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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

BEEHIVE'S REPLY MEMORANDUM

Beehive Telephone Company, Inc. ("Beehive"), submits this reply to the arguments of the Utah Division of Public Utilities ("UDPU" or "Division"), the Utah Committee of Consumer Services ("UCCS" or "Committee"), the Utah Rural Telecom Association ("URTA"), and Qwest Corporation and Qwest Communications Company, LLC ("Qwest"), and shows the Utah Public Service Commission ("UPSC" or "Commission") as follows. At the beginning of this reply, Beehive will attempt to shed

some light on three historical aspects of this docket. Beehive then addresses, in turn, the 240 day bar issue, the preclusion issue, and questions respecting the authorization and authority of the Committee.

THREE OBSERVATIONS ON THE EVOLUTION

OF PROCEEDINGS IN THIS DOCKET

First. All American Telephone Co., Inc. ("AATCO" or "All American"), commenced this proceeding by filing a petition which sought approval for an amendment to an existing certificate of public convenience and necessity. That amendment, if allowed, would enlarge the territory in which AATCO served, expanding that area to include a Beehive exchange with fewer than 5,000 lines. The parties which are participating in this docket may disagree whether that petition seeking an amendment was necessary. The UDPU, the UCCS, and URTA, for example, may believe that further certification is needed in view of the so-called "rural carve-out" provisions of Utah Code, Section 54-8b-2.1(3)(c). AATCO on the other hand may believe that this Commission's prior approval of an interconnection agreement between AATCO and Beehive makes certification under this statute inapplicable or much mooted. Or AATCO may believe that this state certification measure or the rural carve-out portion thereof is inapplicable or moot on the ground of pre-emption in light of provisions such as 47 U.S.C. Section 252(f). But whatever the merits or demerits of these divergent beliefs, in the final analysis, in order to obtain clarification and to insure compliance with all legal requirements, AATCO filed the instant petition, formally seeking ratification of the relationship with Beehive which at least was implicit in the Commission-approved

interconnection agreement. Incidental to that primary relief, AATCO also prayed that the order be entered on a *nunc pro tunc* basis.

As discussed in more detail below, the Committee in particular and other parties as well have treated AATCO's straightforward effort to obtain clarification of its legal position – and to insure that it is kosher with the Commission – as some form of outlawry, calling for revocation of that company's original certification and worse. They have beat this drum incessantly, pointing most often to a Commission-approved interconnection agreement between AATCO and Beehive, a circumstance which they interpret to mean that AATCO is operating without portfolio and hence unlawfully in Beehive territory.[1] The point they miss, of course, is that AATCO applied openly to this Commission for approval of that very interconnection agreement. Qwest and the Division participated in that docket. Nobody raised the lack of certification as a basis for objection to or rejection of the agreement on that occasion. After the statutory time limit had expired, the agreement was deemed approved.[2] Hence, far from attempting to break

[1] The Committee's rhetoric in this regard is completely overblown and, in effect, may be positively misleading. The Committee's papers suggest, for example, that AATCO has admitted to having an illegal relation with Beehive and to operating unlawfully in Beehive territory. These are allegations which the Committee, at some point, may be entitled to assert and, at another time, ultimately may prove. But AATCO has not "admitted" to these charges and it is inaccurate and unfair to put them forward in this fashion.

[2]The Division attempts to minimize the effect of this approval, stating that the Commission's "practice" is merely to "acknowledge" interconnection agreements, implying that this acknowledgement doesn't amount to much. Section 252(e) of title 47, however, is a federal statute, which, under the Supremacy Clause, is the supreme law of the land. The text of that statute says that interconnection agreements are to be approved or rejected by state commissions, and that, absent rejection within 90 days of submission, they are "deemed approved." Approved by whom? Approved by the Commision, of course. Moreover, this approval, because it arises under the federal statute, has the force of law. At a minimum, then, however much we may disagree about the semantics of "acknowledgement" or "approval," the relationship between AATCO and Beehive has been freshly painted with the color of law and lawfulness. Parties may dispute the effect of federal ratification under Section 252(e) in this docket, but arguments that AATCO is operating illegally and that this illegal operation is knowing and willful, in light of

the rules or evade regulation, to date, AATCO has made three trips to the UPSC, each time for the purpose of submitting to the Commission's jurisdiction in an effort to comply with the law. During one of those trips, and pursuant to the terms of Section 252(e), the interconnection agreement between AATCO and Beehive was ratified as lawful and in the public interest. In short, the issues in this docket, as in most cases, are the result of mutual misunderstandings or honest disagreements. There is no villainy or deception involved.

Second. All parties in interest have agreed, and the Commission, by order, has confirmed that the AATCO petition, when filed, was subject to the rules of formal adjudication under the Utah Administrative Procedure Act ("UAPA"). Consistent with this view, AATCO's petition invoked the exception to this rule and asked the Commission to enter an order which, if granted, would have converted the docket to an informal adjudicative proceeding. The UDPU, notwithstanding the general rule of formal adjudication, treated the petition informally. It did not answer the petition, for example, as required under the UAPA and the Commission's rules. Discovery, to some extent, was submitted and answered informally. When demands for discovery escalated, however, AATCO sought a pause in the proceeding and asked the Commission to rule on its request for informal adjudication. A pretrial conference was held in early December, 2008, in order to address this issue. At that time, the Commission ordered that the issue be briefed. As noted above, the briefs which were submitted by all hands concurred that, under the UAPA, the AATCO petition was subject to the rules of formal adjudication unless and until the Commission ordered otherwise. The briefs argued whether the

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Commission approval of an interconnection agreement under the supreme law of the land in an open, transparent docket, in Beehive's view, are overstated.

Commission should or should not order otherwise. The Commission ruled that it would not order otherwise.

