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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION OF)	ALL AMERICAN TELEPHONE
ALL AMERICAN TELEPHONE CO.,)	COMPANY’S RESPONSE TO THE
INC. FOR A <i>NUNC PRO TUNC</i>)	PETITION TO INTERVENE OF
AMENDMENT OF ITS CERTIFICATE)	QWEST COMMUNICATIONS
OF AUTHORITY TO OPERATE AS A)	CORPORATION
COMPETITIVE LOCAL EXCHANGE)	
CARRIER WITHIN THE STATE OF)	Docket No. 08-2469-01
UTAH.)	
)	
)	

Petitioner, All American Telephone Company, Inc. (“All American”), by and through undersigned counsel, hereby submits the following response to the Petition to Intervene of Qwest Communications Corporation (“Qwest”).

ARGUMENT

I. Qwest May Not Intervene If the Commission Designates This Matter As An Informal Adjudicative Proceeding.

Before discussing the merits of Qwest’s Petition to Intervene, All American must emphasize that Qwest’s request may be rendered moot by the pending Request for Formal Adjudication filed by the Division of Public Utilities (“Division”) in this matter. The Division

filed this request because All American contends that its Petition for *Nunc Pro Tunc* Amendment of its Certificate of Authority must be considered an informal adjudicative proceeding pursuant to Utah Admin. R746-110-1.¹

If the Commission denies the Division's request and designates this matter as an informal proceeding, then Qwest's Petition to Intervene must also be denied. This is because the Utah Administrative Procedures Act ("UAPA") states that "[i]ntervention is prohibited" in matters that have been designated as informal adjudicative proceedings. Utah Code Ann. § 63G-4-203(1)(g). Accordingly, it would be premature for the Commission to act on Qwest's Petition to Intervene before it has determined whether or not All American's Petition should be treated informally.

II. Qwest Has Not Shown That it Is Entitled to Intervene in this Matter.

Even if the Commission designates this matter as a formal adjudicative proceeding, Qwest's Petition to Intervene must still be denied. This is because Qwest has failed to make a requisite showing as to why it is entitled to participate in this matter.

According to UAPA, a petition for intervention may only be granted if (a) the petitioner's legal interests may be "substantially affected" by the proceeding, and (b) "the interests of justice and the orderly and prompt conduct" of the proceeding will not be "materially impaired." Utah Code Ann. § 63G-4-207(2). In other words, while UAPA "does not grant an

¹ This rule states that "[w]hen a request for agency action is filed with the Commission and the party filing the request anticipates and represents in the request that the matter will be unopposed and uncontested, ... the request may be adjudicated informally in accord with [Utah Code] Section 63G-4-203...."

absolute right to intervene, it does establish a conditional right if the requisite legal interest is present.” *Millard County v. Utah State Tax Comm’n*, 823 P.2d 459, 462 (Utah 1991). However, that right is still subject “to the condition that the interests of justice and orderly conduct of the administrative proceedings will not be impaired.” *Id.*

In this case, Qwest’s Petition to Intervene fails to show how its legal interests will be “substantially affected” if the Commission agrees to amend All American’s Certificate of Authority. Rather, Qwest’s proposed intervention is based on an unsubstantiated allegation that All American intends to engage in an improper traffic pumping scheme. However, as will be shown more fully below, this issue has no bearing on whether All American is entitled to operate as a CLEC in Beehive Telephone Company’s territory. Furthermore, the interjection of Qwest’s allegations into this proceeding would undoubtedly delay a prompt and orderly resolution on All American’s Petition. Therefore, if Qwest believes there is an issue that needs to be investigated by the Commission, it should be required to file a separate request for agency action that is handled severally from All American’s Petition.

As an initial matter, Qwest assumes throughout its Petition that the conduct in which All American is alleged to be engaged is unlawful. Through the use of colorful language, (e.g., “illegal,” “unfair,” “fraudulent” and “exorbitant”), Qwest would like the Commission to assume that the switched access charges it discusses in its Petition have been deemed improper. However, even if Qwest’s allegations against All American are assumed to be true,² it has not

² It should be noted that All American denies many of the accusations and characterizations of its

provided any information which shows that these types of switched access charges have been deemed unlawful in other circumstances. For example, Qwest states that issues surrounding the “chat room” and “conference call” arrangements referenced in its Petition are currently being “litigated” before several federal district courts, the Iowa Utility Board and the Federal Communications Commission (“FCC”). What is noticeably absent from the discussion is any decision which authoritatively states that these arrangements violate state or federal laws and tariffs.

