

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Quality of Telephone)
Service Within the Territory Served by)
BEEHIVE TELEPHONE COMPANY,)
Respondent

DOCKET NO. 98-051-04
REPORT AND ORDER

ISSUED: November 3, 1999

SYNOPSIS

Respondent having violated a previous Commission Order by continuing to violate its published tariffs, the Commission vacated the previous fine suspension and ordered Respondent to pay the same.

Appearances:

Laurie L. Noda, Assistant Attorney General	For	Division of Public Utilities, Utah Department of Commerce
Alan L. Smith	"	Beehive Telephone Company

By the Commission:

PROCEDURAL HISTORY

Pursuant to notice duly served, the above-captioned matter came on regularly for hearing the third day of February, 1999, before A. Robert Thurman, Administrative Law Judge, at the Commission Offices, Heber Wells Office Building, Salt Lake City Utah. Evidence was offered and received, and additional evidentiary hearings were conducted February 22, 1999, March 2, 1999, March 9, 1999, and March 24, 1999. Briefing was completed June 16, 1999. The Administrative Law Judge, having been fully advised in the matter, now enters the following Report, containing proposed findings of fact, conclusions of law, and the Order based thereon.

FINDINGS OF FACT

1. Beehive Telephone Company (BTC), Respondent herein, is a telephone corporation certificated by this Commission. The Division of Public Utilities, Utah Department of Commerce (DPU), an agency of Utah State Government is complainant herein.
2. By Order dated April 10, 1997, in Docket No. 96-051-04, this Commission required BTC to desist from toll charging its subscribers in the Rush Valley, Vernon, and Skull Valley districts of Tooele County, Utah, for completion of calls to wireless carriers in violation of its tariffs and further to remedy serious service problems in the same area. The Commission suspended a fine in the amount of \$182,500 conditional upon BTC's ceasing the tariff violations, refunding the illegal charges and taking steps to alleviate the service problems. BTC appealed the Order, which appeal was still pending at the time these proceedings began. Alleging violations of that Order, DPU petitioned for an Order to Show Cause October 13, 1998, which initiated these proceedings.

- o In substance, our April 10, 1997 Order (the Order) mandated that BTC cease

charging its subscribers toll for completing calls to numbers served by wireless carriers and to refund such charges previously paid by BTC customers. It is undisputed that BTC did not comply with the Order until after the institution of the instant proceedings, despite previous demands from DPU that BTC do so.

- BTC committed 3,784 billing violations between the time the Order issued and the

time BTC finally complied with the billing provisions of the Order. In dollar amounts, the total, for a period extending both before and after the issuance of the Order, was somewhat less than \$5,000.

- DPU offered evidence of continued service standard violations in the form of two

customer satisfaction surveys, the testimony of two current customers in the area and an exhibit summarizing complaints taken by DPU personnel.

- The surveys, conducted pursuant to a provision in the Order, suffer from one serious

defect: the questions asked do not sufficiently differentiate between the period before the issuance of the Order and the period after. This may be the Commission's fault. We were perhaps not sufficiently explicit in delineating our intent. Or, perhaps we should have allowed more time before taking the survey. In any event, while we appreciate the efforts of DPU, the results are too vague and ambiguous for us to base a finding on them.

- Likewise the evidence of the complaining witnesses, while highly suggestive, does

not, in our opinion, meet the "clear and convincing" standard which must be met to justify the imposition of sanctions. Moreover, it appears that BTC has been making efforts to improve its service in the affected area.⁽¹⁾ It has installed a new switch and is replacing underground cable which was damaged by gophers. We do commend BTC for these efforts. Whether they will be entirely sufficient to remedy the service problems remains to be seen.

DISCUSSION

The first issue raised by BTC relates to the Commission's jurisdiction. BTC argues that the Commission must file an action in the courts and have the court determine whether there has been a violation of a Commission order, rule, or applicable statute. This position is so preposterous and contrary to long-established procedure that we shall not deal with it at length.

Suffice it to say that while § 54-7-29, UCA 1953, as amended, does require that the Commission collect fines through the courts, to accept BTC's reading would stand the statute on its head. The Utah Supreme Court has long countenanced the Commission's imposing fines on utilities in proceedings such as this and thereafter collecting the same through the courts. BTC's due process concerns are adequately addressed through the availability of review by the Utah Supreme Court, which has also countenanced the Commission's long-standing practice of suspending sanctions on condition a utility corrects its malfeasance or misfeasance and vacating the same if the conditions are not met. See, for example, *Anderson v. PSC*, 839 P.2d 822 (Utah 1992).

The sole remaining issue is whether we should vacate the suspension of the fine ordered in our April 10, 1997, order predicated on the continuing tariff violations. BTC characterizes its ongoing violations as a mistake predicated on its belief that the filing of the appeal to the Utah Supreme Court tolled the Order's effectiveness. It did not.

BTC's claim is akin to ignorance of the law, and that, of course, is no excuse. We might be more amenable to viewing it as a factor in mitigation except for the fact that there is no indication in this record that BTC made the slightest effort to ascertain the true legal status of the Order before it was forced to by the filing of the OSC.

Likewise, the dollar amount cannot be viewed as a mitigating factor. BTC's customers in the Rush Valley and Vernon areas are entitled to correct charges.

We are unhappily aware that the fine involved is significant and could adversely impact BTC's financial fitness. We

would much prefer to see the money invested to upgrade the facilities serving BTC's customers. But we see no indication that even if we were once more to forebear, the funds would be so used.

BTC surely was aware of the potential consequences of its obstinacy at the time of the Order and chose to ignore them. A threat without the will to follow through is no threat at all.

Through the course of the proceedings we have seen no indication from BTC's CEO and principal owner that he is willing to acknowledge or accept responsibility in any way for the billing errors or any other problems in the Rush Valley and Vernon areas. Our only option appears to be to attempt to get his attention by vacating the fine suspension.

DPU also seeks the establishment of an extended oversight mechanism to ensure that BTC's Rush Valley customers enjoy adequate service. We attempted to set up such a mechanism in our previous Order. Clearly it failed, and unfortunately, BTC's management appears to be uninterested in any kind of cooperative scheme to ensure service adequacy. We see no alternative but simply to stand ready to use the club of sanctions if it transpires that service problems continue.

> CONCLUSIONS OF LAW

The Commission has party and subject matter jurisdiction. BTC stands in violation of our April 10, 1997, Order and there appear to be no mitigating factors. The suspension of fine should be vacated and BTC ordered to pay the same.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

The suspension of fine ordered in our Order of April 10, 1997, in Docket No. 96-051-04, be, and it is, vacated effective the date of this Order, and the same in the amount of ONE HUNDRED EIGHTY-TWO THOUSAND AND FIVE HUNDRED (\$182,500) DOLLARS is payable forthwith.

- This Order is effective the date of its issuance.

Any person aggrieved by this Order may petition the Commission for review within 20 days of the date of this Order. Failure so to do will forfeit the right to appeal to the Utah Supreme Court.

Dated at Salt Lake City, Utah, this 3rd day of November, 1999.

/s/ A. Robert Thurman, Administrative Law Judge

Approved and Confirmed this 3rd day of November, 1999, as the Report and Order of the Public Service Commission of Utah.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard, Commission Secretary

1. This is not to say, however, that where there is so much smoke there is no fire. We are only saying that at this point DPU has not met its burden of proof on these issues. It would obviously behoove BTC to mend its fences with its subscribers in the area and improve its service. Otherwise, we will doubtless see new cases brought based on BTC's service deficiencies.