- 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 REPORT AND ORDER

ISSUED: June 16, 2009

By The Commission:

This matter is before the Commission on the Division of Public Utilities' (Division) Motion to Dismiss, or in the alternative, Request for Formal Adjudication, the Office of Consumer Services' (OCS) (f/k/a Committee of Consumer Services) Motion to Dismiss, petitioner All American's (Petitioner or All American) Motion to Strike the OCS's Motion to Dismiss, petitioner's Motion for Summary Decision, Motion of Beehive Telephone Company's (Beehive) Motion to Strike the OCS' Motion to Dismiss, and Beehive's Motion for Summary Disposition of the Petitioner's Petition.

BACKGROUND

On April 19, 2006, the petitioner filed its original application for a certificate of public convenience and necessity (certificate or CPCN) in Docket No. 06-2469-01. In its original application, describing the location in which it intended to provide service, it stated: "All American will provide service to and from all points in Utah." It then amended its application to describe its proposed service location as follows: "All American does not plan to provide local exchange services in the service areas of small or rural local exchange carriers ("LECs") as defined by the Telecommunications Act of 1996, except in Beehive Telephone Co., Inc. territory,

or as applied for in the future before the Utah Public Service Commission." The petitioner further amended its initial application on February 20, 2007 as follows: "All American does not plan to provide local exchange services in the service areas of small or rural local exchange carriers ("LEC") as defined by the Telecommunications Act of 1996." Based in part on this final representation regarding service area, the Commission issued the petitioner's certificate on March 7, 2007. The certificate excluded petitioner from serving local exchanges with less than 5,000 access lines controlled by incumbent telephone corporations with fewer than 30,000 access lines.

About three months after the date of certificate's issuance, on June 11, 2007, the petitioner and Beehive submitted an interconnection agreement in Docket No. 07-051-03, whereby petitioner sought to operate as a CLEC[1] in Beehive's certificated territory. The Division did not oppose the interconnection agreement. Pursuant to 47 USC § 252(e)(4), the Commission must have acted within 90 days to either approve or reject the interconnection agreement. S*ee 47 USC § 252(e) (1)-(2).* Since the Commission did not act on the interconnection agreement, the agreement was "deemed approved" *47 USC § 252(e) (4),* by operation of law on or about September 10, 2007.

On May 2, 2008, the petitioner filed what it termed a petition for a *nunc pro tunc* amendment of its certificate of public convenience and necessity. In support of its petition, the petitioner alleged:

1. AATCO was granted a Certificate of Public Convenience and Necessity in Docket No. 06-2469-01 on March 7, 2007, authorizing it to operate as a CLEC within the state of Utah, excluding those local exchanges of less

[1] Competitive local exchange carrier

than 5,000 access lines of incumbent telephone corporations with fewer that 30,000 access lines in the state.

2. On June 11, 2007, AATCO and Beehive Telephone Co., Inc. ("Beehive") filed an interconnection agreement with the Commission. This interconnection agreement was deemed approved by the Commission on September 10, 2007 pursuant to 47 U.S.C. § 252(e)(4).
3. AATCO and Beehive have been operating under the terms of this interconnection agreement on the assumption that AATCO had authority to operate as a CLEC in the area certificated to Beehive.
4. If the terms of the March 7, 2007 Certificate are viewed in isolation, independently of the interconnection agreement, AATCO technically may be deemed to lack authority to operate as a CLEC in the area certificated to Beehive.
5. In order to conform AATCO's CLEC certificate to the facts of the arrangements that have existed between the two companies since the certificate was granted, AATCO hereby requests that the Commission amend AATCO's certificate *nunc pro tunc*, as of the date the certificate was issued so as to grant AATCO the authority to operate as a CLEC in the area certificated to Beehive, at least to the extent of the terms and conditions of that interconnection agreement.
6. Such an amendment will make certain the implicit operating authority already granted by the Commission, and will not operate to extend AATCO's operating authority into any other local exchange carrier's certificated territory. Beehive has filed, concurrently with this application, its consent to AATCO's petition.

