

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Beehive Telephone Company, Inc.)	CC Docket No. 97-249
Beehive Telephone, Inc. Nevada)	
)	Transmittal No. 8
Tariff F.C.C. No. 1)	

OPPOSITION TO MOTION FOR STAY

Pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d), AT&T Corp. ("AT&T") hereby files its opposition to the request for stay of the Commission's June 1, 1998 Order¹ filed by Beehive Telephone, Inc. and Beehive Telephone Nevada, Inc. (collectively, "Beehive"). Beehive claims that it has met the four prong test as established in Virginia Petroleum Jobbers Association v. FPC,² which is necessary to justify a stay of the Commission's Order in Beehive's access tariff rate investigation. As demonstrated below, Beehive has failed to meet any of the elements required under the test, and its motion should be denied.

¹ Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada, Tariff F.C.C. No. 1, Tr. No. 8, CC Docket No. 97-249, Memorandum Opinion and Order (1998) ("June 1 Order").

² 259 F.2d 921 (1958).

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List A B C D E

A. Likelihood Of Success On The Merits.

Beehive has not shown that it is likely to prevail on its argument that the June 1 Order was the result of an unfair process or faulty decision-making by the Commission. Beehive complains primarily in its Petition for Reconsideration³ that the Commission did not direct or allow it to explain each entry contained in its cost data, nor require it to explain its entries relating to the chat line provider, JEI, with which it has had an on-going revenue-sharing relationship. Beehive claims that the Commission's determination of these issues on the merits was unfair. It also argues that there were several factual and legal errors in the June 1 Order.⁴ Petition at 3-16.

³ Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada, Tariff F.C.C. No. 1, Tr. No. 8, CC Docket No. 97-249, Beehive Petition for Reconsideration (filed June 30, 1998) ("Petition").

⁴ Beehive also argues that the Commission went beyond its jurisdiction in requiring Beehive to justify its rates under Part 32 of the Commission's Rules. Motion at 12-13. The Commission did not prescribe rates for Beehive on the basis of its failure to justify its rates under Part 32. Rather, the Commission was clear that Beehive chose not to justify its rates using the accounts specified in Part 32 or in any other way which could provide assurance that they permitted the development of lawful interstate access charges. Accordingly, Beehive failed to meet its burden of proof as required under Section 204. June 1 Order at para. 21.

Contrary to Beehive's arguments, the March 13 Designation Order⁵ was very specific about the information Beehive was required to file to justify its rates. It stated clearly that all of Beehive's rates -- premium local switching, local transport and local transport termination -- were under investigation, and that Beehive must explain why its ratio of operating expenses to total plant in service ("TPIS") was so high, and provide detailed cost data and explanations for year over year changes in the entries.⁶ In response to Beehive's own claim that its switching equipment and litigation expenses were so high because of its arrangement with JEI, the Commission also directed it to explain these expenses in detail.⁷

Furthermore, the Commission put Beehive on explicit notice that,

⁵ Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada, Tariff F.C.C. No. 1, Tr. No. 8, CC Docket No. 97-249, Order Designating Issues for Investigation (rel. Mar. 13, 1998).

⁶ Id. at paras. 9-10. Beehive's claim (Petition at 8-9) that it did not have an opportunity to explain its accounting entries for expenditures made to toy stores, dentists and the Immigration and Naturalization Service, to name a few, is particularly specious because AT&T identified these entries in its Opposition to its Direct Case, and Beehive could have addressed them in its rebuttal.

⁷ Id. at para. 10(d) and (e).

Failure to provide convincing explanations and justifications of these expense levels may result in prescription of rates that are just and reasonable, and these rates may reflect large disallowances of certain costs claimed by Beehive. If Beehive fails to justify its high costs, the Commission may prescribe rates using a methodology similar to that used in the Beehive Tariff Investigation Order (referring to the January 6, 1998 order prescribing rates based on Beehive's inadequate justification for its proposed 1997 annual access rates).

Accordingly, Beehive's argument that it somehow failed to understand that it was required to respond to the Commission's designated issues to meet its burden of proof under Section 204(a) of the Act to show that its proposed rates were reasonable is baseless. The data Beehive did submit, as the Commission found, were inconsistent, questionable and unexplained, and included entries which, on their face, did not appear related to legitimate business expenses.⁸

These rampant anomalies in Beehive's data led the Commission to find that, as a whole, there were substantial questions of whether Beehive's apparent lack of a regular accounting system, which it is required to maintain, leaves ratepayers unprotected from paying imprudent expenses or expenses unrelated to regulated interstate access service.⁹ Having failed to meet its burden to explain the basis for its expenses in its Direct

⁸ June 1 Order at paras. 13-15.

⁹ Id. at para. 16.

Case, as it was ordered to do, Beehive asserts that it was treated unfairly because the Commission did not invite Beehive to engage in ex parte communications with Commission staff to discuss the discrepancies. Petition at 11. However, as the Commission has found already with regard to Beehive's 1997 annual access tariff, although ex parte presentations are permitted in a tariff investigation, neither Beehive nor any other carrier is entitled to discuss a Commission investigation with the Commission staff.¹⁰ To the contrary, the burden rests on the carrier under investigation to respond to the issues in its Direct Case, which Beehive failed to do.

Beehive further attempts to evade its burden of proof obligation by arguing that the Commission committed factual and legal errors by failing to presume that Beehive's extraordinary litigation expenses were justified. Petition at 16-22. Although the Commission has held in its Litigation Costs Order that the ratemaking process will presume that the carrier incurred litigation costs (other than for antitrust violations) in the ordinary course of business and that they benefited ratepayers,¹¹ Beehive ignores that the Commission has also held that presumptions of lawfulness do not survive

¹⁰ Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada, CC Docket No. 97-237, Tr. No. 6, Order on Reconsideration (rel. May 6, 1998), at para. 14.