The fact is that the FCC has actually found these types of chat room and conference call arrangements to be lawful in certain instances. For example, in 2001, AT&T filed a formal complaint with the FCC against a rural telephone company in Iowa that increased its access traffic volumes – and access revenues – by partnering with chat and conference operators in the manner Qwest describes in its Petition. *AT&T Corp. v. Jefferson Telephone Co.*, 16 FCC Rcd 16130 (2001). AT&T argued that the partnership with conference operators was unlawful and that access charges did not apply to calls made to chat line services. In its opinion, the FCC denied AT&T’s complaint because it had “failed to demonstrate that Jefferson violated its duty as a common carrier or section 202(a) by entering into an access revenue-sharing agreement with an end-user information provider.” *Id.* at 16137.

In any event, even if Qwest’s concerns are deserving of consideration, this proceeding is not the proper forum for Qwest to pursue such concerns. The issue presented in

conduct that Qwest asserts as part of its Petition.

All American's Petition is whether it should be authorized to operate as a CLEC in the territory currently certificated to Beehive. When deciding whether a telecommunications company should be issued a certificate authorizing it to compete in an incumbent company's service territory, the Commission is only required to make two determinations: (a) whether the applicant "has sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for;" and (b) whether "the issuance of the certificate to the applicant is in the public interest." Utah Code Ann. § 54-8b-2.1(2). In this case, the Commission implicitly made these determinations regarding All American's entry into Beehive's territory when it approved the interconnection agreement between the companies on September 10, 2007. *See* Docket No. 07-051-03.³ Therefore, the purpose of All American's Petition is to simply formalize a relationship that was previously deemed by the Commission to be in the public interest.

Qwest's concerns over the legality of so-called "traffic pumping" have no bearing on whether All American should be allowed to operate in Beehive's territory. Rather, Qwest only wants to intervene so that it can use this proceeding as a vehicle to conduct copious discovery without having to initiate its own complaint against All American. For example, Qwest's Petition requests that it be granted "authority ... to pursue discovery according to Commission rules." It also states that "more questions need detailed answers before the petition is approved."

³ The Commission's implicit approval of All American's operations in the Beehive territory is

If the complaints Qwest filed with the Iowa Public Utilities Board against other rural telecommunications providers are any indication of the extent to which it wants to become involved in this matter, then a ruling on All American's Petition may be delayed for years. *See* Iowa Public Utilities Board Docket No. FCU-07-2. The Iowa complaints were filed in February 2007 and alleged that the respondent telecom companies were engaging in the type of conduct referenced in Qwest's Petition. This litigation has resulted in numerous discovery requests from Qwest and the production of thousands of documents. Moreover, it has now been almost two years since the Complaints were filed and the cases have yet to proceed to a hearing. It is anticipated that Qwest intends to engage in similar tactics in this matter.

The question of whether All American is entitled to an amendment to its Certificate of Authority should not be delayed while Qwest engages in drawn-out litigation regarding an unrelated issue. *See* Utah Code Ann. § 63G-4-207(2) (request for intervention may only be granted if "the orderly and prompt conduct" of the proceeding will not be "materially impaired."). Rather, Qwest should be required to file a separate request for agency action that is limited to its traffic pumping allegations. This would allow the Commission to rule on All American's requested amendment to its Certificate of Authority in a prompt and orderly fashion while Qwest's concerns over traffic pumping are handled separately.

CONCLUSION

Based on the foregoing, All American respectfully requests that Qwest's Petition

more fully explained in All American's Response to the Division of Public Utilities' Request for Formal Adjudication, filed in this matter on December 23, 2008.

to Intervene be denied.

Dated this 6th day of January 2009.

JENSON & GUELKER, LLC

By: _____/s/
JANET I. JENSON
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May 2009, the foregoing **ALL AMERICAN TELEPHONE COMPANY'S RESPONSE TO THE PETITION TO INTERVENE OF QWEST COMMUNICATIONS CORPORATION** was sent by electronic mail and mailed by U.S. Mail, postage prepaid:

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