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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of: the Notification of the Indirect Transfer of Control of XO Communications Services, LLC from XO Holdings to Verizon Communications, Inc.	DOCKET NO. 16-2208-01 **DIVISION RESPONSE TO COMMISSION'S APRIL 6, 2016 SUPPLEMENTAL ACTION REQUEST**

Pursuant to Utah Code Ann. § 54-4a-1 and Utah Admin. Code r746-100 the Utah Division of Public Utilities ("Division"), hereby submits this Response to the Commission's April 6, 2016 Supplemental Action Request. The Division disagrees with the conclusions of Verizon and XO Holdings that the corporate structure is such that the proposed transaction is unregulated. The Division believes that the transfer may not include "public utilities" as defined by Utah law and therefore may not need Commission approval for that reason. The Division continues to recommend approval if the Commission deems approval necessary.

Introduction

On March 17, 2016 Verizon Communications Inc. ("Verizon") and XO Holdings filed a Notification of the Indirect Transfer of Control of XO Communications Services, LLC from XO Holdings to Verizon Communications, Inc. The transaction will transfer XO Holdings the parent

company of XO Communications, a Utah Certificated telecommunications provider, to Verizon. Verizon operates certificated subsidiaries in Utah under various names. XO Holdings and Verizon represent that the transaction is a "parent level" transfer and no customers or assets are being transferred.

The Parties assert that the transaction does not require Commission approval because the transaction involves the transfer of non-utility parent companies it does not require Commission approval. The Parties further request approval of the transaction in the event that the Commission deems approval necessary.

On April 5, 2016 the Division filed Comments supporting approval of the transaction, but not addressing the necessity of Commission approval. On April 6, 2016 the Commission issued a Supplemental Action Request to the Division to "investigate the parties' jurisdictional analysis to verify whether the proposed transaction falls within the Commission's statutory authority." The following is the Division's response to the April 5, 2016 Action Request.

Discussion

The Division disagrees with the assertion by Verizon and XO Holdings that a transfer at a parent level escapes the regulatory requirements related to transfers of customers, assets, or controlling interests. Verizon and XO Holdings cite to the Commission's March 14, 2011 Report and Order in *In the Matter of: the Notification Regarding the Indirect Transfer of Control of CTC Communications Corp. to EarthLink, Inc.* Docket No. 11-2287-01. The Commission held that "no 'transfer of authorization, assets, or customers will occur as a result of the transfer of control'" therefore "the transaction does not require Commission approval." While somewhat similar, the transaction in *Earthlink* was not entirely similar to the instant transaction. The

equivalent transaction in this case would involve Verizon acquiring the holding company XO Holding rather than only the subsidiary.

Regardless of the differences in transactions the Division does not agree with the conclusion that corporate form may be used to skirt regulatory oversight. "Under some circumstances the corporate entity may be disregarded in the interest of justice in such cases as fraud, contravention of law or contract, or public wrong." [1] The use of holding companies to facilitate transactions between public utilities that would otherwise be subject to regulation should be rejected. This is precisely the type of situation where the Commission should disregard corporate structure and view the question as a matter of actual control of the subsidiaries.

There may be circumstances where a parent company is sufficiently removed from the control of the utility that it would not be within the jurisdiction of the Commission to regulate. The level of control is a question of fact that the Division is not prepared at this time to opine on regarding Verizon and XO Holdings. The Division would only comment that that both Verizon and XO Holdings are entities that operate directly in the telecommunications industry and the assertion that the merger requested will result in efficiencies is an indication that the corporate parents exercise control over the subsidiaries.

Additionally under Utah law "Telephone Corporation" means any corporation… who owns, controls, operates, manages, or resells a public telecommunications service." [2] Consistent with the general principle that corporate form cannot be used to circumvent regulation Utah law provides for regulation of corporations that control or manage public telecommunications

[1] *Shaw v. Bailey-McCune Co.*, 355 P.2d 321, 322 (Utah 1960). *See also State ex rel. Utilities Commission v. Morgan*, 177 S.E.2d 405, 416 (N.C. 1970) ("It is well established that the doctrine of the corporate entity may not be used as a means for defeating the public interest and circumventing public policy. In order to prevent such a result, a parent corporation and its wholly owned subsidiaries may be treated as one." (internal citations omitted)).

