



**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

**In Re:**

**PROPOSED RULE 25-24.845, F.A.C.,  
CUSTOMER RELATIONS; RULES  
INCORPORATED, AND PROPOSED  
AMENDMENTS TO RULES 25-4.003,  
F.A.C., DEFINITIONS; 25-4.110,  
CUSTOMER BILLING; 25-4.118,  
F.A.C., INTEREXCHANGE CARRIER  
SELECTION; 25-24.490, CUSTOMER  
RELATIONS; RULES  
INCORPORATED**

**DOCKET 970882-TI**

**FILED OCTOBER 15<sup>th</sup> 1997**

**BUSINESS DISCOUNT PLAN'S OPPOSITION TO THE ATTORNEY GENERAL AND  
CITIZENS' MOTION TO COMPEL**

COMES NOW, Business Discount Plan, Inc. ("BDP" or "Respondent"), by its attorneys, pursuant to Rules 25-22.034 and 25-22.035, F.A.C., and Rules 1.350 and 1.280(b), F.R.C.P., and hereby responds to the Attorney General and the Citizens of the State of Florida's (collectively "Citizens") Motion to Compel ("Motion") as follows:

1. On September 11, 1997, Citizens' served their First Set of Requests for Production of Documents ("First Request"). On September, 12, 1997, the Florida Public Service Commission ("Commission") issued Order PSC-97-PCO-TI ("Order"), which sets forth a ten-day deadline for objections to discovery requests. Neither BDP nor its attorneys have been

served with copies of the above-referenced Order and, as a result, BDP was unaware of such deadline. Further, BDP did not engage counsel in this matter until after such ten-day deadline had past. BDP immediately drafted preliminary objections in attempt to comply, to the extent possible, with the spirit of the ten-day deadline, and filed its objections on October 1, 1997.

2. The Citizens' First Request specifies a deadline of October 16, 1997. However, BDP did not receive the Citizens' Motion to Compel until October 14, 1997. Further, BDP has not received any ruling from the Commission on its preliminary objections. As a certificate-holder in the state of Florida, BDP wishes to cooperate with the Commission and participate in this proceeding to the extent that it is required to do so. However, especially in light of BDP's contention that it should not be required to participate at all in this rulemaking proceeding because this proceeding, as now recast, is outside the scope of the Commission's authority, BDP will provide its responses to the Citizens' First Requests for production of documents within two weeks after the Commission has ruled on its objections, Citizens' Motion, and BDP's Opposition to such Motion.

3. Citizens' assert that BDP's statement that its objections were preliminary and nature and could be supplemented at the time that it serves its responses on Citizens is an attempt to "unilaterally change Commission Order PSC-97-1071-PCO-TI ... which requires objections to be made within 10 days of service of the discovery request." This is simply untrue. Rather, BDP prepared its preliminary objections as quickly as practicable after notice, in a good faith attempt to comply, to the extent possible, with the Commission's Order.

However, because BDP was never served with a copy of the Commission's Order and because BDP only learned of such a deadline after speaking with the records division of the Commission about an unrelated issue, BDP's only reasonable course of action was to provide its preliminary objections as soon as was practical. Subsequent to the filing of BDP's preliminary objections and upon attempting to respond to the Citizens' First Requests, BDP has discovered additional specific objections. Given BDP's good faith effort to comply with the Commission Order to the extent possible, its reservation of its right to supplement its objections should not be denied.

4. In response to BDP's objection to each and every request on the grounds that it is not a party to this proceeding, the Citizens argue that because they discussed among themselves and with Commission staff at an Agenda Meeting whether all telecommunications companies with a certificate from the Commission could be served with discovery requests, the Citizens must have the power to serve such requests. The Citizens' also argue that because the Commission questioned its staff about this interpretation, it impliedly agreed with it. Finally, the Citizens argue that they must have the power to serve discovery request on non-intervening persons because, if that were not true, they would not have agreed to consolidate the investigative and rulemaking proceedings.

