilege

VCI objects to Interrogatory No. 11 stating that the information is proprietary or protected by attorney client privilege. VCI states that they object to Interrogatory No. 11 to the extent that staff seeks information covered by attorney-client and/or attorney work product privileges. VCI also objects to information deemed non-public or confidential. VCI has not attempted to "describe the nature of the documents, communications or things not produced or disclosed" as is required by Rule 1.280(b)(5) of the Discovery Rules.⁸ Accordingly, staff respectfully requests VCI's objections regarding privilege be rejected and the requested information be compelled.

Employee information

VCI objects to Interrogatory Nos. 25 and 34 asserting that the requested information about VCI employees is an invasion of the privacy interests and rights of its employees. VCI has addressed these employees in previously received responses to staff's data requests and explained that its employees were directly employed for VCI's TLS functions. Staff is simply requesting the full descriptions and functions of the four VCI employees to determine whether these employees are utilized for other non-TLS functions. Low Income support for TLS is available only for incremental costs that are associated exclusively with toll limitation service. Therefore, this information will enable the Commission to determine whether VCI is appropriately seeking reimbursement from USAC of its costs for provisioning TLS functions. Consequently, staff respectfully requests the Commission reject VCI's objection that the information requested in Interrogatory Nos. 25 and 34 are an invasion of its employees' privacy interests and compel VCI to respond to Interrogatory Nos. 25 and 34.

Requested response date

As discussed above, staff firmly believes that each of its discovery requests are relevant, and will lead to the discovery of admissible evidence. In order for staff to have a meaningful opportunity to review the discovery responses and utilize them in preparation for the evidentiary hearing, which is set for Wednesday, June 4, 2008 at 9:30 a.m., staff respectfully requests that VCI be compelled to provide full and complete responses to Staff's First Set of Discovery by 12:00 noon on Wednesday, April 30, 2008.

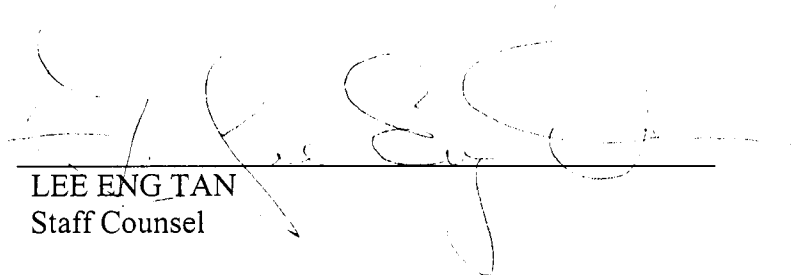
WHEREFORE, for the foregoing reasons, Commission staff respectfully requests that the Commission grant this Motion to Compel Discovery, and compel that Vilaire Communications,

⁸ See TIG Ins. Corp of America v. Johnson, 799 So. 2d 339 (Fla. 4th DCA 2001)

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Inc. provide full and complete responses to the Commission's First Set of Interrogatories (Nos. 1 - 13, 15 - 36 and 39) and Production of Documents (1-10).

Respectfully submitted this 22nd day of April, 2008.



LEE ENG TAN
Staff Counsel

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
(850) 413-6199

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and one correct copy of MOTION TO COMPEL DISCOVERY FROM VILAIRE COMMUNICATIONS, INC. has been served by U. S. mail to Beth Keating, Akerman Senterfitt Law Firm, 106 East College Avenue, Suite 1200, Tallahassee, Florida 32301, and that a true copy thereof has been furnished to the following by U. S. mail or by (*) hand delivery this 22st day of April, 2008.

Vilaire Communications, Inc.
P. O. Box 98907
Lakewood, WA 98496-8907

(*)Rosanne Gervasi
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850



LEE ENG TAN
Staff Counsel

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
(850) 413-6199

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