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BEFORE THE ARIZONA CORPORATION COMMISSION

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ARIZONA CORPORATION
COMMISSION
Complainant.

DOCKET NO. T-01051B-02-0871

v.

QWEST CORPORATION
Respondent.

AT&T'S RESPONSE TO MTI'S
MOTION FOR INJUNCTION

AT&T Communications of the Mountain States, Inc. ("AT&T") hereby responds to the Motion for Injunction filed by Mountain Telecommunications, Inc. ("MTI").

I. INTRODUCTION

MTI seeks:

to enjoin Qwest Corporation ("Qwest") from charging unjust and unreasonable prices to MTI for unbundled network elements. MTI further requests the Commission to stay the effective date of the interim rules for pricing transport facilities established in Decision No. 64922, issued June 12, 2002, until such time as the Commission issues final rules regarding the pricing of transport facilities.¹

MTI alleges that the transport rates approved by the Commission in Decision No. 64922 are unreasonable because the cost to MTI for transport has gone up. Motion at 5-7.²

MTI also alleges that the record in the cost docket is insufficient to support the

¹ Motion at 1 (footnote omitted). MTI's footnote cited the Commission's cost proceeding, Docket No. T-00000A-00-0194.

² MTI also requests that Qwest be required to comply with Decision No. 64922 with respect to loop rates. Motion at 4 and 9.

Commission's decision on transport rates. *Id.* at 3. Essentially, MTI does not like the Commission's decision in the cost proceeding and seeks to prevent the implementation of Decision No. 64922 as it relates to transport rates.

Except for MTI's request to require Qwest to implement the new loop rates ordered in Decision No. 64922, MTI's Motion is nothing more than a collateral attack on the Commission's Decision No. 64922, and the Motion must be denied. Furthermore, the Commission does not have the authority to grant the relief requested in this proceeding.

II. ARGUMENTS

A. **A.R.S. § 40-252**

A.R.S. § 40-252 is explicit: "In all collateral actions or proceedings, the orders and decisions of the Commission which have become final shall be conclusive." MTI seeks to enjoin Qwest from implementing a Commission order and stay the same order in an unrelated proceeding. Therefore, based on a strict reading of the statute, MTI's Motion must be denied.

The Arizona courts have had an opportunity to review A.R.S. § 40-252. "An application to the Commission to rescind,³ alter or amend an order pursuant to A.R.S. § 40-252 does not constitute a collateral attack upon an order of the Commission." *Davis v. Corporation Commission*, 96 Ariz. 215, 219; 393 P. 2d 909, 911-912 (1964). The Arizona Court of Appeals has held that A.R.S. § 40-252 allows the Commission to change an order or decision; however, the statute requires the Commission to provide notice and an opportunity to be heard to the affected corporations. *Tonto Creek Estates*

³ However, see *Mountain States Telephone and Telegraph Company v. Arizona Corporation Commission*, 124 Ariz. 433, 436; 604 P. 2d 1144, 1147, (Ariz. Ct. App. 1979), *reh'g. and rev. denied*, which prohibits retroactive rate determinations and reparations. ("When an agency approves a rate, and the rate becomes final, the agency may not later on its own initiative or as the result of collateral attack make a retroactive determination of a different rate and require reparations.")

Homeowners Association v Arizona Corporation Commission; 177 Ariz. 49, 56; 864 P. 2d 1081, 1088 (Ariz. Ct. App. 1993). (“The Commission may at any time, upon notice to the corporation affected, and after opportunity to be heard as upon a complaint, rescind, alter or amend any order or decision made by it.” A.R.S. § 40-252.)

The Court of Appeals expounded on the notice requirement contained in A.R.S. § 40-252. The Court held that actual notice is required. Presence at the hearing does not serve as notice, and “obtaining actual notice of the charges while seated in the very hearing convened to decide the issues would not afford the parties a meaningful opportunity to be heard.” Nor does being called as a witness demonstrate actual notice. *Id.* at 1090. The Court also held that A.R.S. § 40-252 requires at least ten days notice pursuant to A.R.S. § 40-246. *Id.* at 1089.⁴

If the Commission elects to alter or change Decision No. 64922 on its own initiative, it must give all the affected parties 10 days notice that it is going to amend or alter its prior decision. It must then give the parties an opportunity to be heard consistent with A.R.S. § 40-246 and its rules of practice. Otherwise, MTI must file an application to reopen the record in the cost docket, giving notice of its application to all the parties in the cost proceeding. If the Commission elects to reopen the record in the cost case based on MTI’s motion, due process must be followed before the Commission amends or alters its decision.

