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 ORDER NO. PSC-10-0491-PCO-TP ISSUED: August 6, 2010

ORDER DENYING MOTION TO QUASH NON-PARTY SUBPOENAS, ACKNOWLEDGING WITHDRAWAL OF STAFF'S DEMAND FOR NON-FLORIDA INFORMATION, AND REQUIRING ALL SUBPOENAED FLORIDA-SPECIFIC INFORMATION TO BE PROVIDED WITHIN 20 DAYS

Background

This docket was opened on June 28, 2010, to investigate Associated Telecommunications Management Services, LLC (ATMS) companies for compliance with Chapter 25-24, Florida Administrative Code (F.A.C.), and applicable Lifeline, eligible telecommunication carrier (ETC), and Universal Service requirements.

On June 30, 2010, our staff served Verizon Florida Inc. (Verizon) and BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T) with Subpoenas Duces Tecum Without Deposition, requiring that certain information in their possession related to the ATMS companies be produced on July 19, 2010.[1] In lieu of appearing on that date with the items to be produced, the subpoenas allowed that legible copies of the documents could be mailed or delivered on or before the scheduled date of production. The subpoenas further provided that Verizon and AT&T have the right to object to the production of the items at any time prior to production by providing written notice.

On July 12, 2010, ATMS companies Bellerud Communications, LLC, Life-Connex Telecom, LLC, Triarch Marketing, Inc., American Dial Tone, Inc., BLC Management, LLC, and All American Telecom, Inc. (Companies) filed Objections to Non-Party Subpoenas and Motion to Quash the subpoenas served on Verizon and BellSouth. By Order No. PSC-10-0461-PCO-TP, issued July 19, 2010, the Chairman granted our staff's Unopposed Motion for Extension of Time to respond to the Objections and Motion to Quash by July 29, 2010. On July 29, 2010, staff filed its Response in Opposition to Objections to Nonparty Subpoenas and Motion to Quash. This order disposes of the Objections to Non-Party Subpoenas and Motion to Quash. This Commission has jurisdiction pursuant to sections 350.123 and 120.569(2)(k), Florida Statutes (F.S.),

[1] Verizon and AT&T provide telecommunications services for resale by competitive local exchange carriers (CLECs), such as the ATMS companies that are the subjects of this investigation.

Objections to Non-Party Subpoenas and Motion to Quash

The Companies preliminarily argue that the subpoenas are void because they fail to comply with Rule 1.351(b), Florida Rules of Civil Procedure. That rule requires that a notice be served on every other party of the intent to serve a non-party subpoena at least ten days before the subpoena is issued, and is intended to avoid the premature production of documents by non-parties. The Companies state that because section 120.569(2)(f), F.S., provides that the presiding officer has the power to effect discovery in accordance with the Florida Rules of Civil Procedure, the subpoena rules of the Florida Rules of Civil Procedure must be followed.

Moreover, the Companies argue that the information the subpoenas require Verizon and AT&T to produce is very sensitive competitive information related to the Companies' customers, which information should not be produced unless and until the staff has made a compelling showing that such information is needed for a specific and legitimate purpose within this Commission's jurisdiction. The Companies are aware of our rule protecting confidential information, but argue that such a rule does not justify the requirement that their competitors compile and have access to their customer lists without a showing as to how this information is relevant to the matters which staff believes are at issue in this docket, but of which staff has not apprised the Companies. The Companies argue that section 120.569(2)(k)1, F.S., states that a subpoena should be quashed if it requires the production of irrelevant material, and that due process and fair play require that a showing be made as to the subject of the investigation and the relevance of any requested information.

The Companies further argue that Florida law is clear that a subpoena must be "'properly limited in scope, relevant in purpose, and specific in directive,' in order not to be unduly burdensome,"[2] and that the non-party subpoenas fail this test.

Response in Opposition to Objections to Nonparty Subpoenas and Motion to Quash

Staff responds that as part of its ongoing effort to monitor Universal Service Funds being distributed to ETCs, staff reviews the Universal Service Administrative Company's (USAC) disbursement database on a monthly basis. In this process, staff has observed atypical monthly growth in the amount of Lifeline disbursements received from USAC by certain ATMS companies. The ATMS companies that are the subject of a subpoena are each either certificated by the Commission or have a request for certification or ETC designation pending before us.

