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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| 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 | Docket No. 08-2469-01<br><br>UTAH COMMITTEE OF CONSUMER SERVICES' RESPONSE TO ALL AMERICAN'S MOTION FOR SUMMARY DECISION AND MOTION TO STRIKE |

As permitted by the Utah Public Service Commission's April 1, 2009 scheduling order, the Utah Committee of Consumer Services responds to All American Telephone Co.'s motion for summary decision and motion to strike, and to Beehive Telephone Company's pleadings supporting these motions. The Committee requests that the Commission deny both motions and as the Committee requested in its initial response to the petition, conduct a formal proceeding to consider whether the March 7, 2007 certificate of public convenience and necessity should be revoked. The Committee requests a Commission order that

any application for a CPCN allowing All American to operate in a small or rural local exchange must comply with Utah Code §54-8b-2.1, that such an application be considered as requesting only prospective relief and that it be considered in conjunction with a revocation proceeding.

## I. RESIDENTIAL AND SMALL COMMERCIAL UTILITY CONSUMERS HAVE AN INTEREST IN A UTILITY'S COMPLIANCE WITH UTAH PUBLIC UTILITY STATUTES.

To regulate monopoly public utilities, Utah Code Title 54 demands that utilities acquire the Commission's express authority defining the geographic area within which it may serve customers, the services it must provide, and the rates it may charge. *Utah Code §54-4-4; Utah Code §54-8b-2.1*. In all respects, the burden rests heavily upon a utility to prove it is entitled to rate or other relief. *See Utah Department of Business Regulation v. Public Service Commission*, 614 P.2d 1242, 1245 (Utah 1980). As the exclusive regulatory authority, the Commission is obligated to enforce Utah's public utility statutes, its own rules and to act consistently with prior practice. *See Questar Gas Co. v. Utah Public Service Commission*, 2001 UT 93, ¶¶ 17, 18. The Commission is duty-bound to hold the utility to its burden of proof, to require that the utility's evidence is reasonably calculated to resolve the issue presented for determination, to grant relief only on substantial evidence supporting the utility's request, and to ensure that a hearing

and findings precede the Commission's order. *Committee of Consumer Services v. Public Service Commission of Utah*, 2003 UT 29, ¶14 *citing Utah Department of Business Regulation v. Public Service Commission*, 614 P.2d at 1245-1246. The Commission must exercise its statutory regulatory powers whether or not the Division or Committee or any other party challenges a utility's request and even if parties agree to the utility's request. *Committee of Consumer Services v. Public Service Commission of Utah*, 2003 UT 29, ¶15 ("By accepting the CO2 Stipulation with no consideration of the prudence of the underlying source of the new costs (i.e., the contract between Questar Gas and its affiliate Questar Pipeline), the Commission abdicated its responsibility to find the necessary substantial evidence in support of the proposed rate increase in the record.")

Consumers have an interest in the Commission diligently performing its duties in connection with applications for certificates of public convenience and necessity. This fact is plainly demonstrated by the Commission's consideration of Bresnan Broadband's application as a competitive carrier for a CPCN to provide service in a rural exchange controlled by an incumbent with fewer than 30,000 access lines that receives universal service support. *In the Matter of the Application of Bresnan Broadband of Utah*, Docket No. 07-2476-01. In its November 16, 2007 report and order, the Commission discusses at great length the policy and precedent settling implications of the CPCN at issue. The Commission

acknowledges that the public interest analysis required by Utah Code §54-8b-2.1(2) is "necessarily informed" by the policy declarations in Utah Code §54-8b-1.1; policies that emphasize consumer interests. *See also, In the Matter of the Petitions of Bresnan Broadband to Resolve Dispute Over Interconnection of Essential Facilities*, Docket No. 08-2476-02.

