

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of AT&T OHIO :

Complainant,

Case No. 08-690-TP-CSS

v.

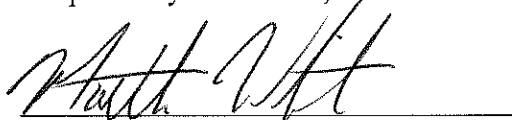
GLOBAL NAPS OHIO, Inc.,

Respondent.

**GLOBAL NAPS OHIO, INC.'S
MOTION TO QUASH PORTIONS OF SUBPOENAS FILED BY AT&T OHIO**

Pursuant to Ohio Administrative Code ("OAC") 4901-1-25(C), Global NAPS Ohio, Inc. ("Global NAPS") files this motion to quash portions of the Subpoenas filed by AT&T Ohio ("AT&T") on July 23, 2009 in this proceeding ("Motion to Quash"). Specifically, Global NAPS asks that the Attorney Examiner quash AT&T's request for "all documents and communications" "in connection with" the documents Qwest Communications Company, LLC and Sage Telecom ("Subpoenaed Parties") provided to Global NAPS in response to subpoena's issued by the Commission in this proceeding. Global NAPS respectfully asks that the Attorney Examiner grant this Motion to Quash for the reasons set forth in Global NAPS' Memorandum in Support.

Respectfully Submitted,



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MEMORANDUM IN SUPPORT OF GLOBAL NAPS' MOTION TO QUASH

I. INTRODUCTION

In the Entry dated July 22, 2009 (July 22nd Entry”) the Attorney Examiner granted AT&T’s leave to issue subpoenas for information that Global NAPs received from Subpoenaed Parties (“Subpoenaed Information”) in response to subpoenaes previously issued in this proceeding upon application of Global NAPs (“Global NAPs Subpoenas”).¹ On July 23, 2009, AT&T served upon the Subpoenaed Parties subpoenaes (“AT&T Subpoenas”) requesting that the Subpoenaed Parties provide, along with the Subpoenaed Information, “all documents and communications . . . in connection with” the Global NAPs Subpoenas.² These requests can be found in paragraphs 2 and 4 of the Qwest subpoena, paragraph 2 of the Sage subpoena and paragraph 2 of the NOS subpoena.

OAC 4901-1-25(C) provides that upon motion of any party, the Commission may “quash” a subpoena if “it is unreasonable or oppressive.” AT&T’s request for “documents and communication” between Global NAPs and the Subpoenaed Parties “in connection with” the Subpoenaed Information are unreasonable and oppressive and must be quashed. AT&T’s attempt to obtain communications *from* Global, and particularly *from Global’s attorneys*, directed to the subpoenaed parties, is a blatantly improper attempt to obtain discovery Global NAPs attorney work product.

II. ARGUMENT

A. The AT&T Subpoenas Are Outside the Scope of The July 22nd Entry.

¹ July 22nd Entry at 7.

² See Subpoenas of Qwest and Sage attached to AT&T’s Motion to Issue Subpoenas (July, 23, 2009).

The AT&T Subpoenas, as drafted, are clearly outside of the scope of the subpoenas authorized by the Attorney Examiner in the July 22nd Entry. In its motion to issue subpoenas, AT&T asked that the Attorney Examiner grant it authority to issue subpoenas for “information provided *to* Global” by the Subpoenaed Parties.³ However, paragraphs 2 and 4 of the AT&T Subpoenas to Qwest, and paragraphs 2 of the AT&T Subpoenas to Sage and NOS, ask for all communications *from* Global *to* the Subpoenaed Parties in connection with the Subpoenaed Information. When the Attorney Examiner granted AT&T’s motion for leave to issue Subpoenas, he granted AT&T exactly what AT&T asked for; “information provided to Global.” AT&T was not granted authority to seek either Global’s own communications or documents tangentially related to information provided to Global NAPs but not themselves responsive to the subpoenas or admissible at trial.

It is undisputable that Global NAPs’ communications with the Subpoenaed Parties is not information provided *to* Global NAPs. Further, communications between Global NAPs and the Subpoenaed Parties is not discovery of third parties, but rather is a back-door means of seeking discovery from Global NAPs itself. Indeed, it is an attempt to discover the questions Global’s attorney’s sought to discuss with the third parties – and its disclosure could reveal counsel thought processes, strategies or tactics. AT&T should not be permitted to ignore the July 22nd Entry, and exceed the scope of discovery authorized in this proceeding, after the Attorney Examiner has explicitly limited discovery, through the July 22nd Entry and numerous other decisions made in this proceeding.

