

DT 02-147

AMERICA'S DIGITAL SATELLITE TELEPHONE, INC.

Show Cause Proceeding with Regard to Deficiencies in Service and  
Continued Operation as a Public Utility

Order Approving Stipulation and Settlement Agreement

O R D E R N O. 24,074

October 25, 2002

**APPEARANCES:** Eugene F. Sullivan III, Esq. for America's Digital Satellite Telephone, Inc.; Carol P. Kuhnow for Qwest Communications Corp.; Office of Consumer Advocate by F. Anne Ross, Esq. on behalf of residential ratepayers; and Donald M. Kreis and Suzanne Amidon, Esq. for the Staff of the New Hampshire Public Utilities Commission.

**I. INTRODUCTION, BACKGROUND AND PROCEDURAL HISTORY**

This case before the New Hampshire Public Utilities Commission (Commission) concerns a persistent pattern of "slamming" and "cramming," as those terms are defined in RSA 374:28-a and 378:44, III, with regard to the provision of interstate and intrastate long-distance telephone service to New Hampshire customers by America's Digital Satellite Telephone, Inc. (ADST), a Nevada corporation that has been authorized to provide long-distance service in 37 states including New Hampshire.

The Commission granted ADST authority to engage in the business of providing intrastate telecommunications toll services on October 10, 2001 under IXC No. 10-003-01. ADST is a

retail reseller of wholesale telecommunications toll services purchased at wholesale from Qwest Communications.

Customer complaints about ADST began arriving at the Commission on April 23, 2002 and, as of October 4, 2002, well over 100 had been received. The majority of these complaints concerned allegations that the customer's interstate and/or intrastate long-distance telephone service had been switched to ADST without the customer's knowledge or consent - slamming, as defined in RSA 374:28-a. Other complaints have concerned misleading telemarketing efforts and the billing of charges not authorized by ADST's tariff. See RSA 378:44, II (defining "cramming" as "a submission of inclusion of unauthorized, misleading, or deceptive charges for products or services on a customer's utility bill").

The Commission opened this docket when advised by Staff that the various allegations against ADST could constitute prohibited acts under both New Hampshire law as well as the relevant anti-slamming rules of the Federal Communications Commission (FCC) that this Commission has elected to administer in New Hampshire. See 47 CFR 64.1110(a) (authorizing such elections by state utility commissions); see also 47 U.S.C. § 258 (proscribing unauthorized changes in long-distance carriers pursuant to federal law). Order No. 24,035 was entered on

August 13, 2002, directing ADST to show cause why its authority to operate as a public utility in New Hampshire should not be revoked and/or penalties imposed. The Order further directed ADST to cease and desist from any and all violations of the applicable FCC rules and state-law requirements and to mail a copy of the Order to each of its customers on or before August 20, 2002. For the purpose of allowing ADST to show cause why its authority to operate in New Hampshire should not be revoked, the Commission scheduled an evidentiary hearing for September 6, 2002.

Order No. 24,035 appeared in the *Union Leader*, a daily newspaper of statewide circulation, on August 12, 2002. The Office of Consumer Advocate (OCA) entered its appearance in the docket on August 14, 2002. A separate notice of the September 6 hearing appeared in the *Union Leader* on August 20, 2002.

ADST filed a written response to Order No. 24,035 on September 6, 2002. In its September 6 letter, ADST apologized for "the circumstances which led to the issuance" of the Order, including the Company's inability to respond completely and on a timely basis to complaints forwarded to it by the Commission Staff. ADST described itself as a "relatively new entrant" to the long-distance market, contending that "[m]any of the problems the company has encountered in implementing systems to

apply the FCC's rules and process consumer complaints are unquestionably due to [ADST's] start-up status." The Company noted that it had indefinitely suspended telemarketing in New Hampshire as of August 15, 2002, stating that the Company's "immediate focus" would be on resolving all outstanding consumer complaints. ADST asked the Commission to defer the imposition of fines and/or penalties, on the ground that "assessing a fine would potentially cripple the company, which desperately needs at this time to devote its limited resources to upgrading its regulatory compliance activities." The Company proposed that, after the concerns raised in Order No. 24,035 were addressed, it be allowed to resume "fully compliant operations with the concurrence of [Commission] Staff."

