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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

Responsive Brief of the Division
of Public Utilities
Docket No. 08-2469-01

The following is the response by the Division of Public Utilities (Division or DPU) to the Initial Briefs filed in this proceeding to address the Certificate for All American Telephone Company (All American or AATCO).

INTRODUCTION

After reviewing the Initial Briefs of the various parties including All American, the Division continues to believe that the Commission should not extend the Certificate issued to AATCO to allow limited service to conference calling companies such as Joy, or, more generally to provide services in the Beehive exchanges. In addition, the Certificate, which had never been exercised to provide service in the Qwest exchanges, should be revoked. This reply will not repeat the argument made in the Division's Initial Brief but will instead focus on a few areas raised in All American's Initial Brief that deserve some response.

LIMITING THE CERTIFICATE TO SERVICE OF CONFERENCE CALLING COMPANIES SUCH AS JOY IS NOT A REASONABLE ALTERNATIVE AND SHOULD BE REJECTED

In AATCO's Initial Brief (section 1 pp 4-6), it states that AATCO does not object to the Certificate being limited to just providing service to Joy and, possibly, other conference calling companies. The Division opposes this proposal. First, and probably most important, the Division does not believe that the arrangement that AATCO has created with Joy is a local exchange service or a public telecommunications service under Utah law. In addition, the Division still believes that AATCO's arrangement with Joy did not create an end user or customer relationship under AATCO's FCC Access Tariffs that might apply in Utah. (Tariff No 2). Importantly, URTA, the organization that represents small independent telephone companies also questions whether AATCO's service to Joy is a public telecommunications service under Utah's statute. (URTA Initial Brief p. 2). On these bases alone the Commission should not issue a Certificate to serve either Joy alone or other conference calling companies similar to Joy. AATCO cites as its bases for this limited Certificate Utah Code Ann. § 54-8b-2.1(1) and R746-349-8. These rules allow a CLEC to limit its certificate to specified locations and to limit the types of services it may make available. The DPU agrees that in a rural area a CLEC could limit its service to a specified geographic area but does not agree that it can limit its service only to whom it chooses to provide service. The statute, Utah Code Ann. § 54-8b-2.1(4), was written to prevent a CLEC coming into a rural exchange and cherry picking off profitable companies. Instead, CLECs in exchanges of small companies with less than 5,000 access lines, such as Beehive, are not permitted to limit their service to just one customer. As stated in the DPU's Initial Brief it is highly unlikely that in the small exchanges such as where Joy and AATCO do business, that the requirement of this section would have a lot of meaning. However, this is the first Certificate proceeding in an exchange of less than 5,000 access lines and the DPU believes it would not be good precedent to issue a Certificate to only serve one customer. In addition it is

a violation of Utah Code Ann 54-8b-2.1(4) not to impose on a CLEC the obligations included in this Section when the Commission issues a Certificate in a rural exchange of less than 5,000-access lines.

THE CERTIFICATE SHOULD NOT BE AMENDED BECAUSE OF BLATENT VIOLATIONS OF AATCO'S DUTIES AS A TELECOMMUNICATIONS COMPANY

On pp 6-12 of AATCO's Initial Brief it presents various arguments of why its past conduct should be excused now that it has come in for a Certificate. In addition it argues that when the original Certificate was issued the Commission found that AATCO had sufficient technical and managerial abilities to pass the statutory test. According to AATCO, that fact plus the additional evidence it presented in these hearings should satisfy the statutory test for a Certificate. (AATCO Initial Brief p. 8). AATCO also argues that the legislative policy that there should be flexible and reduced regulation should serve as a basis for the Commission to excuse AATCO's past violations. (AATCO Initial Brief pp 11-12).

The Commission should not rely on the findings made in the March 7, 2007 Order granting AATCO a Certificate to serve in the Qwest exchanges. At the time AATCO submitted its Amended Application on February 20, 2007, it represented to the Commission that it would not provide service in the Beehive area. Both the Division and the Commission relied on that representation when the March 7, 2007 Order was issued granting AATCO's Certificate only to serve in the Qwest exchanges. We now know that AATCO's intent, regardless of what they represented to the Commission, was not to serve in Qwest exchanges but to enter into the business relationship between it, Joy Enterprises and Beehive and not to exercise the Certificate that the Commission issued. Therefore, little can be relied upon from that Order because of the representations made to the Commission. In addition, as the DPU stated in its Initial Brief, AATCO'S conduct, both subsequent to the March 7th Order and prior to filing for its Certificate, put in serious question whether the Commission can today issue a finding that AATCO has the

managerial expertise to run a telecommunications' company. Examples include the failure to file an intrastate access tariff, failure to file an annual report with the Commission, the apparent failure to have proper interstate access tariffs in effect that covered the state of Utah, filing of an interconnection agreement with the Commission when both parties to the agreement clearly knew that AATCO did not have authority from this Commission to operate in the Beehive area, and AATCO's operation in the Beehive exchange prior to even filing for its Certificate .

