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100340-TP

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Sent: Thursday, July 29, 2010 3:32 PM
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Cc: Adam Teitzman; Charles Murphy; Vicki Gordon Kaufman
Subject: Docket No. 100340-TP
Attachments: Triarch Motion to Quash Subpoena 7.29.10.pdf

In accordance with the electronic filing procedures of the Florida Public Service Commission, the following filing is made:

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- b. This filing is made in Docket No. 100340-TP.
 c. The document is filed on behalf of Triarch Marketing, Inc..
 d. The total pages in the document are 15 pages.
 e. The attached document is Triarch Marketing, Inc.'s Motion to Quash Subpoena.

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DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

7/29/2010

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of Associated
Telecommunications Management
Services, LLC (ATMS) companies
For compliance with Chapter 25-
24, F.A.C., and applicable lifeline,
Eligible telecommunication carrier, and
Universal service requirements.

Docket No. 100340-TP

Filed: July 29, 2010

Triarch Marketing, Inc.'s Motion to Quash Subpoena

Triarch Marketing, Inc. (Triarch), pursuant to section 120.569(2)(k)1, Florida Statutes, rule 1.410(c), Florida Rules of Civil Procedure, and rule 28-106.212, Florida Administrative Code, hereby objects to and moves to quash the Commission Staff subpoena served on Triarch on or about July 2, 2010. (Exhibit A).

Background

1. This docket was opened on June 28, 2010. A review of the docket file shows that Staff has filed two documents since the docket was opened. The first is a form entitled "Request to Establish Docket" in which Commission Staff requested that this docket be opened and be styled an investigation. There is no documentation accompanying the request and, in fact, the request states that supporting documentation will "be provided with the recommendation." Thus, no reason, justification or information is provided as to why Staff requests that an investigation be instituted.

2. The second document, filed the next day, is a request that a number of subpoenas be issued, requiring various companies to produce a vast array of documents on July 19, 2010. The subpoena to Bellerud is the subject of this motion.¹

¹ Similar, though not identical, subpoenas were issued to other companies and similar motions to quash are filed simultaneously herewith.

3. Neither of these documents provides any information as to what the subject of the investigation is or what Commission Staff thinks may be at issue. Given the breadth of the subpoena, it is impossible to tell what Staff is attempting to investigate.

4. Upon receipt of the subpoena, legal Staff was contacted regarding the subject of the investigation, in an attempt to narrow the requests and resolve any issues with which Staff may be concerned. However, Staff preferred to proceed with the subpoena and Triarch is still unaware of what the explicit subject matter of the investigation is.

Relevance and Scope of A Subpoena

5. A subpoena is not a blanket vehicle by which to request a broad and vast array of documents which are not tied in any way to matters at issue in a proceeding. However, that appears to be exactly what Commission Staff has done with the subpoena served on Triarch. This is impermissible and thus, the subpoena must be quashed in its entirety.

6. Information sought in a subpoena must be relevant and cannot be unreasonable or burdensome. This standard is clear from the applicable rules and statutes. For example, section 120.569(2)(k)1, Florida Statutes, addresses the issuance of subpoenas in administrative proceedings. It states that a subpoena should be quashed if the subpoena is “unreasonably broad in scope, or requires the production of irrelevant material.” The subpoena at issue here is both unreasonably broad and requires the production of irrelevant material.

7. Similarly, rule 1.410(2)(c), Florida Rules of Civil Procedure, provides that a subpoena should be quashed if it is unreasonable or oppressive. The subject subpoena, as demonstrated below, is both.

8. Florida case law describes the limits on subpoena power. A subpoena must be “properly limited in scope, relevant in purpose, and specific in directive,” in order not to be

unduly burdensome.” *Check ‘N Go of Florida, Inc. v. State*, 790 So.2d 454, 460 (Fla. 5th DCA 2001), *rev. denied*, 817 So.2d 845 (Fla. 2002), quoting *Dean v. State*, 478 So.2d 38, 40 (Fla. 1985). Quoting the United State’s Supreme Court, the *Check ‘N Go* court counseled against “fishing expeditions” into private papers. *Id.* at 460. Further, in *Check ‘N Go*, the court stated:

A subpoena duces tecum may not lawfully require the production of a mass of books and papers, merely so that one may search through them to gather evidence; and an omnibus subpoena for all, or even a substantial part, of the books and records of the subpoenaed party is invalid.