It is important to remember this sequence of events, and especially the fact that all parties, including the Division, have maintained in legal argument, if not in their day-to-day behavior, that this docket, at all times, has been subject to the rules of formal adjudication. Only in its latest and last brief, does the Division contend that, since this proceeding has been conducted informally, the 240 day clock, found at Utah Code, Section 54-2b-1.2-(3)(d), should be re-set from the date that the Commission "ordered" a formal adjudication of all issues in this case. This argument is inconsistent with the Division's prior position that, under the UAPA, the case must be adjudicated formally absent a ruling to the contrary. This argument also mischaracterizes the order of the Commission -- which did not rule that the case would be adjudicated formally, but rather denied AATCO's request that it be converted from formal to informal adjudication. And this argument is irrelevant in view of the language of Section 54-2b-1.2(3)(d) which provides for approval or denial of an application within 240 days after that application "is filed[,]" and not after a request for conversion from formal to informal adjudication has been granted or denied.

Third. Finally, some parties, in so many words, have suggested that AATCO has misrepresented its intentions or that it has been withholding information or obstructing any investigation into its affairs – that this is the cause of delay in this docket – and that more time, accordingly, should be taken in pursuit of this proceeding. As argued at greater length in its original memorandum, Beehive believes that these allegations, even if they were true, would not matter in terms of Section 54-8b-2.1(3)(d)'s strict 240 day

bar. But Beehive also believes that these allegations are untrue and that it is important for the record to reflect this fact. Any delays in this docket are not attributable to unjust or unreasonable conduct by AATCO. For example, after the petition was filed, the Division never answered. Absent an answer, issues were not joined. Without the joining of issues, the scope of discovery that is necessary and relevant could not be effectively determined. Nevertheless, when the Division, after a hiatus of months, issued data requests, information was supplied by AATCO and Beehive. Beehive also supplied information informally to the Division. When discovery requests became more burdensome and arguably outside the issues framed in the petition, AATCO asked for clarification and this proceeding then took a different turn. The interexchange carriers, AT&T and Qwest, did not appear in the docket until December, approximately 30 days before the expiration of the 240 day deadline. The Committee entered its appearance after that deadline had elapsed. These parties started to argue traffic stimulation and unrelated issues – after the fact -- in earnest. In short, there are no factual grounds for claiming that the delays in this docket, whether undue or otherwise, were caused by AATCO.

In addition to the above, please consider this: The traffic stimulation issues, which the Committee and the interexchange carriers have attempted to raise late in this proceeding, have been the subject of concern at the FCC for years. They were raised long ago – in the Beehive-AATCO interconnection docket at this Commission -- by Qwest and the Division, but were overruled by the 90 day limitations period of Section 252(e). At any time since then, the Division, Qwest, AT&T (and even the Committee,

assuming authorization and standing) could have raised these issues about the AATCO-Beehive connection before now.

On three occasions – once when the initial certificate was sought, again when the interconnection docket was opened, and a third time in this docket – AATCO voluntarily has jumped into the regulatory fishbowl where its affairs have been subject to review. On all of these occasions, it never has withheld information about the interconnection agreement or plans for service in Beehive's territory. The first application, which sought authority in rural exchanges, even though later reduced by amendment, gave notice that AATCO contemplated such service. The interconnection docket told the world that AATCO was doing business with Beehive. This third docket has sought to obtain clarification of that business relationship and compliance in every respect with Commission rules.

In view of this history and these circumstances, suggestions by the Division, the Committee, and others that AATCO is hiding the ball, that it is seeking to avoid regulatory scrutiny – or that there is some sudden and compelling urgency to the investigation of traffic stimulation in this docket, a subject matter which they have been prevented timely from pursuing – is nothing more than finger-pointing in the wrong direction.[3]

[3] The Division's brief also avers that AATCO didn't permit intervention in this docket. This is inaccurate. AATCO exercised its statutory right under the UAPA to seek conversion of the proceeding from a formal to informal adjudication. If that request had been granted, intervention would have been limited. But that request was not granted, and this docket has remained open and unrestricted for intervention to all comers from the date of filing. URTA, AT&T, and Qwest did file for intervention – albeit late in the day. The Committee, without intervention, entered an appearance -- albeit after the fact. AATCO exercised its right to oppose those requests for intervention by URTA, AT&T, and Qwest, and the appearance by the Committee. This opposition was overruled. But all of this is moot because Section 54-8b-2.1(3)(d)'s "come hell or high water" language doesn't allow the Commission or the parties, by express stipulation, implied

SECTION 54-2b-1.2(3)(d) HAS DETERMINED

THE OUTCOME OF THIS DOCKET ON THE MERITS

The UDPU, the UCCS, URTA, and Qwest (sometimes collectively the "Opposition Parties") have argued, according to their particular viewpoints, for a treatment of the AATCO petition on its merits. The Committee, for example, suggests that the Commission simply cannot grant the petition, allowing service in Beehive's territory, absent a thorough review of the public interest and other desiderata for certification under our public utilities code. Qwest, as another example, argues that AATCO cannot bootstrap the Commission's approval of the AATCO-Beehive interconnection agreement to operational rights in Beehive territory, and that this result would be particularly inappropriate in the event that AATCO unlawfully has exceeded the pre-existing authority in the original certificate. The Committee and Qwest, as still another example, suggest that, since AATCO may have been serving illegally in Beehive's territory, this circumstances, if demonstrated, should result in a denial of the petition, if not revocation of the original certificate. The Division and the Committee, as still another example, find fault with the form of relief which is requested in the petition; there is no basis, they say, for the Commission to grant an amended certificate on a *nunc pro tunc* basis.

