BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of BellSouth Telecommunications, Inc. against Miami-Dade County for alleged operation of a telecommunications company in violation of Florida Statutes and Commission rules.	DOCKET NO. 050257-TL ORDER NO. PSC-08-0112-FOF-TL ISSUED: February 19, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

FINAL ORDER

BY THE COMMISSION:

I. Case Background

On April 13, 2005, BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T) filed its Complaint regarding the operation of a telecommunications company in violation of applicable Florida Statutes and Commission rules against Miami-Dade County (County). In its complaint, AT&T contends that the County is providing shared local tenant services to commercial airport tenants in violation of Rule 25-24.580, Florida Administrative Code (F.A.C.), by failing to obtain a shared tenant services (STS) certificate. The County filed its Answer and affirmative defenses on May 24, 2005.

On June 2, 2005, the County filed its Motion to Dismiss. AT&T filed its opposition to the County's motion to dismiss on June 17, 2005. In Order No. PSC-05-0847-FOF-TL, issued August 19, 2005, we denied the County's motion to dismiss. On August 26, 2005, the Greater Orlando Airport Authority (GOAA) filed its petition to participate as a party.

On April 21, 2006, we issued Order No. PSC-06-0326-PCO-TL granting the parties' joint motion for entry of order adopting the procedural schedule. On April 25, 2007, we issued Order No. PSC-07-0355-PCO-TL, granting AT&T's and the County's joint motion for extension of filing dates. On May 1, 2007, we issued Order No. PSC-07-0384-PCO-TL, granting AT&T's and the County's joint motion for second extension of filing dates. On June 28, 2007, we issued Order No. PSC-07-0544-PCO-TL granting AT&T's and the County's third motion for extension of filing dates.

On July 6, 2007, GOAA, AT&T, and the County filed a joint motion for a final extension of filing dates. In the joint motion, the parties stated that settlement discussions between the parties have terminated. The parties requested a final extension of thirty (30) days in which to submit their direct briefs and forty five (45) days to file reply briefs. Specifically, the parties requested that direct briefs be due on August 9, 2007, and reply briefs on September 10, 2007. On August 21, 2007, we issued Order No. PSC-07-0678-PCO-TL granting the parties' joint motion for final extension of filing dates.

Order No. PSC-07-0775-PCO-TL, issued September 24, 2007, set forth the oral argument procedure. Oral argument before this Commission was held on September 25, 2007, at the conclusion of the Agenda Conference.

We have jurisdiction over this matter pursuant to Sections 364.01, 364.339, 364.345, and 364.37, Florida Statutes.

II. Miami-Dade County's Operation of a Telecommunications Company

Pursuant to the definition of a telecommunications company under § 364.02(14), Florida Statutes, the County is operating as a telecommunications company at MIA because it is "offering two-way telecommunications service to the public for hire within this state by use of a telecommunications facility."

Pursuant to page 1 of the County's Direct Brief, it appears that the County no longer contests this issue. In its Direct Brief, the County acknowledges that it operates a shared airport telecommunications system at MIA pursuant to Rule 25-24.580, Florida Administrative Code, and § 364.339, Florida Statutes. Although the County fails to specifically identify itself as a telecommunications company, the County does acknowledge that we have jurisdiction to enforce our rules and the provisions of Chapter 364, Florida Statutes, over the County pursuant to §§ 364.01(1) and (2), Florida Statutes. Sections 364.01(1) and (2), Florida Statutes, grant this Commission exclusive jurisdiction to regulate telecommunications companies. The County chose not to further address Issue 1 in its Direct Brief or in its Reply Brief.

Accordingly, absent any evidence or arguments to the contrary, we find that the County is operating a telecommunications company at MIA.