Staff argues that voiding the subpoenas and requiring them to be refiled with a ten-day notice pursuant to Rule 1.351, Florida Rules of Civil Procedure, would serve no purpose. The Companies filed their Motion prior to the production of the information by the non-parties. Therefore, the information will not be produced prior to resolution of the Motion, which is substantially the same protection afforded by the prior notice requirement in the Rule.

[2] Check 'N Go of Fla., Inc. v. State, 790 So. 2d 454, 460 (Fla. 5th DCA 2001) (quoting Dean v. State, 478 So. 2d 38, 40 (Fla. 1985)).

Staff argues that "an agency's investigatory subpoenas and other statutorily authorized investigative devices are presumptively entitled to be given effect judicially 'if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.'"[3] Moreover, as noted in the Check 'N Go decision,

> [t]he limits of the production that can lawfully be sought in an investigatory subpoena cannot be reduced to a formula. "Relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry." Thus, each investigatory subpoena must be evaluated on its own merits.[4]

Based on its review of that decision, staff recedes from its request for non-Florida information at this time, but reserves its right to file a subsequent subpoena for AT&T and/or Verizon to provide such information to the extent that non-Florida information is subsequently determined to be necessary for the investigation.

Staff further argues that the remainder of the subpoenaed information is clearly within the parameters established by applicable case law because the investigation is within this Commission's authority, the demand is not too indefinite, and the information sought is reasonably relevant. The Commission has jurisdiction over Lifeline services pursuant to section 364.10, F.S., and investigative authority pursuant to sections 350.121 and 350.123, F.S. The Companies' customer information is very specific and limited to specific months. And the Florida-specific subpoenaed information is needed to determine whether the Companies that serve Florida Lifeline customers are complying with applicable reporting and reimbursement requirements governing those services and facilities requirements applicable to ETC providers.

Analysis and Ruling

Having reviewed and considered the arguments of the Companies and staff, the Companies' Motion to Quash the subpoenas served upon Verizon and AT&T is denied with the understanding that staff recedes at this time from its demand for non-Florida information. Rule 1.351, Florida Rules of Civil Procedure, pertains to subpoenas of non-parties of interest to a civil lawsuit, and, pursuant to section 120.569(2)(f), F.S., to subpoenas of non-parties of interest to administrative adjudicatory proceedings involving decisions which affect substantial interests. That Rule is inapplicable here because this docket is investigatory rather than adjudicative in nature.

Pursuant to section 350.123, F.S., challenges to subpoenas issued in both investigatory and adjudicative matters are to be handled as provided in section 120.569, F.S. The provision of section 120.569 relating to challenges to subpoenas is contained in subsection 120.569(2)(k)1, F.S., which provides that "[a]ny person subject to a subpoena may, before compliance and on timely petition, request the presiding officer having jurisdiction of the dispute to invalidate the

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[3] Florida Dept. of Ins. and Treasurer v. Bankers Insurance Co., 694 So. 2d 70, 73 (Fla. 1st DCA 1997) (quoting U.S. v. Morton Salt, 338 U.S. 632, 652 (1950)).
[4] 790 So. 2d at 460.

subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material." This is precisely what the Companies did here by the filing of their Motion. I find that the subpoenas were lawfully issued pursuant to section 350.123, F.S., and with the withdrawal of the demand for non-Florida information, they are not unreasonably broad in scope, nor do they require the production of irrelevant material.

Based upon the foregoing, the Companies' Motion to Quash the subpoenas served upon Verizon and AT&T is denied with the understanding that staff recedes at this time from its demand for non-Florida information. AT&T and Verizon shall provide all Florida-specific information described in the subpoenas within 20 days from the issuance date of this order.

It is, therefore,

ORDERED by Art Graham, Commissioner and Prehearing Officer, that the Companies' Objections to Non-Party Subpoenas and Motion to Quash is hereby denied. It is further

ORDERED that staff's withdrawal of its demand for non-Florida information is acknowledged. It is further

ORDERED that AT&T and Verizon shall provide all Florida-specific information described in the subpoenas within 20 days from the issuance date of this order.

By ORDER of Commissioner Art Graham, as Prehearing Officer, this 6th day of August, 2010.

ART GRAHAM
Commissioner and Prehearing Officer

(SEAL)

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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 Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, 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.