- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of Carbon/Emery Telcom, Inc. for an Increase in Utah Universal Service Fund Support	DOCKET NO. 15-2302-01 ORDER ON PETITION FOR INTERVENTION

ISSUED: September 8, 2015

I. Procedural History and Parties' Positons.

On July 27, 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 PCS, LLC (AT&T) petitioned for leave to intervene in this docket. The petition for intervention was timely.[1] In its petition, AT&T claimed an interest in this matter as a contributor to the Utah Universal Service Fund (UUSF), arguing that a disbursement to Carbon/Emery Telcom, Inc. (Carbon) might ultimately increase the surcharge that AT&T is required to collect from its customers and contribute to the fund.

On August 12, 2015, both Carbon and the Division of Public Utilities (Division) opposed intervention, arguing that AT&T has no direct financial responsibility to the UUSF and that intervention by a direct competitor would inevitably complicate the proceeding. In responding to the opposition, AT&T claimed a further interest as a competitor of Carbon. Specifically, AT&T stated that it seeks to ensure that disbursements from the UUSF are not used to subsidize Carbon's non-basic services or to facilitate operations of its unregulated affiliates, thus allowing Carbon to undercut rates charged by competitors that do not have access to the UUSF.

[1] Pursuant to the May 11, 2015 amended scheduling order issued in this matter, the intervention deadline was August 28, 2015.

On August 25, 2015, the Commission issued a scheduling order, giving Carbon and the Division until August 31, 2015 to reply to AT&T's claimed interest as a competitor. Both parties timely filed reply briefs, making similar arguments, as follows:

- The Division and the Office of Consumer Services (Office) are statutorily charged to ensure compliance with the laws governing the administration and distribution of the UUSF and do not need AT&T's assistance in performing those duties.

- AT&T's claimed legal interest is general in nature and is shared by the Division and the Office.

- AT&T, as a direct competitor of Carbon, should not be allowed to use intervention so as to gain access to Carbon's confidential data and proprietary information.

- Intervention by a direct competitor would complicate the proceeding without providing any meaningful benefit.

II. Analysis.

A. Standing to Intervene – Legal Standard.

Utah Code § 63G-4-207(2) provides:

> The presiding officer shall grant a petition for intervention if the presiding officer determines that:
> (a) the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and
> (b) the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.

The Utah Supreme Court has determined that the standards through which standing is evaluated in a court proceeding apply equally in the administrative forum.[2] The Court has also

[2] See *Utah Chapter of the Sierra Club v. Utah Air Quality Board*, 148 P.3d 960, 966 (Utah 2006): "[T]he same policies that apply to standing before the judicial branch also apply to controversies before administrative agencies."

issued two decisions that provide guidance as to how the statutory language regarding intervention at the administrative level should be interpreted and applied.

In *Utah Chapter of the Sierra Club v. Utah Air Quality Board*, 148 P.3d 975 (Utah 2006), the Court evaluated the Sierra Club's standing to intervene in any proceedings that might be conducted to determine whether the Division of Air Quality had complied with all regulations in an earlier proceeding through which the agency determined to allow construction of a power plant. It is notable that the Sierra Club did not seek to intervene in the proceeding through which the power plant was approved. Rather, it filed an action to challenge the approval and sought standing to participate in any evaluation or review of the agency order.

The Court found that, if the power plant had been wrongfully approved, its construction and operation would specifically affect three individuals, all members of the Sierra Club. These individuals, who lived in the affected area, had reason to believe that increased pollution would adversely affect their health, their enjoyment of the area, and their property values. Further, two of the individuals made a career of photographing and filming the landscape and had reason to believe that increased pollution would negatively affect that line of work. *Id*. at 980.

The Court concluded and held that the Sierra Club did have standing, noting:

- "The [Sierra Club] in this case merely [seeks] the opportunity to ensure that the [agency] complies with [the Clean Air Act]." *Id*. at 981.
- "[T]he Sierra Club is the only party seeking to raise the issues of the plant's detrimental effects on health, the environment, property values, and recreational interests." *Id*. at 982.

- "[B]ecause the Sierra Club's purpose is environmental protection, it has the interest and expertise necessary to investigate and review all relevant legal and factual questions[.]"[3] *Id*. (internal quotes omitted).