These arguments in opposition to the granting of the AATCO petition, whatever their merits or demerits, for better or for worse, must be raised, tried, and determined within the fixed parameters of Section 54-8b-2.1. Those parameters include a 240 day deadline, which, if missed, has statutorily mandated consequences. That deadline has

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acquiescence, waiver, estoppel, or any other means to defeat the legislative mandate that, after 240 days, the application is granted.

passed and those consequences have occurred by operation of law. In view of that deadline and this result, whatever strengths or weaknesses once might have been found in the arguments of the Opposition Parties on the merits now have become moot.

None of the Opposition Parties quotes the language of Section 54-8b-2.1(3)(d) in argument to the Commission. The statute, however, 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." No wonder that the Opposition Parties do not quote the statute in their briefs. The statute, once quoted and read, overrules all of their arguments on the merits and determines the outcome in this docket. That outcome, according to the clear requirements of the statutory text, is that the petition has been granted. After reviewing the briefs of the Opposition Parties on this question, none of their arguments, in Beehive's view, overcomes Section 54-8b-1.2(3)(d)'s statutory command or alters this result.[4]

The Committee's sole comment on the 240 day issue is found at page 12 and in footnote 9 of its brief. It asserts that, "The 240-day time limit for Commission action does not apply to the [AATCO] petition, whether or not an amendment to the CPCN is granted retrospectively or prospectively." No analysis or citation is given in support of this assertion. With respect, insofar as the Committee and other Opposition Parties insist that AATCO must satisfy the certification requirements of Section 54-8b-2.1 (which, after all, is what everybody seems to be insisting), then subpart (3)(d) of that statute does

[4] Beehive rebuts below the arguments advanced by the Committee, URTA, and the Division. Qwest did not address Section 54-8b-1.2(3)(d)'s 240 day time limit. AT&T did not file a brief.

apply.[5] The Opposition Parties can't have it both ways, requiring AATCO to comply with Section 54-8b-2.1, including the rural carve-out in Section 54-8b-2.1(3)(c), but ignoring the timing mandates of Section 54-8b-2.1(3)(d).

URTA appears to argue that Section 54-8b-2.1(3)(d) may be no bar because AATCO has yet to apply for certification in Beehive's territory. For example, URTA advises in its brief, at page 2, that, "In order for All American to serve customers in Beehive's territory, All American is obligated to *first seek an amendment to its certificate from the Commission.*" (Emphasis supplied.)[6] But this argument misapprehends the plain language of AATCO's petition and the relief which it seeks. AATCO's petition expressly seeks an amendment to the original certificate, an amendment that would allow service in Beehive's territory. The style of the petition says that. The text of the petition

[5] AATCO and Beehive have suggested that Section 54-8b-1.2, including subpart (3)(d), may be "inapplicable" to the application *on other grounds and for different reasons* – because relief already has been granted, in effect, through the interconnection agreement previously approved by the Commission or in view of federal preemption pursuant to the 1996 Telecommunications Act. But if, as maintained by the Opposition Parties, AATCO must jump through the hoop of Section 54-8b-1.2, then that hoop is circumscribed by the time limits found in subpart (3)(d). Those limitations are applicable in that event. In other words, AATCO and Beehive deny "that event," but argue that the 240 day provision limits (and now bars) the Opposition Parties to the extent they claim (as they do here) that Section 54-8b-2.1 does apply.

[6] Other examples may be cited from URTA's brief. It says that, "The simplest solution for All American now is to seek an amendment in this docket or in a new docket to serve in Beehive's territory prospectively." It also says that, "URTA recommends that the Commission treat this proceeding as a request for an amendment to all American's certificate to provide service in Beehive's service territory prospectively. The proceeding can occur in this docket, in All American's certification docket, or in a new docket. If the Commission determines that the amendment is in the public interest . . . " These statements ignore the plain language of the AATCO petition and other pleadings in this docket. AATCO's petition *does* seek an amended certificate permitting service in Beehive's territory. Whether the timing of that relief is prospective or retrospective does not alter this fundamental fact. The Commission has had 240 days to decide whether to grant the petition for an amended certificate, including an allowance or disallowance of *nunc pro tunc* relief. The Commission has not approved or disapproved the petition within that time frame. Section 54-8b-2.1((3)(d), by its express terms, accordingly, determines the outcome in this docket; the petition is deemed granted, the certificate is deemed amended to permit operation in Beehive's territory, and this amendment is deemed effective retrospectively to the date of the order approving the original certificate.

argues for that result. Beehive's consent to the petition, another pleading in this docket, confirms that this is the thrust of the petition and the result being sought. The petition's additional request, that the amendment be approved *nunc pro tunc*, is merely incidental in this regard; it asks that the primary relief to be granted, operational rights in Beehive's territory, be timed in a certain way.[7] In short, URTA's argument is nothing more than a straw man: it assumes a circumstance which does not exist, namely, that AATCO's petition doesn't request the relief which in fact it requests, and then inexplicably avers that the relief which already has been requested must be requested once again before the 240 day clock which governs proceedings under Section 54-8b-2.1 will run. But wishing won't make it so. AATCO requested relief which the Opposition Parties claim may be obtained only through the process governed by Section 54-8b-1.2. If their claim respecting the applicability of Section 54-8b-1.2 be true, then the 240 day deadline which is an integral part of that statute has expired. The consequences of that expiration, which are mandated in subpart (3)(d), have occurred. The AATCO application, including the incidental request for retroactive relief, is approved by operation of law.

