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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

IN THE MATTER OF THE PETITION OF )	<b>PETITIONER’S RESPONSE TO THE</b>
ALL AMERICAN TELEPHONE CO., )	<b>DIVISION OF PUBLIC UTILITIES’</b>
INC. FOR A <i>NUNC PRO TUNC</i> )	<b>REQUEST FOR FORMAL</b>
AMENDMENT OF ITS CERTIFICATE )	<b>ADJUDICATION</b>
OF AUTHORITY TO OPERATE AS A )	
COMPETITIVE LOCAL EXCHANGE )	Docket No. 08-2469-01
CARRIER WITHIN THE STATE OF )	
UTAH. )	

Petitioner, All American Telephone Company, Inc. (“All American” or “AATCO”), by and through undersigned counsel, hereby provides the following response to the Division of Public Utilities’ Request for Formal Adjudication.<sup>1</sup>

**BACKGROUND**

On March 7, 2007, the Commission granted All American a Certificate of Public Convenience and Necessity (“CPCN”) authorizing it to operate as a competitive local exchange

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<sup>1</sup> The Division initially filed a Request for Dismissal, or in the alternative, a Request for Formal Adjudication. However, during the Scheduling Conference held on December 3, 2008, the parties agreed that the pertinent issue that need to be decided was whether this matter should be treated as a formal or informal adjudicative proceeding. See Interim Scheduling Order at 2 (“[I]t became apparent that the parties would need a resolution to their dispute as to the nature of these proceedings, i.e., whether they are formal or informal, before any other issues could be resolved.”). Therefore, this response is limited to the

carrier (“CLEC”) within the state of Utah, excluding those local exchanges of less than 5,000 access lines of incumbent telephone corporations with fewer than 30,000 access lines in the state. *See* Docket No. 06-2469-01. As part of the application for its CPCN, All American submitted all the information required by Utah Admin. R746-349-3. *See id.*

Three months later, on June 11, 2007, All American and Beehive Telephone Co., Inc. (“Beehive”) submitted an interconnection agreement to the Commission for approval pursuant to 47 U.S.C. § 252(e)(1). *See* Docket No. 07-051-03. This agreement sets forth the nature of the parties’ relationship. For example, it states:

... All American terminates local telecommunications traffic that originates from Beehive subscribers, and Beehive terminates local telecommunications traffic that originates from All American subscribers.  
... All American provides a point of interconnection in the Beehive service areas, or interconnects with Beehive network via a Beehive tandem switch; and  
... the Parties wish to establish a reciprocal compensation interconnection arrangement that compensates each other for terminating local telecommunications traffic that originates on the other Party’s network.

This interconnection agreement was approved by the Commission on September 10, 2007 pursuant to 47 U.S.C. § 252(e)(4).

If the terms of All American’s CPCN are viewed in isolation, and independently of the interconnection agreement, All American may technically be deemed to lack authority to operate as a CLEC in the area certificated to Beehive. However, by approving the

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issues surrounding this particular dispute.

interconnection agreement, the Commission implicitly authorized All American to operate as a CLEC in Beehive's territory. Therefore, in order to conform All American's CPCN to the Commission's approval of the interconnection agreement, All American has now requested that the Commission amend the March 7, 2007 CPCN *nunc pro tunc*, so as to formalize All American's authority to operate as a CLEC in the area certificated to Beehive. Furthermore, since Beehive has no objection to All American operating as a CLEC within its territory, All American has requested that its Petition be handled as an informal proceeding.

Despite Beehive's consent to All American's Petition, the Division of Public Utilities ("Division") felt the need to conduct discovery in the matter and served two sets of data requests on All American. However, All American contends that this matter should be considered an informal proceeding because the Petition only pertains to the relationship between Beehive and All American and both parties have consented to the proposed amendment. As such, All American contends it is not required to participate in any formal discovery initiated by the Division. *See* Utah Code Ann. §63G-4-203(1)(e) ("[d]iscovery is prohibited" in informal adjudicative proceedings.).<sup>2</sup>

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<sup>2</sup> It should be noted that All American did provide responses to the Division's first set of data requests. However, All American wanted to preserve its position that this matter should be treated as an informal adjudicative proceeding and therefore declined to answer the Division's second set of requests. *See* Division's Motion to Dismiss at Ex. "B". Nevertheless, All American is still willing to meet with the Division *informally* to discuss and concerns it may have regarding the relationship between Beehive and All American. *See* Petitioner's Motion for Extension of Time at Ex. "A". However, it is not willing to stipulate to formal discovery (e.g., formal technical conferences) or to the ability of third parties to intervene.

In response to All American's decision not to participate in formal discovery, the Division filed its Request for Dismissal, or in the alternative, Request for Formal Adjudication. Based on the discussions held in the December 1, 2008 teleconference, it appears that the pertinent issue is whether the Commission should designate this matter as a formal or informal proceeding. If the matter is designated as informal, then the law relieves All American from any discovery obligations.