Appended to ADST's written response was a point-by-point response to the allegations contained in Order No. 24,035. The Company neither admitted nor denied most of the specific Staff determinations as to the specific consumer complaints then on file, but took the position that "many of these concerns are readily corrected." Attached to the appended response was a script purportedly used by the Third Party Verification (TPV) service used by ADST. See 47 CFR 64.1120 (describing requirement for use of independent third party to verify requests for long-distance carrier changes).

The evidentiary hearing took place as scheduled on September 6, 2002. The Commission heard oral statements from 12 customers with complaints against ADST. In addition, The Commission's Director of Consumer Affairs, Amanda O. Noonan, testified about the number and extent of the complaints against the Company. Ms. Noonan testified that, based upon information received from Qwest, ADST had served a total of 5,213 different telephone numbers in the New Hampshire, with ADST reporting to Quest that ADST had 4,873 customers at one time or another in New Hampshire. Ms. Noonan stated that the number of complaints her department had received about ADST an unusually large (i.e., 100-plus) number, given the number of customers served by this carrier.

Ms. Noonan described a "very consistent pattern" to the complaints. She said the majority of the complaints amounted to allegations of slamming, with other complaints generally falling into the category of telemarketing issues. In these cases, according to Ms. Noonan, the customer duly agreed to switch long-distance providers but did so based on certain incentives and prices that were offered to them but never provided.

Ms. Noonan further indicated that, based upon her consultations with her counterparts in other states, she was aware that ADST was the subject of a similar pattern of consumer

complaints in Indiana, Kentucky, Massachusetts, North Carolina, Ohio and Vermont. She testified that numerous New Hampshire complaints forwarded by the Commission to ADST remained unanswered and that, based upon her review of tape recordings submitted by ADST, the script appended to the Company's September 6 filing was not the script actually used by ADST's TPV service.

Thereafter, the Commission decided to defer the cross-examination of Ms. Noonan and the presentation of evidence by ADST and OCA. The Commission noted that these parties had not received adequate time to prepare their case and suggested that the parties and Staff might profitably engage in further informal discussions prior to the presentation of additional evidence.

ADST provided a statement through counsel, essentially reiterating the positions taken in the Company's September 6 filing. OCA indicated that it was still reviewing the matter and intended to participate fully.

Following the hearing, the parties and Staff conducted a technical session to discuss how the case should proceed. Thereafter, the participants recommended a schedule to the Commission that included two rounds of discovery, culminating with an additional evidentiary hearing on October

21, 2002. The Commission did not accept this recommendation. Instead, the Commission determined that the public interest required a more expedited treatment of the case and, accordingly, approved only one round of discovery with a hearing scheduled for October 4, 2002.

By letter received on September 25, 2002, ADST (1) submitted a motion for confidential treatment of certain materials provided in discovery, and (2) requested a delay in the scheduled October 4 hearing. Staff objected in writing to the request for postponement, which the Commission denied by secretarial letter on September 27, 2002.

The parties appeared for the hearing as scheduled on October 4, 2002, as did Quest Communications. Also present was Damian A. Cipriani, president and sole shareholder of ADST. ADST made an oral motion to dismiss the proceeding, contending in essence that its rights to due process had been violated and that the remedies being considered by the Commission were preempted under the Supremacy Clause of the U.S. Constitution in light of the applicability of the federal Telecommunications Act. On behalf of Mr. Cipriani, ADST invoked the provisions of

RSA 365:16, with regard to any testimony he might provide.<sup>1</sup> The Commission denied the motion to dismiss and ruled that RSA 365:16 did not apply because it had not secured Mr. Cipriani's attendance by subpoena and would not compel him to testify. The Commission then recessed the hearing and directed the parties and Staff to conduct settlement discussions.

These discussions yielded an agreement, which the parties and Staff placed on the record orally. The Commission instructed the parties and Staff to reduce their agreement to writing and, thereafter, the hearing was adjourned.

On October 14, 2002, the Commission issued a secretarial letter noting that well over a week had passed without the filing of a written settlement agreement. Accordingly, the secretarial letter established a deadline of October 16, 2002 for the written document. On that date, ADST indicated by letter that it had submitted its written response to Staff and to OCA with regard to its proposed agreement. The Company also submitted a motion for confidential treatment with regard to a customer list supplied to the Staff. On October 22,

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<sup>1</sup> RSA 365:16 provides: No person shall be excused from testifying or from producing any book or paper in any investigation or inquiry by or upon any hearing before the commission, when ordered to do so by the commission, upon the ground that the testimony or evidence, book or document required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which under oath, after claiming his privilege, he shall by order of the commission have testified or produced documentary evidence.



