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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 Telephone Co., Inc., to Operate as a Competitive Local Exchange Carrier Within the State of Utah	Response of the Division of Public Utilities to Petitions for Rehearing Docket No. 08-2469-01

The following is the response of the Division of Public Utilities (Division or DPU) in opposition to the Petitions for Rehearing filed by All American Telephone Company (AATCO or All American) and Beehive Telephone Company (Beehive).

INTRODUCTION

On May 26, 2010 AATCO and Beehive both filed Petitions for Rehearing asking the Commission to rehear and reconsider its April 26, 2010 Order denying AATCO's request to amend its Certificate to serve in the Beehive service area and revoking the Certificate that had been granted AATCO to serve in the Qwest exchanges. The Division believes neither AATCO nor Beehive has presented sufficient justification for

the Commission to grant rehearing or reconsider its Order. It should also be pointed out that AATCO has not asked for a stay of the Commission's Order revoking its Certificate and not allowing it to serve in the Beehive exchange. Based on that information and a recent filing before the Federal Communications Commission (FCC), the Division is operating currently under the presumption that AATCO currently is not operating in Utah. Attachment 1 is an Order of the FCC rejecting a tariff filing of All American that would replace earlier tariffs and establish interstate tariffs for both Utah and Nevada. See in particular footnote 14 of the FCC Order which questions AATCO's ability to have a tariff in Utah in light of the Commission's April 26th Order. On May 28, 2010 AATCO refiled its interstate tariff only for Nevada (attached). ATTCO's transmittal letter states that the tariff only applies in Nevada and that AATCO is only offering service in Nevada.

THE NOTICE TO AATCO OF THE SCOPE OF THE PROCEDING WAS SUFFICIENT.

In AATCO's Petition for Rehearing at pages 8-19, it claims that the Commission should reconsider its Order revoking AATCO's Certificate because ATTCO did not get sufficient notice of the grounds upon which its Certificate could be revoked. The company claims that it did not know the specific grounds on which parties would propose revocation until the Division and Office filed their direct testimony. In addition, AATCO claims that the Commission did not properly institute a proceeding under the Administrative Procedures Act to revoke its Certificate. Finally, AATCO indicates that as a result of these defects it has been denied procedural due process.

AATCO'S WAS NOT DENIED PROCEDURAL DUE PROCESS.

AATCO's due-process rights were not infringed. "[T]he Constitution is concerned with procedural outrages, not procedural glitch… Its interest is only in whether an

adjudicative procedure as a whole is sufficiently fair and reliable that the law should enforce its result." *Energy West Mining Co v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009). "As long as a party to an administrative proceeding is reasonably apprised of the issues in controversy, and is not misled, the notice is sufficient." *Savina Home Indus., Inc. v. Secretary of Labor,* 594 F.2d 1358, 1365 (10th Cir.1979). Further, to prevail on a procedural due-process claim, AATCO must show that it has been prejudiced by lack of notice. *Long v. Board of Governors of the Federal Reserve System*, 117 F.3d 1145, 1158 (10th Cir. 1997) ("To establish a due process violation, an individual must show he or she has sustained prejudice as a result of the allegedly insufficient notice").

AATCO has been given every opportunity to address the merits of both the revocation of its Certificate and the Commission's refusal to allow ATTCO to provide service to Joy Enterprises in Garrison, i.e. the amendment to ATTCO's Certificate to serve in Beehive's territory. ATTCO was apprised of the issues in controversy and plainly notified of the administrative proceedings to evaluate revocation of its Certificate. AATCO is not claiming that it has additional evidence to put in the record or that it was not provided a full opportunity to cross-examine all witness at the hearing. AATCO filed both an initial and reply brief after the hearing. In those filings AATCO did not raise any procedural concerns or claim that it did not have an adequate opportunity to present whatever evidence it wanted or to cross-examine witnesses adequately.

The Commission should also keep in mind that although ATTCO claims testimony filed by the Division and Office gave ATTCO insufficient time to respond, AATCO asked no discovery of either party even though an opportunity for discovery existed. The Commission also gave AATCO an opportunity to delay the hearing if it

needed more time to prepare – an offer which ATTCO declined. Its claim of being prejudiced and having inadequate time to prepare is contradicted by ATTCO's actions.