Rocky Mountain Power's CPCN application to construct a high voltage transmission line demonstrates the potential such applications have to impact not only utility consumers but also the public at large. *In the Matter of the Application of Rocky Mountain Power*, Docket No. 08-035-42. This case and the Bresnan cases reveal All American's petition and motion for summary decision to be injudicious and improper. These cases also serve as examples why the Committee, as the residential and small commercial utility consumer representative, is a proper and necessary party.

The meaning of these principles of utility regulation to All American's petition, motion for summary decision and motion to strike is this: it matters that All American knowingly conceded that it could not operate in Beehive's territory and represented that it would not. It matters that All American presents no substantial evidence, indeed no evidence at all, that an amended and expanded CPCN is in the public interest. It matters that All American contends the Commission is precluded from applying a public interest analysis guided by law

and must grant an expanded CPCN solely because All American knowingly exceeded the March 7, 2007 certificate's terms.

II. ALL AMERICAN'S APRIL 23, 2008 PETITION AND ITS MOTION FOR SUMMARY DECISION ARE DEFICIENT AS A MATTER OF LAW.

Utah's Public Telecommunications Law establishes utility regulatory policies encouraging competition as the means to provide quality, affordable telecommunications services to all Utah residents and businesses, and to encourage customer choice and develop advanced infrastructure and new technology. Flexible and reduced regulation is allowed and new regulatory policy is encouraged to promote competition. *Utah Code §54-8b-1.1.* Competitive entry into the service territory of an incumbent telephone corporation and interconnection with essential facilities is intended to implement these policies. However, the Commission retains continuous jurisdiction over competing telecommunications corporations, which are required to satisfy all material obligations contained in Commission rules and orders, even in a flexible and reduced regulatory environment. *Utah Code §54-4-1; Utah Code §54-8b-2(17); see also Utah Code §54-8b-7.*

Between April 19 and June 1, 2006, three competitive local exchange carriers, CLECs, applied to the Commission for certificates of public convenience

and necessity to provide telecommunications services throughout Utah, including certificated territories that are served by small or rural local exchange carriers. These exchanges are defined as a local exchange that has fewer than 5,000 lines and that is controlled by an incumbent telephone corporation with fewer than 30,000 access lines within Utah.[1] Because granting such a CPCN would represent a shift in regulatory policy that could impact telecommunications service to rural residential and small commercial customers, the Committee participated in and monitored all three dockets.[2] Conferences and some actions taken in these dockets were on a consolidated basis. *See* September 12, 2006 Motion for Protective Order and September 19, 2006 Protective Order in each docket.

In each of the three applications, pursuant to Utah Code §54-8b-2.1(3)(c), the Utah Rural Telecom Association on behalf of its members except for the incumbent Beehive, all of whom had fewer than 5,000 lines in an exchange and fewer than 30,000 lines within Utah, petitioned the Commission to exclude its

[1] Application of Beehive Telephone, Docket No. 06-051-01 filed May 3, 2006; Application of All American Telephone, Docket No. 06-2469-01, filed April 19, 2006; Application of IDT America, Docket No. 06-2464-02, filed June 1, 2006. Ms. Hooper represented All American and Ms. Hooper and Mr. Smith represented Beehive. Beehive's application is in the name of a CLEC wholly owned by the Beehive Telephone, an incumbent local exchange carrier.

[2] The Committee is to be given full participation rights in any case before the Commission. *R746-100-5*. Other interested local exchange carriers serving in the same geographic areas where the applicants sought to serve, intervened through and were represented by the Utah Rural Telecom Association.

members' certificated territories from the sought after CPCN. In response, All American amended its application to respect the mandatory exclusion of all small and rural local exchange carriers from its CPCN. Beehive too, amended its application to exclude rural exchanges, but asked that it be permitted to operate as a competitive carrier within the territory of its parent corporation, an incumbent telephone corporation. These facts are significant because while Beehive purposefully requested a narrow CPCN to cover a single small or rural incumbent, All American purposefully amended its application to exclude **all** small or rural incumbents, including the incumbent Beehive.[3]