AATCO argues that it voluntarily filed a Petition with the Commission to correct its past errors and that should be a positive factor in determining if the Certificate should be amended. AATCO did voluntarily file its Nun Pro Tunc petition but has at all stages of these proceedings tried to limit parties' participation, limit discovery, and in other ways avoid scrutiny of what was occurring between AATCO and Joy. For example, AATCO filed its r Nun Pro Tunc Petition asking that the proceeding be made informal, not allowing discovery or intervention. AATCO knew that both the DPU and others had serious concerns about AATCO serving in the Beehive area. Informal adjudication was not appropriate. AATCO has also tried to prohibit both the DPU and Office of Consumer Services (OCS) from presenting their positions in this docket through AATCO's Motion in Limine. Not until this phase of the proceeding has significant discovery taken place. It is also not so clear that AATCO's reason for filing its Nun Pro Tunc Petition was not forced on it by the litigation occurring with AT&T and others. The Commission should give little weight to AATCO's argument that it has voluntarily presented itself to the forum for review.

Finally AATCO cites the legislative intent that there should be "flexible and reduced regulation of telecommunications corporations and telecommunications services as competition develops." Utah Code Ann. 54-8b-1.1 (4). Of course, as admitted by AATCO both in pre-filed testimony and at hearing, it has no intention of competing with anyone for customers in

Beehive's territory. The legislative intent to permit flexibility "as competition develops" clearly does not apply in this case, as competition from AATCO has not and will not develop. AATCO's uses this section to argue that if the Commission does not excuse AATCO's past violations then the Commission is not allowing reduced and flexible regulation. The Division disagrees. A review of R746- 349 shows that the Commission has significantly granted reduced and flexible regulation for a CLEC. A look at any of the Certificates issued to a CLEC, including AATCO, show that reduced regulation is incorporated into the Certificate. However, reduced and flexible regulation does not mean that a CLEC can blatantly violate its Certificate and in other ways violate its duty as a certificated CLEC and not avoid any consequences from its actions.

In conclusion the DPU continues to believe that solely based on AATCO's past conduct the Commission has a sufficient basis not to extend AATCO's Certificate into the Beehive area. In addition the Commission should revoke the Certificate to AATCO that was granted on March 7, 2007 to serve in the Qwest area.

AATCO'S ARGUMENT THAT ITS RELATIONSHIP WITH JOY AND BEEHIVE IS IN THE PUBLIC INTEREST IS NOT REASONABLE

AATCO raises in its Initial Brief (pp 13-23) a number of arguments that its service to Joy is in the public interest and that it has positive and not negative effects on both Beehive and the state USF fund. The Division continues to believe that it is not in the public interest to extend AATCO's Certificate into the Beehive area to serve Joy Enterprise.

If there are any positive benefits to a free conference calling and chat line company they are attributable to Joy Enterprise and not to AATCO. Anybody could provide the switching service that AATCO provides. In fact, AATCO acknowledges that Beehive provided the switching service prior to AATCO taking it over. Presumably, Beehive could have continued providing the switching service to Joy and presumably, if legal, Beehive could provide those services if AATCO was not serving in the Beehive area. The benefits to Beehive that are

discussed in AATCO's Initial Brief (pp 18-20) rested with Beehive originally and presumably could revert to Beehive.

If AATCO wanted to exercise the Certificate that was issued March 7, 2007 it could have provided switching for Joy in a Qwest exchange. However, the relationship that was developed between Joy and Beehive could never have been developed between Qwest, Joy and AATCO. Therefore, it seems obvious that AATCO's original intent was to operate under the Joy-Beehive relationship.

AATCO argues in its Initial Brief (p. 19) that the rural companies that own the Utah Fiber Network (UFN) and the UFN Tandem benefit from AATCO's traffic and that that benefit would be lost if AATCO was not issued its Certificate. The record does not support the conclusion that the local exchange customers of the nine small rural telephone companies that own the Utah Fiber Network are directly benefited from this relationship. It is the Division's understanding that many of the owners of the Utah Fiber Network consider that network and its tandem as being unregulated operations and not part of the local exchange company that provides basic phone service to customers within their companies. Therefore, if traffic was switched to Nevada as AATCO posits, it is not clear what the impact of that change would be on the local telephone customers of the companies that own the UFN network and tandem.

AATCO argues in its Brief (pages 21-22) that the DPU's reliance on the Bresnan decision is misplaced. (Docket No. 07-2476-01). Mr. Coleman, in his testimony, argued that the service that AATCO is offering does not provide the citizen of Garrison any additional competitive choice, which additional choice possibly could support a finding that it is in the public interest for AATCO to operate in that exchange. The statute itself, Utah Code Ann. § 54-8b-2.1 permits the Commission to issue a Certificate to a CLEC in order to "compete in providing local exchange services or other public telecommunication services..." There is no

competition occurring by AATCO's operations. No increased choice of services exists for the citizens of Garrison.

CONCLUSION

For the reasons stated in the DPU Initial Brief and in this Responsive Brief, the DPU continues to believe that the Certificate ATTCO requested should not be issued to operate in the Beehive area and that the original AATCO Certificate issued March 7, 2007 should be revoked.

Respectfully submitted this _____ day of March 2010.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing RESPONSIVE BRIEF was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the following on March ____, 2010.

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