Id. at 460, citations omitted. Staff’s subpoena fails to meet the necessary standards for a lawful subpoena as set forth above.

9. The United States Supreme Court has held that:

It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that *the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.*

See v. City of Seattle, 387 U.S. 541, 544 (1967), footnote omitted, emphasis added. The Staff subpoena fails to meet this standard because, as described below, the subpoena is not sufficiently limited in scope or relevant in purpose.

10. Triarch is extremely concerned with and objects to the expansive and overbroad nature of the documents sought in the subpoena which is the subject of this motion. Though this docket is styled as an “investigation,” Triarch has no idea and has been not put on any notice as to what is being investigated. Fundamental requirements of due process mandate that Triarch be put on notice of the specific subject matter of the investigation and any allegations related thereto. Otherwise, it cannot appropriately respond to the subpoena nor otherwise evaluate the materials being requested.

11. Instead, Triarch has received an extensive subpoena request with no information as to what facts, claims or alleged violations Staff believes are at issue. Triarch should not be required to produce reams of documents without being advised specifically as to what the Commission Staff thinks the subject matter of investigation is.

12. It is beyond dispute that subpoenas may only seek relevant information related to the merits of the inquiry. None of the requests in the subject subpoena can meet this basic standard. Because Triarch has no idea what the Commission Staff is attempting to investigate or why, the scope and breadth of the subpoena cannot, on its face, meet the standard of relevancy required by statute and rule. Until it is clear what Staff thinks is at issue in this docket and puts Triarch on notice of its concerns, none of the documents sought can be relevant to an undisclosed investigation.

13. Further, Triarch can make no assessment as to the relevance of any of the documents sought. As just one example, in request No. 3, Staff seeks "all corporate minutes of Triarch including stockholder meetings and Board of Director meetings from June 2009 through May 2010." Many items are discussed at stockholder and director meetings; most, if not all, are unlikely to be related to matters to be reviewed in this docket. A similarly expansive request is made for state and federal income tax returns. These requests are in no way limited in scope or subject and because the subject of the investigation is not known, Triarch does not have any way to assess Staff's requests. However, one thing is certain, Triarch is not required to blindly produce documents in the face of an undesignated and undisclosed investigation.

14. At this point, the subpoena appears to be an overly broad attempt by Staff to access reams of documents which are not related to any problem or set of facts of which Triarch

is aware or on notice. *Thus, as to each and every request in the subpoena, Triarch objects on the grounds of relevance and overbreadth.*

15. Finally, as described in detail below, it would cost Triarch thousands of dollars to respond to this subpoena. Before such resources are expended, Triarch is entitled to understand what the issues are which Staff seeks to review.

16. Triarch is willing to work with Staff to provide relevant documents when it is appraised of and has an understanding of the nature of the inquiry in which Staff is engaged.

Place of Production

17. The subpoena directs that the documents at issue be produced at the Commission's offices in Tallahassee. Triarch objects to the place designated for production as such records, to the extent they exist, are not located in Tallahassee. It would be burdensome and oppressive to transport them to Tallahassee. If any production does occur, after clarification of the matters at issue in this docket, such production should occur where the records are located. See rule 1.350(b), Florida Rules of Civil Procedure.