All American's original application represented that if granted a CPCN, All American would create greater competition in the local exchange marketplace for residential and business customers, would provide better quality services, enhanced user features, and increased customer choices. On March 7, 2007, the Commission granted a CPCN based upon All American's February 20, 2007 Amended Application excluding small or rural local exchange carriers as the URTA requested. Thereafter, All American entered into the June 11, 2007 interconnection agreement with Beehive that admittedly violated the CPCN [*See*

[3] The record of All American's amended applications deliberately excluding small and rural local exchanges from its request for authority is documented in the Committee's January 7, 2009 Response to Petition. Because the same attorneys prepared Beehive and All American's amended applications, and because one of the attorneys is both an executive officer and director of Beehive, any claim of mistake, clerical error or the like when excluding small and rural local exchanges has no merit.

*Petition ¶ 2 and 4, Docket No. 08-2469-01]*, and then filed the April 23, 2008 petition commencing this docket. There is no evidence that All American provided any local service to any customer or sought to interconnect with any other Utah incumbent carrier.[4]

All American's petition claims that the Beehive interconnection agreement implicitly authorized an expanded CPCN. All American asks the Commission to amend the CPCN to conform to the arrangement with Beehive; the interconnection agreement that violated the CPCN. All American contends that the omission of Beehive's territory from its CPCN is "a mere technicality." All American does not offer any evidence that this petition complies with Utah Code §54-8b-2.1, contending that "the Commission already made the requisite factual determinations for granting the Petition when it approved an interconnection agreement between All American and Beehive Co., Inc. in Docket No. 07-051-03." All American ignores the fact that in the original application docket, URTA unequivocally objected to All American's CPCN including any small or rural local exchange carrier, and All American expressly eliminated Beehive from its CPCN in its February 20, 2007 amended application.[5,6]

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[4] The fact that a utility represents that if granted a certificate it will offer new and better customer choices but then does nothing for customers is another reason why the Committee has an interest if not an obligation to question the legality of the certificate.

[5] URTA remains concerned for All American's competitive entry into small or rural local exchanges. Addressing this possibility URTA states: "Changes in policy of this

In light of the Commission's obligations to scrutinize any application for a certificate of public convenience and necessity, and in light of the standards for granting a certificate, the petition All American filed commencing this docket and its motion for summary decision, are wholly inadequate requests for agency action and offer no substantial evidence upon which the Commission can base any decision. The factual and legal justification All American asserts to support its request for relief is that it was granted a CPCN excluding small or rural local exchanges as required by law (Utah Code 54-8b-2.1(3)(c)), which it promptly violated. All American relies upon the fact of this violation to claim that the Commission is bound by *res judicata* to condone the violation; an absurd interpretation of record and the Commission's order in Docket No. 06-2649-01.[7]

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magnitude do not happen by operation of law, and these changes cannot occur where the carrier involved lacks the authority to trigger approval by operation of law provided under 47 USC § 252." URTA also states: "The rural exemption continues to be critical to URTA." April 7, 2009 Response of the Utah Rural Telecom Association to Motions to Dismiss, Docket No. 08-2469-01.

[6] Despite the record in the earlier docket including URTA's objection and its informed and intended amendments to the CPCN application in response, All American asserted initially in this docket that there was no reasonable expectation of opposition to the relief it requests.

[7] On April 15, 2009, AT&T filed an informal complaint with the FCC alleging that All American, e-Pinnacle and Chasecom are engaging in unreasonable, improper and unlawful practices within Beehive's local exchanges with Beehive's consent, but without a certificate to provide any service. The complaint alleges that All American began operating in Beehive's territory and billing AT&T for access charges before it obtained authority to operate as a CLEC in Utah. While only a complaint, the allegations strongly suggest that All American has been less than candid in its petition and that the request the matter be informally adjudicated may have been motivated by the desire to avoid a

## III. THE UTAH PUBLIC SERVICE COMMISSION DOES NOT HAVE THE AUTHORITY TO GRANT THE RELIEF REQUESTED IN THE PETITION.

All American requests that the Commission amend the March 7, 2007 CPCN to conform to the terms and conditions of an interconnection agreement with Beehive entered after the order granting the CPCN and which violates the CPCN. All American requests that the relief be retrospectively granted, nunc pro tunc, to March 7, 2007. Because it is equitable relief and because the doctrine for such relief does not apply, the Commission has no authority to grant such relief.

