

**ORIGINAL**

**OPEN MEETING ITEM**

COMMISSIONERS  
GARY PIERCE - Chairman  
BOB STUMP  
SANDRA D. KENNEDY  
PAUL NEWMAN  
BRENDA BURNS



ERNES  
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ARIZONA CORPORATION COMMISSION RECEIVED

DATE: MARCH 14, 2011

2011 MAR 14 A 11: 26

DOCKET NO.: T-20595A-08-0278

AZ CORP COMMISSION  
DOCKET CONTROL

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Teena Jibilian. The recommendation has been filed in the form of an Opinion and Order on:

ATC OUTDOOR DAS, LLC  
(CC&N)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

MARCH 23, 2011

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

MARCH 29, 2011 and MARCH 30, 2011

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

Arizona Corporation Commission  
**DOCKETED**

MAR 14 2011

DOCKETED BY

ERNEST G. JOHNSON  
EXECUTIVE DIRECTOR

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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 GARY PIERCE - Chairman  
4 BOB STUMP  
5 SANDRA D. KENNEDY  
6 PAUL NEWMAN  
7 BRENDA BURNS

8 IN THE MATTER OF THE APPLICATION OF  
9 ATC OUTDOOR DAS, LLC FOR APPROVAL  
10 OF A CERTIFICATE OF CONVENIENCE AND  
11 NECESSITY TO PROVIDE NON-SWITCHED  
12 LOCAL TRANSPORT SERVICES FOR  
13 WIRELESS CARRIERS IN ARIZONA.

DOCKET NO. T-20595A-08-0278

DECISION NO. \_\_\_\_\_

OPINION AND ORDER

14 DATE OF HEARING: February 23, 2011  
15 PLACE OF HEARING: Phoenix, Arizona  
16 ADMINISTRATIVE LAW JUDGE: Teena Jibilian  
17 APPEARANCES: Mr. Michael Hallam, LEWIS & ROCA LLP, on behalf  
18 of ATC Outdoor DAS, LLC; and  
19 Ms. Ayesha Vohra, Staff Attorney, Legal Division, on  
20 behalf of the Utilities Division of the Arizona  
21 Corporation Commission.

22 **BY THE COMMISSION:**

23 \* \* \* \* \*

24 Having considered the entire record herein and being fully advised in the premises, the  
25 Commission finds, concludes, and orders that:

26 FINDINGS OF FACT

27 Procedural History

28 1. On May 30, 2008, ATC Outdoor DAS, LLC ("ATC Outdoor" or "Company"), filed  
with the Arizona Corporation Commission ("Commission") an application for a Certificate of  
Convenience and Necessity ("CC&N") to provide non-switched local transport services for wireless  
carriers throughout Arizona.

2. On July 7, 2008, the Commission's Utilities Division ("Staff") filed its First Set of  
Data Requests and on August 5, 2008, the Company docketed responses to those Data Requests.

1           3.     On November 5, 2010, Staff filed its Staff Report recommending approval of the  
2 Application.

3           4.     On November 30, 2010, by Procedural Order, a hearing was scheduled on the  
4 application for February 23, 2011, notice of the hearing was ordered, and other filing deadlines were  
5 established.

6           5.     On January 12, 2011, an Affidavit of Publication was docketed, indicating that the  
7 Company caused notice of the application to be published in *The Arizona Republic*, a newspaper of  
8 statewide circulation, on December 22, 2010.

9           6.     No public comments or requests for intervention were filed in the docket.

10          7.     The evidentiary hearing on the application convened as scheduled on February 23,  
11 2011, before a duly authorized Administrative Law Judge of the Commission. The Company and  
12 Staff appeared through counsel and presented evidence through the sworn testimony of witnesses.  
13 No members of the public appeared to provide comment.

