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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Petition of All American Telephone Co., Inc., for a *Nunc Pro Tunc* Amendment of Its Certificate of Authority to Operate as a Competitive Local Exchange Carrier within the State of Utah.	Dkt. No. 08-2469-01

OPPOSITION OF BEEHIVE TELEPHONE COMPANY, INC.

TO MOTIONS FOR INTERVENTION

Beehive Telephone Company, Inc. ("Beehive"), submits this pleading in opposition to the motions of AT& T Communications of the Mountain States, Inc., and TCG Utah (the "AT&T Companies" or "AT&T"), Qwest Corporation and Qwest Communications Corporation (the "Qwest Companies" or "Qwest"), the Utah Rural Telecom Association ("URTA"), and the Utah Committee of Consumer Services

(“UCCS”) for intervention in this docket and shows the Utah Public Service Commission (“UPSC” or “Commission”) that the motions for intervention should be denied. In making this showing, Beehive first will review the historical and procedural background to this docket. Beehive then will state the reasons for disallowing participation by the proposed intervenors.

BACKGROUND

On April 19, 2006, All American Telephone Co., Inc. (“All American”), applied for authority to serve as a Competitive Local Exchange Carrier (“CLEC”) in Utah. This was in UPSC Docket No. 06-2469-01. In this application, All American asked for statewide authority, including the territory served not only by Beehive but also by every other rural carrier. Parties in interest in this docket included the Utah Division of Public Utilities (“UDPU”), Qwest, and URTA; the UCCS declined to participate. After negotiations among the parties in interest, a compromise was reached. All American believed that this compromise allowed for a certificate in Qwest as well as Beehive territory. The certificate as granted, however, was limited to Qwest territory. But a certificate, nevertheless, was granted, and by granting this certificate the UPSC necessarily found that All American had met all of the qualifications, financial, technical, and otherwise, to operate as a CLEC, and that such operation was in the “public interest.” *See,* Utah Code, Section 54-8b-2.1. The Commission’s order, issuing the certificate to All American, was not appealed and became final. Hence, that order, including its “public interest” and other findings, by statutory edict, cannot be assailed collaterally in this or any other docket. *See,* Utah Code, Section 54-7-14.

On May 24 and June 11, 2007, and pursuant to 47 U.S.C. Sections 252(a) and 252(e)(1), Beehive filed for approval of certain interconnection agreements with All American. This was in UPSC Docket Nos. 07-051-01, 07-051-02, and 07-051-03. The UDPU, by statute, Utah Code, Section 54-4a-1(1)(a), was entitled to participate and in fact participated in these interconnection dockets as a party in interest. The Qwest Companies, by formal petition and order of the Commission, obtained intervention in these dockets as parties in interest; the UCCS declined to participate. The Qwest intervention petition, moreover, charged that Beehive was going to engage in "traffic pumping," an allegedly unfair telecommunications practice that has been the subject of proceedings before the Federal Communications Commission ("FCC"). Qwest apparently sought to block approval of the proposed agreement between Beehive and All American on this "traffic pumping" ground.

After the filings for approval of the interconnection agreements noted above, the Commission had 90 days within which to approve or disapprove these proposed contracts under the timeline mandated in 47 U.S.C. Section 252(e)(4). Pursuant to Section 252(e)(2)(A), an interconnection agreement may be disapproved if it is not consistent with the "public interest, convenience, and necessity[.]" Those deadlines for disapproval on this or any other ground expired, however, on August 23 and September 10, 2007. As of those dates, the Beehive/All American interconnection agreements were "deemed approved" pursuant to the express terms of Section 252(e)(4). Once again, this Commission, as a matter of law, and notwithstanding the actual intervention and overt objection of Qwest, determined that All American's relationship with Beehive, as manifested in this interconnection agreement, was consistent with the "public interest."

No party sought judicial review of this determination. Hence, the determination became final. As a matter of statutory command, it cannot be challenged collaterally in this or any other docket. *See,* Utah Code, Section 54-7-14.