III. Commission's Jurisdiction

The County acknowledges on page 1 of its Direct Brief that pursuant to §§ 364.01(1) and (2), and 364.339(1)(a), Florida Statutes, we have jurisdiction to enforce our rules and the provisions of Chapter 364, Florida Statutes, over the County's telecommunications operations at MIA. Sections 364.01(1) and (2), Florida Statutes, grant this Commission exclusive jurisdiction to regulate telecommunications companies and § 364.339(1)(a), Florida Statutes, grants this Commission exclusive jurisdiction over the provision of shared tenant services that duplicate or compete with local service provided by an existing local exchange telecommunications company.

Accordingly, we find that pursuant to §§ 364.01(1) and (2), and 364.339(1)(a), Florida Statutes, Miami-Dade County's telecommunications operations are subject to the jurisdiction of the Commission.

IV. Airport Exemption Rule

A. Parties' Arguments

AT&T's Argument

To the extent the County provides STS to airport tenants and is not otherwise subject to Rule 25-24.580, F.A.C. (Airport Exemption Rule), it is required to obtain a Certificate of Public Convenience and Necessity and to otherwise comply with all applicable rules governing STS providers.

AT&T argues that the Airport Exemption Rule creates a limited exemption solely due to the necessity to ensure the safe and efficient transportation of passengers and freight through the airport facility. AT&T argues that the rule is not a blanket authorization for airports to offer and provide STS for any and all purposes without our oversight. The County's provision of STS to the commercial tenants at MIA is not now and never has been designed or intended to provide safety, security or efficiency. The County's true purpose of providing STS is to make money by competing with regulated telecommunications companies for customers at MIA. The airport tenants to which the County offers and provides STS include facilities such as a shopping mall and hotel. The Airport Exemption Rule does not apply to the County's provision of STS to commercial tenants at MIA.

AT&T argues that this Commission clearly intended that the Airport Exemption Rule would apply solely to the provision of STS that are materially necessary for the internal security and operation of an airport, and not to services offered for commercial purposes to commercial tenants within the airport facility. AT&T claims that the County's provision of STS to its commercial tenants at MIA is not related to the safety, security, or efficient transportation of passengers and freight through the airport facility. AT&T claims that the County offers STS to a collection of retail shops, restaurants, and management companies within the MIA complex that constitute a shopping mall, and also provides STS to the Airport Hotel attached to MIA. AT&T maintains that the County's provision of STS to airport tenants is purely commercial and competitive in nature and is used to generate revenue to fund airport and other County operations, not to ensure the safe and efficient transportation of passengers and freight through the airport facility as the rule intended.

Miami-Dade County's Argument

The County argues that AT&T's complaint is flawed and incorrect. The County, through Miami-Dade Aviation Department (MDAD), has been an STS provider since 1987. The County points out that Order No. PSC-94-0123-FOF-TL, issued February 1, 1994, in Docket No. 931033-TL, indicated the County as the STS provider at MIA pursuant to the Airport Exemption. The County argues, to date, the status quo has remained unchanged, and AT&T's opinion that

the County only became an STS provider post-acquisition of the Airport System infrastructure in 2002 is subterfuge for relitigating the principles of STS and the Airport Exemption Rule.

The County argues that, unlike commercial STS operations, the County's systems are operated by governmental authorities for the convenience of the traveling public and have unique and critical communications needs. The County states that there was substantial testimony at the hearings for the STS rulemaking docket about the security reasons for permitting airport tenants, including not only airlines, freight carriers, and aviation and airport operations support services, but also concessions in the airport terminal (e.g., restaurants, newsstands, bars, and even the shoeshine stand) to obtain service through the shared airport system and therefore to continue to intercommunicate "behind" the PBX switch – i.e., without accessing the LEC central office. . The County argues that although we did not per se define "hotels, shopping malls, and industrial parks," this Commission neither intended nor required airports to obtain certification in order to serve any commercial tenant within the airport terminal facility.

