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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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 **QWEST RESPONSE TO ALL AMERICAN AND BEEHIVE MOTIONS**

Qwest Corporation and Qwest Communications Company, LLC (collectively, "Qwest"), in accordance with the Second Interim Scheduling Order issued April 1, 2009, hereby submit this response to the several motions in this docket filed by All American Telephone Co., Inc. ("All American") and Beehive Telephone Company, Inc. ("Beehive") after issuance of the Second Amended Scheduling Order. The Public Service Commission of Utah ("Commission" or "PSC") granted Qwest's petition for intervention in this case via an Order Granting Intervention on February 18, 2009.

Qwest believes the Commission should: deny All American's Motion for Summary Decision; deny All American's Motion to Strike the Committee of Consumer Services' Motion to Dismiss; and deny Beehive's Motion to Strike Pleadings of the CSS

[sic] and Motion for Summary Disposition of the All American Petition, as well as Beehive's motion for oral argument.

ALL AMERICAN'S MOTION FOR SUMMARY DISPOSITION

All American's request for summary decision is inappropriate and distorts the procedures by which a certificate of public convenience and necessity is considered and its terms enforced, particularly if All American has knowingly exceeded the scope and terms of its Certificate. All American's novel advocacy that language buried in an interconnection agreement somehow amends the geographic boundaries of their Commission-approved service territory and their Certificate of Public Convenience and Necessity ("Certificate" or "CPCN") is a theory untested and not approved elsewhere by this Commission. Furthermore, adoption of the All American and Beehive advocacy will gut the long-held public policy in Utah of restricting CLECs from competing in rural ILEC territory in exchanges with less than 5,000 access lines, and do this without public comment or critical examination. On March 26th of this year, the Commission upheld this consistent policy and rejected an interconnection agreement between Citizen's/Frontier and Beehive.1 In that Order, this Commission found that operations which position CLECs to provide public telecommunications services in areas of the State of Utah outside of their certificates are "not consistent with the public interest, convenience, and necessity".2 All American and Beehive argue that they are owed summary disposition of this case; however, such disposition would violate the due process rights (specifically, notice of the change of the certificate in question and the

1 Docket No. 09-2218-01, In the Matter of the Interconnection Agreement between Citizens Telecommunications Company of Utah, d/b/a Frontier Communications of Utah, and Beehive Telecom, Inc., Report and Order Rejecting Interconnection Agreement, issued March 26, 2009.
2 Id., p. 2.

right to be heard on the merits of such a change) of the DPU, the CCS, Qwest, AT&T, and any other parties. All American and Beehive argue that it was "clear" that All American intended to operate as a CLEC in the area certificated to Beehive. Evidently, this was clear (if at all) only to All American and Beehive. Indeed, All American admits in its memorandum accompanying its motions that "**its CPCN did not technically authorize All American to operate as a CLEC in Beehive's territory**."3 (emphasis added). Despite this damaging admission, and the questions it raises as to what exactly All American has been doing in Beehive's territory since its CPCN was issued, All American brazenly declares that they are entitled to summary decision as a matter of law. The question of whether a CLEC offering public telecommunications services is offering those services outside its certificated service territory is first and foremost a matter imbued with the public interest, especially in Utah with its restriction on CLECs operating in small rural ILEC territory.

Nor is res judicata applicable in this matter. Res judicata prevents the readjudication of fully litigated issues. If All American's position prevails, once a CPCN is issued, or once an interconnection agreement is approved, then the Commission would be restricted from ever examining the impact that new facts or admissions of actions contrary to the public interest would have on all previously granted certificates or on an approved ICA. That argument is absurd. The Commission is empowered by Utah Code §§ 54-4-1 and 54-4-2 with broad jurisdiction over public utilities, and with investigating any act or omission which implicates the public interest. All American's contention that the via-operation-of-law approval of the ICA with Beehive precludes investigating facts

3 Memorandum in Support of Petitioner's Motion for Summary Decision and in Support of Petitioner's Motion to Strike the Committee of Consumer Services' Motion to Dismiss and in Opposition to the Division of Public Utilities' Request for Dismissal, pp. 3, 4.

which were deliberately withheld by All American and Beehive during the ICA approval process is reprehensible. All American used its best efforts to successfully resist answering DPU's data requests, as well as Qwest's, in the interconnection docket. The questions concerning where in Utah All American is actually operating raises new issues regarding their compliance with their Certificate, implicates the public interest, raises questions regarding the long-standing policy in Utah regarding CLECs competing in small rural ILEC territory, raises issues about the impact of a bilateral interconnection agreement on a pre-existing CPCN, and raises issues regarding whether All American and Beehive are scheming to illegally stimulate switched access traffic. None of those issues have ever been formally adjudicated, so the application of res judicata to prevent such an investigation is inappropriate.