¹¹ 12 FCC Rcd 5105, 5144 (1997).

if a tariff is set for investigation.¹² Beehive therefore still had the burden of proof under Section 204(a)(1) of the Act to show that its rates are just and reasonable, and to the extent that it sought to recover significant legal expenses, it had to show that its litigation costs were prudent and benefited ratepayers.¹³

Beehive did not make such a showing with respect to most of the legal expenses it sought to recover in its proposed rates. In fact, after multiple opportunities to justify its litigation expenses associated with the shareholder suit, which was undertaken to maintain Arthur Brothers' control of the company, and the contract dispute against James Ball, Beehive has still failed to demonstrate that they were related in any way to legitimate business interests. Accordingly, Beehive is therefore unlikely to prevail in its arguments that all the costs associated with them are properly recovered in its rates.

B. Irreparable Harm.

Beehive also clearly will not suffer irreparable harm if the Commission does not stay the June 1 Order. Other than making a conclusory statement that its

¹² Policies and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3253 (1989).

¹³ Accounting for Judgments and Other Costs Associated with Litigation, 12 FCC Rcd 5112 (1997) ("Litigation Costs Order").

operating income will not be sufficient to cover its expenses if it refunds a portion of the excessive rates it has imposed since the beginning of 1998 (Motion at 3-4), Beehive has made no showing that its expenses preclude the refund.¹⁴ To the contrary, the Commission has found already that Beehive has consistently collected a rate of return, for local switching, to which it claims a significant portion of its expenses are attributable,¹⁵ which is far in excess of the Commission's lawful rate of 11.25 percent. Specifically, its reported interstate rate of return for local switching increased from 12.2 percent in 1994 to 111 percent in 1995 and 65 percent in 1996.¹⁶ Indeed, it has not shown in any detail whatsoever why its earnings will not allow it to reasonably refund the several months of overcharges the Commission ordered. Moreover, even if Beehive were to experience lost earnings, the Commission has found that economic loss, in

¹⁴ Beehive's refund plan consists of a statement by Beehive that it will implement the refund sometime after March 1999 "if it can," or else carry out the Commission ordered refund over a period of six years, beginning on May 20, 1999. Letter to James D. Schlichting from Pamela Gaary, July 1, 1998. This letter, which amounts to de facto contempt of the Commission's Order, shows further that Beehive has not supported its claims that it will be harmed by having to refund its unlawful rates.

¹⁵ See Beehive Direct Case, CC Docket No. 97-249, Tr. No. 8. (filed Apr. 6, 1998), at 7, 10-11.

¹⁶ Beehive Telephone Company, Inc., Beehive Telephone, Inc., Nevada, CC Docket No. 97-237, Tr. No. 6, Memorandum and Order (rel. Jan. 6, 1998), at para. 13.

and of itself, does not constitute irreparable harm for purposes of analyzing a stay.¹⁷

Beehive's claim that the Commission failed to consider the higher than average costs it incurs as a result of the rural nature of its service territory is similarly meritless. Motion at 4. The Commission was clear that in order to account for the possibility that Beehive is a high cost carrier, which is as yet unproven by Beehive, it used the highest ratio for NECA companies of total expense to total plant in service of 25 percent to calculate Beehive's interstate revenue requirement.¹⁸ Beehive has not shown why this percentage is inadequate.¹⁹

C. Harm To Other Parties And The Public Interest.

Finally, Beehive's argument that neither its customers nor the public interest will be harmed by a grant of the stay is also baseless. Motion at 4-6. Again, Beehive offers nothing but a conclusory assertion that its local subscribers will suffer as a result of the

¹⁷ See, e.g., Price Cap Regulation of Local Exchange Carriers Rate of Return Sharing and Lower Formula Adjustment, 10 FCC Rcd 11979, 11979 (1995).

¹⁸ June 1 Order at para. 24.

¹⁹ The Commission should also reject out of hand Beehive's frivolous attack (Motion at 4) that the Commission found Beehive's rates to be unlawful because of a "bias" it has against Beehive as a result of unrelated litigation between the Commission and Beehive currently pending in the D.C. Circuit.

severe economic impact of a refund. Equally important, however, is Beehive's failure to address how its interstate access customers will be affected by a stay. The Commission has found that in the analysis of stay requests, the interests of both customers and the public interest generally are at least as important as the claims of irreparable harm to the carrier requesting the stay.²⁰ Indeed, when taking the interests of customers into account, the Commission has recognized that a stay denies the immediate benefit to ratepayers that the Commission seeks to provide when it issues a rate order.²¹ Contrary to Beehive's arguments, refund payments to interstate access customers made at some unknown time in the future will not undo the adverse effect that these rates have had. Accordingly, the most efficient remedy, as contemplated by Section 204(a)(1) of the Act, is to refund the overcharges to the affected customers at the conclusion of the investigation.

²⁰ Access Charge Reform, Price Cap Performance Review for Local Exchange Carrier; Transport Rate Structure and Pricing, End User Common Line Charges, 12 FCC Rcd 10175, 10191 (1997).

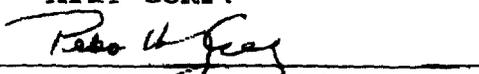
²¹ Id.

WHEREFORE, for the foregoing reasons, Beehive has failed to meet any of the elements required to justify a stay of the Commission's June 1 Order, and its motion should be denied.

Respectfully submitted,

AT&T CORP.

By



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CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 7th day of July, 1998, a copy of the foregoing "Opposition to Motion for Stay" of AT&T Corp. was served by U.S. first class mail, postage prepaid, to the parties listed below.

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