On May 2, 2008, after realizing that the certificate of public convenience and necessity which the Commission had granted to All American did not embrace the Beehive territory, as originally contemplated, and realizing that this omission created an incongruous circumstance in relation to the Commission's approval of the interconnection agreements noted above, All American filed the instant petition for a *nunc pro tunc* amendment to its certificate.

Because this petition, on one view, triggered application of Utah Code, Section 54-8b-2.1, All American obtained a form of consent from Beehive. Beehive authorized its counsel to sign this form of consent on April 16, 2008,[1] and the form of consent was filed with All American's petition on May 2, 2008. Insofar as the conditions of Section 54-8b-2.1 have relevance to this proceeding or, assuming relevance, remained unmet notwithstanding Beehive's consent, the deadline for adjudicating any and all such issues arising under those conditions expired 240 days after the filing of the petition, or, in other words, on or about January 2, 2009.[2] Although the All American petition had been pending since May 2nd, AT&T, Qwest, and URTA did not seek intervention until December 23rd, 2008, approximately one week prior to the expiration of the 240 day

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[1] Beehive does not necessarily concur in the view that compliance with Section 54-8b-2.1 is required in this proceeding. Signing the form of consent, therefore, was authorized only as a precautionary measure.

[2] Utah Code, Section 54-8b-2.1(3)(d) provides that, "The commission *shall approve or deny* the application under this section *within 240 days* after it is filed. If the commission has not acted on an application within 240 days, the application is considered granted." (Emphasis supplied.)

statutory period. The UCCS did not enter an appearance in the case formally until January 7, 2009, after that period of limitation had lapsed.

In the main, these proposed intervenors, while ignoring the legislature's mandatory time-line, wish to interject the issue of "traffic pumping" into this proceeding. This is an issue which, for the most part, relates to federal tariffs and access charges for interexchange carriers and has minimal or no relevance to a local certification proceeding.[3] As shown below, the FCC and courts have determined that conferencing services, such as those offered by All American, are entirely legal. Moreover, the FCC and courts, while declining to outlaw All-American type operations, have yet to determine what might be an illicit form of "traffic-pumping." Hence, the proposed intervenors are asking the UPSC (1) to displace federal regulatory authorities which have primary jurisdiction of "traffic pumping" issues, (2) to determine what might be an illegal brand of "traffic pumping" (as distinct from All American-type conferencing arrangements which already have been declared legal), (3) after some crystal-ball gazing, to predict that Beehive and All American are going to violate this as yet to be determined

[3] All American has averred that billing disputes between All American and AT&T and other long distance carriers – arising under federal access tariffs which govern those relationships – is the real cause behind the motions for intervention in this docket. Beehive agrees with this characterization. Most of the money at issue between these parties involves the federal tariffs, and, hence, from an economic standpoint, that is what truly drives this contest. The intrastate amounts at stake are minimal or *de minimis* by comparison. Hence, while the UPSC may have jurisdiction to review instrastate "traffic pumping" concerns (if any there be), that is not the real source of controversy which is prompting these motions to intervene. As shown below, there is a rulemaking docket at the FCC treating this issue, and litigation presently is pending in several federal courts where the IXCs are refusing to pay their bills, asserting "traffic pumping" as the basis for denying collection. The question of "traffic pumping," no doubt, will be resolved in these fora, and, accordingly, there seems even less need to introduce this foreign issue into a local docket, preventing the "prompt" and "orderly" resolution of what otherwise would be a simple certification proceeding. Indeed, in litigation between All American and AT&T in New York, a federal judge has cut off further discovery by AT&T into "traffic pumping" allegations in that case. One suspicions that AT&T is attempting to circumvent that ruling by obtaining intervention and doing discovery against All American in the instant docket. In the event, this abuse of process should not be countenanced here.

rule respecting so-called illegal “traffic pumping” and, (4) based upon this prediction, to punish All American pre-emptively with a denial of certification. Beehive respectfully submits that, to the extent that the “traffic pumping” issue hasn’t been mooted already by FCC proceedings and judicial rulings, the Commission should deny intervention and leave the proposed intervenors to their remedies in other fora.