14 **Fitness and Properness to Obtain a CC&N**

15          8.     ATC Outdoor, founded on December 20, 2007, is a Delaware limited liability  
16 company in good standing with the Commission's Corporations Division. ATC Outdoor's corporate  
17 officers and directors are Gerard Ainsztein, Senior Vice President, and Daniel Wojciechowski, Vice  
18 President. ATC Outdoor is wholly owned by SpectraSite Communications LLC. SpectraSite  
19 Communications LLC is wholly owned by SpectraSite, LLC. American Tower Corporation  
20 ("American Tower") is the sole member and manager of SpectraSite, LLC.

21          9.     American Tower, ATC Outdoor's ultimate parent, is publicly traded on the New York  
22 Stock Exchange and owns and operates over 30,000 wireless and broadcast communications sites in  
23 the United States, Mexico and Brazil. American Tower merged with SpectraSite Communications,  
24 Inc. in 2005. American Tower and its subsidiaries are currently authorized to conduct business in all  
25 50 states, and have a total of 991 employees in the United States.

26          10.    ATC Outdoor has neither had an application for authority to provide service denied,  
27 nor had its authority to provide service revoked in any state. There are, and have been, no formal  
28 complaint proceedings involving ATC Outdoor.

1           11.     According to the Staff Report, ATC Outdoor is authorized to provide private line  
2 telecommunications services similar to those it intends to offer in Arizona in thirty-one states and the  
3 District of Columbia. ATC Outdoor is currently providing telecommunications services similar to  
4 those it intends to offer in Arizona in Michigan.

5           12.     The Staff Report indicates that Staff contacted fifteen of the jurisdictions in which  
6 ATC Outdoor is authorized to provide service and found that no complaints had been filed.

7           13.     ATC Outdoor is in good standing with the Commission's Corporations Division.

8           14.     Staff's search of the Federal Communications Commission's website revealed that  
9 there have been no formal or informal complaints filed against ATC Outdoor.

10          15.     ATC Outdoor disclosed in its application that its ultimate parent American Tower has  
11 been involved in the following civil matters:

12                   a. American Tower was subject to and in compliance with a stipulated order,  
13                   effectively a consent decree, in the State of California from 2001 through its  
14                   expiration in 2006. The subject of the complaint giving rise to the stipulated  
15                   order was American Tower's failure to file proper forms with Santa Clara  
16                   County under the Emergency Planning and Community Right-to-Know Act of  
17                   1986 ("EPCRA") and other environmental statutes relative to its fuel storage  
18                   and underground tanks. The stipulated order stated that American Tower was  
19                   in substantial compliance with the code sections alleged in the complaint, and  
20                   that there had not been any known significant release of a hazardous material  
21                   to the environment as a result of any of the violations alleged in the complaint.

22                   b. In June 2005, the Antitrust Division of the Department of Justice issued Civil  
23                   Investigative Demands concerning American Tower's merger with  
24                   SpectraSite, Inc. According to the Staff Report, the investigation was a routine  
25                   part of the merger transaction, and American Tower fully complied with the  
26                   investigation, which closed on October 24, 2005.

27                   c. In November 2005, American Tower entered into a Facilities Audit Agreement  
28                   with the United States Environmental Protection Agency ("EPA") that

1 provides for payment of penalties as a result of non-compliance with certain  
2 notice and record-keeping requirements. Pursuant to the Facilities Audit  
3 agreement, American Tower conducted audits of approximately 12,500 towers.  
4 American Tower disclosed approximately 200 violations of EPCRA reporting  
5 violations. In November 2008, American Tower paid a penalty of  
6 approximately \$35,000 under the Facilities Audit Agreement, which satisfied  
7 its obligation under the agreement.

8 d. During May-August 2006, American Tower received a letter of informal  
9 inquiry from the Securities and Exchange Commission Division of  
10 Enforcement, a subpoena from the office of the United States Attorney for the  
11 Eastern District of New York, and a Document Request from the Internal  
12 Revenue Service for information concerning stock option granting practices.  
13 American Tower has fully cooperated with all document and information  
14 requests. The investigations have been dormant for more than four years, and  
15 American Tower believes that the agencies have terminated their  
16 investigations.

