

Roger Moffitt
Utah State Bar No. 05320
645 East Plumb Lane, B132
P.O. Box 11010
Reno, Nevada 89520
Telephone: (775) 333-3114
Facsimile: (775) 333-2175
E-mail: roger.moffitt@att.com
*Attorney for AT&T Communications of the
Mountain States, Inc. and TCG Utah*

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

)	DOCKET NO. 08-2469-01
In the Matter of the Petition of)	
ALL AMERICAN TELEPHONE CO., INC.,)	INITIAL POST-HEARING BRIEF
for a <i>nunc pro tunc</i> Amendment of its Certificate)	OF AT&T COMMUNICATIONS OF
of Authority to Operate as a Competitive Local)	THE MOUNTAIN STATES, INC.
Exchange Carrier within the State of Utah)	AND TCG UTAH

Pursuant to the Amended Scheduling Order in this docket dated March 4, 2010, AT&T Communications of the Mountain States, Inc., and TCG Utah (collectively the “AT&T Companies”), submit this Initial Post-Hearing Brief. The AT&T Companies ask the Utah Public Service Commission to rule (1) to deny amendment of the Certificate of Public Convenience and Necessity (“Certificate”) of All American Telephone Co., Inc. (“AA”), and (2) to revoke the Certificate of AA. Both rulings are supported by evidence at hearing in this docket showing (1) that AA cannot meet its burden of showing that the provision of AA services in Beehive or elsewhere in the state are in the public interest, and (2) that the entirety of AA’s activities as a telecommunications provider in Utah have been unauthorized and illegal under the terms of its Certificate, as well as the statutes of this state and the regulations of this Commission governing competitive local exchange providers (“CLEC”).

I. AA HAS NOT MET ITS BURDEN OF SHOWING THAT THE SERVICES IT PROVIDES ARE IN THE PUBLIC INTEREST.

Under Utah law, an applicant CLEC has the burden of demonstrating that “issuance of the potential certificate to the applicant is in the public interest.” Utah Code 1953 54-8b-2.1, subsection (2)(b) (emphasis added). See also R746-349-3 Subsections A.1 and A.15. In the present case, this criterion raises additional concerns because of the unusual nature of the services provided by AA to its one customer, Joy Enterprises, Inc. (“JEI”), with which it has material identity of ownership. Testimony of David Goodale, transcript at pages 55-56 (noting that all ownership of AA is held by Joy Boyd or her family). AA, in fact, appears to have operated as more or less as a captive division of JEI, serving only the interests of JEI and offering nothing in itself to the public at large. Unlike a normal customer, JEI pays no money for services to AA (Testimony of David Goodale, transcript at page 65), but instead is paid by AA for JEI doing marketing for its own benefit (*Id.* at page 163), and nothing directly for AA. *Id.* at pages 66, 118. In fact, AA’s officer could not identify any specific terms of the “oral contract” between AA and its putative “customer” JEI, and could only talk vaguely about possible ranges of remuneration to be paid to JEI for unspecified consideration. *Id.* at pages 104-105. In fact, AA’s officer has offered no documentation for any of the monies flowing between the two companies, permitting the inference that there is no respect for the corporate separateness of AA, or for its status as a telecommunications provider.

A. AA DOES NOT PROVIDE ANY PUBLICLY AVAILABLE SERVICES.

This is contrary to Utah law, which contemplates, and even requires, competitive providers to provide public services. A certificate issued by the Commission authorizes competitive providers to provide “public telecommunications services,” which are defined as

specific telecommunications services “offered to the public generally.” Utah Code 1953 54-8b-2 (13). For rural areas under 5,000 access lines, this burden is heightened by the requirement that the CLEC must provide “public telecommunications services to any customer or class of customers who requests service within the local exchange.” *Id.*, at subsection (4) (emphasis added). In short, Utah statutes contemplate that rural CLECs must be prepared to serve the entire general local rural public where they have located.

AA, however, serves only one customer, and all of its arguments about how it serves the public interest are not based on the services it actually provides, but on the conference call services that its customer provides. This legally erroneous conflation is understandable, since there is substantial if not complete identity of ownership between AA and its customer. AA, however, really does only one thing: AA terminates service for one customer. This was admitted by AA’s counsel in his opening remarks when he stated:

I think it’s first to---first important to look at what’s the service All American is seeking to provide in Beehive’s territory. Well, it wants to use its switching equipment in Garrison, Utah to terminate calls made to a conference call company namely—namely, Joy Enterprises.

Comments of Gary Guelker, transcript at page 16.