The UDPU's brief makes the most extensive effort to treat Section 54-8b-1.2(3)(d)'s impact on this proceeding, but notwithstanding this effort none of the Division's arguments are persuasive in our view. Those arguments, distilled to

[7] The Opposition Parties have questioned whether *nunc pro tunc* relief should or can be granted. The Committee and the Division devote considerable space in their respective briefs on this point. But this question surely is tangential to the primary concerns in this docket. And as with all other concerns in this docket, it, too, has become moot because of the 240 day bar found at Section 54-8b-1.2(3)(d). If the merits of this debate over timing of relief could be reached – and beyond their quibble over the power of the Commission in this regard – the Opposition Parties do not articulate any substantive reason for making or refusing to make the relief retroactive to the date of the original certificate. This failure underlines our point that the timing of relief is secondary to the primary concern of amending the certificate and that, in all events, these concerns, whether primary or secondary, have been overtaken by an expiration of the statutorily mandated decision-making deadline.

essentials, are fourfold. (1) AATCO "admitted" in correspondence or a pleading that the 240 day deadline doesn't apply in this proceeding, and, therefore, the 240 day deadline doesn't apply in this proceeding. (2) Beehive did not "admit" to the inapplicability of the statute. Beehive nevertheless didn't tell the Division that it would argue the 240 day deadline. Therefore, Beehive is estopped by this omission from asserting the statutory bar. (3) AATCO didn't submit enough information to process the application and, furthermore, has not responded to discovery. This lack of cooperation bred delay in this proceeding. This delay vitiates the 240 day deadline. (4) It's not fair to conduct this proceeding informally and then to reverse course and order a formal adjudication. In light of this unfairness, the 240 day clock shouldn't start ticking until the order respecting the manner of adjudication was entered. Beehive rebuts these arguments, one by one, below.

(1) When the Division moved to compel discovery or in the alternative to dismiss the petition, AATCO asked for additional time to respond. The Division was willing to grant an enlargement of time on condition that AATCO waived the 240 day deadline found at Section 54-8b-1.2(3)(d). AATCO agreed to this condition because, in its opinion, the 240 day deadline was "not applicable." The Division has latched on to this "admission" and argues that it prevents enforcement of Section 54-8b-2.1(3)(d)'s statutory command. This argument seems strange, of course, because the Division itself obviously believed that the 240 day deadline did apply and mattered not a little in fact, since otherwise it never would have insisted upon a waiver from AATCO as a condition to the enlargement of time. What is more, AATCO's *opinion* about the applicability of the 240 day deadline (even if the Division properly is understanding that opinion – which

it is not),[8] does not determine the meaning of Section 54-8b-2.1(3)(d). All of the Opposition Parties have taken the position that, in order to become certificated in Beehive's territory, AATCO must obtain relief under Section 54-8b-1.2. Either the Opposition Parties are wrong or they are right in this regard. If they are wrong, then AATCO does not need Commission approval -- beyond that already obtained for the AATCO-Beehive interconnection agreement – to serve in Beehive's territory. If they are right, then subpart (3)(d) of that statute, the 240 day deadline, applies. And, as argued at length in Beehive's initial memorandum, the parties to this proceeding, by waiver or otherwise, cannot derail the express requirements of this legislative edict. The text of the statute requires a decision of approval or denial within 240 days. If either of those alternatives are not selected within that time-line, then it dictates a specific consequence, namely, that the application is approved. It makes no express exception for "admissions" or "waivers." No such exception can be implied in view of the mandatory consequence – approval -- when one of the stipulated alternatives is not selected within 240 days. The 240 day deadline in Section 54-8b-1.2(3)(d), by insuring the expeditious deployment of telecommunications services, is a critical factor in the "public interest" being served in the certification process. If we are to keep faith with the "public interest" *as defined by the legislature in the statute,* the Commission cannot ignore or avoid this 240 day deadline.

(2) Beehive's initial memorandum argued that, even if Section 54-8b-2.1(3)(d) could be waived, and even if the AATCO "admission" were such a waiver, other parties to the docket, including Beehive, did not waive the 240 day deadline and therefore the statutorily dictated consequence, approval of the application, still must follow. The

[8] Please see the discussion in footnote 5 of this memorandum.

UDPU responded that, in the event, Beehive had a duty to alert the Division, in advance of that expiration date, that Beehive was not waiving the deadline, and that, having failed to discharge this duty, it could not seek now to enforce this part of the statute. This response is misguided for a variety of reasons, however. First, the response is a variation on the theme of waiver, and, as we have shown in our initial memorandum, the 240 day deadline is mandatory and cannot be waived by the parties or ignored by the Commission. Second, Beehive had no duty to the Division in this respect. The imposition of such a duty is unnecessary – if not ridiculous. Section 54-8b-1.2((3)(d) is plain as the nose on anybody's face and gives notice to all concerned that, if the Commission neither approves nor denies an application within 240 days, then that application becomes approved by default. The Division, which has examined the terms and conditions of Section 54-8b-1.2 in many contexts and which has argued those provisions to this Commission on many occasions, does not need Beehive to explain the consequences of a failure to meet the 240 day deadline. The text of the statute plainly informs any reader what those consequences will be – the application is granted. The Division's argument implies that its staff and attorneys are either illiterate or so incompetent that they cannot gauge the meaning of this plain statement of mandatory consequence – and that, therefore, they require forewarning of this consequence from the likes of Beehive and its counsel. Beehive refuses to endorse this suggestion. Moreover, if Beehive had this kind of duty, how would it be discharged without creating a conflict of interest for its counsel? Those attorneys would not be able, in all circumstances, to alert the Division about enforcement of the deadline – or under any circumstances to advise the Division respecting the meaning or implications of the statute -- while at the

same time remaining loyal as fiduciaries to Beehive. Creation and enforcement of a duty to warn, therefore, would interfere with the professional responsibilities of counsel who practice before the Commission, adding a dangerous complication to the practical administration of Commission affairs. Such a duty seems all the more misguided because, as noted above, it is entirely superfluous in view of the plain meaning of the relevant statute and totally unnecessary in light of the admitted competence of Division personnel. Third, even assuming that Beehive had babysitting duties insofar as the Division is concerned, it has not remained silent about the 240 day deadline in this docket. At each scheduling conference, it has stated openly that it would argue the 240 day bar. Its pleadings consistently reflect an intention to preserve this defense. Even had Beehive been mute on this point, there could be no reasonable reliance on the Division's part that Beehive would waive a defense otherwise available to it in a contested proceeding – absent an express, written statement to that effect. This want of any reasonable reliance is underscored by the proceedings in the interconnection docket where Beehive insisted upon enforcement of Section 252(e)'s analogous, 90 day deadline – over the Division's opposition. In short, Section 54-8b-1.2(3)(d) admits of no waiver in any case, and, even if waiver were possible, Beehive did not give such a waiver by estoppel in this docket. The Division's claim that Beehive had a duty to advise the Division is wrong and wrong-headed. Any such duty, moreover, would have been satisfied on the facts of this case in any event.