17 e. In August 2007 American Tower received a request for information from the  
18 Department of Labor with respect to the Company's retirement plan and stock  
19 option granting practices. In a letter dated September 11, 2008, the  
20 Department of Labor indicated that its review was concluded and that it  
21 contemplated no further action.

22 f. In 2008, American Tower settled a securities class action suit filed in the  
23 United States District Court for the District of Massachusetts, and in 2009, the  
24 dismissal of shareholder derivative lawsuits filed in 2006 was upheld by the  
25 Massachusetts Supreme Judicial Court.

26 **Technical Capabilities**

27 16. ATC Outdoor's top two executives, combined, have 28 years of experience in the  
28 telecommunications industry.

1           17.    ATC proposes to offer non-switched local transport and backhaul services of voice  
2 and data signals, leased on a long term basis, similar to the private line services offered on a  
3 competitive basis by other telecommunications providers in Arizona, primarily for wireless telephony  
4 and data providers throughout the State of Arizona. ATC Outdoor's services will be offered through  
5 a Distributed Antenna System ("DAS") network. Its radio frequency ("RF") transport services will  
6 use optical technology, including multiwavelength optical technology. RF transport services will  
7 connect customer-provided wireless capacity equipment to customer-provided or ATC Outdoor-  
8 provided bi-directional RF-to-optical conversion equipment at a hub facility. The hub facility can be  
9 customer-provided or ATC Outdoor-provided. The conversion equipment will allow ATC Outdoor  
10 to accept RF traffic from the customer and then transmit bi-directional traffic across the appropriate  
11 optical networks. At the remote end, ATC Outdoor or the telecommunications company will provide  
12 RF-to-optical conversion equipment to allow bi-directional conversion between optical signals and  
13 RF signals. RF signals can be received and radiated at this remote node.

14           18.    ATC Outdoor will not provide voice services or dial tone local exchange  
15 telecommunications services.

16           19.    ATC Outdoor currently does not have any employees that are exclusively dedicated to  
17 ATC Outdoor's operations. American Towers, Inc., an affiliate of ATC Outdoor, has employees in  
18 Arizona who dedicate their time to addressing the needs of both companies.

19           20.    ATC Outdoor does not plan to have a customer service center or employees in  
20 Arizona. However, services and operations to Arizona customers will be handled by employees of  
21 American Towers, Inc., which has employees in Arizona. ATC Outdoor's Arizona customers will  
22 have access to a customer hotline 24 hours a day, seven days a week.

23           21.    Based on its analysis of the application and its investigation, Staff concluded that ATC  
24 possesses the technical capabilities to provide the services it is requesting authority to provide.

#### 25 **Financial Resources**

26           22.    ATC Outdoor indicated in its application that it will rely, in large part, upon the  
27 financial resources of its parent American Tower to provide services in Arizona. ATC Outdoor  
28 provided Staff with audited consolidated financial statements, with notes, of American Tower for the

1 years ending 2005 through 2009. The financial statements list total assets of over \$8.5 billion; total  
2 equity of over \$3.3 billion; and net income of approximately \$247 million for the full year 2009.

3 23. ATC Outdoor projects total Arizona intrastate revenue of \$1,800,000 for the first  
4 twelve months of service, with total intrastate operating expenses of \$1,080,000 for the same period.  
5 The Company stated in the application that it does not plan to deploy a system until it has a customer  
6 under contract.

7 24. ATC Outdoor projects a net book value of \$0 for all Arizona jurisdictional assets used  
8 to provide telecommunications services to Arizona customers for the first 12 months of service.  
9 Currently, ATC Outdoor has no Arizona jurisdictional assets.

#### 10 **Competitive Services/Proposed Rates**

11 25. ATC requested that its proposed services be classified as competitive because it  
12 intends to provide point-to-point transport and backhaul private line telecommunications service  
13 leased on a long term basis, similar to the private line services offered on a competitive basis by other  
14 telecommunications providers in Arizona.

