JANET I. JENSON (Bar No. 4226)
GARY R. GUELKER (Bar No. 8474)
JENSON & GUELKER, LLC
747 East South Temple, Suite 130
Salt Lake City, Utah 84102
Telephone: (801) 579-0800
Facsimile: (801) 579-0801
Attorneys for Petitioners

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.	))))))))	**ALL AMERICAN'S APPLICATION FOR REVIEW AND REHEARING OF THE COMMISSION'S JUNE 16, 2009 ORDER** Docket No. 08-2469-01

Petitioner, All American Telephone Company, Inc. ("All American"), by and through undersigned counsel, and pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, hereby submits the following Application for Review and Rehearing of the Order issued by the Public Service Commission of Utah (the "Commission") in this matter on June 16, 2009.

BACKGROUND

I. Prior Proceedings

On March 7, 2007, the Commission granted All American a Certificate of Public Convenience and Necessity ("CPCN") authorizing it to operate as a competitive local exchange carrier ("CLEC") within the state of Utah, excluding those local exchanges with less than 5,000 access lines controlled by incumbent telephone corporations with fewer that 30,000 access lines

in the state. *See* Docket No. 06-2469-01. As part of the application for its CPCN, All American submitted all of the documentation and factual information required by Utah Admin. R746-349-3 to the Utah Public Service Commission (the "Commission") . *See id.*.

Three months later, on June 11, 2007, All American and Beehive Telephone Co., Inc. ("Beehive") submitted an interconnection agreement to the Commission for its approval pursuant to 47 U.S.C. § 252(e)(1). *See* Docket No. 07-051-03. This agreement set forth the nature of the parties' proposed relationship. For example, its states:

> ... All American terminates local telecommunications traffic that originates from Beehive subscribers, and Beehive terminates local telecommunications traffic that originates from All American subscribers.
> ... All American provides a point of interconnection in the Beehive service areas, or interconnects with Beehive network via a Beehive tandem switch; and
> ... the Parties wish to establish a reciprocal compensation interconnection arrangement that compensates each other for terminating local telecommunications traffic that originates on the other Party's network.

See id..

Based on the foregoing, it was clear that All American intended to operate as a CLEC in the area certificated to Beehive if and when the interconnection agreement was approved by the Commission. Furthermore, the proposed agreement was given its own docket and placed in the public record so that any interested party could view it. In fact, the Division of Public Utilities ("Division") was a party to this proceeding and participated by serving Beehive with a set of data requests.[1] The Division did not oppose the interconnection agreement, which was eventually

[1] In addition, the Qwest Corporation and Qwest Communications Corporation were given permission to intervene in the matter on August 1, 2007. *See* Docket No. 07-051-03.

approved by the Commission on September 10, 2007 pursuant to 47 U.S.C. § 252(e)(4).

In order to approve the interconnection agreement, the Commission was required to make certain findings regarding the nature of Beehive and All American's relationship. For example, the Commission was required to reject the agreement if it determined that it "discriminates against a telecommunications carrier not a party to the agreement." 47 U.S.C. § 252(e)(2)(A)(i). Likewise, the agreement could not be approved if "the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity." *Id.* at § 252(e)(2)(A)(ii). Again, the Division did not raise any concerns that Beehive and All American's proposed relationship fell short of these standards. Therefore, by approving the interconnection agreement, the Commission necessarily determined that agreement was consistent with the public interest, convenience and necessity.

II. The Current Dispute

Soon after the interconnection agreement was approved by the Commission, All American realized that the agreement was somewhat incongruous with its CPCN, as the CPCN did not technically authorize All American to operate as a CLEC in Beehive's territory. However, since Beehive had no objection to All American's entry into its territory, and since the Commission had already determined that such entry was consistent with the public interest, All American viewed the omission of Beehive's territory from its CPCN as a mere technicality. Therefore, in order to conform All American's CPCN to the Commission's approval of the interconnection agreement, All American filed a Petition requesting that the Commission amend

the March 7, 2007 CPCN *nunc pro tunc*, so as to formalize All American's authority to operate as a CLEC in the area certificated to Beehive.

Based on the Commission's prior approval of the interconnection agreement between All American and Beehive, All American filed a Motion for a Summary Decision requesting that the Commission grant its Petition as a matter of law. In short, All American argued that in order for the Commission to deny a CLEC's entry into a rural exchange, two conditions must be met. *See* Utah Code Ann. § 58-8b-2.1(3)(c). First, the affected ILEC must intervene and protest the certification, and, second, the Commission must find that the CLEC's entry would not be "consistent with the public interest." *Id.*. All American argued that neither of these conditions could be satisfied because (1) Beehive consented to All American's certification in Beehive territory, and (2) the Commission previously determined that All American's certification would be consistent with the public interest when it approved All American's interconnection agreement on September 10, 2007.