18. Each specific request is discussed below and incorporates paragraphs 1-17 above.

Request No. 1

19. In Request No. 1, Staff seeks specific and extensive customer information for customers in eight states and Florida. First, Triarch objects to this request on the grounds that the Commission lacks jurisdiction to subpoena the documents pertaining to information outside of Florida. Commission Staff seeks a great deal of specific information regarding customers in Alabama, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. The Commission does not have jurisdiction over operations in states other than Florida nor the ability to request information as to customers outside its jurisdiction. This

request seeks information irrelevant to these proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

20. Further, the request is overly broad and burdensome and oppressive. The request is burdensome as it would require extensive work on the part of Triarch to collect and provide the information requested. To respond to this request would require Triarch to contact its database vendor, request information, review all information collected, redact all CPNI information not related to Florida, prepare for hearing on objections, prepare a customer report for each required field pertaining to the information requested, and prepare the report and review it for accuracy. This would take approximately 80 man hours at a total cost of approximately \$2,500.00 plus costs from vendors and attorney fees. Such a request is particularly burdensome and oppressive in light of the lack of any connection of this information to the undisclosed purpose of this docket. The subpoena provides absolutely no justification for the requirement that Triarch expend time and resources on a request that would encompass thousands of customers.

21. In addition, as noted above, the request seeks irrelevant information because it is not related to any facts or allegations of which Triarch is aware.

22. Finally, Triarch objects to producing the requested documents because documents concerning Lifeline matters are matters of federal law outside of this Commission's jurisdiction.

23. Triarch also objects because this request seeks confidential proprietary customer information.

Request No. 2

24. Request No. 2 seeks copies of Lifeline certification records for all Lifeline customers. The request is overly broad, burdensome and oppressive. The request is burdensome

as it would require extensive work on the part of Triarch to collect and provide the information requested. To respond to this request would require an individual representing Triarch to travel to Louisiana and make copies of each form. Triarch is required to keep the original hard copy filed at the physical location at all times. The approximate man hours for this would be in excess of 100 man hours with a cost of approximately \$3,500 (man hours + copy charge + travel expense). Such a request is particularly burdensome and oppressive in light of the lack of any connection of this information to the undisclosed purpose of this docket. The subpoena provides absolutely no justification for the requirement that Triarch expend time and resources on a request that would encompass thousands of customers.

25. Further, as noted above, the request seeks irrelevant information because it is not related to any facts or allegations of which Triarch is aware. This request seeks information irrelevant to these proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

26. Finally, Triarch objects to producing the requested documents because documents concerning Lifeline matters are matters of federal law outside of this Commission's jurisdiction.

27. Triarch also objects to the extent this request seeks information beyond Florida.

28. Triarch also objects because this request seeks confidential proprietary customer information.

Request No. 3

29. Request No. 3 seeks a copy of all corporate minutes of Triarch, including stockholder and Board of Director meetings. Triarch objects to this request because it is over broad, oppressive and not limited in any way by subject matter. Again, since Triarch does not know what is being investigated, it does not know what minutes, if any exist, might bear on the

investigation. It is highly unlikely that *all* corporate minutes, if any, will have any bearing on this matter.

30. Further, as noted above, the entire request seeks irrelevant information because it is not related to any facts or allegations of which Triarch is aware. This request seeks information irrelevant to these proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 4

31. Request No. 4 seeks Triarch's federal and Florida state tax returns for the last two years. First, as with the other requests, Triarch objects on the basis of relevance. There has been absolutely no showing made that Triarch's federal and state income tax returns are relevant in any way to this proceeding.²

32. Triarch further objects to this request as it is over broad, oppressive and harassing. No showing has been made as to what income tax returns might have to do with this matter and Triarch vehemently objects to being required to produce such highly sensitive documents without a compelling showing from Staff that such documents are relevant to the matter at issue, which has yet to be identified.

33. Further, since Triarch does not know what is being investigated, it does not know how or in what way its income tax returns might have any bearing on any matter within the Commission's jurisdiction. It is highly unlikely that such returns will have any bearing on this matter.

² Income tax returns are subject to production *only* if they are relevant. *Cabanas v. Ford, Armenteros, Manucy, Inc.*, 727 So.2d 1100, 1102 (Fla. 3rd DCA 1999).