5. However, none of these arguments specify what portion of the Commission's Order directs non-intervening persons to this rulemaking procedure to respond to discovery requests. Further, assuming arguendo, that the Commission's Order does require BDP to respond to Citizens' First Request, Citizens' argument provides no legal authority under which

the Commission could make such an order. Moreover, whether Citizens' would have agreed to consolidate the two proceedings into a rulemaking proceeding knowing it they would not have the authority to serve discovery requests on non-intervening persons is completely irrelevant to the question of whether such authority actually exists.

6. In its Order, the Commission specifically characterizes this consolidated proceeding as a rulemaking proceeding to be conducted pursuant to §120.54, Florida Statutes. Section 120.54, the relevant rulemaking statute, clearly specifies that "[r]ulemaking proceedings shall be governed solely by the provisions of this section." Further, nothing in §120.54 provides the Commission, the Attorney General, or the Office of Public Counsel with the authority to serve discovery requests on non-intervening persons. Instead, the rule directs agencies to provide affected persons, upon request of such persons, an opportunity to present evidence and argument. Moreover, if a person whose substantial interests will be affected by the proceeding demonstrates to the agency that a rulemaking proceeding is inadequate to protect his or her interests, the agency must suspend the rulemaking proceeding and commence a separate proceeding under §§120.569 and 120.57. In fact, the intent of §120.54, is to give persons who want to participate in a rulemaking proceeding, the opportunity to do so. Although Citizens' suggest that the potential effect on all telecommunications companies of this change in rules justifies its discovery request, the rulemaking statute simply does not support this argument. Hence, because neither Citizens' or the Commission have the authority to command a non-intervening person to respond to discovery requests, BDP's further participation in this proceeding, as recast, can no longer legally be required. See East Central Regional Wastewater

**Facilities Operation Bd. v. City of West Palm Beach, 659 So.2d 402 (Fla. App. 1995) (as creatures of statute, administrative agencies only have the powers granted to them by statute, may not increase such powers, and have no common law jurisdiction or inherent power).**

7. Further, Rule 25-22.034, F.A.C., governs discovery by administrative agencies. Rule 25-22.034 specifies that "[p]arties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure." (emphasis added). In turn, Rule 1.350, F.R.C.P., the rule governing production of documents, states that "any party may request any other party" to produce, among other things, documents. In its Motion, Citizens specifically admit that, "[s]ince this docket is now a rule proceeding, there are no 'parties' to the proceeding." Hence, the rules and statutes which govern Commission practice and procedure also do not provide either Citizens or the Commission with the authority to command discovery from a non-intervening person in a rulemaking proceeding.

8. With respect to BDP's objection to the definition of "you," "your," "company," and "Business Discount Plan" in the request for documents, Citizens explain that the document request does not seek to have BDP procure documents from every affiliated company of BDP, but instead seeks only those documents from persons or entities acting on behalf of BDP. BDP reiterates its objection to these definitions to the extent these definitions seek to impose an obligation on BDP to respond on behalf of other entities or persons that are not parties to this proceeding on the grounds that such definition is overly broad, unduly burdensome, oppressive, and not permitted by applicable discovery rules. BDP specifically objects to these definitions,

even as modified by the Citizens in their Motion, to the extent that it applies to other persons or entities which provide services for BDP, such as independent companies who verify PIC change orders or solicit customers, who are not parties to this proceeding. As discussed above, applicable discovery rules do not provide for the production of documents from non-parties. Further, contrary to Citizens' contention, such companies would not be within the "control" of BDP. Hence, it would be impossible for BDP to cause such other entities to produce such documents. BDP's objection, therefore, should be granted.

9. Citizens contend that, at the time they submitted their objections, BDP should have identified all documents to which any kind of privilege might apply. The instructions contained in Citizens' First Request direct BDP to withhold the documents to which it makes a claim of privilege and furnish a list identifying each document for which privilege is claimed. If the Commission determines that BDP must continue to participate in these proceedings, BDP intends to follow these instructions. Citizens' argument that this information must have been provided with BDP's objections is without merit, and BDP's objections based upon privilege should not be denied at this time.

