

Decision No. R09-1389-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 09A-393T

IN THE MATTER OF THE APPLICATION OF TRACFONE WIRELESS, INC. FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER IN THE STATE OF COLORADO FOR THE LIMITED PURPOSE OF OFFERING LIFELINE SERVICE TO QUALIFIED HOUSEHOLDS.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
QUASHING SUBPOENA AND
DENYING REQUEST FOR ISSUANCE OF SUBPOENA**

Mailed Date: December 14, 2009

I. STATEMENT

1. On June 1, 2009, Tracfone Wireless, Inc. (Tracfone) filed the above-captioned application requesting designation as an Eligible Telecommunications Carrier (ETC) in the State of Colorado to offer Lifeline service to qualified households.

2. On October 30, 2009, the Comments of the Colorado PUC 911 Task Force (Task Force) were filed in this proceeding. The Comments are directed to “Members of the Colorado Public Utilities Commission” and are executed by “Brad Heyden, Secretary to the Colorado PUC 911 Task Force.”

3. Pursuant to the request of TracFone a subpoena duces tecum was issued to “Dennis J. Tharp, member of Colorado PUC 911 Task Force” on November 30, 2009. TracFone served the subpoena duces tecum calling Mr. Tharp to appear for a deposition on December 14, 2009.

4. On or about December 9, 2009, the Combined Motion to Quash Subpoena Duces Tecum/Motion for Protective Order (as to Documents and Deposition of Dennis J. Tharp) was filed by Adams County E-911 Emergency Telephone Service Authority, the Arapahoe county E-911 Emergency Communications Service Authority, and the Jefferson County E-911 Emergency Communications Authority (hereinafter 911 Authorities).

5. On November 30, 2009, the Request for Issuance of Subpoena Duces Tecum was filed by Tracfone requesting issuance of a subpoena to Ms. Kimberly Culp, Chairman of the Task Force.

6. On December 1, 2009, the Notice of Filing Revised Subpoena was filed by Tracfone requesting issuance of a revised subpoena to Ms. Kimberly Culp, Chairman of the Task Force.

7. On December 11, 2009, Tracfone's Response in Opposition to the 911 Authorities' Combined Motion to Quash Subpoena Duces Tecum/Motion for Protective Order (as to the Documents and Deposition of Dennis J. Tharp) (Response in Opposition) was filed.

8. Tracfone seeks discovery regarding matters addressed in public comments filed in this proceeding by the Task Force.

9. Generally, the scope of discovery as well as depositions and discovery procedures provided in Rules 26 through 37 of the Colorado Rules of Civil Procedure apply to Commission proceedings. The Commission has broad authority as to discovery matters and often plays an integral role in managing discovery in proceedings.

10. Judge Gomez recently summarized Commission practice regarding subpoenas:

Commission Rule 4 Code of Colorado Regulations (CCR) 723-1-1406 sets out the Commission regulations regarding the issuance of subpoenas and subpoenas duces tecum. Rule 1406(a)(I) indicates that C.R.C.P. Rule 45(a)-(d) is

incorporated by reference. Section 40-6-103(1), C.R.S. sets out the statutory requirements under which the Commission may issue subpoenas. In relevant part, § 40-6-103(1) provides that "[n]o subpoena shall be issued except upon good cause shown. Good cause shown shall consist of an affidavit stating with specificity the testimony, records, or documents sought and the relevance of such testimony, records or documents to the proceedings of the commission.

The requirements under Commission Rule 1406 and § 40-6-103 only slightly vary from C.R.C.P. Rule 45. For example, while Commission Rule 1406 and § 40-6-103(1) require a showing of "good cause" for issuance of a subpoena, such a requirement no longer exists under C.R.C.P. Rule 45. Otherwise, the requirements are similar. A key requirement for issuance of a subpoena duces tecum is that the items requested must be specified with "reasonable particularity." Under Rule 1406 and § 40-6-103(1), good cause must be shown in a manner prescribed by statute, which consists of an affidavit which specifically states the records or documents sought, as well as the relevance of those records or documents to the proceeding at hand.

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11. Judge Jennings-Fader also recently summarized Commission consideration of discovery matters:

General Discovery-Related Principles.

Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1405 governs discovery in Commission proceedings.¹ That rule incorporates by reference specific provisions of the discovery rules found at Colorado Rules of Civil Procedure (Colo.R.Civ.P.) 26 through 37.