15 26. Staff stated that ATC Outdoor would be providing private line service as a new entrant  
16 in areas where it would face competition from both an incumbent local exchange carrier ("ILEC"),  
17 along with various competitive local exchange carriers ("CLECS") and interexchange carriers  
18 ("IXCs"). Staff stated that IXCs and ILECs hold a substantial share of the private line service  
19 market, and a number of CLECs have been authorized to provide private line service or substantially  
20 similar service. Staff stated that ATC Outdoor will have to compete with several existing companies  
21 in order to obtain customers, and as such, the Company would generally not be able to exert market  
22 power.

23 27. Staff recommends that ATC Outdoor's proposed services be classified as competitive  
24 because there are alternatives to ATC Outdoor's services, ATC Outdoor will have to convince  
25 customers to purchase its services, and ATC Outdoor has no ability to adversely affect the local  
26 exchange or interexchange service markets.

27 28. Staff stated that because ATC Outdoor provides service to customers on a site-to-site  
28 basis, the vast majority of ATC Outdoor's customers are expected to purchase transport and backhaul

1 services under individual case basis ("ICB") contracts, but that ATC Outdoor customers who choose  
2 not to negotiate an ICB contract will be allowed to purchase services in accordance with the rates  
3 established in ATC Outdoor's proposed tariff. Staff reviewed the rates to be charged by ATC  
4 Outdoor and determined that the rates are for highly competitive services targeted for sophisticated  
5 carriers and communications companies who are experienced in negotiating the best market prices for  
6 services and have adequate resources to protect their business interests. Staff noted that ATC  
7 Outdoor's proposed tariff contains initial rates that equal the maximum rates, and that pursuant to  
8 A.A.C. R14-2-1109, the rate charged for service may not be less than the Company's total service  
9 long-run incremental cost of providing the service. Staff determined that ATC Outdoor's proposed  
10 tariff rates are comparable to the rates charged by other carriers operating within the State of Arizona,  
11 and that they are just and reasonable.

12 29. In general, rates for competitive services are not set according to rate of return  
13 regulation. While Staff considered the fair value rate base ("FVRB") information submitted by ATC  
14 Outdoor, Staff did not accord that information substantial weight in its analysis.

15 30. We find that ATC Outdoor's current FVRB is \$0 and that it is too small to be useful in  
16 an analysis of ATC Outdoor's rates.

17 **Performance Bond/Irrevocable Sight Draft Letter of Credit**

18 31. ATC Outdoor does not offer prepaid services, does not collect deposits, and will not  
19 collect advance payments.

20 32. While ATC Outdoor's proposed tariff filed with its application indicated that it might  
21 collect a deposit for service from any applicant or customer whose financial responsibility is not  
22 established to the Company's satisfaction, ATC Outdoor later indicated that it does not intend to  
23 collect deposits from its Arizona customers, and that it will remove the deposit language from its  
24 conforming tariff.

25 33. Staff stated in the Staff Report that because ATC Outdoor is requesting approval to  
26 provide non-switched local transport and backhaul services primarily to other carriers, and not to  
27 individuals or small businesses, and because ATC Outdoor will not be collecting deposits, advances  
28 or prepayments from its customers, Staff does not believe it is necessary for the Company to obtain a

1 performance bond or irrevocable sight draft letter of credit.

2 **Regulatory Requirements**

3 34. Commission rules require ATC Outdoor to file a tariff for each competitive service  
4 that states the maximum rate as well as the effective (actual) price that will be charged for the service.  
5 Under A.A.C. R14-2-1109(A), the minimum rate for a service must not be lower than the total  
6 service long-run incremental cost of providing the service. Any change to ATC Outdoor's effective  
7 price for a service must comply with A.A.C. R14-2-1109, and any change to the maximum rate for a  
8 service in ATC Outdoor's tariff must comply with A.A.C. R14-2-1110.

9 35. A.A.C. R14-2-1107 requires a competitive telecommunications service provider to file  
10 an application for authorization with the Commission before it discontinues service; the rule also  
11 establishes customer notice requirements and other requirements related to discontinuance of service.

12 **Staff's Recommendations**

13 34. The Staff Report recommends that ATC Outdoor's Application for a CC&N to  
14 provide intrastate telecommunications services described herein be approved.