INTERVENTION SHOULD BE DENIED

All of the proposed intervenors, excepting URTA, argue that they should be allowed to participate in this docket because All American, once certificated in Beehive territory, may engage in that “fraudulent,” “unlawful,” and “irregular” activity known as “traffic-pumping.” This argument should be overruled, however, since it proceeds from a false premise as well as sheer speculation. Aside from the speculative, and, hence, non-justiciable character of “traffic-pumping,” this issue largely concerns interstate, inter-exchange access rates and, therefore, is a matter solely within the bailiwick of the FCC. What is more, the FCC and federal courts already have addressed and continue to address the “traffic pumping” issue. In view of that supervening federal jurisdiction and adjudication, there is no need to treat this issue here – even if there is any jurisdiction to do so. Any such treatment by this Commission has the potential to delay unreasonably what should remain as simple, certification procedures. And in all events the claims of these proposed intervenors are either much mooted or the product of unclean hands, and any order of intervention should be conditioned to account for those facts.

(1) **The “Traffic Pumping” Bogeyman.** The proposed intervenors’ false and misleading premise is that conferencing arrangements equate to fraudulent, unlawful, or irregular “traffic-pumping.” All telcos, as profit-seeking businesses, legitimately strive to

increase traffic over their networks. Interexchange carriers like AT&T and Qwest ("IXCs") are no exception in this regard. That undoubtedly is why they use advertising gimmicks and other artificial stimulants in order to garner customers who will rack up minutes of use. However, the IXCs, while claiming the right to increase sales for themselves, don't want to extend the same liberty to others – especially when that might "gore" their "ox." This explains the IXCs' concerted effort to block or limit conferencing services in local exchanges. They are in a competitive market and need to keep their prices down. But conferencing systems may increase traffic which terminates at local exchanges – which, in the event, could cause the IXCs to incur additional access charges. The IXCs may be loath to pass these costs through to their long distance customers – thereby increasing prices -- but the alternative is to absorb the costs without recoupment. This alternative lessens or eliminates their profit margin. In short, the IXCs are having a harder time making money in today's competitive market and they are looking to blame somebody else – local exchange carriers and conference operators -- for their woes. And blaming others (for your own competitive shortcomings) works best when you employ words with flair, like "fraudulent," "unlawful," or "irregular." But calling somebody or something by these names, doesn't make it so.

Indeed, thus far, the FCC, as well as courts, have ruled that the type of conferencing in which All American and others have engaged is neither fraudulent, unlawful, nor irregular; it is entirely legal. The FCC has made four such rulings. Three of these involve AT&T. The fourth involves Qwest. *See, AT&T Corp. v. Jefferson Telephone Co.,* 16 FCC Rcd 161130 (2001); *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.,* 17 FCC Rcd 4041 (2002); *AT&T v. Beehive Telephone Co.,* 17 FCC

Rcd 11641 (2002); *Qwest Communications Corporation v. Farmers & Merchants Mutual Telephone Company,* 22 FCC Rcd 17973 (October 2, 2007). Likewise, the United States District Court for the Southern District of New York recently ruled that AT&T unlawfully was exercising self-help in refusing to pay tariffed charges to All American and others. The Court overruled AT&T's argument that AT&T was excused from abiding by the filed rate doctrine because of allegedly "fraudulent," "unlawful," and "irregular" conferencing arrangements. *See, All American Telephone Company, Inc. v. AT&T, Inc.,* 07 Civ. 861 (WHP), Memorandum & Order (S.D.N.Y., July 24, 2008).[4]