(3) The Division says that AATCO's application contained insufficient information and that discovery was refused. Since AATCO "obstructed" the application process, or so the argument goes, the 240 day deadline should not be enforced in this

case. This argument was anticipated, addressed, and refuted in Beehive's initial memorandum. Beehive asks the Commission to review that argument here. When Section 54-8b-2.1(3)(d) was enacted, the legislature undoubtedly knew that there would be certification contests, with discovery disputes and other issues. It nevertheless required that applications for certification be processed in 240 days. In view of what universally is known about gamesmanship and delay in ordinary litigation, it is all the more remarkable that Section 54-8b-1.2(3)(d) did not make provision for extensions of time. This underscores the deliberate design of Section 54-8b-1.2(3)(d) as a mandate for repose– there is not a syllable of flexibility in the statutory text –even for cases where there are discovery disputes or other contests which, in the ordinary course of litigation, may delay proceedings. Likewise, as shown in our original memorandum and elaborated above, AATCO has not unreasonably withheld information or otherwise caused delay in this case.

(4) The Division finally argues that, since the Commission denied AATCO's request for informal adjudication in this docket, the 240 day clock should run from the date of that order. As noted above, however, the plain text of Section 54-8b-1.2(3)(d) starts the clock when the application "is filed," not from the date of other orders in the docket. And, as also noted above, the Division's brief on this point misconceives what happened in connection with the argument over formal versus informal adjudication. Everybody concurred that the UAPA requires formal adjudication unless informal adjudication, as an exception to the rule, is ordered by the agency involved. Hence, this docket was subject to formal adjudication unless and until the Commission ordered otherwise. But the Commission never ordered otherwise. This docket, therefore, always

has been subject to formal adjudication, since the Commission denied AATCO's request to convert proceedings to informal adjudication. Thus, even if the 240 day clock were to run from the date that formal adjudication were decreed (as opposed to the date the application is filed – as the statute directs), that date would have been the date of the petition and the outcome is the same. What is more, and in any event, the Division has not shown how the nature of the adjudicative process in this docket, whether formal or informal, could possibly prejudice its ability to meet the 240 day deadline under the statute. Failure to meet that deadline in this case had nothing whatsoever to do with any mode of adjudication.

The clear, strict language of Section 54-8b-1.2(3)(d) decides this case. This statute's language requires the Commission to take specified action, either approval or denial of the application, within 240 days. If one of those actions, approval or denial, is not taken within that limited time, the language mandates an outcome; the application is approved. Given the nature of this language -- permitting two and only two alternative decisions within the time-line -- and further directing a specified consequence if one of those choices isn't made within the allotted time -- no allowance for waiver or exception can be created by implication. The 240 days ran on January 4, 2009, in this case. The AATCO application for an amended certificate, permitting service in Beehive's territory – with retrospective effect – by the express mandate of this statutory language has been granted.

BEEHIVE'S PRECLUSION ARGUMENT

Even if the Commission determines that Section 54-8b-1.2(3)(d) does not dictate the outcome in this proceeding, Beehive argued in the alternative that principles of

preclusion required that the application be granted as a matter of law. Here again the Division was the only party which argued this point with any degree of elaboration. But the Division's arguments, as to Beehive, missed the mark.

Beehive's preclusion argument proceeded along the following lines. It analyzed the requirements for certification under Section 54-8b-1.2. Where the rural carve-out is not at issue, those requirements essentially are twofold. First, the applicant must show financial strength, technical ability, and managerial competency. Second, the application must be in the public interest. Where the rural carve-out is at issue, the incumbent carrier asserting that exemption has the burden of showing that monopoly maintenance within the affected exchange is in the public interest.

Under the statute's language, the rural carve out does not come into play unless the affected carrier objects. If the carve out is triggered by objection, the affected carrier has the burden of demonstrating that the public interest warrants a denial of competition and continuation of a monopoly within the exchange. This public interest test is different -- substantively and procedurally -- from the public interest test where the carve out is not at issue. It is different substantively because (a) the requirement may be vitiated through lack of objection by the affected carrier and because (b) the criteria are peculiar to the rural context.[9] It is different procedurally because (a) it is triggered conditionally through the affected carrier's objection and because (b) the risk of non-persuasion is shifted from the applicant to the incumbent carrier which desires to preserve its monopoly status. The legislature logically tied the requirement of an objection to this risk of non-persuasion: Absent an objection, litigation over the carve out would be futile, if not pointless,

[9] If the criteria were not different in this respect, reference to the public interest in the carve out portion of the statute would be redundant, since the forepart of the statute already contains a generic public interest requirement.

because, in the event, there is no incumbent carrier willing to shoulder any burden of proof.

Beehive claimed that the rural carve out does not come into play in this case because the statutory condition, the affected carrier's objection, has not be met. Since Beehive is the affected carrier, and since it has consented to an invasion of its territory, the exemption has not been put at issue in this proceeding. The rural carve-out's version of "the public interest," and what might have been Beehive's burden to articulate the meaning of that phrase and to make a factual demonstration in view of that articulated meaning, accordingly have not been triggered and are not at issue in this docket.

