

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
HAXTUN TELEPHONE COMPANY,
Complainant,
v.
AT&T CORP.,
Defendant.
File No. E-99-28

ORDER ON REVIEW

Adopted: December 18, 2000

Released: December 20, 2000

By the Commission:1

I. INTRODUCTION

1. In this Order, we deny an Application for Review of an August 10, 2000, order of the Enforcement Bureau (Bureau)2 dismissing without prejudice a complaint filed by Haxtun Telephone Company (Haxtun) against AT&T Corp. (AT&T) pursuant to section 208 of the Communications Act of 1934, as amended (Act).3 Specifically, we agree with the Bureau that Haxtun's claimed damages are not its own but those of a third party, Zonicom, Inc. (Zonicom). Given this finding on one of the key issues apparently referred to the Commission by the district court under the doctrine of primary jurisdiction,4 we concur with the Bureau that it now is appropriate to dismiss Haxtun's complaint without prejudice. This course will give the district court an opportunity to evaluate certain important threshold issues (i.e., standing and party joinder) that previously were not apparent because of Haxtun's failure to make clear the nature of

1 Commissioner Ness did not vote on this item because it was adopted between the expiration of her term and the beginning of her recess appointment.

2 See Haxtun Telephone Co. v. AT&T Corp., Memorandum Opinion and Order, DA 00-1812 (Enf. Bur., rel. Aug. 10, 2000) (Bureau Order).

3 See 47 U.S.C. § 208 (complaints to the Commission). See also 47 C.F.R. § 1.115 (application for review of action taken pursuant to delegated authority).

4 See Haxtun Telephone Co. v. AT&T Communications, Inc., Order and Memorandum of Decision, Civil Action No. 97 N 1484 (D. Colo., filed June 19, 1998) (attached as Exhibit 1 to Answer of AT&T Corp., File No. E-99-28 (filed Oct. 4, 1999) (Answer)).

the damages at issue and the identity of the carrier whose access charges were implicated.

II. DISCUSSION

2. Haxtun raises two issues in its Application for Review. For the following reasons, we find that neither merits reversal of the *Bureau Order*.⁵

3. First, Haxtun contends that the Bureau's factual findings regarding the nature of Haxtun's allegations in the district court are erroneous. According to Haxtun, it consistently has alleged the same facts during the proceedings before the district court and the Commission. In particular, Haxtun asserts that it has contended throughout all of the phases of this dispute that the access charges of Zonicom are at issue, as well as the access charges of Haxtun.⁶ The Bureau concluded otherwise, finding that Haxtun's court assertions characterized the disputed charges as Haxtun's alone, whereas Haxtun's Commission assertions characterized the disputed charges as primarily Zonicom's.⁷

4. The Application for Review merely proffers the same arguments that Haxtun advanced in its pleadings before the Bureau, and the Bureau thoroughly addressed each of them in its order. Our review of the record indicates that the Bureau's conclusions were well-grounded. In this regard, one point bears emphasis. We disagree with Haxtun's contention that the district court was "fully informed" of "Zonicom's . . . role in the case."⁸ As the *Bureau Order* acknowledged, the district court was aware generally of Zonicom's existence.⁹ Haxtun, however, repeatedly asserted in the district court that it was seeking to recover only its own access charges.¹⁰ Given these assertions, Haxtun did not make clear to the district court Zonicom's

⁵ We incorporate by reference the *Bureau Order*'s description of the factual and procedural background pertinent to this proceeding. See *Bureau Order* ¶¶ 2-10.

⁶ See Haxtun Telephone Company Application for Review, File No. E-99-28 (filed Sept. 11, 2000) (Application for Review) at 7-8; Reply of Haxtun Telephone Company, File No. E-99-28 (filed Oct. 6, 2000) (Reply) at 2-3.

⁷ See *Bureau Order*, ¶¶ 16-17.

⁸ Application for Review at 10. See also Reply at 2 ("The bottom line is that the record before the court and before the Commission are not dramatically different.").

⁹ See *Bureau Order* ¶ 14.

¹⁰ This especially was the case in Haxtun's reply in support of its summary judgment motion. See *Haxtun Telephone Co. v. AT&T Communications, Inc.*, Reply Brief in Support of Haxtun's Motion for Summary Judgment, Civil Action No. 97 N 1484 (D. Colo., filed May 4, 1998) (attached as Exhibit 3 to Answer) at 1 ("There is no question that Haxtun billed AT&T for access charges related to telecommunications *traffic* generated by Zonicom's services. There is no evidence, however, to support AT&T's claim that Haxtun billed AT&T for Zonicom access charges."); at 2 (characterizing as lacking basis AT&T's contention that it was billed for "pass-through" charges of Zonicom); at 3 ("Haxtun was the entity providing interexchange carriers such as AT&T with interstate switched access services"); at 5 ("The testimony makes clear that all Zonicom *traffic* was routed through Haxtun's switch, and therefore the access charges incurred in terminating calls by AT&T customers to Zonicom's services were provided by Haxtun and properly billed on its own behalf."); at 5 ("AT&T ordered circuits from Haxtun, and must pay for all traffic that passes through them, including traffic routed to Zonicom's numbers."); at 8-9 ("AT&T cannot deny that all of its traffic – including Zonicom traffic – was terminated by Haxtun on Haxtun's (continued....)");

pivotal role in this matter.¹¹ In sum, we affirm the Bureau's conclusion that Haxtun's assertions before the district court regarding the nature of the charges at issue were fundamentally different from its assertions before the Commission.