Insofar as competition among IXCs may be impacted negatively by the FCC's current regulatory regime involving access charges, that concern is being addressed in a separate rule-making dockets at the FCC. *See, e.g., In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers,* WC Dkt. No. 07-135, Notice of Proposed Rulemaking, FCC 07-176, released October 2, 2007, published at 72 Fed. Reg. 64179 (November 15, 2007). AT&T, Qwest, and other IXCs are participating in that proceeding and will have ample opportunity and plenty of due process in raising their "traffic pumping" issues there. *See, e.g., Comments of AT&T, Inc., id.* (December 17, 2007). In the event that the FCC determines to implement reforms as a result of its investigations in that docket, however, those reforms, as a matter of long-standing FCC precedent, will have prospective effect only and would not affect present relationships between All American and any other carrier. *See, e.g., Establishing Just and Reasonable Rates for LECs,* 22 FCC Rcd 17989, 17989 (2007).

[4] For the convenience of the Commission, Beehive has attached the All American pleadings and the order of the court in the SDNY litigation as an appendix to this brief. Those pleadings in turn have attached the FCC rulings cited above.

(2) **Intervention Based Upon Sheer Speculation Concerning Future Events Should Not Be Allowed.** Sections 63G-4-207(1)(c) and (d) of the Utah Code require a proposed intervenor to file a petition setting forth "facts" showing that the "petitioner's legal rights or interests are substantially affected by the formal adjudicative proceeding," as well as a "statement of relief that the petitioner seeks from the agency." The proposed intervenors have not complied (and, given the nature of the relief which they seek under the circumstances of this proceeding, cannot comply) with these requirements.

The proposed intervenors argue that (1) Beehive had a relation in the past with Joy Enterprises, (2) this relation was scrutinized by the FCC (implying that there was some illegal "traffic pumping" involved), (3) somebody who was on the board of directors of Joy now is on the board of directors of All American, and (4) this looks awfully sinister, meaning that All American and Beehive well may be planning on conspiring to "pump traffic"(perhaps even in the manner that the FCC in the four decisions cited above and Judge Pauley in his Memorandum & Order found to be entirely legitimate).[5]

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[5] The UCCS pleading, filed January 7, 2009, especially is misleading in this regard. The Committee cites an FCC decision, *In the Matter of AT&T Corporation v. Beehive Telephone Company,* 17 F.C.C.R. 11641 (June 20, 2002) which held that Beehive had over-earned pursuant to its filed tariff for interexchange access charges. Based upon this ruling, the UCCS insinuates that Beehive may be an inveterate law-breaker, likely to violate "traffic pumping" rules. The over-earning issue is irrelevant in this docket, however, not only because certification is proposed for All American, rather than Beehive, but also because the tariff at issue involved federal, not state, issues, and, in any case, is much mooted since Beehive now, for interexchange purposes, is a member of the NECA pool. But most egregious of all, the Committee fails to inform the UPSC that, insofar as "traffic pumping" (the ostensible reason for the proposed intervention in this docket is concerned) the FCC hasn't yet defined a form of "traffic pumping" which may be illegal, and the FCC specifically held, in the very ruling which is cited, that the Beehive-Joy conferencing arrangement in fact was lawful. *Id.* at 11655.

The UCCS pleading, not only is misleading, by omitting to inform the UPSC that, on the exact point at issue, namely "traffic pumping," the FCC has not outlawed any specified behaviors in this regard and the FCC ruling which is cited exonerates Beehive and validates All American-

Putting aside the disturbingly McCarthy-like tenor of the argument ("Are you now or have you ever been associated with a known pumper of traffic?"), and the *non sequitars* stacked one atop another (for example, Qwest may have an affiliation with Joseph Nacchio who has been convicted of insider trading felonies and reportedly is involved with massive accounting irregularities, but surely this does not lead to the conclusion that, Qwest's pleadings in this docket are cloak for fraud), the speculative fear that a telco, once certificated, might violate a "traffic pumping" rule -- if (more speculation) some form of "traffic pumping" ever is given definition as illegal conduct -- cannot be the predicate to allow intervention.