Beehive also filed a memorandum in support of All American's Motion. In addition to the foregoing argument, Beehive asserted that All American's Petition must be deemed approved by virtue of Utah Code Ann. §54-8b-2.1(3)(d), which states that if the Commission has not acted on an application for competitive entry within 240 days, the application is deemed to be granted as a matter of law. Since All American's Petition was filed on May 2, 2008, Beehive argued that the Petition has already been granted as a matter of law.

In response to its Motion to Dismiss, All American received an opposition memorandum

filed by the Office of Consumer Services ("OCS"). This was surprising because the OCS had never formally sought permission to intervene in the matter. Furthermore, All American believed that the OCS's involvement was inappropriate because (1) its involvement had not been authorized by the Committee of Consumer Services, and (2) the subject matter of All American's Petition exceeded the scope of interests that the OCS has been directed to protect. Therefore, All American filed a motion to strike OCS's memorandum and the arguments set forth therein.

III. The Commission's Order.

On June 16, 2009, Administrative Law Judge Ruben Arredondo issued an Order denying All American's Motion for Summary Decision and its Motion to Strike OCS's arguments. With respect to the Motion for Summary Decision, Judge Arredondo first determined that the Commission lacks authority to grant *nunc pro tunc* relief because such relief is equitable in nature and therefore beyond the Commission's scope of authority. Second, he stated that the Commission's approval of the interconnection agreement does not have any preclusive effect and that All American must present new evidence before its Petition may be granted. Third, the Judge stated that 240-day deadline set forth in Utah Code Ann. §54-8b-2.1(3)(d) may be waived and that All American in fact waived the deadline. Fourth, the Order stated that the even if the 240-day deadline cannot be waived, it does not apply to this proceeding because All American's Petition only seeks an amendment to its CPCN, as opposed to the issuance of a new one. Finally, the Judge determined that even if All American's legal arguments were to be assumed

to be true, the Commission could still deny All American's Petition because it has the ongoing authority to review All American's CPCN and to determine whether it should be altered or amended.

With respect to All American's motion to exclude the OCS's arguments, Judge Arredondo determined that there is no rule which expressly authorizes such motions. As such, he denied the motion on procedural grounds and did not discuss the substance of All American's argument.

The Commission subsequently approved and confirmed Judge Arredondo's Order on June 16, 2009, thus setting the stage for the following application.

ARGUMENT

Utah's Administrative Procedures Act states that "if a statute ... permit[s] parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order...." Utah Code Ann. § 63G-4-301(1). In turn, the Public Utilities Act states that "[a]fter any order or decision has been made by the commission, any party to the action or proceeding ... may apply for rehearing of any matters determined in the action or proceeding." Utah Code Ann. § 54-7-15(2)(a). Based on this statutory authority, All American respectfully requests the Commission to rehear All American's Motion for Summary Decision and review its June 16, 2009 Order for the following reasons.

I. All American's Motion for Summary Decision.

A. The Commission Has Already Made the Factual Findings Necessary to Grant All American's Petition.

All American's Petition requests the Commission to amend All American's March 7, 2007 CPCN *nunc pro tunc*, so as to formalize All American's authority to operate as a CLEC in the area certificated to Beehive. All American contends that it is entitled to such relief as a matter of law under principles of res judicata. This is because the Commission already made the factual determinations necessary for the granting of All American's Petition when it approved the All American's interconnection agreement with Beehive on September 10, 2007.

"Res judicata, often referred to as claim and issue preclusion, prevents the readjudication of issues previously decided." *Salt Lake Citizens Congress v. Mountain States Telephone & Telegraph Co.*, 846 P.2d 1245, 1251 (Utah 1992). "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." *Id.* at 1251-52. In other words, the principle "bars a second adjudication of the same facts under the same rule of law." *Id.* at 1252. Finally, the Utah Supreme Court has held that the "basic policies" of res judicata apply to administrative decisions, including the "need for finality." *Id.* at 1251.

In order to apply the foregoing principle to All American's Petition, it is necessary to first examine Utah Code Ann. § 54-8b-2.1, which provides the standards for approving an applicant's competitive entry into an existing service territory. The statute states that the Commission shall issue a certificate upon a determination that (a) the applicant has "sufficient technical, financial, and managerial resources and abilities" to provide the services in question and (b) "the issuance

of the certificate to the applicant is in the public interest." *Id.* at § 54-8b-2.1(2). The statute further provides that if the applicant is seeking to enter the territory of an ILEC which serves fewer than 30,000 access lines in the state, that ILEC "may petition" the Commission "to exclude from [the] application . . . any local exchange with fewer than 5,000 access lines that is owned or controlled" by such ILEC. *Id.* at § 54-8b-2.1(3)(c). If the Commission finds that the proposed exclusion is consistent with the public interest, then it "shall order that the application exclude such local exchange." *Id.*.