That means that the only requirements for obtaining an amended certificate in this proceeding are those bearing upon financial ability, technical ability, managerial competency, and satisfaction of the public interest in the generic sense, or, in other words, the same tests that AATCO satisfied when it obtained its initial certificate. The Commission already made findings and conclusions that AATCO satisfied these statutory tests when it granted that initial certificate. These findings from the original certification proceeding, in Beehive's view, must be given preclusive effect as to the same statutory requirements in this amended certification proceeding.

The Division either misconstrues or does not respond to *Beehive's* argument in this regard. On this motion, Beehive did not argue, as the Division avers, that the Commission's approval of the interconnection agreement between AATCO and Beehive has *res judicata* or collateral estoppel effect in this docket. In this respect, and insofar as Beehive is concerned, the Division's argument is a straw man.[10]

[10] Beehive's brief did not argue (contrary to the assertion of the Division) that the result in the interconnection docket has preclusive effect in this proceeding. But it does not disagree with

Moreover, the Division fails to rebut Beehive's contention that, as a matter of statutory construction, unless the affected carrier (Beehive in this case) invokes carve out protection, that subpart of Section 54-8b-1.2 does not become an issue to be determined in this docket. The Division says that parties in a certification docket, through there consent, cannot vitiate the Commission's duty to investigate the case and come to an independent determination that an application's approval would be in the public interest, citing the *Bradshaw* decision.

Beehive does not disagree with this proposition as a general statement – assuming proper qualification. But in light of the particular language of Section 54-8b-1.2, the Division misapplies that principle here. As argued in our initial memorandum, there are two public interest tests in Section 54-8b-1.2. One is in subpart (2)(b) and another is in subpart (3)(c). Beehive agrees that the test in subpart (2)(b) must be satisfied and cannot be waived by the parties, but Beehive argues, as discussed below, that this test can be and has been satisfied through the use of issue preclusion. Beehive contends that the test in subpart (3)(c), in light of the clear statutory text, is an exception to the general rule of

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AATCO's position in this regard. Interconnection agreements cannot be approved absent a finding and conclusion that they satisfy a public interest test. (And as noted in the Qwest brief, this Commission, where appropriate, has invoked a lack of certification as grounds, under the public interest rubric, to deny approval to interconnection agreements.) As a factual finding, under the public utilities code and our case law, this has collateral estoppel effect on the parties who participated in the docket. Unlike the example cited in Qwest's brief, the interconnection agreement at issue in this proceeding was deemed approved after the Division and Qwest participated as parties in that docket. Contrary to the assertion of the Division, these parties actually litigated their points of contention, including allegedly unlawful traffic stimulation, in that docket. In any case, not only actual litigation but also the opportunity to litigate (which surely was afforded all parties in the interconnection docket) is all that is needed under our cases to achieve collateral estoppel effect. To this extent, all of the elements of collateral estoppel – subject-matter jurisdiction, the same parties, an identical issue, and actual litigation or an opportunity to litigate in respect of that issue – have been satisfied. Since the public interest standard was met in the interconnection docket, that standard, on the basis of issue preclusion, should be deemed satisfied in this docket.

subpart (2)(b), and that application of the exception is triggered only by an objection of the affected carrier.

The legislature, therefore, has made a policy judgment that the public interest associated with our rural carve-out provision may be satisfied only where the incumbent local exchange carrier whose territory is subject to invasion makes objection. This is different from the situation in *Bradshaw*. In *Bradshaw* the UPSC delegated to parties in interest certain responsibilities which the legislature, by statute, had given to the Commission. This delegation was contrary to the statutory directive and, hence, unlawful. In this case, the legislature, by statute, has said that there is no need to make any *additional* finding respecting the public interest in the rural carve out situation so long as the affected carrier does not object. This is not about who decides, but whether a decision should be made at all. And to force a decision or add criteria to the decision-making process, where the statute directs otherwise, would be contrary to the legislative will and, hence, unlawful.

The Division likewise ignores Beehive's actual argument respecting issue preclusion on this motion – namely that the Commission's findings in the original certification docket (not the interconnection docket) respecting financial wherewithal, technical ability, managerial competence, and generic public interest may be applied in this amended certification docket. The Commission already found, in the original certification docket, that the conditions to certification under Section 54-8b-1.2 have been satisfied by AATCO. There are no other tests requiring satisfaction in order to approve the amended certificate. The Commission's findings respecting original certification, by

virtue of issue preclusion, must be applied in this docket, and, when applied, they require approval of the AATCO application as a matter of law.

THE COMMITTEE'S PRESENCE IN THIS PROCEEDING

Beehive has moved to strike the pleadings of the UCCS on the grounds that (a) the Committee has not been authorized, pursuant to the terms of its statutory charter, to appear and be heard on the issues in this case, and (b), even if authorization can be shown, it has no standing to raise issues which are outside or contrary to its purpose to represent the interests of residential consumers and small businesses.

