

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah	Docket No. 08-2469-01
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QWEST’S INITIAL BRIEF

Qwest submits this initial brief in the above-styled matter and asks the Utah Public Service Commission (“Commission” or “PSC”) to rescind the certificate of authority of All American Telephone Company, Inc. (“All American” or “Respondent”) to operate in Utah, and as grounds states:

Introduction.

This is a textbook case of a rogue telephone company operating in Utah since at least 2004 in direct defiance of the PSC’s rules, and subsequent to 2007 in contravention of its granted certificate of authority, and raising absolutely no coherent public interest defense at hearing for its actions. All American, in league with its business partner Joy Enterprises and with the collusion of Beehive Telephone Company, created and operated a fraudulent scheme relying on Beehive’s admitted monopoly power in its Utah exchanges to loot money from Qwest and other interexchange carriers.¹ On the stand, All American’s sole witness, David Goodale, admitted his company operated in Utah without a certificate in Beehive’s service territory before 2007, when All American’s Certificate of Public Convenience and Necessity (“CPCN”) to compete against Qwest in

¹ Hearing Transcript (“TR”), p. 152, ll. 17 – 20.

Qwest's service territory was granted. Even though the certificate was granted, Mr. Goodale admitted that All American has never competed against Qwest, but instead ran an unauthorized business in Beehive's territory outside the limits of its certificate of authority. Mr. Goodale's pleas of ignorance as to what his company was doing and what it was authorized to do at any given time since 2004 raises serious questions about his (and his staff's) managerial and technical capability to run a telecommunications carrier in compliance with the Commission's rules (principally Utah Admin. Code R746-349) and with the laws of Utah. All American sought and was denied special dispensation in the form of a *nunc pro tunc* ruling from this Commission to cure its blatant, unauthorized operations in Beehive's service territory, as if what it had done was simply a ministerial oversight. Instead of granting All American the relief it seeks, the Commission should send a clear message to anyone who intends to operate in Utah that their rules are there to be complied with, not flaunted. The Commission should rescind All American's CPCN and end the abuses and fraud in rural Utah by All American, Beehive, and Joy Enterprises.

Argument.

1. There are no coherent public interest reasons why the Commission should change the existing CLEC certificate for All American and expand it to include the service territory of Beehive Telephone. First, such an action would break with past Commission precedent regarding the Utah rural exemption in Utah Statute 54-8b-2.1, and All American has failed to meet its burden of proof that such an exception to a long-standing policy is in the public interest. Second, to do so will not facilitate competition anywhere in Utah, but instead merely allows All American to continue to perpetuate its traffic

pumping scheme. Mr. Goodale was very clear on the stand that All American had no intention of competing against Beehive:

“Q. Now, you've testified here today and in your direct or rebuttal testimony -- I can't recall which right now -- that it's not your intent to compete with Beehive upon your entry into Beehive's service territory, correct?

A. Correct.”²

Third, continued operation by All American and Joy Enterprises in Beehive’s exchanges in Utah exposes minors to unfettered access to adult content and pornographic chat lines without the ability for parents to block access to those numbers.

2. None of the reasons given by All American for expanding its certificate recite any public benefit. All American has provided no compelling reasons why they should be immune from the rural exemption statute, particularly since they have openly admitted they exclusively serve only one out-of-state customer – Joy Enterprises.³ The facts in the record show there is an admitted traffic pumping scheme that is being perpetuated through the alliance of All American, Beehive Telephone, and Joy Enterprises. There is no public interest reason for this Commission to enable a traffic pumping scheme and expand All American’s CPCN, and given the nature of much of Joy Enterprises’ traffic and Mr. Goodale’s testimony that All American has no system or process to allow parents to block their minor children’s calls to its adult content numbers⁴, there are compelling public interest reasons to deny this modification and to revoke All American’s authority to operate in Utah.

² TR, p. 152, ll. 3 – 8.

³ *E.g.*, TR, p. 53, ll. 14 – 25.

⁴ TR, p.p. 149 -150, ll. 19 – 25, and 1 - 8.

3. All American has been knowingly and willfully engaging in unauthorized operations Utah since at least 2004. Not only that, All American has admitted to operating in Beehive's territory even before its CPCN was granted.⁵ These are relevant facts in determining whether expanding All American's CPCN is in the public interest. All American carries the burden in this docket of justifying the requested amendment of its CPCN. It also carries the burden of explaining its admitted violations of operating in Utah without a CPCN prior to 2007, and of its current certificate by conducting operations in Beehive's service territory. Moreover, All American decided to openly defy the Commission when, after the question was raised about its authority to operate in Beehive territory in 2008, it continued to operate there rather than suspend operations pending the resolution of their violations through this docket.⁶ Not only did All American admit the infractions discussed in this pleading, since the hearing date they have filed a Joint Statement of Stipulated Facts at the FCC which confirms many of the facts elicited at hearing.⁷ A copy of the Joint Statement is attached as Exhibit A to this brief.