In this case, Beehive has chosen not to petition for the exclusion of All American from its territory under § 54-8b-2.1(3)(c). To the contrary, Beehive consented to All American's Petition in writing. Therefore, the only two remaining issues for the Commission to decide are the feasibility issue and the public interest issue, as required by § 54-8b-2.1(2). However, pursuant to the basic principles of res judicata, there is no need for further proceedings to resolve these issues. This is because the Commission already made factual determination regarding these two issues when it approved All American's interconnection agreement with Beehive.

The Commission approved All American's interconnection agreement pursuant to 47 U.S.C. § 252(e)(4). This portion of the Federal Telecommunication Act required the Commission to make the following findings before the agreement could be approved:

> (e) Approval by State Commission
> (1) Approval required
>
> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted ***shall***

> ***approve or reject the agreement, with written findings as to any deficiencies***.
> (2) Grounds for rejection
> The State commission may only reject—
> (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—
> (I) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
> (ii) ***the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity***;

47 U.S.C. § 252(e) (emphasis added).

In this case, the Commission approved the All American's interconnection agreement via operation of law. This means that the Commission did not feel it was necessary to issue any written findings detailing deficiencies in the agreement. As such, the Commission implicitly determined that the interconnection agreement was "***consistent with the public interest, convenience and necessity.***" *Id.* at § 252(e)(2)(A)(ii) (emphasis added). If the Commission had determined otherwise, it would have been *required* to reject the interconnection agreement pursuant to federal law. By approving the interconnection agreement, the Commission has already determined that All American meets the legal requirements for competitive entry into Beehive territory. Therefore, any further litigation on this issue is proscribed and All American is entitled to a summary decision as a matter of law.

In its Order denying All American's Motion, the Commission states that it is not authorized to grant relief *nunc pro tunc* because such relief is equitable and therefore beyond the scope of its authority. However, the Commission's position is misplaced because it ignores the high degree of flexibility that Utah courts have afforded administrative agencies. In fact, there is

no rule that prohibits administrative bodies from employing equitable measures, as long as such measures are consistent with statutory mandates. In this case, the Utah Legislature has expressly given the Commission wide latitude in its ability to regulate public utilities and has not prohibited the Commission from granting equitable relief.

The Commission's position is based, in part, on a federal bankruptcy decision which states that *nunc pro tunc* orders may only be used to correct mistakes in the record. *See In re Wallace*, 298 B.R. 435, 442 (B.A.P. 10th Cir. 2003). However, this rigid federal court rule is not applicable to state administrative proceedings. This is because "[a]dministrative proceedings are usually conducted with greater flexibility and informality than judicial proceedings." *Pilcher v. Utah Dep't of Social Services*, 663 P.2d 450, 453 (Utah 1983). As such, "[r]igid adherence to judicial procedures in administrative actions is generally inappropriate because it ignores basic differences between judicial and administrative proceedings." *Id.*. In fact, federal administrative agencies do have the authority to grant *nunc pro tunc* relief for reasons other than to correct mistakes in the record. *See Romero-Rodriguez v. Gonzales*, 488 F.3d 672 (5th Cir. 2007) ("'It makes persuasive sense that the power of the [Board of Immigration Appeals] to enter *nunc pro tunc* orders is greater than that of federal courts.")

Furthermore, the Legislature has given the Commission a great deal of discretion over matters within its jurisdiction. The Utah Code states that the Commission is "vested with power and jurisdiction to supervise and regulate every public utility in this state, ... and to do all things, ***whether herein specifically designated or in addition thereto***, which are necessary or

convenient in the exercise of such power and jurisdiction." Utah Code Ann. § 54-4-1 (emphasis added). In other words, the Commission does have powers that go beyond those expressly set forth in its governing statutes.

Based on the foregoing, the Commission certainly has the ability to amend All American's CPCN *nunc pro tunc.* It has been given the authority to issue certificates authorizing competitive entry. *See* Utah Code Ann. § 54-8b-2.1. Furthermore, while the Legislature provided standards that must be considered before a certificate can be issued, it did not set forth precise procedures that govern exactly how the application process must be administered. Therefore, there is nothing which prevents the Commission entering orders *nunc pro tunc,* as long as the appropriate factual findings are made.

As support for its Order, the Commission also cites to one of its previous decisions which states that "this Commission does not possess equitable powers." *In re Complaint of Union Telephone Co. v. Qwest Corp.,* 2005 Utah PUC LEXIS 255. However, this decision has no bearing on the foregoing analysis. The issue in *Union Telephone* was not whether the Commission could use equitable remedies to resolve matters within its jurisdiction. Rather, it was whether the court possessed jurisdiction to adjudicate a common law claim for unjust enrichment.[2] In this case, the subject matter of All American's Petition, e.g., the amendment of a CPCN, is clearly within the Commission's jurisdiction. There is simply no law which prohibits

[2] *See* 2005 Utah PUC LEXIS 255 at 3 ("We begin our analysis with the recognition that this Commission does not possess equitable powers. We therefore will not further entertain Union's claim that it is entitled to compensation under the equitable doctrine of unjust enrichment.").

the Commission from employing equitable measures to resolve issues that the Legislature has given the Commission authority to adjudicate.