The Committee's response to the concern respecting authorization appears to be that this is none of the Commission's business. Beehive disagrees. Every tribunal has inherent power to test the credentials of those who purport to act as agents for parties – and the Commission is no exception to this rule. But for such power, no agency or court ever could insure the efficient, economic control of its dockets or obtain certainty in connection with its regulatory and adjudicative agendas. This is because a party which was misrepresented by an agent acting *ultra vires* might seek to undo what, after enormous time, effort, and expense, had been accomplished and concluded through litigation in that forum.[11]

In their initial papers on these motions, Beehive and AATCO demonstrated that, upon review of the Committee's agendas, it does not appear that a meeting has been convened or that the question of this docket has been put at issue or that the director or

[11] The Commission's form of order, granting intervention to parties, illustrates an exercise of this power to regulate appearances. That form of order requires all agents for every party (whether or not they are licensed attorneys) to observe the rules of civility which are binding upon members of the Utah State Bar. If the Commission has jurisdiction to regulate these standards of conduct – the particulars of etiquette -- for agents, then it has power to examine and insure the *bona fides* of their representation.

counsel for the Committee have been authorized to participate in respect of this case. The Committee's response does not deny this state of affairs and, in any event, fails to prove the contrary to the Commission. With respect, Beehive submits that the Committee is not authorized to participate in this docket and its pleadings accordingly should be stricken.[12]

Even if the Committee can demonstrate authorization according to the requirements which the legislature has imposed upon that agency, it doesn't have standing to raise the arguments which it is pitching to the Commission in this case – especially the arguments respecting traffic stimulation. The Committee appears to respond to the standing concern with three points. (1) First, as with the question of authorization, it says that the Commission does not have jurisdiction to determine the standing of the Committee. (2) Second, it says that, pursuant to a Commission rule, the Committee always has standing in every proceeding. (3) Third, it says that it has a generalized interest in making sure that all utilities "obey the law," and that this interest confers standing upon the Committee in this docket. None of these dogs will hunt, however.

[12] The Committee's position that, when challenged, it need not demonstrate authorization to appear under its statutory charter is puzzling in light of all other arguments which it makes in connection with the issues in this case. The Committee claims, for example, that it has standing (as distinct from authorization) because, in every proceeding, it should be a voice for "obedience to the law" in regulatory matters affecting public utilities. While this argument, as shown below, is eyewash, the legislative framework for the Committee, recently the subject of vigorous debate in the Utah legislature, is no less the law than the rules for certification or any yet-to-be-determined-rule respecting traffic stimulation. At best, the Committee is being arbitrary and capricious in selecting which legal rules it will choose to champion, and, at worst, the Committee is guilty of the very outlawry of which it accuses AATCO in this proceeding.

(1) The Commission has jurisdiction to determine whether the Committee has standing.[13] The Commission regularly exercises this power by ruling upon standing questions. A recent example is *In the Matter of the Formal Complaint of Big City Insulation against Questar Gas Company*, Report and Order, at 11 (UPSC, April 28, 2009). Standing determinations likewise are implicit in many rulings respecting intervention under Utah Code, Section 63G-4-207, and, as we all know, intervention rulings are part of the day to day business of this Commission. Finally, it seems double-tongued for the Committee to maintain on the one hand that the Commission has no jurisdiction to determine the Committee's standing while on the other hand arguing, as discussed below, that the Commission, by rule, has exercised that very jurisdiction to confer standing upon the Committee in the ordinary course of Commission business. With respect, the Committee cannot have it both ways on the point of Commission jurisdiction and questions of standing.[14]

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[13] The Committee cites *Utah Ch. of Sierra Club v. Utah Air Quality*, 148 P.3d 960, 966 (Utah 2006) for the proposition that the UPSC, as an administrative agency, has no power to determine questions of standing. This is not what the Utah Supreme Court held in *Sierra Club*, however, and, by ignoring the overall context of the pertinent language, the Committee seriously misreads this opinion. The agency in *Sierra Club* had made a ruling respecting standing and the Utah Supreme Court was deciding what standard of review should be applied in determining whether to uphold or reverse this ruling. The evaluation of agency power to deny standing was made with this background. The gravamen of the opinion is that, because this agency had no explicit or implicit authority to decide a standing question, since the agency had no expertise in these questions, and the like, standing rulings by this agency would be reviewed for "correctness, granting the Board's decision no deference." *Id.* at 967. Hence, *Sierra Club* did not say that agencies could not decide standing questions under any circumstances; it merely said that agency decisions respecting standing would not be reviewed by the judicial branch with any degree of deference.

[14] The Committee's brief, in an aside, also avers that Beehive and AATCO have no standing to raise the question of the Committee's standing before the Commission. In addition to the circularity of this argument (if the Commission has no power, as the Committee contends, to resolve the question of standing, then how can it resolve the question of Beehive's standing to raise the question of the Committee's standing?), it won't wash as a matter of law. Standing is jurisdictional. Tribunals, including the Commission, have to determine their jurisdiction in any

(2) The Commission Rule does not confer standing upon the Committee in this case. This is because the Rule, as interpreted by the Committee, would be inconsistent with the limitations which the legislature, by statute, has imposed upon the Committee and, further, because the Rule, in any case, does not purport to regulate standing, but rather litigation rights in pretrial and trial proceedings before the Commission after intervention has been granted or standing has been ascertained.

Utah Code, Section 54-10-4 sets forth the statutory basis upon which all Committee participation in Commission dockets may be predicated. That statute limits Committee participation before this Commission in three ways. First, as noted above, only such participation as may be directed by the Committee is allowed. Second, participation is limited to "original actions" commenced by the Committee. Third, the Committee is limited to the taking of "positions most advantageous to a majority of residential consumers as determined by the committee and those engaged in small commercial enterprises[.]"

The Division's grant of power, found at Utah Code, Section 54-4a-1(1)(a), stands starkly in contrast with these limitations. Unlike the Committee, the Division, by statute, has automatic standing in all proceedings before the Commission. It also is charged with representing the "public interest" in those proceedings. The Committee, however, as noted above, may only commence "original actions" -- and even in those actions,[15] it

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case – whether or not questions respecting that jurisdiction are raised by a party. Hence, the Commission has to determine the jurisdictional question of the Committee's standing – whether or not that question is pressed by Beehive or any other party in this docket.

[15] Beehive is giving the Committee the benefit of the doubt on this point and assuming, for purposes of argument, that the phrase, "original actions," may be construed more broadly than the common-sense meaning which those words ordinarily would allow -- to include the right to seek intervention under Section 63G-4-207.

may raise and be heard only on matters pursuant to its narrow statutory charge -- rather than the broader bailiwick respecting the "public interest" which is delegated to the Division.