[2] Utah Code Ann. §54-2-1(28(a).(Emphasis added.)

service. A parent corporation that exercises control over a subsidiary may be subject to regulation in the same manner as the subsidiary.

The second matter of whether the transfer is in fact between two regulated public utilities by definition in Utah law is less certain. The relevant issue to this determination is whether the corporations are providing service to the public generally. Utah Code § 54-4-28, §54-4-29, and §54-4-30 require Commission approval where merger, consolidation or combination is proposed, or where a public utility is acquiring the voting stock or securities of another public utility, or where a public utility is acquiring properties of another public utility. The Statutes read as follows:

§54-4-28

> No public utility shall combine, merge nor consolidate with another public utility engaged in the same general line of business in this state, without the consent and approval of the Public Service Commission, which shall be granted only after investigation and hearing and finding that such proposed merger, consolidation or combination is in the public interest.

§54-4-29

> Hereafter no public utility shall purchase or acquire any of the voting securities or the secured obligations of any other public utility engaged in the same general line of business without the consent and approval of the Public Service Commission, which shall be granted only after investigation and hearing and finding that such purchase and acquisition of such securities, or obligations, will be in the public interest.

§54-4-30

> Hereafter no public utility shall acquire by lease, purchase or otherwise the plants, facilities, equipment or properties of any other public utility engaged in the same general line of business in this state, without the consent and approval of the Public Service Commission. Such consent shall be given only after investigation and hearing and finding that said purchase, lease or acquisition of said plants, equipment, facilities and properties will be in the public interest.

Transactions that require Commission approval under these provisions involve a "public utility" engaging in a transaction with another public utility in the same general line of business. It is likely undisputed that Verizon and XO Communications are in the same general line of business.

Similarly the entire entity of XO Communications including its assets is being transferred as part of the transaction. Therefore the issues that must be resolve are whether the acquiring entity or the transferring entity are "public utilities."

A "Telephone Corporation" means any corporation… who owns, controls, operates, manages, or resells a public telecommunications service." [3] Telecommunications service is defined as the "two way transmission of signs, signals, writing, images, sounds, messages, data, or other information by any nature by wires, radio, lightwaves, or other electromagnetic means offered to the public generally."[4] Verizon states in its notification letter as follows:

> In Utah, Verizon's wireline business is comprised of five indirect wholly-owned subsidiaries: TTI National, Inc., Verizon Long Distance LLC and Verizon Select Services Inc., all of which hold authority from the Commission to provide resold interexchange services[5]; MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, which holds authority to provide resold and facilities-based local exchange telecommunications services; and MCI Communications Services, Inc. d/b/a Verizon Business Services, which holds authority to provide resold and facilities-based interexchange telecommunications services.

Verizon wholly owns subsidiaries operating as certificated public utilities in Utah. XO Communications offers some similar services.

> In Utah, XO Communications offers local and long distance voice, Internet access, cloud connectivity, security, private line, Ethernet, and other private data and network transport services for small and medium-sized companies, enterprises, national and government customers, and other carriers, both on a managed and wholesale basis.

[3] Utah Code Ann. §54-2-1(28(a).
[4] Utah Code Ann. §54-8b-2(16).
[5] TTI National, Inc., Verizon Long Distance LLC and Verizon Select Services Inc. operate as toll resellers and therefore are not "public utilities" under Utah Code Ann. §§ 54-2-1(19)(a) and (28)(b)(iii).

While XO Communications does not provide residential retail sales it does offer end user local and long distance voice service. It is uncertain whether the services of either Verizon and its subsidiaries or XO Communications would be considered offered to the public generally.