IF THE COMMITTEE OF CONSUMER SERVICES WISHES TO DISAVOW THE PLEADINGS FILED IN ITS NAME, IT CAN SO INFORM THE COMMISSION

Simply put, if the CCS believed the pleading filed in this case on its behalf were unauthorized, it could and should have informed the Commission. The CCS's silence speaks volumes. The argument All American puts forth regarding authority to file CCS's pleading is yet another procedural maneuver designed to prevent Commission examination of the underlying substantive issues in this case. The CCS legislative grant of authority which All American cites in its motion, Utah Code § 54-10-4, contains ample authority for CCS to participate fully in this proceeding, representing the interests of, and assessing the impact of regulatory actions on residential consumers and those engaged in small commercial enterprises in the state of Utah. The absence of a "formal instruction" to the attorney representing CCS is meaningless – there is no statute, rule, or Commission

Order cited to by All American that supports their contention that there is a previously unknown requirement of a "formal instruction" as a precursor for CCS's attorney to participate in a Commission proceeding.

QWEST BELIEVES THE COMMISSION IS IN THE BEST POSITION TO DETERMINE WHETHER TO DISMISS THE UNDERLYING PETITION IN THIS DOCKET OR TO PROCEED WITH CONSIDERING THE AMENDED CERTIFICATE IN THIS DOCKET

Qwest believes that ultimately, whether or not the Commission dismisses the underlying petition in this docket, there must be a formal adjudication of the proposed amendments to All American's CPCN and of how All American has operated in Beehive's territory since the CPCN was issued. Qwest is agnostic regarding the particular docket number to be used in the examination of the issues here, but insists that a fully litigated proceeding is necessary to examine the effect of granting such an amendment to All American's certificate will have. At the very least, All American should be compelled to demonstrate in a formal proceeding how their requested relief is consistent with the public interest, why the Commission should change the existing "rural exemption", whether they have been operating in a manner contrary to their certificate, and whether any Commission action can obviate the small rural ILEC competition statute. A formal proceeding would allow Qwest and other parties the ability to conduct discovery into specific facts that will reveal the extent to which All American has been operating outside the terms of its certificate. DPU has expressed its frustration with All American's refusal to answer earlier, formal data requests designed to shed light on the nature of the services to be provided to, and the business conducted by All American with Beehive. Qwest has experienced the same frustrations. It follows as a matter of course

that if the Commission decides to initiate a formal proceeding in this case, or in a separate proceeding, that discovery will be permitted and the Commission will have the ultimate power to determine whether All American's data responses are responsive and complete. Qwest urges the Commission to allow discovery via a formal proceeding that will lift the veil of secrecy about the business relationship between All American and Beehive, and provide facts about the extent to which All American has been operating in violation of its Certificate.

QWEST BELIEVES THE COMMISSION HAS SUFFICIENT INFORMATION BEFORE IT TO RULE ON THE MOTIONS WITHOUT ORAL ARGUMENT

The series of motions generated by the Commission's Second Interim Scheduling Order, and the responses thereto, are sufficient for the Commission to render its decision on the pleadings, and to grant oral argument on the motions in the manner argued for by Beehive is best reserved for a formal proceeding that considers all of the issues in the case, not just those selected and proposed by Beehive.

CONCLUSION

In sum, Qwest believes the Commission should (1) deny the Petitioner's Motion for Summary Decision, (2) deny the Petitioner's Motion to Strike the Committee of Consumer Services' Motion to Dismiss, (3) deny Beehive's request for oral argument, and (4) formally adjudicate whether All American's present Certificate should be amended. In addition, if the instant petition is dismissed, Qwest believes the Commission should formally investigate All American's conduct regarding whether All American has violated the terms of its Certificate granted on March 7, 2007 at any time from that date until the present, and if so, craft an appropriate remedy including consideration of whether their Certificate should be cancelled.

WHEREFORE, Qwest respectfully requests that:

1. The Commission deny All American's motion for summary decision and motion to strike the CCS's pleading; and,

2. Deny Beehive's motion to strike pleadings of the CCS and motion for summary disposition of the All American petition and deny Beehive's motion for oral argument; and,

3. Even if the instant petition is dismissed, Qwest requests the Commission formally investigate All American's conduct in a separate proceeding regarding, *inter alia*, whether All American misrepresented facts or its intent in its applications to the Commission, whether the long-standing policy concerning restricting CLECs from competing in small rural ILEC territory should be reconsidered, whether All American has violated the terms of its Certificate granted on March 7, 2007 at any time from that date until the present, and if so, craft an appropriate remedy including consideration of whether All American's Certificate should be cancelled; and,

4. Grant such other relief that the Commission deems appropriate.

RESPECTFULLY SUBMITTED this 22th day of April 2009.

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George Baker Thomson, Jr.
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CERTIFICATE OF SERVICE

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

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