The Commission's Rule, Rule R746-100-5, on the other hand, provides as follows: "Parties to a proceeding before the Commission, as defined in Section 63G-4-103, may participate in a proceeding including the right to present evidence, cross-examine witnesses, make argument, written and oral, submit motions, and otherwise participate as determined by the Commission. The Division and Committee shall be given full participation rights in any case."

The Committee reads the last sentence of this Rule to confer standing in all cases, to the fullest extent, upon the Committee. Beehive disagrees with this reading because, if read this broadly, the Rule would enlarge the Committee's standing beyond those statutory bounds which have been legislatively fixed. A Commission rule cannot be inconsistent with or otherwise trump a legislative mandate. Rule R746-100-5 can be read, in context, to mean that, as to the scope of pretrial and trial participation allowed various parties, those who intervene are subject to such limitations as the Commission in its discretion may impose, whereas the Division and the Committee will not be subjected to these same discretionary limitations. Put differently, once parties are admitted to a proceeding, the rule governs the scope of litigation effort, such as motion practice and trial examination, that will be allowed; it does not speak to the question of admissibility or the bases for admission as to intervenors or the Committee in the first instance. This reading, not only is more satisfactory from a contextual standpoint, but also serves to

harmonize the Commission's rule with the legislature's carefully crafted mission statement for the Division and Committee respectively.

(3) Finally, the Committee argues that, notwithstanding the narrow limits of its legislative charter, it has standing to enforce obedience to the utilities code, and hence its interest, in this proceeding, to insure that AATCO follows the strictures of Section 54-8b-1.2 and this Commission's certification regime. Beehive applauds the Committee's enthusiasm for legal correctness, but nevertheless maintains that this enthusiasm at all times and on all occasions is subject to the legislature's requirements. For whatever reason, the legislature charged the Division, not the Committee, with enforcing the utilities law in the public interest. And for whatever reason, the legislature circumscribed those interests which could be vindicated by the Committee, the interests of residential consumers and small businesses, and, moreover, put limits on the means by which the Committee could pursue these ends – after full Committee deliberation and direction and, even then, by original actions. The Committee has neither plead nor demonstrated how its efforts on behalf of AT&T, Qwest, and other interexchange carriers in this docket will further the interests of residential users and trade shops in Beehive's neck of the woods.[16]

What is more, even if we allow the Committee a roaming commission generally to enforce the law, this enforcement effort should be evenhanded and rational. Section 54-8b-1.2(3)(d) is the law, for example, but the Committee has shown no interest in upholding either the language or the policy behind this statute. Filed tariffs and the filed rate doctrine are the law in this jurisdiction, as elsewhere, but the Committee does not seem to care that interexchange carriers are refusing to honor those tariffs or pay their bills to rural carriers like Beehive. Litigation is pending between Beehive and Sprint, for

[16] In fact, as discussed below, this effort is subverting and ultimately may defeat those interests.

example, wherein Sprint, as an interexchange carrier, has refused to pay upwards of 2.5 million dollars of access charges to Beehive. This violation of access tariffs, flouting of the filed rate doctrine, and unlawful self-help under FCC precedents, is costing Beehive dearly. These monies, if paid under the lawful terms of Beehive's tariff, could go to network expansion and service improvements for residential subscribers and small businesses (the Committee's statutory constituents) in Beehive's territory. These monies, if withheld indefinitely or permanently, may force Beehive to go on the USF dole, a contingency which, if it materializes, also could be inimical to the interests of telephone consumers everywhere.

The Committee is not bending its oars to enforce these laws or legal principles. Instead, the Committee is seeking to make new law – a rule against so-called "traffic stimulation." In furtherance of this endeavor, not at law enforcement, but at the creation of new rules, the Committee has attached to its pleadings in this case an opinion rendered years ago by the FCC and a complaint filed recently by AT&T. Indeed, these massive attachments dwarf the memoranda submitted by the Committee, revealing its primary intentions and the overall thrust it is making in this docket. Those filings, those intentions, and that direction will be welcomed, we're sure, by interexchange carriers everywhere, including AT&T, Qwest, and, of course, Sprint. But this isn't law enforcement. This is policy making and rule formulation far beyond the certification issues narrowly posed in this docket. Most important for our standing concerns, it is an effort that is far afield from the Committee's charge, as defined by the legislature, to represent the needs of small consumers rather than the interests of large utilities. The

Committee has transgressed the bounds of the "certificated area" in which the legislature has authorized the Committee to serve. Its pleadings should be stricken.

CONCLUSION

This docket, which began so innocently under Section 54-8b-1.2, has become, largely through the influence of interexchange carriers such as Qwest and AT&T, part of the policy battleground respecting access tariffs, rate reform, and so-called traffic stimulation issues. The 240 day limitation which our legislature has imposed for processing applications under Section 54-8b-1.2, a central purpose of which is to encourage competitive entry and to promote industry innovation, does not seem well-suited to a contest of this magnitude. Indeed, this case may be a perfect storm in that regard.

In view of these statutorily imposed temporal constraints, this docket should deal with certification issues, not rate reform. Qwest, AT&T, and URTA came on the scene in the last month of the 240 day time-line. The Committee appeared after the deadline had passed. The Division never answered the application, as required by the rules, and made its motion to compel discovery approximately 60 days from the legislatively mandated expiration point. AATCO is not to blame for all of these late appearances or any undue delay in processing the application in this proceeding. But as Beehive repeatedly has stressed, attempts to assign blame are beside the point. We all are accountable to an ultimate, legislative judgment that, for better or worse, there is a 240 day drop dead date. With respect to that judgment, our deadline in this docket has passed and the application has been granted.

Dated this 15th day of May, 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing pleading was served this 15th day of May, 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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