These aren't "facts;" they are speculations and conjectures. There is no "interest" to be "affected," substantially or otherwise, because, to date, the FCC and courts affirmatively have declared that the very conferencing arrangements the proposed intervenors wish to re-argue here are a lawful form of telecommunications service. None of these authorities, moreover, has specified what behaviors might lead to the elusive if not illusory, yet to be defined, "offense" of "traffic pumping."

What the proposed intervenors really want is for this Commission to "investigate" the "problem" of "traffic pumping," duplicating an effort that is ongoing at the FCC, so that they can posture in pending, filed rate litigation in federal courts, attempting to excuse their non-payment of tariffed charges by telling judges that "the matter is under

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type conferencing arrangements, but it also should be stricken as *ultra vires*. The Committee is allowed participation in UPSC proceedings in order to speak for particular classes of utility consumers. These classes of consumers do not include Qwest and AT&T. Beehive is at a loss to understand why the Committee, which surely must struggle, being short-staffed and under-funded, to fulfill its statutory mandate, feels the need to carry water for the IXCs in this docket. Indeed, the UCCS pleading should be stricken on the ground that the Committee, in this instance, has overstepped its limited statutory bounds. Indeed, in the two proceedings where the Committee's statutory mandate specifically applied, it opted against participation.

investigation at the regulatory agencies." This is not a rule-making docket and the Commission should not be in the business of helping the IXCs to dodge payment of legitimate bills incurred pursuant to filed tariffs.

(3) **Problems of Justiciability Argue Against Intervention.** As noted above, the FCC still is deciding how to define "traffic pumping," and, once defined, whether to interdict or otherwise regulate certain types of service arrangements in this regard. Even if a type of service *presently* were defined as "traffic pumping" and clear rules respecting what is allowed or disallowed on that front were established, it is not determinable (without a crystal ball or divination rod) that All American, once certificated, will be engaging in whatever form of conduct ultimately may be proscribed by an FCC or local agency rule. The proposed intervenors, by raising the "traffic pumping" issue in this context, are engaged in a replay of the Tom Cruise movie, "Minority Report," attempting both to proscribe and punish before behavior is criminalized and a crime, based upon such criminalization, is committed. That makes for good Hollywood fantasy but terrible administrative practice. Even if the proposed intervenors are successful in proving that, because a Joy director also is an All American director, Beehive and All American are on the cusp of outlawry, poised to violate an agency rule which is as yet unknown, but which may be promulgated sometime in the next 2 years, why should such "guilt by association" interdict today the competitive entry of All American in Beehive territory? All American satisfies the current requirements for CLEC certification. If there are access charge reforms which the regulators, federally or locally, have jurisdiction to make and in fact implement in the future, there will be time enough to be sure that all carriers,

All American included, abide by those changes. There is no need to attempt to pre-judge unknown and inherently unknowable circumstances at the present time.

(4) **Outstanding Rulings Involving the Same Parties and the "Traffic Pumping" Issue Suggest that There Is No Interest Substantially to be Affected Which Would Warrant Intervention.** As noted above, AT&T already has attempted unsuccessfully to raise a "traffic pumping" defense against All American in New York litigation. A judgment on the pleadings, adverse to AT&T, has been entered in that regard. AT&T and Qwest have been parties to the FCC proceedings, cited above, which ruled that conferencing arrangements of the sort which have been used by Beehive and All American are lawful under federal telecommunications law. Two proceedings before this Commission, now *res judicata,* have resulted in findings that the certification of All American and the interconnection relationship between All American and Beehive were in the "public interest." Qwest was a party to both of those proceedings and expressly raised "traffic pumping" issues in one of them. The orders, judgments, findings, and conclusions in all of these proceedings, the Southern District of New York, the FCC, and in two dockets before this Commission, have resolved the anti-traffic pumping, "public interest" question in All American's favor. Beehive respectfully submits that one bite at the apple is sufficient. These IXCs have had, not just one bite, but no fewer than seven. Whatever the law is at this point respecting "traffic pumping," the proposed intervenors have had ample opportunity to shape and apply that law to All American and Beehive and others in the proceedings noted above. The issue is completely mooted at this juncture and intervention, accordingly, should be denied.