A party may serve discovery upon another party to discover any matter, not privileged, that is relevant to the claim or defense of a party. Colo.R.Civ.P. 26(b)(1). The scope of pretrial discovery is broad in order to effectuate its purposes, some of which are: discovery of relevant evidence, simplification of issues, elimination of surprise at hearing, and promotion of settlement of issues and cases. *Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1188 (Colo. 2002).

Consistent with the purposes of discovery, the concept of relevance with respect to discovery is a broad one (*Sewell v. Public Service Company of Colorado*, 832 P.2d 994, 999 (Colo. App. 1991)) and "is not equivalent to the standard for admissibility of evidence at trial" (*Williams v. District Court*, 866 P.2d 908, 911 (Colo. 1993)). The test of relevance for purposes of discovery is whether the information sought "appears reasonably calculated to lead to the discovery of

¹ The Commission may modify the time frames and procedures in Rule 4 CCR 723-1-1405. In this proceeding, Decisions No. R09-0868-I and No. R09-1094-I contain such modifications and clarifications.

admissible evidence.” Colo.R.Civ.P. 26(b)(1). Thus, “[i]nformation is discoverable if it is sufficiently related to the issues in the litigation.” *Williams*, 866 P.2d at 914 (Vollack, J., concurring). The Colorado Supreme Court has emphasized that, “[w]hen resolving discovery disputes, the rules should be construed liberally to effectuate the full extent of their truth-seeking purpose, so in close cases the balance must be struck in favor of allowing discovery.” *National Farmers Union Property and Casualty Co. v. District Court*, 718 P.2d 1044, 1046 (Colo. 1986).

This is not to say that the right to pretrial discovery is boundless. The Colorado Supreme Court has cautioned that,

[a]lthough the law generally favors discovery, the scope of discovery is not limitless. The need for discovery must be balanced by weighing a party's right to privacy and protection from harassment against the other party's right to discover information that is relevant.

Silva, 47 P.3d at 1188 (internal citation omitted).

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12. Rule 26(b)(2) has not been incorporated into the Commission’s Rules of Practice and Procedure, except as provided in Rule 1405. Rule 1405(a)(II). However, Rule 26(b)(2)(F) C.R.C.P. describes considerations courts make in determining whether to limit discovery including :

(iii) Whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issues; and

Rule 26(b)(2)(F) C.R.C.P.

13. Comparably, the Rule 26 F.R.C.P. requires a court to limit the frequency or extent of discovery if it determines that:

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Rule 26(b)(2)(C) F.R.C.P.

14. The undersigned administrative law judge finds that considerations in federal and state court, while not controlling, are among reasonable considerations in balancing the need for discovery.

15. While the Task Force is not created by statute, it is sufficiently analogous to statutory advisory committees that applicable law is helpful in considering the requested subpoenas. Pursuant thereto, non-party status is one of the factors the courts use in weighing the burden of imposing discovery. *Wyoming v. United States Dep't of Agric.*, 208 F.R.D. 449, 453 (D.D.C. 2002) *citing Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993).

16. Affidavits of Douglas J. Friednash, Esq. were filed in support of the requested issuance of subpoenas.

17. As to Mr. Tharp, Mr. Friednash states:

Mr. Tharp, the attorney representing the 911 Authorities, is also a voting member of the Colorado PUC 911 Task Force. On October 30, 2009, the Colorado PUC 911 Task Force filed comments in this proceeding. The comments state that a formal motion was made at a Colorado PUC 911 Task Force meeting to file a comment in the TracFone ETC proceeding "proclaiming that it was the formal position of the Task Force that it is in the public interest that any telecommunications carrier that does not collect and pay the emergency telephone charge should not receive ETC designation." Upon information and belief, Mr. Tharp initiated the motion for the Task Force to file comments in this proceeding and voted in favor of the motion—a motion which would support the position of his clients in this proceeding -- the 911 Authorities. (footnote omitted).

18. As to Ms. Culp, Mr. Friednash also addresses her knowledge about the Task Force to support the requested issuance.

19. Further, TracFone's Response in Opposition reiterates that depositions are sought as to individual task force members regarding the comments filed by the Task Force.

A. The 9-1-1 Task Force.

20. By Decision No. C08-0383, the Commission accepted the 9-1-1 Task Force Annual Report for 2008. There is substantial history therein as to the creation and maintenance of the Task Force. It was created by Commission order and rule for the purpose of overseeing statewide implementation of basic emergency service.

21. The Task Force represents a broad spectrum of representation. *See* Amended Bylaws attached to Annual Report in Docket No. 08M-118T.