B. The Communications Between Global NAPs and Subpoenaed Parties Are Privileged.

³ See Motion and memorandum in support for leave to file a motion for subpoenas in the alternative, at 4,

The attorney work product doctrine protects materials prepared in anticipation of litigation from discovery by opposing counsel.⁴ The communication and documents “in connection with” the Global NAPs Subpoenas, including the communications and documents originated by Global’s counsel and sent to the subpoenaed parties, were made in preparation of the upcoming hearing and therefore are privileged attorney work product. AT&T has not made even the pretense of a showing any necessity to allow an opposing party to discover material that is privileged attorney work product.

Further, while such disclosure could have tactical advantages, AT&T will not get additional admissible information from Global NAPs’ attorney work product. Any material obtained by Global from the subpoenaed parties must be in response to the subpoenas. Information sent by Global to these companies would not be admissible by either AT&T or Global.

In sum, AT&T cannot circumvent the attorney work product privilege through the AT&T Subpoenas by seeking information that was neither sought under the subpoenas nor obtained from the subpoenaed parties. Accordingly, AT&T’s request for Global NAPs’ attorney work product and associated communications must be quashed.

C. The Communications In Connection With Subpoenaed Information Is Not Relevant To This Proceeding.

In its motion to issue subpoenas, AT&T has not demonstrated that the communications and documents tangentially related to the Subpoenaed Information is relevant or probative to this proceeding. AT&T argued in its motion to issue subpoenas that the requested information is

⁴ *Blacks Law Dictionary* (Abridged 7th ed. ed.). St. Paul, Minn.: West Group. p. 1298.

relevant because “Global intends to rely on at least some of the *Subpoenaed information*” in Globals’ testimony.⁵ Further, AT&T argues that “the days of trial by surprise are over.”⁶

AT&T’s arguments provide no support for a wide ranging forage through all related documents and communication in any way connected to the Subpeonaed Information. Global NAPs will not be relying on any of the communications and/or documents *in connection with* the Subpoenaed Information. Rather, Global NAPs relies on only some of the Subpoenaed Information: a fact now known to AT&T since it has received AT&T’s Supplemental Testimony that includes all of the Subpoenaed information that Global will rely on in this case. Global NAPs will not “surprise” AT&T with Global NAPs’ documents and communications with the Subpeonaed Parties or with material exchanged by and between the parties but not reduced to a formal response to the Subpoenas. None of that material can or will come in at trial, therefore there is no ground for AT&T’s receipt of it. The AT&T Subpenaes clearly request information that is not relevant to this proceeding or reasonably calculated to lead to the discovery of evidence that would be admissible within the confines of the Attorney Examiner’s entries. Accordingly, AT&T’s request for irrelevant information should be quashed.

III. CONCLUSION

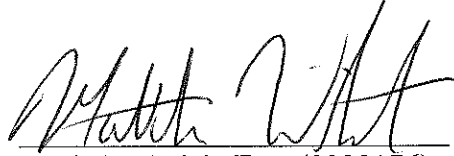
For the reasons set forth herein, Global NAPs asks that the Attorney Examiner quash portions of the subpoenas served on the Subpoenaed Parties by AT&T. Specifically Global NAPs requests that the subpoenas only require that the Subpoenaed Parties produce the Subpoenaed Information provided to Global NAPs as a result of the Global NAPs Subpoenas. The Attorney Exanimer should quash paragraphs 2 and 4 of the Qwest subpeona, paragrah 2 of the Sage subpeona and paragrah 2 of the NOS subpeona. It is unreasonable or oppressive to

⁵ AT&T Motion to Issue Subpoenas at 3.

⁶ *Id.*

require the Subpoenaed Parties to produce all documents in communications in connection with the Subpoenaed Information.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Mark S. Yurick', written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Global NAPs Ohio, Inc.'s Motion to Quash Portions of Subpoenas Filed by AT&T Ohio* was served upon the following parties of record or as a courtesy, via U.S. Mail postage prepaid, express mail, hand delivery, or electronic transmission, on July 31, 2009.


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Summary: Motion Motion to Quash Portions of Subpoenas Filed by AT&T electronically filed by Mr. Matt S White on behalf of Global Naps Ohio, Inc.