

- 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

ORDER ON MOTION IN LIMINE

BENCH ORDER ISSUED: March 3, 2010

By The Commission:

This is a written version of an order issued from the bench at the commencement of the March 3, 2010 hearing. All American Telephone Company, Inc. (AATCO) filed a Motion in Limine, seeking to prevent the Division of Public Utilities (Division) and the Office of Consumer Services (OCS) from opposing AATCO's proposed amendment, seeking the rescission of AATCO's CPCN at the hearing, and/or introducing any evidence at the hearing in support of these positions. The Commission has reviewed the moving and responding papers, and also heard comments by the parties opposed to the Motion in Limine at the pre-hearing conference held Monday past.

AATCO has moved to preclude the Division and the OCS from opposing AATCO's proposed amendment or from seeking the rescission of its CPCN at the hearing and from introducing any evidence in support of such positions.

The purpose of the discovery rules are to make discovery as simple, and efficient as possible by eliminating any unnecessary technicalities, and to remove elements of surprise or trickery so that the parties and the court—in this case the administrative agency, can determine

the facts and resolve the issues as directly, fairly and expeditiously as possible. *Ellis v. Gilbert*, 429 P.2d 39 (Utah 1967). However, case law makes clear that the sanctions listed in Rule 37 are discretionary with the administrative agency. (“Trial courts are granted a great deal of deference.” *Morton v. Continental Baking Co.*, 938 P.2d 271). In *Morton v. Continental Baking Company*, the Court stated that before discovery sanctions under Rule 37 are imposed, the administrative agency must find “find on the part of the non-complying party 1) willfulness, 2) bad faith, or 3) fault, or 4) persistent dilatory tactics frustrating the judicial process.” *Id.* None of these circumstances exist here. The Commission denies the Motion for the following reasons:

First, the OCS and DPU complied with the scheduling order in place. The October 28, 2009 scheduling order, which deadlines Beehive and All American helped decide at a scheduling conference, set February 12, 2010 as the deadline for the filing of DPU and OCS testimony. They both complied with this order

Second, it would be unjust to preclude the Office and Division evidence, especially when some of that delay—if any, was partly due to AATCO’s lateness. Even assuming there was any delay on the part of the Office and the Division, there is substantial evidence to suggest they were substantially justified in doing so. Delay in discovery has been common in this docket, and AATCO has delayed in participating in discovery as well. For example, AATCO responded late when in August 2008 it responded to data requests sent in June 2008. AATCO failed to respond to a second set of data requests sent August 2008 and the Division filed a motion to dismiss in October 2008, partly due to AATCO’s lateness and failure to respond to data requests. AATCO obtained an extension in responding to the Division’s motion by saying it would waive the 240-day time period for the PSC to act and while it

attempted to resolve some of the Division's concerns. At the next scheduling conference, it appeared that no such negotiation took place. Additionally, the waivability of the 240-day time period is on appeal now. In January 2009, five months after the Division sent data requests, the Commission ordered AATCO to respond to those data requests. The Office stated other delays in discovery; namely late responses to the Office's April 2009, November 2009 data requests, January 2010 data requests. Additionally as of the prehearing conference this past Monday, AATCO still had outstanding responses.

Finally, allowing the Division and the Office to present evidence opposing the amendment or of rescission is not unfair, nor will it allow for a hearing by surprise or trial by ambush. Generally, preclusion of evidence under Rule 37 is disfavored. The Office and the Division filed their positions in February, but filed them in a timely manner and in accordance with the Scheduling Order filed in this matter. In any case, their positions should not be a surprise to AATCO. They have made their positions clear before. For example, as early as the 2006 Docket where AATCO was granted its certificate, the Division recommended granting a certificate to AATCO in Qwest territory, but raised the same concerns it raised here regarding AATCO serving in Beehive Territory, e.g. precedent setting nature of AATCO entering into a rural telecom territory, USF, telecom prices, etc. The Division raised its concerns again in its October 2008 Motion to Dismiss. The Office in its January 2009 Motion to Dismiss explicitly stated the Commission should consider whether to cancel AATCO certificate. There are other times when the DPU and OCS have made their opposition clear.

AATCO has made no Motion in Limine with regards to other parties that have made clear their opposition to any amendment of AATCO certificate. URTA presented some of

the same concerns here as it did in the 2006 original certificate proceedings and reiterated those concerns in its December 2008 Motion to Intervene. Qwest raised concerns in its Motion to Intervene in this docket in 2008, with amending the AATCO Certificate. Therefore, AATCO has already been prepared to address opposition of these parties—at the very least, related to amendment of its Certificate, if not prepared to address evidence related to rescission of its certificate. In fact, after the hearing, the evidence supporting the reasons for rescissions and those merely opposing amendment may in fact be very similar. For these reasons the Motion is denied.

DATED at Salt Lake City, Utah, this 3rd day of March, 2010.

/s/ Ruben H. Arredondo
Administrative Law Judge

Attest:

/s/ Julie Orchard
Commission Secretary
G#66199