Petition, pp. 1-2.

Following a discovery dispute between the Division and the petitioner, the Division filed its Motion. Because the petitioner believed these proceedings were informal, and because it refused to answer a second set of data requests, the Division moved to dismiss the petition or, in the alternative, have the proceedings designated as formal.

On January 7, 2009 the OCS filed its response to the petition and Memorandum supporting its own Motion to Dismiss. The OCS moved to dismiss the

petition, arguing that an amendment to the original certificate must be adjudicated formally in the original docket. Additionally, since the petitioner had violated the terms of its certificate, the OCS argued that the Commission should consider, in the original docket, whether the petitioner's certificate should be cancelled.

On January 14, 2009, the Commission ruled on the Division's Motion and reaffirmed that the proceedings were formal, denied the petitioner's request to designate them as informal, and set deadlines for all parties and intervenors to respond to the Division's and the OCS's Motions, as well as deadlines for the petitioner and Beehive to file their own dispositive motions.

On or about April 7, 2009, several parties filed motions or responses to motions. The petitioner filed its Motion to Strike the OCS's Motion to Dismiss, arguing that the Motion is not authorized by statute and "exceed[ed] the sphere of interests that the Committee has been directed to protect." The petitioner also filed its Motion for Summary Decision, arguing that the Commission already "made the requisite factual determinations for granting the Petition" for a *nunc pro tunc* amendment of its CPCN when it approved the interconnection agreement between All American and Beehive. The petitioner filed a memorandum supporting its two motions, which memorandum also incorporated its response in opposition to the Division's Motion.

Utah Rural Telecom Association (URTA) filed its response and did not move for dismissal, but argued that the Commission should consider, in this docket or in a new docket, if the petitioner's CPCN should be amended prospectively to include

Beehive's certificate. It opposed the petitioner's motion for summary disposition, contending that the interconnection agreement did not expand All American's territory, nor did the operation of law change its CPCN to include Beehive's territory.

AT&T Communications of the Mountain States, Inc's and TCG Utah's (AT&T) filed their memorandum supporting the OCS's and the Division's Motion to Dismiss. AT&T agreed that the petition should be dismissed, but also recommended the Commission issue an order to show cause as to why All American's CPCN should not be cancelled for its violation of its CPCN. AT&T also recommended that the Commission consider if the petitioner should have its CPCN revoked for alleged traffic pumping.

Qwest Corporation and Qwest Communications Company, LLC (Qwest) submitted their Response to the petition and generally favoring the Division and OCS's Motions. In sum, it requested the Commission dismiss the petition or formally adjudicate whether the petitioner's CPCN should be amended. It also stated that the Commission should commence formal proceedings to examine whether the petitioner's certificate should be cancelled.

Beehive also submitted its Motion to Strike Pleadings of the OCS and for summary disposition granting All American's petition. Beehive moved to strike the OCS's motion because it was not authorized by the Committee of Consumer Services, beyond the scope of the OCS's powers, and was not timely, being filed after what Beehive claimed is a jurisdictional bar. Beehive also incorporated its response to the Division and the OCS's Motion in its Motion.

On April 23, 2009 URTA, the OCS, the Division, and Qwest filed their Responses. URTA opposed All American's petition. It argued that the interconnection agreement did not enlarge the petitioner's certificate by operation of law. It argued that All American needed first to obtain Commission approval to operate in Beehive's territory before operating there. It claims an interconnection agreement could not have enlarged authority the petitioner never had. It recommended that All American seek an amendment in this docket or in a new docket to operate prospectively in Beehive's territory.

The OCS also responded. It recommended denial of All American's and Beehive's motions and requested a formal proceeding to consider whether the petitioner's CPCN should be revoked. It argued that any Commission order dealing with amendment and permitting the petitioner to operate in Beehive territory, should only deal with prospective relief, and that any such order should come as a result of a formal proceeding which also considers revocation of the CPCN. It also argued that it did have the authority to represent the interest of residential and small utility consumers, whose interests would be impacted by these proceedings. It also argued that the petitioner's and Beehive's request for agency action provides no legal or factual basis upon which the Commission may make appropriate findings and issue related orders related to the petitioner's provision of telecommunications service and its compliance with state and federal law. The OCS also argued that the Commission did not have the authority to grant the relief requested by All American's petition, i.e. *nunc pro tunc* amendment of a certificate.