AA has shown no reason why that customer could not provide conference calling services with another service provider or in another service territory. Of course, the reason for this business relationship is clear, since JEI does not pay for telecommunications service as any other “customer,” but instead receives a cut from AA’s rural access charges. See Testimony of David Goodale, transcript at page 157. AA tries to talk about the public benefits to Beehive and to the Beehive territory, see *Id.* at page 131, but again these have nothing to do with AA service, but at most are related to the traffic generated by JEI, regardless of who its provider might be.

AA has essentially no evidence of the public interest served by AA, considered only in itself as a service provider.

B. AA'S CUSTOMER'S SERVICE DOES NOT MATERIALLY SERVE THE PUBLIC INTEREST OF THE CUSTOMERS IN BEEHIVE'S TERRITORY OR THE STATE OF UTAH.

Even if the Commission were to consider the benefits provided by AA's customer, there is no meaningful benefit to the public in Beehive's territory or Utah generally. The AT&T Companies have shown that number to be "extremely small, both as an absolute matter and as a percentage of overall usage." Prefiled Direct Testimony of Jack Habiak at page 2.

More importantly, however, AA does not even provide any "public telecommunications service," as that term is defined by Utah law, since it makes no "general" offering to the public. It has no state tariffs or publicly available terms, and has made no attempt to offer service to any other customers in Beehive or Qwest territory. See Testimony of David Goodale, transcript at page 155. It has made no effort to describe any potential offerings that would fit this definition of "public telecommunications service," let alone meet the higher rural standard of offering to "any" customer or class of customers in Beehive territory. It is not just that AA has been operating outside of its licensed territory, but that it has not even attempted to offer public telecommunications services within the scope of its Certificate.

Although AA has talked hazily about new service offerings in Qwest or other territories, see Testimony of David Goodale, transcript at page 123, it has offered no evidence of what specific offerings it would make, or when they would be offered. AA has admitted that it has made no efforts to date to provide service in Qwest territory. And it has made no suggestion of what public offerings it might be willing to make in Beehive territory. In fact, the only evidence

provided by AA as to the specific services it would offer in the future is to simply continue the service it currently provides to JEI. Since that JEI service does not and cannot satisfy the public interest and public offering requirements of Utah law, AA has failed its burden and its application to amend should be denied, and its Certificate should be revoked.

II. ALL OF AA'S ACTIVITIES AS A UTAH TELECOMMUNICATIONS PROVIDER HAVE BEEN UNAUTHORIZED AND ILLEGAL.

The AT&T Companies think it is important that the Commission conclusively rule that all of AA's activities as a telecommunications service provider in Utah have been unauthorized and illegal under state law. This is because AA has acted and billed other telecommunications providers for services which were either not under cover of any Certificate from this Commission at all, or, once the Certificate was issued, outside the express limitations of that Certificate. Since this docket focuses on AA's Certificate and the authority it did or did not provide to AA, it is appropriate that the Commission should rule on whether AA's services had any legal authority under state law.

AA, in fact, has conducted no services under the apparent authority of its Certificate. That Certificate effectively limits AA to providing service in Qwest territory. AA, however, has already acknowledged that it has never provided any telecommunications service in Qwest territory. Testimony of David Goodale, transcript at page 155.

A. AA OPERATED AND BILLED AS A UTAH TELECOMMUNICATIONS PROVIDER PRIOR TO RECEIVING ITS CERTIFICATE.

AA apparently does not dispute that it was billing telecom providers for its Utah services as early as February, 2007, a full month prior to obtaining a Certificate from the Commission.

The evidence in this docket shows that AA was also acting as a Utah telecommunications provider perhaps as early as 2004. See also Testimony of David Goodale, transcript at pages 120, 124, and 156 (acknowledging AA was doing business in Beehive territory without a certificate in 2005). AA offers no explanation for this unauthorized activity, leading to the conclusion that AA knowingly acted as a provider in Utah without any legal authority to do so.

B. AA’S SERVICES IN BEEHIVE TERRITORY HAVE BEEN OUTSIDE THE AUTHORITY OF ITS CERTIFICATE.

The circumstances of AA’s Certificate are clear from the documents in docket 06-2469-01, as well as the testimony provided by the Division of Public Utilities (“Division”). In that docket, AA petitioned the Commission for a CPCN. Initially, it sought a statewide authority, but pulled back after resistance from various parties, including the Division, and agreed to exclude rural territories from its application. In its Amended Application, filed on February 27, 2007, AA claimed that it “intend[ed]” to provide service throughout Utah, but specifically excluding “exchanges with less than 5,000 access lines that are served by incumbent telephone corporations with fewer than 30,000 access lines in the state.” See Docket 06-2469-01, Amended Application at pages 2 and 4 (February 27, 2007). This rural exclusion was clearly the reason for the Amended Application, and it seems a little questionable that AA officers could reasonably have believed that they would have authority to continue their operations in Beehive territory.