AATCO was given full and fair notice of the administrative proceedings. It was given every opportunity to present evidence in support of its position. The adjudicative procedure as a whole was fair and reliable. AATCO has failed to claim that there was additional evidence not presented that might have changed the ultimate outcome of the proceeding. Therefore ATTCO has not shown or alleged how it has sustained actual prejudice as required to prevail on a procedural due process claim.

THE COMMISSION'S NOTICE OF THE PROCEEDING WAS SUFFICIENT FOR PURPOSES OF THE ADMINISTRATIVE PROCEDURES ACT.

The expansion of the scope of the issues did not constitute a commencement of a new adjudicative proceeding. Rather it was a continuance of the docket opened by AATCO. Therefore the technical notice requirements of Utah Code Ann. § 63G-4-201 by definition do not apply.

Moreover, even if those requirements were required, the Commission substantially complied with them. It is fundamental that the Commission has broad power over AATCO. Utah Code Ann. § 54-4-1 provides that the Commission has to power to supervise and regulate every public utility in the state and to do all things necessary whether "specifically designated or in addition thereto" in order to exercise it powers and jurisdiction. Section 54-4-2(a) provides:

> Whenever the commission believes that in order to secure a compliance with the provisions of this title or with the orders of the commission, or that it will be otherwise in the interest of the public, an investigation should be made of any act or omission to act, or of anything accomplished or proposed, or of any schedule, classification, rate, price, charge, fare, toll, rental, rule, regulation, service or facility of any public utility,

> it shall investigate the same upon its own motion, and may fix a time and place for a hearing thereof with notice to the public utility concerning which such investigation shall be made, and upon such hearing shall make such findings and orders as shall be just and reasonable with respect to any such matter.

The plain language of Section 54-4-2 provides the Commission with authority to, upon its own motion, expand the proceeding to investigate compliance and issue orders with respect to those investigations. Finally, Section 54-7-14.5 gives the Commission the authority to amend, alter or rescind any order or decision of the Commission at any time. While Section 54-7-14.5 does require notice and an opportunity to be heard, it does not require formal commencement of a new proceeding.

The June 16, 2010 Order of the Commission accomplished a number of purposes. First it unequivocally denied AATCO request for a nunc pro tunc amendment to its Certificate allowing it to serve in the Beehive area. Second, it clearly stated that the request to serve in the Beehive area made in its nunc pro tunc Petition did not go into effect because of the passage of 240 days. At that point, it should have been clear to AATCO that it had no authority to serve in Beehive's territory.

More importantly, for purposes of its Petition for Rehearing, the Commission stated that it would investigate to what extent its Certificate that had been issued to AATCO to serve only in Qwest exchanges should be amended, altered, or rescinded. In fact the title to the Docket was specifically changed by the June 16, 2010 Order to reflect the changed nature of the proceeding. This changed nature of the proceeding incorporated in the change in the Docket title is a fact that AATCO does not recognize to this day. (See caption to Petition for Rehearing).

Sections 54-4-2 and 54-7-14.5 clearly authorize the Commission to conduct an investigation and issue the type of order that it did on June 16. Those statutes clearly authorize the Commission to, after notice and a hearing, make such findings and orders, which shall be just and reasonable with respect to matters being investigated by the Commission. The June 16th and August 24th Orders provided AATCO notice of the Commission's intend to determine if its Certificate should be rescinded. Those Orders provided sufficient notice to AATCO of the bases of the investigation. A schedule was established, discovery took place, testimony was filed by a number of parties besides the DPU and OCS, and finally a hearing was held where AATCO was given every opportunity to defend itself.

Additionally, even if the Commission were required to give formal notice as required for commencement of new adjudicative proceedings, the notice given fulfils those requirements. Utah Code Ann. § 63G-4-201 sets forth the relevant requirements; there must be a writing signed by a presiding officer that includes names and addresses of those being given notice, file or reference number, date of mailing, statement of formality, statement for each respondent to file response within 30 days, place of hearing and notice of potential default, legal authority of agency, presiding officer's information, and a statement of purpose and to the extent known questions to be decided.

All of the above listed elements are contained within the June 16, 2009 Report and order. The Report and Order is a writing signed by 3 presiding officers. It included the name and address of AATCO. While the Report and Order did not specifically give a 30 -day notice for response, this requirement was superfluous in light of the ongoing

adjudication. Moreover any potential error was corrected by the schedules established by the parties and Commission. The presiding ALJ's information was known to the parties and the legal authority of the Commission was set forth in the June 16th and August Order. The purpose and extent of the adjudication were clear both from the Analysis and Order sections. Even though formal notice was not required, the Commission properly afforded notice in substantial compliance with Section 63G-4-201.