Finally, the OCS claimed the Commission did not have authority to "oversee' the OCS, its director, or the assistant attorneys general as they serve the OCS. Further, it claimed that All American and Beehive did not have the requisite standing needed to litigate the issue of whether the OCS and its counsel were acting within the scope of their power. The OCS also argued that the Commission still retained jurisdiction over the petitioner and could still make determinations as to whether the petitioner's service was still in the public interest.

The Division also responded. It opposed the petitioner and Beehive's Motions, arguing that the petitioner had not provided sufficient evidence upon which the Commission could amend All American's petition to operate in Beehive's territory. It noted that there were still questions of whether the petitioner's entry into Beehive territory was in the public interest. It also noted that AT&T and Qwest had raised an issue of alleged traffic pumping which needed to be resolved. The Division contended that, even if the 240-day limitation of Utah Code § 54-8b-2.1(3)(d), All American had waived that time period. It also argued that *nunc pro tunc* relief was not an appropriate in this docket. It also argued that the doctrine of res judicata did not bar the Commission from acting on the petition, and even at this point, amending or revoking the petitioner's CPCN.

Qwest also filed its Response. It criticized as baseless the petitioner's argument that an interconnection agreement may amend the service territory listed in a CPCN. It also argued that approving the petitioner and Beehive's positions would "gut

the long-held policy in Utah" of maintaining the rural exemption, all without public comment or thorough examination. It also argued that the doctrine of res judicata was inapplicable, as the Commission still retained jurisdiction to investigate "any acts or omissions which implicate[] the public interest," including whether All American violated the terms of its Certificate. It also contended that the OCS's Motion should not be stricken. Qwest also recommended that the Commission formally hear any proposed amendment which would allow the petitioner to operate in Beehive's territory. It suggested that the Commission should also formally consider whether such relief would be in the public interest, if the "rural exemption" should be changed, if the petitioner had operated contrary to its certificate, and if the Commission's action could eliminate the "rural ILEC competition statute."

On May 7, 2009, the Commission granted All American and Beehive's Motion for an extension of time to file their replies, which they filed on May 19, 2009. Beehive contended that Utah Code § 54-2b-1.2(3)(d) has conclusively settled whatever issues the parties or the Commission may have on the petition. It argued that the 240-day time frame is the limit in which the Commission may consider whether to deny or grant an application. Since no action was taken within the 240-day time frame, the application for *nunc pro tunc* relief was considered granted. It also argued that the *nunc pro tunc* aspect of its petition was merely incidental to the relief it sought, i.e. an amendment to its petition, allowing it to serve in Beehive's territory. Beehive also contended that the 240-day deadline could not have been waived. It stated that the petitioners' "opinion about

the applicability of the 240 day deadline does not determine the meaning of Section 54-8b-2.1(3) (d).” It states that there is no such waiver listed in Section 54-8b-2.1(3) (d) that it could not be waived, and despite the petitioner’s purported waiver of such timeframe, the Commission cannot uphold such a waiver. Regardless, however, Beehive claims that if the waiver is permitted, it did not waive the deadline (although All American may have), and that approval of the application must still follow. It again argues that principles of res judicata require the Commission’s approval of the petition.

All American responded in support of its motions and Beehive’s Motions. It argues that the Commission does have authority to exclude the OCS from participating in this docket and to strike the OCS’s motions and responses. It again reiterated its position that when the Commission approved the interconnection agreement between it and Beehive, it found the interconnection agreement was in the public interest. It also argued that since all the present parties had opportunity to oppose the interconnection agreement between it and Beehive, and since they chose not to, they cannot now attack the agreement after the 240-day deadline has passed, based on principles of res judicata. Finally, it contended that the Commission did have the authority to grant the relief requested *nunc pro tunc*.

