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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION OF
ALL AMERICAN TELEPHONE CO., INC.
FOR A *NUNC PRO TUNC* AMENDMENT
OF ITS CERTIFICATE OF AUTHORITY TO
OPERATE AS A COMPETITIVE LOCAL
EXCHANGE CARRIER WITHIN THE
STATE OF UTAH

RESPONSE TO PETITIONER'S RESPONSE
TO THE DIVISION OF PUBLIC UTILITIES'
REQUEST FOR FORMAL ADJUDICATION

Docket No. 08-2469-01

The following is the response by the Division of Public Utilities (DPU or Division) to the Petitioner's response to the Division's Motion to Dismiss or for Formal Adjudication. In addition, the Division responds to the Petitions to Intervene of Qwest, AT&T and the Utah Rural Telephone Association (URTA). The Division makes the following recommendations: (1) That it be made clear that this proceeding is a formal adjudication; (2) that the Petitions to Intervene be granted; and (3) that a scheduling conference be established at which time a schedule for discovery is established and hearings are set, if needed.

INTRODUCTION

In March 2007, in Docket No. 06-2469-01, All American (AATCO) was granted a Certificate to operate as a CLEC in Qwest exchanges. The Certificate specifically excluded

Beehive's exchanges. This Certificate proceeding occurred after formal adjudication and intervention from a variety of parties including URTA. The Certificate was granted only after AATCO amended its application to exclude Beehive's territory. After the Certificate had been issued in June 2007 in Docket No. 07-051-03, AATCO and Beehive filed an Interconnection Agreement with the Commission. While discovery was occurring, the 90-day statutory window for approval of interconnection agreements passed and the agreement was deemed to be approved by operation of law. Qwest was granted intervention in the interconnection agreement proceeding, made allegations similar to their Petition to Intervene in this proceeding and was in the process of discovery when the 90-day statutory time period expired.

Apparently, AATCO has been operating under the Interconnection agreement. At least, it has been providing conference calling services possibly similar to what Qwest has alleged to be improper. (See P. 2 Qwest's Petition to Intervene.) AATCO is asking the PSC to amend its Certificate nunc pro tunc and to approve its actions under the Interconnection agreement back to the time the Certificate was originally granted. In other words, AATCO is asking the PSC to amend its Certificate to allow it to provide service in the Beehive service territory under the theory that its authority to provide that service already exists under the interconnection agreement.

Two questions are before the Commission at this point. First, should this proceeding be designated informal (as AATCO desires), where there can be no discovery (arguably even by the DPU) and no intervention, or should the proceeding be designated formal, allowing intervention and discovery? Second, if designated formal, should the Petitions to Intervene of Qwest, AT&T and the URTA be granted?

THIS PROCEEDING SHOULD BE A FORMAL ADJUDICATION

AATCO's original application for a Certificate to provide service in rural exchanges of less than 5000-access lines was a formal adjudication. Intervention was granted to URTA. Objections to the Certificate were made. AATCO amended its Application to exclude Beehive's territory and at that point the Certificate was granted. This proceeding should be viewed as an Application to amend AATCO's Certificate to provide service in the Beehive territory. This proceeding, like the original proceeding, should be formal and intervention should be allowed.

AATCO argues that since Beehive consents to AATCO providing service in the Beehive territory that no one else can properly object to or oppose its Application. (Petitioner's Responses P. 6.) AATCO's arguments are unpersuasive. First, AATCO misconstrues Section 54-8b-2.1(3). That section does not state that the only party that may have an interest in a Certificate is the ILEC who serves in that area. Instead, that section only requires that notice be given to the ILEC, and that it can intervene in the proceeding as a matter of right. Nowhere does that statute say that others who may have an interest (like URTA, Qwest or AT&T) cannot intervene and protest the Application when their interests are affected. More importantly, the DPU is to provide the PSC a recommendation on this Application. Under the interpretation of AATCO, the DPU cannot even ask AATCO questions in order to aid it in providing its recommendation to the Commission. AATCO relies on R746-110 as its source for making this Docket informal. That rule requires that the party filing the application reasonably assert that the application is unopposed and uncontested, or, that the PSC find that the action is unopposed and uncontested. When the proceeding is designated informal, a tentative order is issued and notice is provided to those who may have an interest. The Order does not become effective for 20 days. If objections are filed then further proceedings can be held.