As will be shown more fully below, the matter must be considered informal because (a) Beehive does not object to All American's ability to operate as a CLEC in Beehive's territory, and (b) the Commission has already determined that the relationship between Beehive and All American is consistent with the public's interest. Therefore, All American respectfully requests that the Division's request for formal adjudication be denied.

## **ARGUMENT**

### **I. Standards for Informal Proceedings**

"When a request for agency action is filed with the Commission and the party filing the request anticipates and represents in the request that the matter will be unopposed and uncontested, ... the request may be adjudicated informally in accord with [Utah Code] Section 63G-4-203...." Utah Admin. R746-110-1. This code section lifts some of the procedural requirements that would ordinarily apply in formal adjudicative proceedings. For example, both discovery and third-party intervention are prohibited in informal proceedings. Utah Code Ann. § 63G-4-203(1)(e) and (g).

In order to designate a matter as informal, “the applicant shall file in support of the request sworn statements and documents as may be necessary to establish the pertinent facts of the matter.” Utah Admin. R746-110-1. Thereafter, the Commission may issue an order “in tentative form not to be effective for a minimum of 20 days after its issuance.” *Id.* The order shall also provide “that any person may file a protest prior to its effective date and that if the Commission finds the protest to be meritorious, the effective date shall be suspended pending further proceedings.” *Id.* This order “shall be served by the applicant upon all persons deemed by the Commission to have an interest or potential interest in the subject matter, and the Commission may require public notice in the form designated by the Commission.” *Id.* Finally, “[a]bsent a meritorious protest, the order shall automatically become effective without further action.” *Id.*

**II. All American’s Petition Should Be Designated as an Informal Proceeding Because Beehive Does Not Oppose the Requested Action.**

In this case, All American has requested a *nunc pro tunc* amendment to its CPCN “so as to grant AATCO the authority to operate as a CLEC in the area certificated to Beehive.” Petition at ¶ 5. Such authority is to be consistent with the terms and conditions set forth in the parties’ interconnection agreement. *Id.* In other words, the only party that will be impacted by All American’s requested relief is Beehive.

Beehive has already filed a pleading in this matter which states that it “has no objection to AATCO receiving retroactive authority to operate as a CLEC in the area certificated to Beehive.” (Beehive Telephone’s Consent to the Petition of All American Telephone Co.).

Based on this consent, All American's Petition specifically requests that this matter be handled informally because the matter is unopposed and uncontested:

Because this petition affects only two parties, AATCO and Beehive, both of whom favor the action requested, the petitioner represents that there is no reasonable expectation of opposition to petitioner's request and therefore requests that the petition be adjudicated informally under Utah Code Ann. § 63-46b-5 and R746-110 of the Commission's Rules.

Petition at ¶ 7.

Besides Beehive, there is no other party that could properly oppose or contest All American's Petition. In fact, state law recognizes that a CLEC's attempt to enter a territory may normally be opposed only by the carrier or carriers that are currently operating in the territory. For example, state law identifies those parties that may intervene when a carrier initially seeks to provide telecommunications services in a new area:

(b) Each telecommunications corporation *holding a certificate to provide public telecommunications service within the geographic area where an applicant is seeking to provide telecommunications service* shall be provided notice of the application and granted automatic status as an intervenor.

(c) An intervening incumbent telephone corporation serving fewer than 30,000 access lines in the state may petition the commission to exclude from an application ... any local exchange with fewer than 5,000 access lines *that is owned or controlled by the intervening incumbent telephone corporation.*

Utah Code Ann. § 54-8b-2.1(3) (emphasis added).

Even state law recognizes that the only entities who would have an interest in opposing a company's entry into a new area are the entities that already provide services in that

particular area. The standard should be no different in this matter. The only entity that will be impacted by an amendment to All American's CPCN is Beehive. Therefore, since Beehive has no objection to the proposed amendment, it should be granted by the Commission via an informal adjudicative proceeding.<sup>3</sup>

### **III. The Commission Has Already Determined That All American's Entry Into Beehive's Territory Would Be in the Public Interest.**

As part of its Request for Dismissal, the Division fails to identify a single entity who would have an interest in opposing All American's Petition. Rather, it makes a generalized argument that All American's requested amendment may not be in the public's interest. In doing so, it references the fact that All American's Petition is the first request in Utah by a CLEC to enter a rural territory currently serviced by an ILEC. In turn, it summarily argues that this arrangement disregards the reasons behind "rural exemption" and "to allow those reasons to be disregarded is unreasonable without hearing and proof that a change is warranted." (Request for Dismissal at 3). However, any issues as to whether All American's activities in the Beehive territory are in the public interest were resolved when the Commission approved the interconnection agreement between the parties. Therefore, the Division's belief that it needs