ANALYSIS

The parties filed various motions, responses, and replies to those motions. The Commission, above, has only briefly summarized the arguments made in their

supporting and opposing memorandums. The details of their positions are fully stated in their respective filings. The Commission addresses the motions below.

All American and Beehive's Motions to Strike

There is no Commission rule specifically governing Motions to Strike. Therefore the Commission turns to the Utah Rules of Civil Procedure in determining whether the OCS's Motion to Dismiss should be stricken. Rule 12(f) governs motions to strike. It states:

> Motion to strike. Upon motion made by a party before responding to a *pleading* or, if no responsive *pleading* is permitted by these rules, upon motion made by a party within twenty days after the service of the *pleading*, the court may order stricken from any *pleading* any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(emphasis added). Rule 7 of the Rules of Civil Procedure define a "pleading" as a complaint, an answer, reply to counterclaim, an answer to cross-claim, third party complaint, third party answer, and a reply to answer or third party answer. Commission Rules similarly define a pleading as an "application, petitions, complaints, orders to show cause, and other traditional initiatory pleadings" and "answers and protests." R746-100-3. Rule 746-100-3(A) (1) states that "motions, oppositions, and similar filings" are not requests for agency action or responses to requests for agency actions. It seems clear, therefore, that a motion to strike is appropriate when directed at pleadings as defined by Commission Rules and the Rules of Civil Procedure, but not when directed at motions. *See e.g. Lowery v. Hoffman*, 188 FRD 651, 653 (MD Ala 1999) (holding that "terms of the rule make clear that 'only material included in a 'pleading' may be subject of a motion

to strike. … Motions, briefs or memoranda, objections, or affidavits may not be attacked by the motion to strike.')(internal citation omitted))[2] Instead, such a motion directed at other motions may be "regarded as an 'invitation' by the movant "to consider whether [proffered material] may properly be relied upon." *United States v. Crisp*, 190 FRD 546, 551 (ED Cal 1999). The Commission concludes that it may properly rely upon the OCS's motions and memoranda in reaching its conclusion, especially as they relate to, or may relate to, the public interests related to residential and small utility consumers. Beehive and All American's Motions to Strike are denied.[3]

Beehive and All American's Motions for Summary Judgment

Rule 56 of the Utah Rules of Civil Procedure allows summary disposition[4] of a controversy if the

> pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

They are particularly helpful where the issues are primarily legal questions, as they are here. The material facts forming the basis of the motions to this point are not in dispute. However, Beehive and All American have not shown, and the Commission is not

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[2] "Interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are "substantially similar" to the federal rules." *Lund v. Brown*, 2000 UT 75, ¶ 26.

[3] Even if the OCS's motion could properly be subject to a motion to strike, a motion to strike is generally disfavored by courts because "striking an entire pleading, or a portion thereof, is a drastic remedy, and because a motion to strike may often be brought as a dilatory tactic." Therefore, they should not be granted "unless the allegations have no possible relation to the controversy and are likely to cause prejudice to one of the parties." *Sellers v. Butler*, 2006 U.S. Dist. LEXIS 72935, *4-*5. Here the OCS's allegations are relevant to the issue of whether the petitioner's actions in maintaining its CPCN are in the public interest.

[4] Utah courts and those in the 10th Circuit use the terms summary disposition and summary judgment interchangeably. *See e.g. Wycalis v. Guardian Title*, 780 P.2d 821, 824 (Utah App. 1989), *Durborow v. IHC Hosp., Inc.*, 1998 Utah App LEXIS 158, *2, *and Franklin v. Oklahoma City Abstract & Title Co.*, 584 F.2d 964, 969 (10th Cir. 1978).

convinced, that the movants are entitled to summary judgment as a matter of law. For the reasons below, the Commission denies their motions.