The County argues the following in its direct brief:

> The parameters within which an airport may share local telephone service without becoming subject to the STS rules have not changed since the Airport Exemption [Rule] was adopted initially in 1987, codified in 1991, and amended in 1992. Therefore, so long as the County's sharing of local telephone service is related to the purpose of an airport (i.e., "the safe and efficient transportation of passengers and freight"), it will not be required to obtain a certificate of authority to provide shared tenant service from the Commission, or to comply with the Commission's regulations applicable to telephone companies or STS providers, such as the filing of tariffs of its rates and charges or the filing of annual reports at the Commission, given "there is no competition with [sic] no duplication of local exchange service by the LEC."

The County argues that its shared airport system at MIA fully complies with those requirements, and we should issue an order that the County's operation and provision of shared tenant services at MIA is exempt from the STS rules pursuant to applicable Florida Statutes and this Commission's rules.

GOAA's Argument

GOAA's arguments are essentially the same as the County's. GOAA maintains that to the extent the County provides shared services to such tenants of the airport, such service is entirely consistent with our rules and orders that specifically exempt airports from our STS certification requirement. GOAA argues that it was clear to this Commission in 1987 that the shared operations at Orlando International Airport and MIA included sharing of service by terminal shops, restaurants, bars, newsstands, shoeshine stands and other terminal concessions in order to intercommunicate behind a PBX, and we permitted the County and GOAA "to continue to provide service under these conditions." GOAA further argues, "To the extent AT&T now seeks to restrict the Airport Exemption [Rule] and argues that airports have now, by virtue of

sharing service among concessions located in the airport terminal, become 'shopping malls,' AT&T's argument is foreclosed by the unambiguous text of Section 25-24.580 of the Code."

B. Analysis

Rule 25-24.580, F.A.C., currently states:

> Airports shall be exempt from the other STS rules due to the necessity to ensure the safe and efficient transportation of passengers and freight through the airport facility. The airport shall obtain a certificate as a shared tenant service provider before it provides shared local services to facilities such as hotels, shopping malls and industrial parks. However, if the airport partitions its trunks, it shall be exempt from the other STS rules for service provided only to the airport facility.

In Order No. 17111, issued January 15, 1987, in Docket No. 860455-TL, In Re: Investigation into Appropriate Rates and Conditions of Service for Shared Local Exchange Telephone Service (STS Order), we stated the following regarding the provision of STS by airports:

> Airports are unique facilities, generally construed as being operated for the convenience of the traveling public. One unique communications need is the ability of airport tenants to quickly communicate with one another for security reasons. It is for this reason that we will permit intercommunications between and among tenants behind the PBX without accessing the LEC central office. While we recognize the unique needs of airports such as GOAA, the sharing of local exchange service must be related to the purpose of an airport – the safe and efficient transportation of passengers and freight through the airport campus. To the extent that sharing of local trunks is limited to this purpose, there is neither competition with nor duplication of local exchange service by the LEC. There was some discussion at the hearing of extending local sharing to facilities such as hotels, shopping malls, and industrial parks. To the extent an airport engages in this type of local sharing, it must be certificated as an STS provider. Because of the unique nature of the airport, we consider it to be a single building. As an alternative to becoming certificated as an STS provider, the airport could partition the trunks serving these other entities. With these caveats, airports may continue to provide service under existing conditions.

Our STS Order and the STS rules were codified by Order No. 23979, issued January 10, 1991, in Docket No. 891297-TS, in Re: Adoption of Rules 25-24.550 through 25-24.587, Florida Administrative Code, Relating to Shared Tenant Service (STS) Providers. The Airport Exemption Rule at that time read:

> Airports are exempted from the STS rules due to the necessity to ensure the safe and efficient transportation of passengers and freight through the airport facility. If airports extend their sharing of local services to facilities such as hotels, shopping malls and industrial parks, the airport will be required to be certificated

> as a shared tenant service provider. However, the airport could partition the trunks serving those entities and forego STS certification.