As a statutorily created administrative agency, the Commission has only those powers expressly or impliedly granted to it by the legislature. It is not a court of equity. *See Bevans v. Industrial Commission of Utah*, 790 P.2d 573, 577 (Utah App. 1990). Without clear statutory authority, the Commission cannot pursue even worthy objectives for the public good. *Mountain States Telephone & Telegraph Co. v. Public Service Commission of Utah*, 754 P.2d 928, 933 (Utah 1988).

If the Commission did have the equitable power to apply the nunc pro tunc doctrine, it is not available to retrospectively expand All American's CPCN. Nunc pro tunc authority is limited to rectifying what might be termed mechanical errors;

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complete evaluation of the interconnection agreements impact upon the public interest. An electronic copy of the complaint is filed with the Committee's response, but because of its length a paper copy will be filed only if the Commission requests it.

it is appropriately exercised to conform an order or judgment to that actually pronounced. *Diehl Lumber Transportation Inc. v. Mickelson*, 802 P.2d 739, 742 (Utah App. 1990). The nunc pro tunc order is designed to reflect the existence and content of a previous order, not to correct some affirmative action of the court which ought to have been taken. "A nunc pro tunc order may not be used to show what the court might or should have decided, or intended to decide, as distinguished from what it actually did decide." *Id.* 743. Furthermore, nunc pro tunc relief is not available to the party who caused the error. *Bagshaw v. Bagshaw*, 788 P.2d 1057, 1061 (Utah App. 1990).[8]

There is no evidence that All American disclosed the limits to its CPCN in the application for approval of the interconnection agreement with Beehive. And by invoking the nunc pro tunc doctrine, All American argues that the Commission is legally bound to retrospectively expand its CPCN because All American mislead the Commission when it excluded small or rural local exchange carriers

[8] Cases in which courts traditionally have applied the nunc pro tunc doctrine fall into two categories: (1) those in which one of the parties died after the submission of the case to the lower court for its decision, but before the actual rendition of judgment; and (2) those in which a judgment has in fact been rendered by the lower court, but the clerk has failed to perform the ministerial function of entry. 6A J. Moore, *Moore's Federal Practice* para. 58.08 (1989). The second category is based upon the principle that "where the delay in rendering judgment or decree arises from the act of the court, that is, where the delay has been for its convenience, or has been caused by the multiplicity or press of business or the intricacy of the questions involved, or of *any other cause not attributable to the laches of the parties*, but within the control of the court; the judgment or the decree may be entered retrospectively . . . ." *Mitchell v. Overman*, 103 U.S. 62, 64-65, 26 L. Ed. 369 (1881) (emphasis added); *see also* 6A J. Moore, *Moore's Federal Practice* para. 58.08 (1989). *Bagshaw v. Bagshaw*, 788 P.2d at 1060-1061.

from its CPCN application, knowingly exceeded the CPCN by entering the interconnection agreement, and did not disclose the CPCN limits in the application for approval of the interconnection agreement. This absurd argument should be summarily rejected.[9]

III. THE UTAH PUBLIC SERVICE COMMISSION HAS NO JURISDICTION TO DETERMINE THE PERMISSIBLE SCOPE OF REGULATORY ACTION THAT THE COMMITTEE OF CONSUMER SERVICES, UNDER ITS STATUTORY CHARTER, MAY UNDERTAKE.