First, the Commission must deny the motions because it does not have the authority to grant the relief sought by the petitioner, i.e. *nunc pro tunc* amendment of their CPCN. "A *nunc pro tunc* order is an *equitable remedy* that is used to rectify errors, omissions, or mistakes in previously entered orders." *In re Wallace*, 298 B.R. 435, 442 (B.A.P. 10th Cir. 2003). As the Commission has stated before, "this Commission does not possess equitable powers." *In the Matter of the Complaint of Union Telephone Co. v. Qwest Corporation,* 2005 Utah PUC LEXIS 255, *3; *see also* Utah Code Ann. § 54-7-20. Even if the Commission could grant *nunc pro tunc* relief, it would not be appropriate, as the powers can only be "used to correct a mistake in the records; it cannot be used to rewrite history." *See In re Wallace*, 298 B.R. at 442 (internal citations omitted). The Commission did not make a mistake in not authorizing the petitioner to serve in Beehive's territory. In granting the CPCN, it explicitly precluded from serving there.

Second, it would not be appropriate to grant the petitioner's requested relief (even if it were properly before the Commission) with this matter still proceeding, and without any significant discovery, public comment, or Commission scrutiny. The petitioner claims the 240-day deadline found in § 54-8b-2.1(3) (d) governs the process for amendments of certificates, and that deadline having passed, their request for relief must be granted. However, even assuming the 240-day deadline controls in petitions seeking to amend a certificate, the petitioner waived its right to have the matter concluded in 240-

days. The Commission's current practice allows petitioners to waive the 240-day deadline found in 54-8b-2.1. Not only have other petitioner's taken advantage of this practice, but so did the petitioner. The Commission will adhere to this practice unless the petitioner or Beehive show that there is some fair and rational basis to depart from this practice. *See Utah Code Ann.* 63G-4-403(4)(h)(iii); *see also Comm. of Consumer Servs. v. PSC of Utah*, 2003 UT 29, ¶ 13. All American's contention that its waiver was merely an expression of its "opinion", and Beehive's argument that it did not agree to this waiver, do not provide the Commission with the rational basis, much less a fair one, needed to depart from its previous practice of allowing parties to waive the 240-day deadline. This matter is still proceeding through adjudication and the Commission will not grant the petitioner and Beehive's Motion for summary disposition of their request for relief.

Third, even though the petitioner and Beehive contend the 240-day deadline mandates the granting of its petition, it is not clear, as a matter of law, that the Commission must adjudicate a petition to amend[5] a certificate within the 240-day deadline. The Commission does use the factors listed in UCA 54-8b-2.1, e.g. sufficient technical, financial, and managerial resources, considerations of the public interest, etc. in determining whether a certificate should be amended. But section 54-7-13, which specifically relates to "rescission or amendment of orders[6]", e.g. like a certificate of

[5] Beehive, in its Reply briefs, has stated that the petitioner merely seeks to amend its certificate to include Beehive's territory, and that the *nunc pro tunc* aspect is merely incidental.

[6] "The word 'order' refers to a specific legal obligation or duty running to a particular utility and is like a judgment or decree in the judicial context. Simply stated, an order is an agency command to do or to refrain from doing a

public convenience and necessity, does not state a timeframe by when the Commission must consider an amendment. The Commission finds that the passing of the 240-day deadline does not mandate the granting of the petition for *nunc pro tunc* amendment of its CPCN, but finds that it may still properly investigate whether All American's CPCN should be rescinded, altered, or amended.

Fourth, the Commission cannot agree that an interconnection agreement can expand a certificated territory, as the petitioner and Beehive would have the Commission conclude. The petitioner contends the Commission effectively "amended" its certificate to include Beehive's territory by first granting the petitioner its certificate pursuant to UCA 54-8b-2.1(3) (c) and subsequently approving the interconnection agreement pursuant to 47 USC § 252(e) by operation of law. It states its petition presented two issues for the Commission to adjudicate within 240 days, i.e. "feasibility under subpart (2) (a) and the public interest under subpart (2) (b)." The petitioner contends that the Commission already (impliedly at least) made factual determinations regarding these two issues when it allowed the interconnection agreement to go into effect by operation of law pursuant to 47 U.S.C. § 252(e)(4). In order to have rejected the interconnection agreement on the basis of public interest and feasibility, the Commission should have issued findings and a consistent order that "the implementation of such an agreement or portion is not consistent with the public interest, convenience, and necessity." 47 USC 252(e). Because the Commission did not issue such findings