⁴ The Court noted that A.R.S. § 40-246 allows notice on less than 10 days if the Commission “finds that the public necessity requires that the hearing be held at an earlier date.” *Id.*

B. The Commission Does Not Have Authority To Enjoin Qwest From Implementing The Decision Or To Stay Its Decision

“The Corporation Commission has no implied powers and its powers do not exceed those to be derived from a strict construction of the Constitution and implementing statutes.” *Commercial Life Ins. Co. v Wright*, 64 Ariz. 129, 139; 166 P. 2d 943, 949 (1946).⁵ The corporation commission in rendering its decision acts judicially.” *Southern Pacific Company v Arizona Corporation Commission*, 98 Ariz. 339, 346; 404 P. 2d 692, 697 (1965). Due process of law “requires that there be notice of hearing, a hearing, the right to produce witnesses and to have a full consideration and determination according to evidence before the body with whom the hearing is held.” *Id.*⁶

A review of the Arizona Revised Statutes does not provide any authority to the Commission to enjoin Qwest from implementing the Commission’s Decision or to stay the Decision. The Arizona Revised Statutes addresses injunctive relief in several sections. A.R.S. § 40-360.5 & 40-422. However, both these sections require the Commission to seek such relief by commencing an action in superior court. No specific statutory authority is granted to the Commission to grant injunctions. Although the Commission has authority to enter orders that affect public service corporations, those orders can only be entered after following due process of law.

The Arizona Revised Statutes provide the Commission authority to issue a stay in one specific situation – when an application for rehearing is received. A.R.S. § 40-253. No other statutory authority is given to the Commission to grant a stay.

⁵ “The legislature may enlarge its powers and extend its duties but may not decrease its powers.” *Garvey v Trew*, 64 Ariz. 342, 347, 170 P. 2d 845, 848 (1946).

⁶ In *Salt River Valley Water Users’ Ass’n v Green*, the Arizona Supreme Court held that a general order adopting the National Electric Safety Code as a rule and regulation of the Commission was ineffective against the Association because at the time the general order was adopted, no notice was given to the Association of the pending rule. 39 Ariz. 508, 8 P.2d 255 (1932).

The language of A.R.S. § 40-252 also supports the position that the Commission cannot enjoin or stay its orders. A.R.S. § 40-252 states that a Commission can rescind, alter or amend its orders only after providing notice to the affected corporations and providing an opportunity to be heard “as upon complaint.”⁷ The provisions of the statute contemplate that all affected parties will receive notice and the Commission will create a record to support any order rescinding, altering or amending a prior decision.⁸

C. Granting MTI’s Request Would Not Only Be Unlawful, It Would Be Inequitable

MTI’s Motion should also be denied on equitable grounds. At the procedural conference held January 27, 2002, MTI admitted that it had knowledge of the cost proceeding and chose not to participate. It weighed the benefits of participating versus the risks of not participating. Based on statements made by MTI at the procedural conference, it appeared to AT&T that it was assuming other parties would protect its interests.⁹ Only MTI can look out for MTI’s interests. By deciding not to participate, it gave up the right to put in evidence, file exceptions to the recommended decision, appear at the open meeting and file an application for rehearing. All of these procedural rights are in place to assure a party’s interests are considered by the Commission in its deliberations. Now, after the results of the Commission’s decision finally are being implemented, MTI is unhappy, has filed its complaint in an unrelated proceeding and seeks to enjoin Qwest from complying with the Commission’s Decision, based on

⁷ It appears the language “as upon complaint” refers to A.R.S. § 40-246. See *Tonto Creek Estate Homeowners Association at 1089*. The Commission also has rules of procedure that govern complaints. Ariz. Adm. Code Title 14, Ch. 3, Art. 1. See R14-3-101, for specific applicability of the rules to cases arising under Title 40, Arizona Revised Statutes.

⁸ In other words, the Commission cannot simply rely on MTI’s assertions in its Motion that it will pay more under the new rates.

⁹ It appears to AT&T that MTI thought that the other competitive local exchange carriers (“CLECs”) would have similar interests to MTI and that any order would affect all CLECs similarly. This is not always the case, as the present circumstances demonstrate.

evidence and arguments it could have made in the cost proceeding had it elected to participate. The equities do not support MTI's request for relief in this proceeding.¹⁰

III. CONCLUSION

The Commission does not have any legal authority to grant MTI's request in this proceeding. A.R.S. § 40-252 prohibits MTI's requests as a collateral attack on the Commission's Decision No. 64922.

There are two options: one, the Commission can review Decision No. 64922 on its own initiative; or, two, MTI can file an application to reopen the record in the cost case docket. Phase III in the cost proceeding will address MTI's concerns. If the Commission has any concerns it can order the Administrative Law Judge to expedite the procedural schedule for Phase III.

Case law is clear that the Commission cannot change the order without notice to all the affected parties and providing the affected parties an opportunity to be heard *as upon complaint*.

Respectfully submitted this 31st day of January, 2003.

**AT&T COMMUNICATIONS
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By: 

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¹⁰ The only equity in MTI's favor is had Qwest implemented the order sooner, MTI could have brought the matter to the attention of the Commission sooner. But, this alone, does not legally justify granting MTI's relief in this proceeding.

CERTIFICATE OF SERVICE
(T-01051B-02-0871)

I certify that the original and 13 copies of AT&T Communications of the Mountain States, Inc.'s Response to MTI's Motion for Injunction were sent by overnight delivery on January 31, 2003 to:

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