On August 14, 1991, our staff opened Docket No. 910867-TS, In Re: Proposed Amendment of Rule 25-24.580, F.A.C., Airport Exemption, to clarify that certification of the airport as an STS provider will be required if shared local service is provided to certain facilities. In its request to establish Docket No. 910867-TS, dated August 15, 1991, staff stated it believes the last sentence in the rule could be misinterpreted to authorize airports to provide service to hotels, shopping malls and industrial parks without STS certification if the trunks serving those entities are partitioned.

At the February 4, 1992, Agenda Conference, the Airport Exemption Rule was amended to reflect the current language. In its recommendation filed on January 23, 1992, in Docket No. 910867-TS, our staff summarized its interpretation of the STS rules.

> An airport may share trunks for airport purposes. This requires no STS certification. An airport may also use one switch to do the following: It may partition trunks into two trunk groups. The first trunk group will serve the airport. This group of trunks does not have to be certificated. The second group of trunks will serve an industrial park or a mall or some other arrangement. If shared local service is provided, this group of trunks must be certificated and must comply with all STS requirements. If the partitioned trunks are purchased directly by the customer from the LEC, no sharing of trunks occurs and no certification is required.

There is no dispute that the County is providing shared tenant service at MIA. The question is whether the County's provision of STS to concession stands and shops located in the airport terminal facility has expanded beyond the scope of the initial Airport Exemption Rule. We find they are not. The concession stands and shops located in the airport facility exist for the convenience of the traveling public and do not constitute a separate shopping mall. As a Commissioner alluded to at the Special Agenda Conference held in 1987, when the original rule was adopted, if one applies the legal concept of the "but for rule" in this case, the hotel, concession stands, and shops would not exist but for the airport and the traveling public.

AT&T argues that the County's provision of STS to the commercial tenants at MIA is not now and never has been designed or intended to provide safety, security or efficiency. The County argues, to the contrary, that its provision of STS to certain concessions located in the MIA terminal is consistent with the intent of the airport exemption. Additionally, the County argues that our decision in 1987 specifically contemplated that when a retail establishment is located in an airport terminal, the sharing of service to said establishment may be necessary for the safety and efficiency of the airport, and the County has continuously provided STS to the same types of concessions considered by this Commission in issuing the STS Order.

We find that the County's argument has greater merit and is more congruent with the STS Order and this Commission's original discussions regarding which shops and concessions would be included in the airport exemption. The STS Order states that the airport exemption

was created due to the unique nature of the airport facilities, that is, operated for the convenience of the traveling public. The STS Order also states that one unique communication need is the ability of airport tenants to quickly communicate with one another for security reasons. The STS Order does not specify that the airport exemption includes only airport tenants that use shared tenant services in the course of providing security, safety, or other operations specific to the movement of passengers and freight through the airport facility.

We are not persuaded by AT&T's argument that the concessions at MIA are a shopping mall, and thus, the provision of service to those concessions is not exempt under the Airport Exemption Rule. AT&T submitted a video tape of the types of concessions at the MIA that are the subject of its complaint. The video shows that most of the customers in the stores appear to be travelers carrying luggage or carry on bags. Further, the merchandise and services for sale at the concessions appear to be the types of merchandise targeted to the traveling public. A reasonable person viewing the video tape would not classify the collection of shops in the MIA terminal as a "shopping mall" by conventional standards.

Additionally, the County's STS customer list includes sixty-five airport tenants. During oral argument, the County's counsel, Mr. Hope, indicated that nine of the sixty-two STS tenants are concessions. At most, the County provides STS to nine concessions at MIA. The types of concessions in question are consistent with those that were considered to be included in the exemption during the Special Agenda Conference in 1987 when the airport exemption was first discussed. They include a coffee shop, a bar, a newsstand, a bookstore, a novelty gift shop, and a shoeshine stand, among others. Those types of concessions located in the airport terminal were considered to exist for the convenience of the traveling public, and, thus were included in the airport exemption. The concessions and shops are located within the terminal structure of the airport accessible only by ticketed passengers. The County argues in its reply brief that, "The concessions at MIA are not a shopping mall. The non-traveling public does not drive to MIA to shop. In addition, various concessions are located past the security checkpoints and cannot be accessed without a valid boarding pass and identification."