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specific act in a specific factual context." *Salt Lake Citizens Congress v. Mountain States Tel.&Tel. Co.*, 846 P.2d 1245, 1253 (Utah 1992).

within 90 days, the petitioner claims the Commission implicitly determined that the agreement was, in fact, "consistent with the public interest, convenience, and necessity." All American further contends that the Commission also made the findings regarding feasibility and public interest benefits in the *original* certificate docket, which "findings in that original docket are binding and have preclusive effect"—and the Commission is barred from making any changes to the new "amended" certificate based on the doctrine of res judicata. However, except for their own interpretations of UCA 54-8b-2.1 and 47 USC 252, the petitioner and Beehive present no authority for the proposition that "the simplified act of filing an interconnection agreement has the effect of expanding a certificated territory" nor any authority for the proposition that the interconnection agreement actually "approved" by the Commission did in fact expand its territory. In reality, in relation to a purported amendment of the petitioner's CPCN to operate in Beehive's territory, no evidence was presented regarding the public interest, effect on the patrons served by All American and Beehive, effect of any such amendment on USF rates state-wide—especially in the areas served by Beehive and All American, etc. It is not clear, as a matter of law, that an interconnection agreement can expand a certificated territory. The Commission must, therefore, deny All American and Beehive's motions for summary judgment.

Finally, *even assuming, arguendo,* that the "clear strict language of Section 54-8b-1.2(3)(d) decided this case" as the movants argue, and even if the 240 day time limit was not and could not be waived, and even assuming that the granting of the interconnection agreement

expanded All American's territory into Beehive's territory by operation of law, the Commission still has jurisdiction to consider whether that "expansion" should be rescinded, altered, or amended, and even whether All American's certificate should be rescinded. *See Utah Code § 54-7-13*. All American correctly cited language in *Salt Lake Citizens* stating that the "basic policies, including the need for finality in administrative decisions, support application of the doctrine of res judicata to administrative agency determinations." *See Salt Lake Citizens*, 846 P.2d at 1251. The Supreme Court went on to say that "res judicata applies when there has been a prior adjudication of a factual issue and an application of a rule of law to those facts. In other words, res judicata bars a second adjudication of the *same facts* under the same rule of law." *Id.* at 1251-52 (emphasis added).

However, our Supreme Court has given additional guidance with regards to the applicability of res judicata in administrative proceedings. In *Bowen Trucking, Inc. v. Public Service Comm'n*, 559 P.2d 954 (Utah 1977) the petitioner complained against the Commission after it removed a restriction on the operating rights of a trucking company, but only after the Commission had first imposed those very restrictions. The petitioners in *Bowen* contended that the Commission's original order was final, and any subsequent action by the Commission was barred by the doctrine of res judicata. *See Bowen*, 559 P.2d at 956. Therefore the Commission did not have jurisdiction to remove the restrictions.

The *Bowen* court, however, held that the Commission did have the authority to rescind, alter, or amend any prior order or decision. It cited to Utah Code § 54-7-13 which states:

> (1) The commission may *at any time*, upon notice to the public utility affected and after opportunity to be heard, rescind, alter, or amend any order or decision made by it. (2) When served upon the public utility affected, any order rescinding, altering, or amending a prior order or decision shall have the same effect as the original order or decision.

Bowen went on to state that "the Legislature plainly intended by this section to confer on the Commission the power to amend its decisions and order." *Bowen*, 559 P.2d at 956. In holding that the Commission properly exercised its authority, and that the principles of res judicata did not prevent the Commission from revisiting previous orders based on, at least, "mistake or newly discovered evidence," the Court cited to other case law in explaining the effect of res judicata.

> "It is true that the commission's decision and orders ordinarily become final and conclusive if not attacked in the manner and within the time provided by law. This is not to say, however, that such a decision is res judicata in the sense in which that doctrine is applied in the law courts. The commission has continuing jurisdiction to rescind, alter or amend its prior order at any time . . . ."