This rural exclusion compromise was reflected in the Certificate that AA obtained. On March 7, 2007, the Commission issued a Report and Order granting AA the Certificate, which specifically prevented AA from serving “local exchanges of less than 5,000 access lines of incumbent telephone corporations with fewer than 30,000 access lines in the state.” See Docket 06-2469-01, Report and Order (March 7, 2007).

AA wishes to argue that it merely received “bad legal advice” and did not really understand that its Certificate legally prevented the operations it had in Beehive territory. However, this argument fails for several reasons. There are simply too many facts evidencing knowledge and intent on the part of AA of the limitations of its Certificate.

First, the rural exclusion was clearly the critical compromise factor in AA’s obtaining of its Certificate. The Division had opposed allowing AA into rural territories, noting that such authority for a CLEC was unprecedented in Utah. See Docket 06-2469-01, DPU Memorandum (January 16, 2007), Prefiled Direct Testimony of Casey J. Coleman at pages 6-7. It was this opposition from the Division and others that prompted AA to compromise and file an Amended Application pulling down its request to enter rural territory. AA could be in no doubt that any subsequent efforts to service Beehive territory would be opposed by the Division, by Commission Staff, and by other parties.

Second, AA explicitly misrepresented its intentions in the Amended Application, where it explicitly claimed it intended to service non-rural areas. It would not require an attorney’s parsing to recognize a factual misstatement of intent. To date, by its own admissions, it has not served any non-rural areas in Utah.

Third, service to Beehive followed quickly on the representations made in Docket 06-2469-01, implying that arrangements were made in full knowledge and disregard of what had been agreed to in that docket. AA has acknowledged that it “was aware” of the exclusions of its Certificate at the time it entered into the ICA. Testimony of David Goodale, transcript at p. 97. There is also strong contextual evidence that Beehive also knew that they were executing an ICA for services in territories beyond the authority of AA’s certificate, including the involvement of Judith Hooper in representing AA in obtaining its Certificate, despite her relationships with

Beehive. See Testimony of David Goodale, transcript at page 133. It is possible that the Commission might wish to separately consider the culpability of Beehive in its conduct with regards to AA.

Fourth, AA made no attempt in 2007 to explain to or notify the Commission, the Division, Commission Staff, or other interested parties that it would regard the 2007 ICA with Beehive as legal authority amending its Certificate. Instead, it appeared to rely on the simple fact that nearly all ICAs tend to pass into approval. It submitted that ICA without drawing attention to any parties that AA felt it could disregard the legal impact of important concessions made in obtaining its Certificate just one month before. At the very least, AA is guilty of trying to accomplish surreptitiously what it knew it could not get openly.

C. AA HAS MADE NO EFFORT TO CONFORM ITS CONDUCT TO THE AUTHORITY OF ITS CERTIFICATE.

AA's conduct since the uncovering of its unauthorized service has shown a simple pattern of trying to conform the law to its conduct rather than conforming its conduct to the law. AA protests that it has made significant efforts to correct matters, but can only point to the interconnection agreement with Beehive, and its petition to amend its Certificate. See comments of Gary Guelker, transcript at p. 21. AA has been in this docket for two years, and has not ceased its operations in Beehive territory despite its own acknowledgments and determinations of the Commission that it lacked authority to operate there. See Testimony of David Goodale, transcript at page 155. Similarly, AA does not offer to eliminate its unauthorized service to JEI as a condition of keeping its Certificate, nor does it provide any evidence of what other specific service offerings it would be willing to provide in Beehive or Qwest territory. AA's business

plan seems little changed from what it initially was, to continue to leverage rural access rates with the services it provides to its sole customer, JEI.

AA, in short, has given the Commission little reason to believe that its consistent pattern of violations will cease, and that it will operate within the strictures or limitations this Commission might impose, particularly if they should conflict with AA's service to JEI as it currently exists. Instead, the Commission should consider complete revocation of AA's Certificate and a strong statement that AA's operations in Utah were entirely without legal authority, and therefore, illegal.

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By: _____ /s/

Roger Moffitt
Utah State Bar No. 05320
645 East Plumb Lane, B132
P.O. Box 11010
Reno, Nevada 89520
Telephone: (775) 333-3114
Facsimile: (775) 333-2175
E-mail: roger.moffitt@att.com
*Attorney for AT&T Communications of the
Mountain States, Inc. and TCG Utah*