The Utah Supreme Court recently upheld an order of the Commission on the matter of whether a cooperative association was a public utility. The court stated that "'[t]the test is whether the public has a legal right to the use which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner.' We reasoned that '[t]he essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character.'"[6]

The line of cases from which the test set forth by the court arise are cooperative associations. While the same language is used regarding offering service to the public generally, there may be reason to distinguish the instant case. Cooperative associations that are not subject to regulation are owned by the end users and each user is therefore subject to poor service if rates are low or entitled to a return if the rates result in a surplus. For these reasons "there is no monopoly of essential services needed by the public that warrants regulation when a cooperative's owners are its consumers and the cooperative serves only such owner-members."[7]

The court did however also recognize that in circumstances where there is a "potential for monopolistic coercion… that regulation is desirable in such situations to harmonize and balance competing interests."[8] While the court certainly did not explicitly limit the test it set forth to only

6 *Bear Hollow Restoration, LLC v. Public Service Com'n of Utah*, 2012 UT 18, ¶ 19 (2012) citing to *Garkane Power Co. v. Public Service Commission*, 100 P.2d 571, 572 (Utah 1940).
[7] *Id*. at ¶ 25.
[8] *Id*. at ¶ 20.

cooperative associations, it may be reasonable not to extend the test to its literal limit. The result would be that only those entities that are carriers of last resort are public utilities.

The Division believes that the law and possibly the intent if not the explicit language of the court would support a more balanced approach to interpretation of what it means to offer service to the public generally in cases where a utility service is provided broadly by a private company but not offered indefinitely to all. The risk of such a limitation is that a provider in a competitive area might exercise monopolistic market power and escape regulation due to an excessively narrow interpretation of what offering to the public generally means. The Division is not taking a position on the facts as to whether Verizon is exercising monopolistic market power, but rather providing analysis as to the risks of such an interpretation.

General cannons of interpretation suggest that the best interpretation gives effect to the intent and purpose of legislation. Moreover interpretation should "avoid interpretations that will render portions of a statute superfluous or inoperative."[9] "A 'Certificate' means a [CPCN] issued by the commission authorizing a telecommunications corporation to provide specified public telecommunication services within a defined geographical service territory in the state."[10] Extending the *Bear Hollow* interpretation would result in one of two questionable outcomes. By definition a CPCN is granted to "telecommunication corporations" to provide "public telecommunication service." *Bear Hollow* interpretation requiring indefinite service would render superfluous much of §54-8b as it pertains to CLECs because they would generally not qualify as public utilities and presumably not be eligible for CPCNs. The alternative if CLECs are public utilities they must by default serve without limitation all customers within the certificated areas. It is unlikely that either outcome gives effect to the intent of the statute.

[9] *Hall v. Utah State Dept. of Corrections*, 2001 UT 34, ¶ 15 (2001).
[10] Utah Code Ann. §54-8b-2(3).

Serving the public generally should be interpreted as something less than an unconditional obligation to serve.[11] Therefore the extreme nature of the *Bear Hollow* language should not be extended.

The Division does not believe that the language from *Bear Hollow* should be extended. However Based on the test as it has been set forth in *Bear Hollow* regarding the question of whether the public has a right to call upon the provider for service for determining whether Verizon or XO Communications are public utilities, it would be unlikely that either satisfy that requirement. Neither XO Communications or Verizon are required to serve all customers who request service nor are their offerings open to the indefinite public. This suggests that they are not offering telecommunications service as defined by Utah Code Ann. §54-8b-2(16) and as a result are not by definition telephone corporations. This interpretation seems extreme given the entirety of Title 54 and legislative and regulatory history, particularly given that the entities may offer their services to the public generally, though they are not compelled to.

If neither Verizon nor XO Communications are telephone corporations they are not public utilities subject to the jurisdiction of the Commission for the transaction indicated in the notification. Therefore if the Commission concludes that neither are public utilities the proposed transaction would not require Commission approval and the Commission may take no action or it may acknowledge the transaction.

Respectfully Submitted this 20th day of April, 2016

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[11] The Division does not intend to suggest that obligations of carriers of last resort be reduced or modified.