34. Last, as noted above, the entire request seeks irrelevant information because it is not related to any facts or allegations of which Triarch is aware. This request seeks information irrelevant to these proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 5

35. Request No. 5 seeks information about Triarch employees, officers, directors and owners. The request seeks irrelevant information because it is not related to any facts or allegations of which Triarch is aware. This request seeks information irrelevant to these proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

36. Triarch further objects because such information as to Triarch employees, in particular, because it is irrelevant, unduly burdensome, not likely to lead to the discovery of admissible evidence, and an invasion of the privacy interests and rights of those employees.

Request No. 6

37. Request No. 6 seeks documents provided to underlying carriers certifying compliance with certain Commission requirements regarding Lifeline/Link Up programs. All American objects as this request is overbroad and vague as it does not specify what "Commission requirements" are pertinent.

38. If Triarch is to compile all of this information, it would take considerable research and time to the effect of 100 or more man hours with the cost in the excess of \$2,500.00. Such a request is particularly burdensome and oppressive in light of the lack of any connection of this information to the undisclosed purpose of this docket. The subpoena provides absolutely no justification for the requirement that Triarch expend time and resources on a request that would encompass many documents.

39. Further, the request seeks irrelevant information because it is not related to any facts or allegations of which Triarch is aware. This request seeks information irrelevant to these proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

40. Finally, Triarch objects to producing the requested documents because documents concerning Lifeline/Link Up matters are matters of federal law outside of this Commission's jurisdiction.

Request No. 7

41. Request No. 7 seeks all 499-A and 499-Q forms filed by Triarch for the past two and one half years. The request seeks irrelevant information because it is not related to any facts or allegations of which Triarch is aware. This request seeks information irrelevant to these proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

42. Further, the request appears to seek documents from outside of Florida. Such a request is beyond the Commission's jurisdiction.

43. Triarch further objects to producing the requested documents because documents concerning the Universal Service Administrative Company are matters of federal law outside of this Commission's jurisdiction.

Request No. 8

44. Request No. 8 seeks copies of any outside auditor reports and opinions for the last year. Triarch objects to this request as it is over broad, oppressive and in no way limited by subject matter. Again, since Triarch does not know what is being investigated, it does not know what auditor reports or opinions, if any, and if any such reports exist, might bear on the investigation. It is highly unlikely that all such reports and minutes, if any, will have any bearing on this matter.

45. The request seeks irrelevant information because it is not related to any facts or allegations of which Triarch is aware. This request seeks information irrelevant to these proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 9

46. Request No. 9 seeks copies of purchase agreements between other entities and Triarch. This request is overbroad and oppressive as it is not limited in any way in time or scope.

47. Such a request is also objectionable because it seeks highly confidential proprietary business information which is irrelevant to any matters within the Commission's jurisdiction.

48. Further, the request seeks irrelevant information because it is not related to any facts or allegations of which Triarch is aware. And, it is difficult to envision how such documents have any relevance or relation to any matter within the Commission's jurisdiction.

49. Finally, this request seeks information irrelevant to these proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Conclusion

50. As described in detail above, the very broad requests contained in the Triarch subpoena are irrelevant, overbroad, burdensome, oppressive and harassing. This is particularly the case in light of the fact that Triarch has not in any way been apprised of the subject matter which the Commission Staff seeks to investigate. It is inappropriate for a subpoena to be issued which has no relation to delineated matters under consideration by the Commission. Such a subpoena forces the entity receiving the subpoena to guess at what the subject matter of concern may be and violates fundamental due process rights to be apprised of allegations concerning it.

51. Nonetheless, Triarch is committed to cooperating with the Commission Staff when it is apprised of and fully understands exactly what the subject matter of this docket is and can determine which documents pertain to such subject matter.

52. Triarch further suggests that a meeting with Commission Staff would be a productive first step to understanding Staff's concerns, working with Staff to narrow the documents requested, and resolving any potential issues. Triarch stands fully ready to participate promptly in such a meeting.