4. Commission precedent requires that All American justify why it deserves a waiver of the Commission's current policy on enforcing the rural exemption. All American has yet to establish that it actually has the ability to "provide public telecommunications services to any customer or class of customers who request[s] service within the local exchange" (54-8b-2.1(4)). All American's admitted practice of providing local exchange services free of charge to Joy Enterprises, in the absence of a

⁵ Exhibit A (attached), p. 10, paragraphs 46 & 47; TR, pp. 120 – 121, ll. 12 – 25 and 1 - 22.

⁶ TR, p. 155, ll. 6 – 11.

⁷ In the Matter of AT&T Corp. Complainant, v. All American Telephone Co., e-Pinnacle Communications, Inc., and ChaseCom, Defendants, File No. EB-09-MD-010, filed March 19, 2010.

filed local exchange tariff in Utah, is simply another egregious example of mismanagement by Mr. Goodale and his staff.⁸ Since there has never been an All American local exchange tariff filed in Utah, there is obviously no intent to compete for bonafide customers in any exchange in Utah. These facts all point to the conclusion that expanding All American's CPCN would not foster competition in the Beehive exchanges, and that All American's actual practices call into question its managerial and technical expertise to hold any CPCN at all.

5. All American has a previous history of operating fraudulently in Utah well in advance of this proceeding. As Qwest's witness Lisa Hensley Eckert testified, in 2004, All American requested the removal of fraud blocks from 72 Beehive numbers, which Qwest granted. On June 6, 2007, All American sent a letter to the FCC, claiming that two additional Utah numbers were being blocked by a number of IXC's. The two numbers which All American claimed were their numbers were: 435-855-3333 and 435-855-5555. However, both of these numbers are assigned to Beehive in the Garrison, Utah exchange, and are in TELCODATA as Beehive ILEC numbers. This provides proof that All American was operating in the Beehive Territory as early as 2004, with Beehive's collusion. The 435-855-3XXX and 5XXX series of numbers assigned to Beehive have long been employed as standing "party lines"- a euphemism for adult chat lines. The numbers assigned to All American currently in TELCODATA are 435-777-XXXX numbers, which are also located in Garrison Utah, in the Beehive territory. More evidence of collusion was presented when Mr. Goodale testified that in 2006, Beehive was billing and collecting for "access revenue" on behalf of All American, well before

⁸ TR, pp. 151 – 152, ll. 12 – 25, and 1 - 2.

any certificate was issued to All American.⁹ In that same exchange on the record, Mr. Goodale admitted that “we, in turn, billed Beehive for that portion of the access revenue that we provided.”¹⁰

6. The fact that Beehive Telephone does not oppose All American’s petition provides evidence that Beehive is a complicit party to the traffic pumping scheme and is serving its own private interest. Calls that go to All American are routed first through Beehive, which purportedly serves as a transiting carrier. Beehive is compensated by Interexchange carriers (IXCs) for any traffic that is routed through Beehive’s network. The fact that Beehive then reimburses All American in turn for this traffic (see Goodale testimony, page 14, lines 266 – 268) demonstrates this scheme is also financially beneficial to Beehive. Outside of a traffic pumping scheme, a transiting carrier would have no motivation or reason to compensate another carrier; instead, the transiting carrier would be seeking payment for transit services provided. The only reason Beehive would agree to compensate All American is to encourage All American to stimulate traffic and drive it through Beehive’s network. All American claims they share revenue through a “marketing fee” paid to Joy Enterprises. (see Goodale Direct Testimony, page 14, lines 255 - 258) Mr. Goodale’s lapses in memory regarding what All American had paid to Joy, and the extent of the “marketing services” provided by Joy, add additional questions about his managerial capabilities. The record is replete with clear evidence of a traffic pumping scheme and an alliance between Beehive Telephone, All American and Joy Enterprises.

⁹ TR, p. 109, ll. 1 – 19.

¹⁰ Id.

7. There is other evidence in the record that this is a traffic pumping scheme, and the following points illustrate why:

- a. The offering of “free” services to the public by Joy Enterprises, such as conference call services and adult chat rooms. This is done to stimulate traffic that otherwise would not flow to the Garrison, UT exchange to be terminated by All American and Beehive.
- b. All American uses a rural ILEC’s network so that high access rates based on historically much lower volumes of traffic can be charged by both the ILEC and CLEC operating in the same service territory. In this case Beehive is the ILEC and All American is an illegally operating CLEC, since it does not have an amended CPCN that would allow it to operate in Beehive Telephone’s territory. The access rates of rural ILECs are not cost-based but include a significant subsidy to help keep the local service rates of their customers relatively low because of the high-cost nature of the service territory for a rural ILEC.¹¹ Establishing rural ILEC access rates relies upon assumed (historical) usage, which is significantly lower than the usage that will be generated through traffic pumping and results in a higher per-minute cost to Qwest and other IXCs to terminate traffic to or carry traffic out of Beehive’s service territory.
- c. The CLEC (All American) is able to mirror the access rates of the rural ILEC (Beehive).