Traditionally, Certificate proceedings are a formal adjudication. ; The Commission expects an investigation from the Division, which requires discovery by the Division. Notice is given a hearing is held. Intervention is permitted. The Commission resolves disputes after dealing with intervention and discovery. This proceeding, a request to amend its Certificate, should be treated under that format. However, even if the request by AATCO was to treat the proceeding under R746-110, the objections by the DPU, URTA, AT&T and Qwest make it clear that this proceeding should not be informal. It even seems somewhat unreasonable for AATCO, in light of the objections that occurred in both their original Certificate proceeding and in their Interconnection proceeding, to reasonably have anticipated and represented in the request that the matter will be unopposed and uncontested. R746-110-1. The proceeding is not unopposed and uncontested and the Commission should not find that it is unopposed and uncontested and should not allow this proceeding to be informal.

THE INTERCONNECTION AGREEMENT IS NOT A SUBSTITUTE FOR A FINDING BY THE COMMISSION IN A CERTIFICATE PROCEEDINGS THAT THE AMMENDMENT TO THE CERTIFICATE IS IN THE PUBLIC INTEREST

As was stated previously, the 90 day statutory time period for the Commission to act on an interconnection agreement passed before the Commission could approve or reject the agreement. Section 252(e)(4) of the 1996 Federal Telecommunications Act states that if the state commission does not act in the 90 day window the agreement shall be “deemed approved.” In fact, it appears that the Commission did not acknowledge the Interconnection agreement after the 90 days passed; acknowledgement is the action the PSC takes when it is approving interconnection agreements. So, in fact, the Commission on this agreement took no formal action other than allowing the 90-day window to pass without action. In the Interconnection docket, where Qwest was granted Intervention and filed discovery requests, Qwest raised similar

issues to those that are now being raised again by both Qwest and AT&T in this docket. In the earlier Interconnection docket, the Commission never addressed the issues raised by Qwest. It does not seem reasonable on the bases of those facts to argue that the Commission has made a finding that serving in Beehive's territory in the manner alleged to be illegal by Qwest and AT&T is consistent with the public interest. Nor is it reasonable to argue that the concerns raised by the Division and URITA in the original Certificate proceeding have been resolved by the Interconnection agreement. Finally, it is unreasonable to argue that the Interconnection agreement can be used to expand the Certificate which was specifically limited to the Qwest service area and excluded Beehive's service area. In reality the Commission has never had the opportunity to address any of these issues on the merits in either the Certificate proceeding or in the Interconnection proceeding. Making it clear that this proceeding is a formal adjudication and allowing discovery by all parties will allow the Commission to address the variety of issues on their merits.

THE PETITIONS TO INTERVENE

Qwest and URITA have already been granted intervention, in either in the Interconnection docket, Docket No. 07-051-02 and 03, or the original Certificate proceeding, Docket No. 06-2469-01. The Division had no objections to their intervention in those Dockets and has no objection to their interventions in this Docket. Their interests appear legitimate and raise unique issues not previously addressed by the Commission. In particular Qwest and AT&T raise new issues regarding the services that AATCO is offering and if those services are legal and consistent with the public interest. Those issues deserve to be heard. URITA is concerned about the precedent of a Certificate being granted to a CLEC in an exchange with less than 5000 access lines. This would be the first Certificate in Utah to allow such services.

CONCLUSION

The DPU recommends that the Commission reject AATCO's attempt to limit this matter to an informal proceeding. Such action would limit discovery and intervention. The proceeding is not unopposed and uncontested. Qwest, URTA and AT&T deserve an opportunity to intervene in this docket as they have raised legitimate interests. This docket merits a decision by the Commission.

RESPECTFULLY SUBMITTED, this _____ day of January 2009.

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of Public Utilities

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing RESPONSE TO PETITIONER'S RESPONSE TO THE DIVISION OF PUBLIC UTILITIES' REQUEST FOR FORMAL ADJUDICATION was sent by electronic mail, to the following on January ____, 2009:

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