All American and Beehive pose this question: What is the permissible scope of regulatory action which [*sic*] the CSS [*sic*], under its statutory charter, may undertake? The Commission is vested with exclusive jurisdiction to adjudicate matters delegated to the Commission by statute and for which the Commission can give appropriate relief. *Utah Code §54-4-1; Atkin Wright & Miles v. Mountain States Telephone and Telegraph Co.*, 709 P.2d 330, 333 (Utah 1985). The Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute. The Commission may only exercise those powers expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it. Any reasonable

[9] All American's request that the Commission grant relief nunc pro tunc is incompatible with its position that the April 23, 2008 petition is a new docket that triggered the 240 day provision found in Utah Code 54-8b-2.1(3)(d). The 240-day time limit for Commission action does not apply to the petition, whether or not an amendment to the CPCN is granted retrospectively or prospectively.

doubt of the existence of any power must be resolved against the exercise thereof. *Hi-Country Estates Homeowners Association v. Bagley & Company*, 901 P.2d 1017, 1022 (Utah 1995). The Commission's jurisdiction and authority does not include oversight of the Committee, its director or the Attorney General and his assistants.[10]

In addition, neither All American nor Beehive have a legally protectible interest, either under statute or the common law, in a determination of the permissible scope of regulatory actions taken by the Committee, its staff or the Attorney General and his assistants. Therefore, All American and Beehive lack standing to litigate the issue and the Commission lacks jurisdiction to decide it. *Jones v. Barlow*, 2007 UT 20, ¶12. The Committee advocates positions that the Committee determines will benefit specified classes of consumers. Regulatory action is taken by the Commission, which may or may not be consistent with Committee positions. How the Committee goes about assessing the impact of regulatory actions and then advocating positions based upon the assessed impacts, as a matter of fact and law cannot cause All American or Beehive any distinct and palpable injury. Standing is jurisdictional and if lacking, a court and this Commission may not entertain the controversy. *Id.*; *Sierra Club v. Utah Air Quality Board and Intermountain Power Service*, 2006 UT 73, ¶12; *Sierra Club v.*

[10] To the extent that the Commission's legislative, adjudicative and rule-making powers extend to the Committee, they provide that the "Committee shall be given full participation rights in any case." *R746-100-5.*

*Utah Air Quality Board and Sevier Power*, 2006 UT 74, ¶14 ("That the Board has been assigned some adjudicative functions does not implicitly give it any particular authority to interpret standing doctrine or other issues of general statutory, constitutional, or common law.) [11]

## IV. CONCLUSION.

The Committee's interest in this docket is to represent the interests of all residential and small commercial utility customers in the disciplined analysis of utility rate and regulatory actions. All American's petition for a retrospective amendment to the March 7, 2007 CPCN may not be granted on a summary or any other basis because the petition depends upon an abandonment of all analysis. The petition does not comply with the legal requirements for competitive entry into a small or rural local exchange under Utah Code §54-8b-2.1, and provides no substantial evidence upon which the Commission may base such an amendment. All American has intentionally omitted material facts concerning All American's compliance with terms of the CPCN in this docket and in Docket No. 07-051-03 addressing the Beehive interconnection agreement. The petition asks for nunc pro tunc relief that is outside of the Commission's jurisdiction and to which All American is not entitled, legally or factually. The unauthorized interconnection

[11] All American also contends "the Committee never formally instructed its attorney to seek dismissal of the Petition." This contention can only be the product of All American's speculation about the content of privileged attorney/client communications. As such, it is an inappropriate and irrelevant contention unworthy of consideration.

agreement with Beehive cannot legally imply or affect an amendment to All American's CPCN.

Finally, the character of All American's representations and actions in Docket No. 06-2469-01, Docket No. 07-051-03, and in this docket, evidences a disregard for the Commission's general jurisdiction, right to information, and defiance of a Commission order. Granting All American any relief must follow the Commission's scrupulous consideration of a proper application for an initial CPCN or an amendment. To do otherwise in this case is to sanction All American's attempt to circumvent Utah's public utility statutes and the Commission's scrutiny.

RESPECTFULLY SUBMITTED this 22nd day of April 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing response was served upon the following by electronic mail sent April 22, 2009:

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