(5) "**Traffic Pumping" Issues, In Any Event, Are Irrelevant In This Docket.** All American has been given a certificate of public convenience and necessity in Qwest territory. The issuance of that certificate was based upon a finding of "public interest." All American seeks to amend that certificate to allow service in Beehive's territory. That request can be disallowed only if an exception to certification for areas served by small carriers may be invoked. *See,* Utah Code, Section 54-8b-2.1(2)(c).

Section 54-8b-2.1(2)(c) is an exception to the statute's policies which favor competitive entry. It is, moreover, an exception to the general rule of CLEC certification. Accordingly, under conventional principles of statutory construction, it should be construed narrowly. But let's assume that this interpretive canon respecting the narrow construction of exempting provisions in legislative enactments is deemed inapplicable or isn't applied. Even then Section 54-8b-2.1(2)(c) may be asserted and certification disallowed only on specified conditions: "(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 filed pursuant to Subsection (1) any local exchange with fewer than 5,000 access lines that is owned or controlled by the intervening incumbent telephone corporation. Upon finding that the action is consistent with the public interest, the commission shall order that the application exclude such local exchange."

Accordingly, in order to justify a "carve-out" or exclusion, the statute requires that each of three conditions be met. First, there must be an objection from the incumbent telephone company against whom competition is threatened and this company must serve less than 30,000 access lines state-wide. Second, the objection must be

directed to a local exchange with fewer than 5,000 access lines which is owned by the objecting company. Third, the Commission must find, in light of this objection, that the *exclusion of competition in that local exchange* is "consistent with the public interest."

Once again, fairly read, the statute requires that all three of these conditions be met before competitive entry may be denied. Therefore, since Beehive has not objected (and, indeed, has consented) to the competitive entry of All American, the "public interest" issue under Section 54-8b-2.1(2)(c) becomes moot.

But even if the "public interest" remains at issue, the findings of the Commission, stated and restated in the original certification and the interconnection dockets, noted above, are the law of the case in that regard. And, in any event, in order to deny the application, the Commission must find the *exclusion* of competition with Beehive, the stakeholder protected by the statute, *within a particular exchange involving fewer than 5,000 access lines*, is in the "public interest." Put differently, the Commission must find that the denial of competition – All American against Beehive – within a limited geographic field, is in the "public interest." Thus framed, the remaining issue (if it is an issue that remains) in this docket relates to the competitive relationship of Beehive and All American. The proposed intervenors, which have no interest in that competitive relationship, should not be allowed to interpolate unrelated issues such as "traffic pumping" into this proceeding.

(6) **The Petitions to Intervene Are Untimely and, Allowing Intervention Will Delay this Proceeding Unduly.** All but one of the proposed intervenors have sought intervention at the eleventh hour, approximately one week prior to the expiration of the 240 day statutory deadline associated with certification proceedings under Utah Code,

Section 54-8b-2.1(2)(d). The UCCS filed its pleading after that deadline had lapsed. The statute provides that the UPSC "shall" take action to "approve or deny" an application for CLEC certification within 240 days after the application is filed. If the action to approve or deny is not made within this time limitation, "the application is considered granted." A motion to intervene does not toll the 240-day window within which the Commission may act. Thus, the legislature has enjoined the UPSC to take specified action, "to approve or deny" an application, within 240 days, and has supplied the consequence when that specified action, approval or denial, is not timely taken, namely, that the application is deemed granted. Beehive intends to file a motion for summary judgment and to argue that Section 54-8b-2.1(2)(d) means what it says and, indeed, already has determined the outcome of this docket on the merits. But the language of Section 54-8b-2.1(2)(d) also cannot be ignored in the present procedural context. The legislature obviously was concerned about expeditious treatment of certification petitions for competitive entry into the telecommunications market. This legislative intent is an important if not controlling factor in considering what is undue or unreasonable delay in the event petitions for intervention are at issue. In this regard, there is no way that the legislatively mandated time-line could be honored in view of the late filing of the proposed intervenors. Even if the proposed intervenors had made their requests for intervention at the front end of this docket, the legislature's unforgiving deadline probably could not have been met in view of the long and tortured history of IXC "traffic pumping" litigation. An examination of that history (for example, the FCC dockets on access rate reform in this particular area which have been open and active since 2007) does not augur well for a resolution of these proceedings, in the event of intervention,

with any degree of alacrity. Given the statutory admonition of Section 63G-4-207(2)(b), requiring the "prompt" and "orderly" resolution of adjudicative dockets, intervention should be denied.

