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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

**IN THE MATTER OF EMERY
TELEPHONE'S APPLICATION FOR AN
INCREASE IN UTAH UNIVERSAL
SERVICE FUND SUPPORT**

Docket No. 15-042-01

**REPLY TO AT&T COMPANIES'
RESPONSE TO DIVISION OF PUBLIC
UTILITIES' OBJECTION TO
INTERVENE**

Pursuant to Utah Code Ann. § 54-4a-1 and Utah Admin. Code r746-100 the Utah Division of Public Utilities (“Division”), hereby submits this Reply to AT&T Companies’ Response to Objections to Petition to Intervene.

On August 18, 2015, AT&T Corp., Teleport Communications America, Inc., SBC Long Distance, LLC, BellSouth Long Distance, Inc., Cricket Communications, Inc., Cricket Wireless, LLC, and New Cingular Wireless PSC, LLC (collectively, “AT&T”) filed a response to the Division and Emery Telephone’s (“Emery”) Objections to AT&T’s Petition to Intervene in Docket No. 15-042-01 before the Public Service Commission of Utah (“Commission”). On August 21, 2015 the Commission issued a Scheduling Order on Petition for Intervention providing an opportunity for parties to reply to the matter raised by AT&T with respect to its role as a competitor.

This Reply addresses the claims made by AT&T and articulates why intervention should not be granted to AT&T. Without an alternative statutory basis a party must establish standing under the traditional or alternative tests before intervening under the Utah Code Ann. § 63G-4-207. AT&T's response has: I. failed to meet the necessary elements for traditional or alternative standing; II. failed to meet the statutory requirements of § 63G-4-207; and III. the precedent cited by AT&T is distinguishable from the circumstances of this Docket and presents a novel question.

I. AT&T's Position as a Competitor Fails to Meet Necessary Elements for AT&T to Meet Either Traditional or Alternative Standing Tests as Required by Utah Law.

Standing and intervention, while procedural cousins, are not entirely interchangeable. Rather intervention is the exercise of standing. Utah Code Ann. § 63G-4-207 provides the Utah Administrative Procedures Act's ("UAPA") statutory right to intervene. The language requiring a "legal interest[] that may be substantially affected" by the proceeding is the statutory recognition and requirement that a party have standing as one condition of intervening. Analysis of the substantially affected legal interest is interpreted by Utah courts as analogous to common law standing. The commonality of the standing requirement between the UAPA and state courts is inherent in the Utah Supreme Court's analysis and application of the common law standing doctrine in *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, 148 P.3d 960. *See also Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 73, ¶ 9, 148 P.3d 975, 979 (together "*Sierra Club* cases").

In the *Sierra Club* cases the petitioners sought intervention in Utah Division of Air Quality's permit process and related proceedings. Intervention was denied by the agency, denial was upheld at the appellate court, but overturned at the Utah Supreme Court where it held that the petitioner had standing. Importantly to the current analysis the Supreme Court reviewed the request for intervention under the same UAPA language as applies to AT&T and applied the traditional standing tests. Only upon finding

that the petitioners did indeed meet the traditional standing test did the court order the agency to allow intervention.

Similarly in *In re Questar Gas Co.* the court relied upon the common law standing requirements when applying other similar provisions of UAPA. 2007 UT 79, ¶ 59, 175 P.3d 545, 559. In *Questar* the court held that the statutory right under Utah Code Ann. §54-7-15(2)(a) to seek review if a party was “aggrieved” or “substantially prejudiced” similarly required the same elements as common law standing. It stated that, “the term ‘aggrieved’ connotes nothing more than a showing of injury, the traditional principle that claimants must be able to show that [they have] suffered some distinct and palpable injury that gives [them] a personal stake in the outcome of the legal dispute.” *Id.* citing to *Salt Lake City Corp. v. Prop. Tax Div.*, 1999 UT 41, ¶ 11, 979 P.2d 346 (quoting *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983)) (alterations in *Salt Lake City Corp.*) (internal quotations omitted).

The conclusion that must be drawn from the court’s interpretation of the UAPA intervention requirement as well as other similar language is that establishing a legal interest that may be substantially affected means in effect that AT&T must establish standing under the traditional or alternative test before it may be granted intervention in this docket. Interest as a tax payer without more is insufficient. Similarly interest as a competitor is insufficient. AT&T has not established such standing.

AT&T’s response that it is a competitor as well as a payer of the UUSF is insufficient to establish standing. AT&T cites a rule from *Jenkins v. Swan*, 675 P.2d 1145, 1153 (Utah 1983) (“[t]his Court has long held that a taxpayer has standing to prosecute an action against municipalities and other political subdivisions of the state for illegal expenditures.”) AT&T claims this type of taxpayer standing is exactly the kind it seeks in this Docket, but the rule from *Jenkins* is distinguishable from the circumstances at issue in this Docket.

In *Jenkins*, the Court upheld the lower court's denial of standing on several claims in which the plaintiff's "mere reliance on his general status as a taxpayer and citizen does nothing to distinguish him from any member of the public at large with regard to this dispute." 675 P.2d at 1151. The Court did find standing for the plaintiff on two claims: 1. plaintiff's specific claim "that the system of uniform funding of state public education by local property taxes is unconstitutional"; and 2. "to raise his claim concerning the unconstitutional expenditure of public monies on tax exempt private property held by religious organizations." *Id.* at 1153. Both of the claims in which standing was granted in *Jenkins* involved the constitutionality of the expenditures, not the adherence to certain statutes or administrative rules.