5. Second, Haxtun asserts that the *Bureau Order* improperly "refuse[d] to address issues referred to the Commission under the doctrine of primary jurisdiction."¹² We disagree. The district court apparently sought, among other things, the Commission's guidance regarding "whether the charges for which Haxtun seeks payment were actually Haxtun's tariffed access charges or were instead charges from another purported carrier added to Haxtun's bills."¹³ The *Bureau Order* provides such guidance: it essentially finds, on the basis of Haxtun's own new averments, that the only charges now in dispute are Zonicom's, not Haxtun's.¹⁴ Having reached this crucial conclusion, the Bureau then determined that the district court should have the opportunity, if it so chooses, to examine the ramifications of this conclusion before the Commission proceeded any further.

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access tandem switch. Haxtun agrees that its carrier access bills to AT&T included charges for *traffic* generated by Zonicom, but not for Zonicom's access *charges*. Haxtun billed AT&T for its own services at its own tariffed rates."); at 10 ("[T]he evidence clearly establishes that all AT&T traffic terminated on Haxtun's tandem access switch before being routed by that switch to Zonicom or another Haxtun customer. . . . AT&T cannot point to a single access minute of use that was billed by Haxtun, but not provided by Haxtun."); at 11 ("Haxtun billed AT&T for access related to *traffic* attributable to Zonicom, but not for Zonicom's access *charges*. It is this fundamental mischaracterization of the undisputed facts which flaws AT&T's 'pass-through' argument."). See also *Haxtun Telephone Co. v. AT&T Communications, Inc.*, Complaint, Civil Action No. 97 N 1484 (D. Colo., filed July 9, 1997) (attached as Exhibit 7 to Answer) at 1-3, ¶¶ 1, 3, 6, 7, 9 (identifying Haxtun, as the party that provided tariffed switched access services to AT&T, which AT&T refused to pay); *Haxtun Telephone Co. v. AT&T Communications, Inc.*, Plaintiff's Motion for Summary Judgment, Civil Action No. 97 N 1484 (D. Colo., filed Mar. 12, 1998) (attached as Exhibit 39 to Answer) at 2, 3 (same); *Haxtun Telephone Co. v. AT&T Communications, Inc.*, Haxtun's Response in Opposition to AT&T's Motion to Refer This Case to the Federal Communications Commission, Civil Action No. 97 N 1484 (D. Colo., filed Apr. 13, 1998) (attached as Exhibit 22 to Answer) at 2 (characterizing the case as a simple "collection case" in which "AT&T received services from Haxtun; AT&T collected its (and Haxtun's) fees from its customers; AT&T refused to pay fees it owes Haxtun under valid tariffs").

¹¹ Indeed, Haxtun's district court pleadings never directly identified Zonicom as a carrier, as opposed to an end-user customer of Haxtun. Although Commission staff brought this fact to Haxtun's attention nearly a year ago, and Haxtun's counsel promised to provide citations evidencing that Zonicom's carrier status was disclosed in the district court litigation, no such citations have been presented to date.

¹² Application for Review at 3. See *id.* at 3-6; Reply at 3-4.

¹³ See *Haxtun Telephone Co. v. AT&T Communications, Inc.*, Motion of AT&T Corp. to Refer Case to the Federal Communications Commission under the Doctrine of Primary Jurisdiction with Supporting Authority, Civil Action No. 97 N 1484 (D. Colo., filed Mar. 24, 1998) (attached as Exhibit 38 to Answer) at 2. The district court fully granted AT&T's motion for primary jurisdiction referral, but did not specify any particular issues for the Commission to address.

¹⁴ See, e.g., *Bureau Order* ¶¶ 17 ("the only charges remaining in dispute appear to be Zonicom's, not Haxtun's"), 19 ("Haxtun has belatedly revealed that it is seeking damages for an alleged injury suffered by someone else, not Haxtun itself").

6. We agree with the Bureau's decision. It is unusual for the Commission to "look behind" a primary jurisdiction matter, examine circumstances that preceded the referral, decide only one of the referred issues, and determine that it should defer ruling on other issues pending further action by the district court. We believe, however, that the extraordinary circumstances here warrant such an approach. As discussed in the *Bureau Order* and above, the case presented by Haxtun to the Commission differs in significant respects from the case presented by Haxtun to the district court. In light of the new version of the facts presented by Haxtun to the Commission, we can address one of the key questions referred by the court – whether Haxtun's claim is on behalf of itself or Zonicom. Having concluded that Haxtun's claim is on behalf of Zonicom rather than itself, we believe these newly presented facts raise potential threshold issues of standing and joinder that the court may view as significant to whether the judicial proceeding should continue. Under section 207 of the Act, the Commission and the district courts are coordinate enforcers of the common carrier provisions of the Communications Act. In respect for that coordinate role, and to facilitate the fair and effective operation of the primary jurisdiction doctrine in this context, we think it is important to give the court (which retained jurisdiction) an opportunity to consider, if it so chooses, the procedural and jurisdictional ramifications now raised by Haxtun's belated characterization of the case. We reach this decision having first concluded, on the basis of Haxtun's newly presented evidence, that the only charges remaining in dispute are actually Zonicom's, not Haxtun's. As the *Bureau Order* states,¹⁵ if the district court then wishes further guidance, the Commission stands ready to provide it.

III. ORDERING CLAUSES

7. For the reasons discussed above, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), 207, and 208 of the Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 207, and 208, and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review filed by Haxtun Telephone Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹⁵ *Bureau Order* ¶ 23.