10. In response to BDP's objection to each request in Citizens' First Request insofar as the request was not relevant to the provision of intrastate telecommunications services in Florida, Citizens concede that their requests do not apply to specific customer complaints about slamming from customers outside Florida. However, Citizens contend that other matters related to slamming, in other states or in general, are relevant to this proceeding. BDP, however,

objected to each request both on relevancy grounds and to each request insofar as it is intended to apply to matters other than Florida intrastate operations based upon the argument that such matters are beyond the jurisdiction of the Commission. In addition to specific customer complaints about slamming from customers outside Florida, matters including, but not limited to, scripts, verification forms, studies, reports, internal analyses, correspondence, customer lists, and solicitation forms relating to slamming or PIC change verification in other states are not relevant to this proceeding and are beyond the Commission's jurisdiction. Further, to the extent that each request is intended to apply to matters other than Florida intrastate operations, such requests are unduly burdensome, overly broad, and oppressive. Hence, BDP's objection to the production of such documents should be granted.

11. Citizens argue that BDP's objection to the production of information already in the public record before the Commission is invalid because the rules of discovery do not provide this type of exemption from discovery. BDP responds that its objection was not based upon a specific exemption from discovery. Rather, BDP's objection to providing information already in the public record is based on the argument that a request for production of documents already produced and part of the public record is unnecessary and unduly burdensome, as Citizens can readily obtain these documents. BDP's objection should be granted.

12. In response to BDP's objection to the production of documents BDP is prohibited from disclosing pursuant to §364.24, Florida Statutes, Citizens argue that this statute, which deals with the disclosure of customer account information by telecommunications companies,



includes an exemption for matters "otherwise allowed by law" and argues that formal requests for production of documents in a proceeding before the Commission so qualify. However, Citizens provide no legal authority in support of this argument. It is unlikely that simply because Citizens have chosen to request such information, it then falls within this exemption. Hence, because Citizens' argument lacks legal support, it should be disregarded.

13. Citizens also argue that many of BDP's objections should be denied solely because BDP does not analyze its objections or provide examples illustrating the basis for its objections. This argument is legally without merit. Under Florida law, as in most states and under the Federal Rules of Civil Procedure, responses to requests for productions of documents need only set forth objections and the reasons for such objections. Messer v. E.G. Pump Controls, Inc., 667 So.2d 321 (1995). Contrary to Citizens' contention, provision of analyses and examples explaining an objection to a request for production is not required. Hence, the Citizens' arguments in paragraphs three through five, seven, nine through ten, and twelve through thirteen should be disregarded.

14. Without waiving its argument that analysis and examples explaining objections to requests for production are not required, and without waiving its ability to make specific objections at the time it serves its responses on Citizens, BDP will attempt to further explain its general objections.

15. With respect to BDP's objection to each request insofar as the request is vague, ambiguous, imprecise, or utilizes terms that are subject to multiple interpretations but are not properly defined or explained for the purposes of these requests, BDP specifically responds that this objection applies to, but is not limited to, the following examples:

- a. The term "slamming" is employed in questions one through four, six through eight, and ten through thirteen. However, this term is never defined. "Slamming" is a term of art and is subject to multiple interpretations.
- b. Subpart (b.) of request number one is vague, ambiguous, and imprecise in that it does not specify whether the "slamming" complaints were against BDP or another carrier.
- c. Subpart (c.) of request number one is vague, ambiguous, and imprecise in that it does not specify whose rules or practices to which it refers. "Rules and practices" could refer to BDP's rules, another carrier's rules, any of the several state's rules, or the Federal Communications Commission's rules.
- d. Subpart (d.) of request number one is vague, ambiguous, and imprecise in that it does not specify whether it refers to BDP's customers, another interexchange carrier's customers, or a local exchange carrier's customers.
- e. Request number two employs the term "affiliate" but does not define this term. This term is subject to multiple interpretations depending upon the purpose for which the term is used.

**WHEREFORE, the Attorney General and Citizens' Motion to Compel should be denied.**

Dated this 15<sup>th</sup> day of October, 1997.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Docket No. 970882-TL

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 15th day of October, 1997.

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