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<sup>3</sup> On the day this Response was due to be filed, undersigned counsel received a Petition to Intervene that was submitted in this matter by AT&T Communications of the Mountain States, Inc. and TCG Utah (collectively the "AT&T Companies"). However, the Petition to Intervene does not state that the AT&T companies oppose or contest the proposed amendment to All American's CPCN. Rather, it states that the AT&T companies "legal interests will be substantially affected by this proceeding." Therefore, the AT&T companies' attempt to intervene has no impact on whether this should be considered an informal proceeding. *See* Utah Admin. R746-110-1 (request for agency action may be considered informal where the "party filing the request anticipates and represents in the request that the matter will be *unopposed and uncontested*.)

further discovery regarding this issue is moot. It must be emphasized that All American's Petition simply seeks authority to operate in Beehive's territory "to the extent of the terms and conditions of [All American and Beehive's ] interconnection agreement." (Petition at 5). This interconnection agreement was approved by the Commission on September 10, 2007 pursuant to 47 U.S.C. § 252(e)(4).

The Division mischaracterizes the Commission's approval of the interconnection agreement as an "acknowledgment." However, the approval of an interconnection agreement is not a ministerial act. Rather, federal law requires the Commission to make the following findings before such agreements can be approved:

(e) Approval by State Commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted ***shall approve or reject the agreement, with written findings as to any deficiencies.***

(2) Grounds for rejection

The State commission may only reject—

- (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—
- (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
  - (ii) ***the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;***

47 U.S.C. § 252(e) (emphasis added).

In this case, the Commission approved the parties' interconnection agreement via operation of law. This means that the Commission did not feel it was necessary to issue any

written findings detailing deficiencies in the agreement. As such, the Commission implicitly determined that the interconnection agreement was “*consistent with the public interest, convenience and necessity.*” *Id.* at § 252(e)(2)(A)(ii) (emphasis added). If the Commission had determined otherwise, it would have been *required* to reject the interconnection agreement pursuant to federal law.

Based on the foregoing, there is no basis for the Division to further examine whether All American’s entry into Beehive’s territory would be in the public interest. By approving the relevant interconnection agreement, the Commission has already made this determination. Nevertheless, even if the Division’s concerns had not already been resolved, it is clear that the parties’ activities would not violate the policies underlying the so-called “rural exemption.” This is because the rural exemption has no application in instances where the rural ILEC has no objection to a proposed entry into its territory by a CLEC.

Prior to December 31, 1997, state law prohibited a telecommunications corporation from “receiv[ing] a certificate to compete in providing local exchange service within any local exchange with fewer than 5,000 access lines that is owned or controlled by an incumbent telephone corporation with fewer than 30,000 access lines in the state.” Utah Code Ann. § 54-8b-2.1(1). However, this absolute ban on a company’s ability to enter into a rural territory was modified beginning January 1, 1998. *Id.* From that date forward, the State has allowed companies to apply for certificates to compete in rural territories. However, when such an application is filed, an ILEC serving an affected rural territory is allowed to intervene and to

“petition the commission to exclude from an application ... any local exchange with fewer than 5,000 access lines that is owned or controlled by the intervening incumbent telephone corporation.” *Id.* at § 54-8b-2.1(3)(c). The Division may then exclude the affected rural territory if doing so is in the public interest. *Id.*

Based on the forgoing, there is no longer any state policy that presumptively prohibits a CLEC from entering a rural territory that is controlled by an ILEC. Rather, such arrangements are presumed to be in the public interest unless the ILEC intervenes and is able to show why its territory should be excluded. In this case, the ILEC (Beehive) has already consented to All American’s entry into its rural territory, thus eliminating the need for determining whether the rural exemption should apply. While this may be the first instance of a CLEC entering into a rural ILEC’s territory, it does not represent a “major change in policy” as the Division contends. Rather, All American’s entry into Beehive’s territory is consistent with the State’s policy, as reflected in § 54-8b-2.1, because Beehive has not objected.

In sum, the Division’s position that this matter must be adjudicated formally so that it may conduct discovery is without merit. The Division believes discovery is necessary to determine whether All American’s entry into Beehive’s territory is consistent with the public interest. However, the Commission already made this determination when it approved All American’s interconnection agreement with Beehive. Furthermore, All American’s entry into Beehive’s territory does not undermine the so-called rural exemption because Beehive has no objection to such entry. Therefore, since there are no public policy concerns that require the

Division to conduct discovery, the Division's request for dismissal must be denied and this matter should proceed as an informal adjudicative proceeding.

**CONCLUSION**

Based on the foregoing, All American respectfully requests that the Division's Request for Formal Adjudication be denied and that this matter proceed as an informal proceeding pursuant to Utah Admin. R746-110-1.

Dated this 23d day of December 2008.

**JENSON & GUELKER, LLC**

By:

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GARY R. GUELKER  
Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23d day of May 2008, the foregoing **PETITIONER'S RESPONSE TO THE DIVISION OF PUBLIC UTILITIES' REQUEST FOR FORMAL ADJUDICATION** was sent by electronic mail and mailed by U.S. Mail, postage prepaid:

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