Since this Commission did not deny the petition for a *nunc pro tunc* certificate amendment within the required 240 days, the amendment is statutorily approved, and this docket is now closed. There is no Commission authority to grant intervention in a closed docket.

(7) **Intervention Should Be Denied Because the IXCs Have Unclean Hands.** The proposed intervenors do not have a right to intervene. They may be permitted to intervene only as a matter of equitable discretion on the part of the UPSC. But if the IXCs want that discretion equitably to be exercised in their favor, they must come to the Commission with clean hands. One must act justly in order to receive justice, in other words. But neither of these IXCs are deserving of equity within the meaning of this maxim. Neither is paying their tariffed charges under the filed rate doctrine – to All American or Beehive.[6] AT&T has been thumbing its nose at this long standing rule of law for years, refusing to pay All American's bills. It continues this refusal to pay, even after judgment has been entered against it the *All American v. AT&T* case, noted above. Qwest likewise has not been paying its tariffed charges to Beehive. This form of "self-help," moreover, itself is a form of unlawful conduct which is forbidden under federal law. *See, e.g., MGC Communications, Inc. v. AT&T Corp.,* 14 FCC Rcd 11647 (1999); *MCI Telecommunications Corp., American Telephone and Telegraph Co. and the Pacific Telephone and Telegraph Co.,* 62 FCC 2d 703 (1976). Indeed, if a carrier has a dispute against a tariffed rate, it must pay that rate while pursuing a complaint before the FCC or

[6] Nor is Sprint, for that matter, which owes Beehive in excess of $2,000,000.00.

other appropriate regulatory body. *See, e.g., Marcus v. AT&T Corp.,* 138 F.3d 46, 58 (2d Cir. 1998). Hence, the IXCs, not only are disobeying the "law" of the tariff, that is, the filed rate doctrine, but also are acting unlawfully by exercising self-help and refusing to pay the tariffed charges prior to an adjudication on the merits of their "traffic pumping" challenge. Indeed, since the tariffs have been approved, any relief for the IXCs pursuant to their "traffic pumping" charges, as noted earlier in this brief, can be prospective only. This circumstance exacerbates their failure to pay the filed rate charges in the meantime. They are, in effect, holding the bills hostage, attempting to squeeze, if not bankrupt, small, rural, telecommunications carriers, hoping to coerce capitulation to "traffic pumping" claims which the FCC and courts heretofore have ruled are without merit. In short, because the IXCs have failed to win before the FCC and in court through principled argument and right reason, they now resort to what, in effect, is unlawful self-help as a form of economic extortion. The requests for intervention should be denied on this ground alone. If the Commission determines it may grant intervention, it should do so only on condition that the outstanding bills which are owed by the IXCs be immediately paid in full and as they accrue going forward.

CONCLUSION

If the proposed intervenors wish to raise their "traffic pumping" issue, they may be able to initiate a rule-making docket, exploring the need for intrastate "reform" in this area on a prospective basis. "Traffic pumping," however, is irrelevant, speculative, non-justiciable, much mooted, and, in all events, ill-advised and untimely in relation to this adjudicative proceeding. The motions to intervene should be denied.

Dated this 2nd day of February, 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing pleading, "Opposition of Beehive Telephone Company, Inc., to Motions for Intervention," was served this 2nd day of February, 2009, by e-mailing a copy of the same to all parties who have entered an appearance electronically in this docket.

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