AT&T seeks to intervene "to ensure that proposed USF payments to Carbon/Emery comport with state law." AT&T's Response, pg. 3. AT&T's as a competitor in non-telephone services may have an interest in cross subsidization of internet from the UUSF. However, that is not grounds for intervention any more so than any end user paying into the UUSF might be overcharged if a cross subsidization of other services is approved. Intervening to ensure the Commission sets the appropriate UUSF amount or that Carbon/Emery complies with state law would place AT&T in the position of trying to "act as a private attorney general in the enforcement of this statute," which is one of the reasons the Court denied the plaintiff standing on a similar type of non-constitutional expenditure claim in *Jenkins*. 675 P.2d at 1152.

While it may be argued that "[A] taxpayer should be permitted to enjoin the unlawful expenditure of tax moneys in which he has a pecuniary interest, or to prevent increased levies for illegal purposes." *Jenkins* at 1153. This is not the instant case. AT&T is not the ultimate responsible party for UUSF fees. Rather UUSF is paid by end users through a surcharge.

The circumstances of this Docket are distinguishable from the type of constitutional claim where the AT&T has not suffered a distinct and palpable injury but rather a generalized injury. AT&T's interest as a competitor seeking to ensure that Emery is not subsidizing non-telephone services through UUSF funds is no different from the multitude of other providers of internet, cellular, or video services. There are already several parties involved in this Docket who will be working to ensure any potential increase will comport with state law, including the Commission itself.

The Division and the Office of Consumer Services ("OCS") are both parties before the Commission in this Docket likely to raise the issues AT&T identified in its Response. As stated in the Division's Objection to Intervention, both the Division and OCS are statutorily required to protect the interests of the public. Utah Code Ann. §§ 54-4a-6(2) ("provide for just, reasonable, and adequate rates, charges, classifications, rules, regulations, practices, and services of public utilities;") and 54-10a-201(3). In this Docket, because UUSF surcharges are the responsibility of consumers through an end-user surcharge and the Division and OCS serve to protect the interests of those consumers, the interests of AT&T to have a just and reasonable surcharge are adequately protected. Another "set of eyes" is not needed to review Emery's Application.

II. AT&T's Response Fails to Show the Necessary Elements for AT&T to Meet the Requirements of Utah Code § 63G-4-207 for Intervention.

AT&T has failed in its response to satisfy the statutory requirement from Utah Code § 63G-4-207. As discussed, AT&T's has not established standing and lacks the type of legal interest that may be substantially affected necessary for intervention. Any increase in surcharges resulting from overpayment of UUSF would be a generalized harm faced by the entire community and therefore would not be distinct to AT&T even as a potential competitor.

The second statutory requirement of Utah Code § 63G-4-207, that the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention similarly bars intervention. The Division has no reason to believe that AT&T has any intention to act in bad faith or intentionally cause delay or disruption. AT&T would likely make every effort to minimize disruption. However, intervention of competitors where access to the books and records are necessary for meaningful participation is inherently disruptive. If every potential competitor of a telecommunications provider is permitted to intervene into similar dockets on the basis that they are ensuring competitors “comport with state law,” there is likely to be a flood of competitors also intervening in each UUSF docket.

AT&T claims to have “already tried to minimize the impact their intervention might have on these proceedings,” by seeking “a voluntary production of documents [from Emery].” AT&T Response, pg. 5. AT&T and Emery are competitors. The production of such documents is likely to result in asymmetric information between competitors that may disadvantage Emery in both regulated and non-regulated services. As a result the discovery disputes alone will substantially impair the orderly conduct of such proceedings.

A broad intervention standard allowing all potential competitors access to sensitive information will materially impair the orderly and prompt conduct of this proceeding. Intervention without such access would be limited in utility. As discussed above, other parties already engaged in this Docket such as the Division and OCS will perform their statutory duties to protect consumers who are directly responsible for paying UUSF surcharges.

III. The Precedent Cited in AT&T’s Response is Distinguishable from the Circumstances of this Docket.

AT&T cites to Docket No. 11-2180-01 as precedent for granting AT&T standing for intervention in this docket. The circumstances in this Docket are distinguishable. In the docket cited by AT&T, All West Communications, Inc. was petitioner in the case as well as a member of the Utah Rural Telecom Association (“URTA”), the party seeking intervention to address docket issues that would have precedential effect on URTA members who used group asset depreciation. (*See* URTA Motion to Intervene, pg. 2: “The decision the Commission makes in this docket will set precedent for each of the URTA member’s treatment and use of group asset depreciation and accounting, and will affect the URTA members accounting procedures, accounting and consultant costs, and future rate cases and USF eligibility before the Commission.”) The narrow interest of an industry trade group on a specific issue regarding depreciation treatment, while perhaps more appropriate for a rule making proceeding, is unlikely to raise the same type of confidentiality concerns. Such a group is more likely to be able to reasonably protect confidential information obtained in the proceedings from its members. As such it is also significantly less likely to cause a disruption to the process.

Conclusion

AT&T has not established the necessary elements for intervention pursuant to Utah Code § 63G-4-207. The legal interests claimed by AT&T including that it is a competitor in non-regulated service are generalized in nature. Other parties in this Docket will protect consumers who are ultimately responsible for paying the surcharge and ensure that the statutory limitations on UUSF distributions are upheld. The precedent cited by AT&T is distinguishable from this Docket where AT&T and Emery are competitors. Allowing parties access to financial data of their competitors is strong incentive to intervene even where intervention may not be necessary or useful to the Commission. The result will be disruptive to the proceedings. AT&T should be denied intervention.

Submitted this 31th day August, 2015.

/s/ Justin C. Jetter
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