In *Ball v. Public Serv. Comm'n.*, 175 P.3d 545 (Utah 2006), the Court upheld the Commission's decision to deny intervention. In the *Ball* case, the parties agreed that the interveners had legal interests that were substantially affected by the proceeding. *Id*. at 553. However, the court noted that those interests were "adequately represented by [and] protected by [the Office] and the Division—both charged by statute with protecting consumer interests." *Id*. at 554. The court also noted that the interveners had not sought to involve themselves until after the matter had been fully resolved by stipulation, concluding that to allow such belated intervention "would materially impair the proceedings because it would require all the parties to duplicate expenditures of time and money to accommodate a party" that had every opportunity to intervene at an earlier point. *Id*. at 555.

B. AT&T's Legal Interest.

AT&T has claimed two legal interests. First, AT&T contributes to the UUSF, and might be required to increase its contributions if the Commission increases the yearly disbursement to Carbon. Second, AT&T does not have access to UUSF funds and wishes to ensure that any disbursement from the UUSF is not used to subsidize services as to which AT&T competes in the marketplace.

[3] In the *Sierra Club* case, the court also addressed whether an association could stand in the shoes of one or more members if, in fact, those members were found to have standing. The court's analysis on that point is not relevant to the issues before the Commission in the instant case. AT&T is not an association, and its customers are not members of the company.

On the first point, the Commission agrees with the Division and Carbon that AT&T is not liable to the UUSF. The UUSF is funded through a surcharge that AT&T's customers are required to pay. AT&T is required to collect and remit the surcharge, but the amount assessed has no effect on AT&T's profitability. If it appeared that a requested disbursement would require the surcharge to be increased, then individual customers might have standing to intervene. However, no customer has claimed such an interest. AT&T is not similarly situated with its customers and may not claim standing through them, particularly where none has articulated an interest or injury.

On the second point, the Commission reads the *Sierra Club* case as allowing intervention, when sought for the purpose of ensuring regulatory compliance, only if (a) the issues raised by the intervener would not otherwise be presented by a party; and (b) the intervener would bring useful expertise to the proceeding. This reading is consistent with the outcome of the *Ball* case.[4]

As the Division and Carbon have both demonstrated, the Division and the Office are statutorily charged to ensure that UUSF funds are appropriately disbursed and properly used. AT&T has not articulated a separate and distinct concern. Further, both the Division and the Office have the necessary experience, expertise, and resources to conduct a thorough review of Carbon's financial records, apply the Commission's precedent regarding cost distributions, adjustments, depreciation, etc., and provide the Commission with reasoned and detailed analyses of all facts and circumstances, without bringing into the proceeding an agenda or bias.

[4] The Commission finds the *Ball* case to be more instructive than the *Sierra Club* case. First, the *Ball* case dealt with a case before the Commission while the *Sierra Club* case involved a different administrative body. Second, the *Sierra Club* case evaluated standing to bring and intervene in an appellate review proceeding, which is not the proceeding at issue here. In contrast, the *Ball* case dealt with intervention before the Commission, as does this case.

Finally, there is no evidence that AT&T, which has no history with the UUSF, has specialized expertise that would be necessary or helpful to the Commission beyond the expertise provided by the Division and the Office. Rather, AT&T has volunteered to check the Division's work. The parties of record have reached widely differing conclusions as to how Carbon's application should be resolved. The checks inherent in the adversarial system are fully in play. It does not appear that a further check is necessary.

C. Conduct of the Proceeding.

If allowed to intervene, AT&T intends to request copies of all information and data that Carbon has provided to the Division and the Office. Carbon is opposed to providing a direct competitor with this information, much of which has been marked as confidential, and the Commission credits Carbon's position. If AT&T were given status as a party, the Commission would, at a minimum, be required to adjudicate a request for a protective order. More likely, the Commission would be required to resolve one or more discovery disputes and micromanage the dissemination of records to AT&T. There is no question that intervention by AT&T would complicate this proceeding.

That being said, the Commission would be willing to oversee discovery if the involvement of a competitor would bring forward important issues or needed expertise. However, as has been addressed above, those are not the circumstances here.

D. Commission Precedent.

In its response brief, AT&T argued that the Commission has allowed competitors to intervene in prior dockets, citing to docket number 11-2180-01, in which the Utah Rural Telecom Association (URTA) intervened in a petition for disbursement from the UUSF. The

Commission disagrees that URTA competes with Carbon. Further, in that docket, no party opposed the petition for intervention. Therefore, the Commission does not consider the case to be precedential or instructive.

ORDER

Based on the foregoing analysis, AT&T's petition to intervene is denied.

DATED at Salt Lake City, Utah, this 8th day of September, 2015.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#269100

CERTIFICATE OF SERVICE

I CERTIFY that on the 8th day of September, 2015, a true and correct copy of the foregoing, was served upon the following as indicated below:

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