22. Pursuant to Rule 2145 of the Rules Regulating Telecommunications Providers, Services, and Products, 4 *Code of Colorado Regulations* (CCR) 723-1, the Task Force shall make recommendations and report to the Commission concerning a broad range of matters affecting 9-1-1 services in Colorado.

B. Nature of Comments

23. Rule 1504(b) provides that the “Commission may accept comments from the public concerning any proceeding, which shall be included in the record.” Rule 1504 of the Rules of Practice and Procedure, 4 CCR 723-1.

24. Rule 1504, 4 CCR 723-1, grants discretion to the presiding officer as to the nature and treatment of public comments in the record. Public comments in this proceeding, while part of the administrative record, are not part of the evidentiary record.

25. Public comments provide an opportunity for interested persons to submit input for the Commission’s general information and to encourage the Commission to exercise discretion in the matter.

26. The Commission established the 9-1-1 Advisory Task Force. Rule 2145 of the Rules Regulating Telecommunications Providers, Services, and Products, 4 CCR 723-2. The

Task Force provides oversight of the statewide implementation of basic emergency service, at least in part to fill a void by the lack of any state-wide authority for 9-1-1 implementation.

27. The Task Force is not a party to this proceeding. Rule 1200(a), 4 CCR 723-1. The Task Force has not been shown to be an entity subject to discovery herein. If an entity, it would then designate who would appear pursuant to subpoena. Rule 30(b)(6) C.R.C.P.

28. In this proceeding, the Task Force filed comments, which are not evidence, for the Commission's consideration in this proceeding. No showing has been made that the comments filed are beyond the advisory role provided for in Commission rule. The comments reflect the position of the Task Force. They were not filed through counsel of any other party. The comments were executed by the Task Force through its Secretary.

C. Discussion

29. Mr. Tharp's motion to quash and Tracfone's response address Mr. Tharp's role in this proceeding and as an individual task force member. However, in considering the requested subpoena for Ms. Culp, the undersigned paused at a more foundational level.

30. The Commission is particularly mindful of the commitment requested of those volunteering to participate in the Task Force to advise the Commission. The undersigned administrative law judge is concerned that subjecting individual volunteers to the burden and expense of discovery in the litigation process will chill participation in such committees as well as the advice given thereby.

31. The comments regarding which discovery is sought are not evidence in this proceeding; rather, they are effectively public comment. Subjecting public commenters to the burdens of discovery would needlessly expand the scope of the proceeding and likely chill public participation in Commission proceedings.

32. For all practical purposes, the stated comments appear consistent with that of the 911 Authorities stated in their request for intervention in this proceeding – now parties to the proceeding. Tracfone has acknowledged that the “position of the Task Force is consistent with the position taken by Mr. Tharp's clients in this proceeding.”

33. In its discovery request, TracFone seeks a broad range of documents from each of the non-party witnesses in their role as Task Force members.

34. The Commission Staff is responsible for administering the Advisory Task Force and facilitating its meetings and agenda. Additionally, at least a substantial amount of information regarding the Task Force is publicly available through the Commission’s website.

35. The individuals have not been demonstrated competent to testify on behalf of the Task Force. As to individual board members, the testimony each might provide as to their personal understanding or opinion regarding Task Force actions related to what are effectively public comments in this proceeding are not of sufficient relevance to the merits of this proceeding to warrant subjecting individual board members to the burdens of discovery. While Tracfone seeks to show the motivations for submitting comments, such motivations are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Further, such motivations to provide public comment have no probative value to the determination of the merits.

36. Upon further consideration of all surrounding circumstances, the undersigned ALJ finds that good cause has not been shown to conduct requested discovery of non-party individual Task Force members regarding public comments filed in this proceeding. The need for discovery sought does not justify such task force members being subjected to discovery under the circumstances at bar. The burden and expense outweighs the likely benefit in light of the issues

herein. Finally, the relevance of the requested discovery regarding the Task Force decision has not been shown as to the merits of this proceeding.

II. ORDER

A. It Is Ordered That:

1. The Combined Motion to Quash Subpoena Duces Tecum/Motion for Protective Order (as to Documents and Deposition of Dennis J. Tharp) filed December 9, 2009 is granted, except as to the requested award of attorney fees which is denied.

2. The subpoena duces tecum issued to “Dennis J. Tharp, member of Colorado PUC 911 Task Force” on November 30, 2009, is quashed.

3. The Request for Issuance of Subpoena Duces Tecum filed by Tracfone Wireless, Inc. requesting issuance of a subpoena to Ms. Kimberly Culp, Chairman of the Colorado PUC 911 Task Force on November 30, 2009, is denied.

4. This Order is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director