2002, Staff submitted a Stipulation and Settlement Agreement bearing the signatures of the parties and Staff as well as Mr. Cipriani in his personal capacity.

## **II. TERMS OF THE STIPULATION AND SETTLEMENT AGREEMENT**

The Stipulation and Settlement Agreement filed on October 22, 2002 contains the signatures of Mr. Cipriani in both his personal capacity and his capacity as president and sole shareholder of ADST. Other signatories are counsel to ADST and Mr. Cipriani as well as representatives of OCA and the Commission Staff. The terms of the agreement are as follows:

A. ADST explicitly does not contest, and neither admits nor denies, the allegations of the Commission with regard to slamming in violation of 47 U.S.C. § 258 and RSA 374:28-a, with regard to both interstate and intrastate long distance telephone service provided to New Hampshire customers. Likewise, ADST does not contest, and neither admits nor denies, the allegations of the Commission with regard to cramming within the meaning of RSA 378:46.

B. ADST agreed that it will immediately surrender and relinquish its certificate of authority to provide intrastate long-distance telephone service in New Hampshire. The Company further agreed that it will discontinue the provision of interstate long-distance service to New Hampshire customers and

so inform the FCC. ADST committed itself to winding down and terminating its service to New Hampshire customers in accordance with other provisions of the Agreement, providing temporary service at the rate of \$0.06 per minute. Finally, ADST agreed that it would conduct no further jurisdictional business in New Hampshire without the express written approval of the Commission.

C. The Stipulation and Settlement Agreement contains an express acknowledgement that it is not intended to limit ADST's right to reapply to the Commission for the authority to conduct business in New Hampshire as a reseller of long-distance telephone service.

D. ADST agreed that it would provide the Staff and OCA with a complete and accurate list of its current and past New Hampshire customers, including names, mailing addresses and telephone numbers. In accordance with the agreement, ADST submitted such a list on October 15, 2002.

E. ADST agreed that, on or before 14 days of this Order approving the Stipulation and Settlement Agreement, it will send via certified U.S. Mail a letter to each present and former New Hampshire customer describing ADST's deceptive telemarketing practices and advising each customer of the possibility that the customer may have been the victim of

slamming or cramming. The letter must further advise each customer of the right to obtain relief under federal and state law, informing the customers of whom to contact for relief, the date on which ADST will cease providing service in New Hampshire and the requirement that they contact their local exchange carrier to select a new long-distance carrier or carriers. ADST further agreed that the letter will be in a form acceptable to the Commission and OCA.

F. ADST agreed that, on a Thursday within the two weeks following the entry of this Order, it will cause to be placed in the Union Leader newspaper a half-page vertical advertisement in a form acceptable to the Commission. The purpose of the advertisement is to advise the public that New Hampshire customers of ADST may have been the victim of slamming and cramming and advising such customers of their right to obtain relief under federal and state law. The ad must also advise ADST customers that their service will be terminated 30 days after the date on which this Order is entered.

G. ADST agreed that it would cause Qwest Communications, as its wholesale supplier, to terminate ADST intraLATA and interLATA service to all New Hampshire customers and block the access of these customers to the Qwest toll network 30 days after the date on which this Order is entered,

in a manner consistent with all applicable federal and state requirements.

H. ADST agreed that it will provide relief to each and every New Hampshire customer if such customer has established a prima facie case to the satisfaction of the Commission Staff, upon a review of the TPV tapes, that the customer has been slammed by ADST. The Agreement establishes December 31, 2002 as the deadline for submitting such claims for relief to the Commission. ADST further agreed that the relief it provides will conform to the requirements of 47 CFR 1160 (providing for absolution to customers for charges not yet paid) and 47 CFR 1170 (providing for reimbursement to customers' authorized carriers of 150 percent of all charges paid by customers to ADST). The signatories agreed that these absolution and reimbursement procedures apply to both interstate and intrastate service. ADST agreed that, as to each customer establishing a prima facie case to the satisfaction of the Commission, the company would comply with its obligations under the FCC rules within 30 days of being so advised by the Commission. The Agreement explicitly makes customers responsible for providing ADST and the Commission with the name of their authorized carriers.