Ultimately these claims of failure of adequate notice under Utah Code or procedural due process do not warrant rehearing by the Commission. AATCO has not claimed that they have additional evidence to put into the record or that there is any factual basis for modifying the Commission's revocation of AATCO's Certificate. It was given notice and opportunity to be heard. Revisiting the facts will lead to the same outcome.

THE 240 DAY TIME PERIOD ISSUE

Both AATCO (pp 16-23) and Beehive (pp 2-15) re-raise in their Petitions' for Rehearing the issues surrounding the passage of the 240-day time period in AATCO's Petition for Nun Pro Tunc relief. They essentially argue that the Commission subsequent proceeding that ended in the April 26, 2010 Order has no effect since the Certificate had already been granted by the passage of the 240-day time period in the statute. This argument has no merit. The issues surrounding the 240-day statutory time period were specifically addressed by the Commission in the June 16th and August 24th Orders. In addition, the issues surrounding the 240-day time period are the subject of AATCO's and Beehive's appeals to the Utah Supreme Court. Nothing new was

presented in their Petition's for Rehearing except to claim that the April 26th Order is of no effect.

First, even assuming that AATCO's and Beehive's arguments are correct that when the 240-day time period passed AATCO had a Certificate to serve in the Beehive area, the Commission's June 16th Order clearly started an investigation into whether AATCO should be permitted to serve in the Beehive area and to determine if AATCO's Certificate should be rescinded. Therefore, even if a Certificate had been granted by the passage of 240-days that Certificate was revoked by the April 26th Order and, further, that Order clearly stated that AATCO was not permitted to service in the State of Utah.

Second, the proceeding that resulted in the April 26th Order finally addressed, on the merits, whether AATCO met the statutory requirements for a Certificate to service in the Beehive area. Evidence was presented by AATCO and others directly addressing whether AATCO had sufficient technical, financial and managerial abilities to meet the test set forth in Utah Code Ann. § 54-8b-2.1. In addition, evidence was presented addressing the public interest standard that is also included in Section 54-8b-2.1. The April 26th Order found that AATCO did not meet the statutory requirements for a Certificate to serve anywhere in the state. The adequacies of those findings do not appear to be challenged by either AATCO or Beehive. They rely instead on the argument that the Certificate to serve in the Beehive area had already been granted by the passage of the 240 day time period and that the subsequent proceedings and Order have no effect.

THE COMMISSION APPLIED THE CORRECT STANDARD

Beehive (pp 19-24) argues that the Commission applied the wrong standard to AATCO's request to amend its Certificate. Further, it argues that Section 253 and 251(f) of the 1996 Federal Telecommunications Act somehow have pre empted the state ability to review the Certificate request of CLECs. Beehive appears to argue that the Commission should have reviewed the Certificate request under Section 54-8b-2.1(2) and not the so called "rural carve out" of Section 54-8b-2.1(3)(c). First, the Division does not believe the Commission is prohibited from looking at the public interest issues surrounding serving in a rural exchange such as Beehives regardless of whether an ILEC such as Beehive Petitions the Commission under Section 54-8b-2.1(3)(c). More importantly, the Commission findings in the April 26th Order relate directly to the standard of Section 54-8b-2.1(2). (See p. 13 of the April 26th Order). The Commission specifically found that AATCO did not possess sufficient financial, technical or managerial abilities to have a Certificate. In addition the Commission conducted a public interest review of AATCO to determine under the statute if the request for a Certificate is "in the public interest." These are the standards that are found in Section 54-8b-2.1(2) that Beehive, itself, says the Commission should apply in this case. Therefore, there are no bases for Beehive's view that the Commission applied the wrong standard in evaluating AATCO's request to serve in the Beehive area.

CONCLUSION

For the reasons set forth above, the Division recommends that the Commission deny the Petitions for Rehearing.

Respectfully submitted this _____ day of June, 2010.

_____
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of Public Utilities

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing RESPONSE OF THE DIVISION OF PUBLIC UTILITIES TO PETITIONS FOR REHEARING 08-2469-01 was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the following on June ____, 2010.

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