¹¹ See Qwest Hearing Exhibit 2, Summary for Lisa Hensley Eckert, p.2.

- d. All American and Joy Enterprises pay nothing to collocate their equipment, power that equipment, or for any other local exchange services they receive (in violation of Beehive's tariffs and the interconnection agreement between All American and Beehive) in Beehive's central office.¹² Given Mr. Goodale's admission that All American currently pays Beehive nothing, an additional issue the PSC should consider is the knowing, willful, and continuing violation of the filed rate doctrine by both All American and Beehive.
- e. Even though generally the ILEC is not in a position to police whether connecting CLECs are certificated or not (that being the province of the PSC), the close, long-standing relationship between Beehive, All-American and Joy Enterprises presents a unique situation. In this instance, Beehive allowed All American to place equipment in their central office, knowing All American lacked the necessary certificate of authority to operate in any Beehive exchange.
8. This traffic pumping scheme is not in the public interest for a number of reasons. First, there is no benefit for the local customers in the rural area impacted. There are no additional jobs created by All American in Utah, since All American is based in Nevada. There is no increase in the availability or variety of services for the impacted Beehive community. There are no All American end user customers residing in the exchange, and All American has specifically testified under oath that they do not seek to serve anyone other than Joy Enterprises. All American

¹² TR, p. 60, ll. 7 – 11.

has no local exchange tariff on file in Utah with which to serve customers in any portion of the state, whether it be in Qwest's service territory or Beehive's. The local residents in Beehive's exchanges see none of the benefits which would normally occur with opening a market to competition. All this scheme does is line the pockets of a few All American, Joy Enterprises, and Beehive executives at the expense of Qwest and other interexchange carriers. It does nothing to give consumers a choice of providers in Beehive's service territory.

9. Traffic pumping does not further the public interest goal of universal service. In fact, traffic pumping undermines universal service. Mr. Coleman described the issue in his testimony, saying "[i]n general, allowing CLEC entry into the territory of any rural ILEC that receives Universal Service ("USF") support can impact the USF. The probability of USF support increases when any rural ILEC loses customers and revenues to a CLEC."¹³ To the extent that traffic pumping is allowed to continue, this increases the pressure generally for access and USF reform which could negatively impact customers located in high cost areas.

10. Traffic pumping provides only private benefits to those few individuals involved in the traffic pumping scheme. While Mr. Goodale chose to be coy regarding the nature of the traffic, the Beehive numbers claimed by All American at the FCC are among a set of numbers which have long been used to access adult content. In fact, as Ms. Hensley Eckert testified, a Google search on February 4, 2010 based on the phone number block claimed by All American brings up (among others) the following entry:

¹³ Direct Testimony of Casey J. Coleman, p. 7, ll. 142 – 145.

“Jan 15, 2010 ... I mean, the yahoo **chat rooms** are FULL of guys looking to. Try these: **435-855-3326** 909-661-1234 712-858-9229 775-533-3500 985-425-2617 **Adult Chat** and **Adult Chat Line** - What Happens On RedHot Stays on RedHot™. ...”

As Ms. Hensley Eckert also testified, there are a number of additional Google search entries that she did not include in her testimony because when she attempted to access those other sites, a virus was installed on her computer.¹⁴

11. Another public interest reason for denying All American’s requested expansion of its CPCN is because there is no ability for a parent to block access to these Joy Enterprise numbers in the same way that access by children can be blocked for a 900 adult chat number. On the stand, Mr. Goodale admitted that no such mechanism exists.¹⁵ Because many people now have unlimited calling plans, parents may not double-check their phone bills to see if there are long distance calls to numbers they do not recognize. All American may try to couch their service as a public good, but the bottom line is that access by minors (without the ability to install parental controls) to “the hottest party crowd” (per the menu options on the numbers referenced by Ms. Hensley Eckert) is not in the public interest.

Conclusion.

¹⁴ TR, pp. 201 - 202, ll. 6 – 25, and 1 – 18.

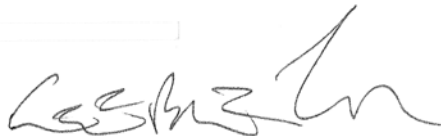
¹⁵ TR, pp. 148 – 150.

All American, through its testimony here and in a statement of stipulated facts filed with the FCC (Exhibit A), admits a number of facts that should lead the Commission not only to deny the requested expansion into Beehive's territory, but to revoke All American's authority to operate anywhere in Utah. David Goodale's lengthy string of admissions about All American's improper, illegal, and unauthorized conduct in Utah call into question All American's managerial and technical capability to hold a CPCN at all. The Commission has promulgated rules in that require any CLEC wishing to compete anywhere in Utah to apply for and be granted a CPCN. All American, under the leadership of Mr. Goodale, ignored or defied those rules from at least 2004 until the present.

WHEREFORE, Qwest respectfully requests that the Commission:

1. Deny All American's proposed amendment to its certificate of authority to operate as a CLEC; and,
2. Revoke All American's current certificate based on the facts set out in the record.

Respectfully Submitted,



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