I. ADST agreed to correct any overcharges that it has made to New Hampshire customers to the extent such customers establish a prima facie case of such overcharges to the satisfaction of the Commission Staff. The overcharges in question explicitly include but are not limited to charges in excess of the rates set forth in the Company's published tariff, charges that are in excess of those promises to customers during sales solicitations and charges that otherwise constitute cramming as that term is defined in RSA 378:44, III. ADST agreed to correct the overcharges by causing a refund to be issued to such customers within 30 days of being notified of the claim by the Commission. ADST agreed to issue such refunds promptly with regard to all claims that are submitted by the Commission on or before December 31, 2002.

J. ADST agreed to the imposition of a civil fine in the amount of \$201,000 pursuant to RSA 374:28-a and RSA 378:46, with such fine to be suspended so long as ADST complies fully with the commitments it has made in the Stipulation and Settlement Agreement.

K. ADST represented that, as of the date of the Stipulation and Settlement Agreement, it had placed the sum of \$25,000 in escrow by causing the sum to be deposited in the trust account of its New Hampshire counsel, Eugene F. Sullivan

III. The agreement calls for Mr. Sullivan to hold these funds for the purpose of guaranteeing the customer relief provided for elsewhere in the agreement. The funds are to be released by Mr. Sullivan only upon an express determination by the Commission that (1) ADST has otherwise satisfied its obligations under the agreement, in which case Mr. Sullivan must release the funds to ADST, or (2) ADST has failed to perform the obligations outlined in the agreement, in which case the funds shall be released to the Commission for disbursement to aggrieved customers. Under the agreement, the Commission is the arbiter of the appropriate recipient or recipients of the funds placed in escrow.

L. Mr. Cipriani represented that he is the sole shareholder and officer of ADST. He further agreed to guarantee, personally, the payment of up to \$100,000 in ADST's refund liabilities with respect to New Hampshire customers. The guarantee is explicitly in addition to the \$25,000 placed in escrow by ADST. Mr. Cipriani agreed that the Commission may enforce the guarantee as necessary by filing a civil action in the Merrimack County Superior Court. With respect to any such civil action, Mr. Cipriani agreed to submit to the personal jurisdiction of the court and designated Mr. Sullivan as his agent for purposes of service of process.

**III. COMMISSION ANALYSIS**

We consider the proposed Stipulation and Settlement Agreement in the context of our obligation under RSA 374:3 to undertake the general supervision of public utilities in New Hampshire, our obligation under RSA 363:17-a to serve as the arbiter between the interests of the customer and the interests of regulated utilities, our authority under RSA 365:4 and RSA 365:5 to investigate complaints against utilities, our authority under RSA 365:41 to impose civil penalties against public utilities that violate our enabling statutes or orders entered pursuant to such statutes, the prohibition against slamming set forth in RSA 374:28-a and the prohibition against cramming that is codified at RSA 378:46. We note that the anti-slamming statute explicitly authorizes us, after notice and hearing, to withdraw a company's authorization to engage in business upon a determination that slamming has occurred. RSA 374:28-a, IV. We also act pursuant to the authority delegated to us by the FCC under the anti-slamming provision of the Telecommunications Act, 47 U.S.C. § 258, noting that subsection (b) of the provision provides for the imposition of remedies authorized by FCC rule and also makes clear that these remedies "are in addition to any other remedies available by law," including, presumably, state-law remedies.

This is the most egregious case of slamming that has ever been brought to the attention of the New Hampshire Public Utilities Commission. Moreover, the record adduced at the September 6, 2002 hearing demonstrates that ADST did not simply switch numerous customers' long-distance carriers without their permission but also regularly engaged in dishonest telemarketing practices. We refer to the numerous complaints that the Company's telemarketers represented themselves as Verizon, AT&T or some entity other than ADST, offered rebates that were not provided, groundlessly stated that customers were entitled to refunds and offered rates lower than the tariffed ones without actually providing them.

Likewise, the tape recordings of the Third Party Verification process used by ADST suggest that the Company and its verification service have, to say the least, a disregard for the verification process and the policy reasons for requiring such a process. For all we are able to ascertain, the recorded responses of customers, responding to the pre-recorded promptings of the verification service, were in numerous instances simply disregarded.<sup>2</sup>

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<sup>2</sup> We note that ADST's September 6 filing identifies Federal Verifications of 230 Judson Way in Alpharetta, Georgia as ADST's TPV service. Because we did not receive additional evidence at hearing on October 4, we were unable to conduct further investigation on the record as to whether Federal Verifications is a legitimate enterprise, independent of ADST, and whether it is providing similar services to other long-distance providers.