In its direct brief, AT&T argues that the County provides STS to the Airport Hotel attached to MIA and notes in footnote 202, "While the trunk serving the airport hotel is partitioned from the trunk serving the airport terminal, the Commission has clearly stated that, even if partitioned, the provision of STS to a hotel must be certificated." It is undisputed that the County provides STS service to the Airport Hotel and the trunks for the hotel are partitioned in the County's PBX to be separate from the trunks providing service to the other airport services. Our staff explained in its recommendation filed on January 23, 1992, in Docket No. 910867-TS, if the partitioned trunks are purchased directly by the customer from the LEC, no sharing of trunks occurs and no certification is required. In his deposition, County witness Pedro Garcia explained that the County owns the Airport Hotel at MIA which is operated by a management company. Mr. Garcia further states that the trunks for the Airport Hotel are partitioned in the PBX, and are provided by the former AT&T, which is contracted by them separately. Upon the merger of BellSouth and AT&T, service could now be considered to be provided by the LEC: the new AT&T. Additionally, a County memorandum summarizing the Airport Hotel telephone charges includes a copy of a bill from BellSouth, dated April 20, 2006, charging for local service

provided to the hotel. Hence, it appears the County's provision of STS service to the Airport Hotel meets the requirements for exemption under the Airport Exemption Rule. The trunks are partitioned in the PBX and are purchased by the customer (the County) directly from the LEC (AT&T / BellSouth), and the Airport Hotel receives local service from the LEC.

AT&T argues that the purchase of the STS and telecommunications infrastructure by the County from NexteriaOne now makes the County an STS provider. However, the County argues that for over twenty years it has provided STS to tenants at MIA without certification under the Airport Exemption Rule. In 2002, the County purchased the telecommunications infrastructure at MIA and subsequently contracted with NexteriaOne to manage and operate the telecommunications and STS system. As a result, the County now bills its STS customers and receives the gross revenues from the STS operations. Prior to purchase, the County paid NexteriaOne for its telecommunications services and shared a small percentage of the revenue which reportedly caused financial losses for the County. In an effort to reduce its telecommunications expenses, the County purchased the MIA telecommunications systems from NexteriaOne. The County points out, "Neither Chapter 364 of Florida Statutes, nor Chapter 25-24, Part XII of the Florida Administrative Code, prohibits airports from defraying costs and generating revenues from their STS operations." The County further argues that the Airport Exemption Rule is based upon necessity to ensure the safe and efficient transportation of passengers and freight through the airport facility, not whether the provision of STS generates a profit.

Conclusion

In this case, the record indicates that the County's provision of STS complies with the Airport Exemption Rule. The County does not provide shared tenant service to "shopping malls" or "industrial parks" at MIA. The County has partitioned its trunks serving the MIA Hotel in accordance with Rule 25-24.580, F.A.C., and the MIA Hotel receives local service from the LEC. We hereby find that Miami-Dade County's provision of shared tenant services at the Miami International Airport is exempt from STS certification pursuant to Rule 25-24.580, F.A.C., Airport Exemption.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Miami-Dade County is operating a telecommunications company at Miami International Airport. It is further

ORDERED that we have jurisdiction over this matter pursuant to Sections 364.01, 364.339, 364.345, and 364.37, Florida Statutes.

ORDERED that Miami-Dade County's provision of shared tenant services at the Miami International Airport is exempt from STS certification pursuant to Rule 25-24.580, F.A.C., Airport Exemption.

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 19th day of February, 2008.

ANN COLE
Commission Clerk

(SEAL)

AJT

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.