WHEREFORE, Triarch requests that the Commission enter an order quashing the Triarch subpoena in its entirety.

s/ Vicki Gordon Kaufman
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Attorneys for Triarch Marketing, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Quash has been furnished by electronic mail and US Mail this 29th day of July 2010 to the following:

Adam Teitzman
Charles Murphy
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399
ateitzma@psc.state.fl.us
cmurphy@psc.state.fl.us

s/ Vicki Gordon Kaufman

Vicki Gordon Kaufman

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Docket No. 100340-TP Investigation)
of Associated Telecommunications)
Management Services, LLC (ATMS))
companies for compliance with Chapter 25-)
24, F.A.C., and applicable lifeline, eligible)
telecommunication carrier, and universal)
service requirements.)

**SUBPOENA DUCES TECUM
WITHOUT DEPOSITION**

THE STATE OF FLORIDA

TO: Triach Marketing, Inc. c/o Registered Agent of INCORP SERVICES, INC., 17888 67th Court North
Loxahatchee FL 33470

YOU ARE COMMANDED to appear at 2540 Shumard Oak Boulevard, Tallahassee, FL 32399, on July 19, 2010, by 5:00 p.m., or at such other time and place as may be mutually agreed upon by counsel, and to have with you at that time and place the following:

The documents listed in Attachment A.

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You may comply with this subpoena by providing legible copies of the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may mail or deliver the copies to the attorney whose name appears on this subpoena and thereby eliminate your appearance at the time and place specified above. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. **THIS WILL NOT BE A DEPOSITION. NO TESTIMONY WILL BE TAKEN.**

YOU ARE SUBPOENAED by the following attorney to (1) appear as specified, or (2) furnish the records instead of appearing as provided above, and, unless excused from this subpoena by this attorney or the Commission, you shall respond to this subpoena as directed.

DATED July 1, 2010

Ann Cole, Commission Clerk
Office of Commission Clerk
Florida Public Service Commission

By: *Dorothy Menasco*
Dorothy Menasco
Chief Deputy Commission Clerk

(SEAL)

Adam Teitzman
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Attorney for Florida Public Service
Commission

ATTACHMENT A

Provide responses to each of the following questions and provide the requested documents on or before Monday, July 19, 2010. Your company may avail itself of the statutory confidential provisions of Section 364.183, Florida Statutes, and Rule 25-22.006, Florida Administrative Code, if it believes it is necessary to comply with this subpoena.

1. Provide the following customer information for each Lifeline customer for the months of January 2010 through May 2010 in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee:
 - a) Customer Name
 - b) Customer Address
 - c) Customer Telephone Number
 - d) Date customer became a Lifeline customer
 - e) Date customer ceased being a Lifeline customer (If no longer a Lifeline customer)
 - f) If customer was disconnected, the reason customer was disconnected
2. Provide copies of the Lifeline certification records which provide proof of Lifeline eligibility for each Lifeline customer receiving service from January 2010 through May 2010. Include self-certification and/or income completed certification forms.
3. Provide a copy of all corporate minutes of Triarch Marketing, Inc. (Triarch) including stockholder meetings and Board of Director meetings from June 2009 through May 2010.
4. Provide copies of all Federal and State of Florida income tax returns filed in the last two years.
5. Provide a list of all Triarch employees, officers, directors, and owners employed during the period June 2009 through May 2010, along with their job descriptions.
6. If an underlying carrier provides Lifeline discounted wholesale services to Triarch, provide a copy of the certification given to each underlying carrier that Triarch is complying with all Commission requirements governing the Lifeline/Link Up programs as required by 47 CFR §54.417(b).
7. Provide copies of all 499-A and 499-Q forms filed with the Universal Service Administrative Company for 2008 through May 2010.
8. Provide copies of any outside auditor reports and opinions for Triarch for the period June 2009, through May 2010.
9. Provide copies of the purchase agreements between Associated Telecommunications Management Service and Triarch Acquisition Group, LLC, and Triarch Acquisition Group, LLC and Triarch Marketing, Inc.