The extent of these practices, relative to and in light of the number of customers ADST has signed up in New Hampshire over approximately a year of doing business in the state, is unprecedented and extremely troubling. We credit Ms. Noonan's testimony that, to have attained the numbers of New Hampshire customers that ADST has, the Company would have had to embark upon a particularly aggressive marketing campaign.

Despite these observations, we note that ADST and Mr. Cipriani have responded appropriately to the allegations against the Company in this investigation. Mr. Cipriani's personal presence at the October 4 hearing gives reason to conclude that ADST desires not only to remain in business but also to transform itself into a long distance provider that abides by the rules. We note a palpable change in the Company's strategy between the September 6 and October 4 hearings, from an initial posture of admitting only to regulatory incompetence and perhaps neglect to a forthright agreement not to contest the extensive allegations of deliberate wrongdoing revealed by the Commission's investigation of the Company. Mr. Cipriani's personal guarantee, while modest in comparison to the extent of the potential relief due New Hampshire customers and the financial penalties to which he could be exposed, nonetheless laudably reflects at least some willingness to shed the

corporate veil and accept personal responsibility for the activities of an entity that is obviously under his complete personal control.

In our view, when faced with a serious slamming and cramming case such as this one, our paramount consideration ought to be making aggrieved New Hampshire customers whole. This objective is more important to us than punishing corporate misdeeds through the imposition of civil penalties. Therefore, we deem it appropriate that the Stipulation and Settlement Agreement holds out the prospect of a \$201,000 forfeiture so as to secure ADST's compliance with its promise to provide appropriate refunds to all New Hampshire customers that the Company has harmed.

Moreover, ADST's agreement to cease doing business in New Hampshire is, in itself, a significant penalty to a Company that has obviously sought to make itself a national presence in the long-distance telephone industry. We note that the Stipulation and Settlement Agreement contains an express reservation of ADST's right to seek reinstatement in New Hampshire. We caution ADST that should it ever make such a request, the Company can expect something other than automatic approval. Rather, we will closely scrutinize the Company's operations so as to satisfy ourselves that New Hampshire

customers will not be subject to the kind of practices the investigation in this case has revealed.

Finally, we wish to add a note of public thanks to the ADST customers who took time out of their schedules to appear at the two hearings we conducted in this case. The public statements were compelling and appreciated. It is our hope that investigations such as these will make it unnecessary for other New Hampshire telephone customers to appear at future Commission proceedings in similarly unfortunate circumstances.

We approve the Stipulation and Settlement Agreement as consistent with the public interest and the applicable statutes and rules. We caution ADST that we will expect letter-perfect compliance with the commitments the Company has made in the agreement, particularly the requirement to provide notice of the availability of relief and the obligation to provide such relief fully and promptly. The suspended fine of \$201,000 is no mere possibility in the event of non-compliance - it is a certainty.

We regret the necessity of entering an Order terminating the authority of a long-distance carrier to do business in New Hampshire. Competition flourishes, consumers benefit and the public interest is well-served when there are more rather than fewer long distance carriers from which to choose. Given the comments and testimony in this proceeding,

however, we are unable to determine that allowing ADST to continue to provide long distance service in New Hampshire serves the public good.

**Based upon the foregoing, it is hereby**

**ORDERED**, that the Stipulation and Settlement Agreement entered into among America's Digital Satellite Telephone, Inc., Damian A. Cipriani, the Office of Consumer Advocate and the Staff of the Commission is hereby APPROVED; and it is

**FURTHER ORDERED**, that this docket shall remain until such time as the Commission determines that America's Digital Satellite Telephone, Inc. has satisfactorily complied with all terms of the agreement approved herein.<sup>3</sup>

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<sup>3</sup> With regard to the pending motions for confidential treatment: RSA 378:43, II provides that a telephone utility may automatically obtain confidential treatment of documents submitted to the Commission when the company represents that the information in the records is not general public knowledge or elsewhere published, that the company has taken steps to prevent dissemination of the information and that the information either pertains to the provision of competitive services or set forth trade secrets or other similarly competitively sensitive information. ADST has made the requisite representations and, accordingly, the motions for confidential treatment are granted. *But see* RSA 378:43, III (noting that Commission may subsequently determine, after notice and hearing, that such representations are incorrect and that data is therefore subject to disclosure under the Right-to-Know Law, RSA 91-A).

By order of the Public Utilities Commission of New  
Hampshire this twenty-fifth day of October, 2002.

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Thomas B. Getz  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Debra A. Howland  
Executive Director & Secretary