Id. at 956 (quoting *Sale v. Railroad Comm'n*, 104 P.2d 38 (Utah 1940)).[7] It further commented that "'every tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriately to modify its judgment, decree, or order.'" *Id.* at 957 (internal citations omitted). One of the main reasons that res judicata does not apply "in the sense in which that doctrine is applied in the law courts" is because "unlike traditional court proceedings, hearings before the Commission are not designed to consider only the interests of the litigating parties. The Commission must consider the interests of the utility's customers and the interests of the public." *Bradshaw v. Wilkinson Water Co.*, 2004 UT 38, ¶ 36.

[7] The *Bowen* court went so far as to say that "the doctrine of res judicata applies only to judicial decisions and a hearing before this Commission does not conclude such rights of the parties that it is deemed to be exercising a judicial function as that term is construed in reference o the courts." *Id.* at 956. Despite seemingly contravening language quoted by the petitioner from *Salt Lake Citizens* (p. 1251-1252), *Bowen* is still good law in this state.

The Commission clearly has authority to "rescind, alter, or amend any order or decision made by it" in circumstances when inadvertences or errors have been made, when a utility has violated terms of orders—including but not limited to the terms of its certificate, and when it is "otherwise appropriate[] to modify its judgment, decree, or order."

Arguably, the petitioner may be found to have violated the terms of its certificate. The order of the Commission, as clearly reflected in the petitioner's CPCN, was that the petitioner was excluded from serving local exchanges with less than 5,000 access lines controlled by incumbent telephone corporations with fewer than 30,000 access lines. About three months after the date of certificate's issuance, the petitioner and Beehive submitted an interconnection whereby petitioner sought to operate as a CLEC in Beehive's certificated territory. In its petition in this docket, All American admitted it "and Beehive have been operating under the terms of this interconnection agreement on the *assumption* that [All American] had authority to operate as a CLEC in the area certificated to Beehive" but that All American "technically may be deemed to lack authority to operate as a CLEC in the area certificated to Beehive." Just given these admissions, the Commission may, even now, investigate any alleged violation of the petitioner's certificate and determine whether the granting or maintenance of the CPCN is still in the public interest (including what effect alleged traffic pumping may have, if any, on the public interest). Even if the interconnection agreement somehow expanded the petitioner's certificated territory, the Commission still maintains continuing jurisdiction to determine whether that should again be amended to restrict the petitioner to its original certificated area—which excluded Beehive's territory.

The Division's Motion to Dismiss

Absent the petitioner's cooperation in discovery, and absent the Commission's finding that this was a formal proceeding, the Division requested the Commission dismiss the petition. Having already affirmed that these proceedings are formal proceedings in its January 14, 2009 Report and Order, and having found that the petitioner has an obligation to cooperate in discovery, the Commission finds the Division's Motion is moot.

The OCS's Motion to Dismiss

The Commission denies the OCS's Motion to Dismiss. The Commission, in this docket, will determine to what extent the applicant's CPCN should be rescinded, altered, or amended.

ORDER

Therefore, the Commission orders as follows:

1. All American's and Beehive's Motions are denied;
2. The OCS's Motion is denied;
3. To the extent not done previously, the Commission gives notice to All American that this docket shall consider to what extent its certificate should be rescinded, altered, or amended, and whether its certificate should permit it to operate in Beehive's territory or to what extent it should be excluded from serving local exchanges with less than 5,000 access lines controlled by incumbent telephone corporations with fewer

than 30,000 access lines. The caption in this docket shall be changed to be as follows: "In the Matter of the Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah."

4. Pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing within 30 days after issuance of this Order by filing a written request with the Commission. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of the request, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirement of Sections 63G-4-401 and 63G-4-403 of the Utah Code and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 16th day of June, 2009.

/s/ Ruben H. Arredondo
Administrative Law Judge

Approved and confirmed this 16th day of June, 2009 as the Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#62527