15 35. The Staff Report further recommends:

- 16 a. That ATC Outdoor be required to comply with all Commission Rules, Orders  
17 and other requirements relevant to the provision of intrastate  
18 telecommunications services;  
19 b. That ATC Outdoor be required to notify the Commission immediately upon  
20 changes to its name, address or telephone number;  
21 c. That ATC Outdoor be required to cooperate with Commission investigations  
22 including, but not limited to customer complaints; and  
23 d. That ATC Outdoor be authorized to discount its rates and service charges to  
24 the marginal cost of providing the services.

25 36. Staff further recommends that ATC Outdoor be ordered to docket conforming tariffs  
26 for each service within its CC&N within 365 days from the date of an Order in this matter or 30 days  
27 prior to providing service, whichever comes first, and that the tariffs submitted shall coincide with the  
28 application and state that ATC Outdoor does not collect advances, deposits and/or prepayments from  
its customers.

37. At the hearing, the Company's witness agreed with Staff's recommendations.

**CONCLUSIONS OF LAW**

1  
2 1. ATC Outdoor is a public service corporation within the meaning of Article XV of the  
3 Arizona Constitution and A.R.S. §40-281 and 40-282.

4 2. The Commission has jurisdiction over ATC Outdoor and the subject matter of this  
5 application.

6 3. Notice of ATC Outdoor's application was given in accordance with the law.

7 4. A.R.S § 40-282 allows a telecommunications company to file an application for a  
8 CC&N to provide competitive telecommunications services.

9 5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised  
10 Statutes, it is in the public interest for ATC Outdoor to provide the telecommunications for which it  
11 has requested authorization in its application.

12 6. ATC Outdoor is a fit and proper entity and has the technical capabilities and financial  
13 resources necessary to receive a CC&N authorizing it to provide competitive private line  
14 telecommunications services in Arizona.

15 7. The telecommunications services that ATC Outdoor intends to provide are  
16 competitive within Arizona.

17 8. ATC Outdoor's FVRB is \$0 and is not useful in determining just and reasonable rates  
18 for the competitive services it proposes to provide to Arizona customers.

19 9. Pursuant to Article XV of the Arizona Constitution as well as 14 A.A.C. 2, Article 11,  
20 it is just and reasonable and in the public interest for ATC Outdoor to establish rates and charges for  
21 competitive services that are not less than ATC Outdoor's total service long-run incremental costs of  
22 providing the competitive services approved herein.

23 10. ATC Outdoor's rates, as they appear in the proposed tariff, are just and reasonable and  
24 should be approved.

25 11. Staff's recommendations as set forth in Findings of Fact Nos. 35 and 36 are reasonable  
26 and should be adopted.

**ORDER**

27  
28 IT IS THEREFORE ORDERED that the application of ATC Outdoor DAS, LLC, for a

1 Certificate of Convenience and Necessity to provide competitive private line telecommunications  
2 services within the State of Arizona, is hereby granted approved, subject to the conditions set forth in  
3 Findings of Fact Nos. 35 and 36 and in accordance with the following ordering paragraphs.

4 IT IS FURTHER ORDRED that if ATC Outdoor DAS, LLC, fails to meet the conditions  
5 outlined in Findings of Fact No. 36 within the timeframes therein, the Certificate of Convenience and  
6 Necessity conditionally granted herein shall be considered null and void after due process.

7 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

8 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

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CHAIRMAN		COMMISSIONER
COMMISSIONER	COMMISSIONER	COMMISSIONER

IN WITNESS WHEREOF, I, ERNEST G. JOHNSON,  
Executive Director of the Arizona Corporation Commission,  
have hereunto set my hand and caused the official seal of the  
Commission to be affixed at the Capitol, in the City of Phoenix,  
this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
ERNEST G. JOHNSON  
EXECUTIVE DIRECTOR

DISSENT \_\_\_\_\_

DISSENT \_\_\_\_\_

1 SERVICE LIST FOR: ATC OUTDOOR DAS, LLC

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