The Commission's Order also states that even if it had the authority to grant *nunc pro tunc* relief, the Commission's approval of the interconnection agreement could not have expanded All American's territory because no evidence was presented regarding the public interest as part of that agreement. However, this conclusion ignores the fact all of the parties to this proceeding were notified that All American and Beehive's interconnection agreement had been submitted to the Commission for approval. In fact, both the Division and Qwest intervened in the matter and made appearances in the docket. Any of the parties could have objected to the Commission's approval of the interconnection agreement on the grounds that All American's entry into Beehive's territory would not be in the public interest. They chose not to do so. Rather, the agreement was approved as a matter of law after the statutory deadline for rejection passed. *See 3D Const. and Development, L.L.C. v. Old Standard Life Ins. Co.*, 2005 UT App 307, ¶ 20, 117 P.3d 1082 (For purposes of res judicata, an issue has been "fully litigated" in a previous action if the opposing parties received notice that sufficiently apprised them of the previous action's pendency and afforded them an "opportunity" to present their objections.).

The principles of consistency, finality and judicial economy would be severely compromised if All American is required to re-litigate whether All American's entry into Beehive's territory is consistent with the public interest. It would be entirely inconsistent for the

Commission to approve the interconnection agreement and then deny an amendment to All American's CPCN that is consistent with the agreement. Moreover, the Commission's approval of the interconnection agreement would be rendered meaningless if the parties are allowed to re-open and re-litigate issues that were already decided in the approval process. Therefore, the Commission should give preclusive effect to its approval of the interconnection agreement and grant All American's petition as a matter of law.

Finally, the Commission's Order states that it is not required to grant All American's Petition as a matter of law because it has the statutory authority to rescind, alter or amend a CPCN at any time. While this is true, such powers cannot be implemented in the context of this docket. If the Commission believes that there are reasons why All American's entry into Beehive's territory is no longer in the public interest, it should issue a Notice of Agency Action which outlines the grounds for its proposed action. However, during the interim period, All American must be allowed to operate under the terms of the interconnection agreement that the Commission previously approved. To do otherwise would necessarily deny All American of its right to an amended CPCN without any notice in violation of its due process rights under the Fifth Amendment.

B. All American's Petition Must Be Granted Because The 240-Day Deadline for the Commission to Act Has Passed.

In its order, the Commission concludes that All American's Petition must be adjudicated under the standards set forth in Utah Code Ann. § 54-8b-2.1. *See* Order at 13 ("The Commission does use the factors listed in UCA 54-8b-2.1 ... in determining whether a certificate should be

amended). This statute sets forth procedures the Commission must follow in approving applications for certificates to provide services in an incumbent telephone corporation's service territory. It states, in part, that "[t]he 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." Utah Code Ann. § 54-8b-2.1(3)(d).

At the commencement of this litigation, All American's position was that § 54-8b-2.1 did not apply to this proceeding because the Commission had already given All American permission to operate in Beehive's territory when it approved its interconnection agreement with Beehive. The purpose of the Petition was to simply conform All American's CPCN to the grant of authority it has previously received. As such, All American believed that the 240-day deadline was not applicable to this proceeding, and said as much in a letter which is now being construed as a waiver.

Now that the Commission has formally concluded that All American's Petition must be adjudicated pursuant to § 54-8b-2.1, it is necessarily bound by the deadline set forth therein. Since the Commission failed to take action on the Petition within the 240 days of its filing, the Petition must now be considered granted as a matter of law.

In its Order, the Commission states that the 240-day deadline may be waived and that All American did, in fact, waive the deadline in November 2008. However, this conclusion is flawed for several reasons. First, All American did not expressly waive the deadline. Rather, as explained more fully above, All American simply stated its opinion that the underlying statute

did not apply to this case. Second, Beehive did not consent to any extension of the deadline, but rather has consistently has maintained that the deadline applies, is non-waivable, and should be enforced. Finally, even if All American's position could be properly characterized as a waiver, such waiver has no effect because the relevant statutory language regarding the deadline is absolute and cannot be waived by the parties. *See* Utah Code Ann. § 54-8b-2.1(3)(d) ("[t]he commission ***shall*** approve or deny the application under this section within 240 days after it is filed.) (emphasis added).

All American and Beehive's position that this deadline cannot be waived is consistent with Utah Supreme Court's decision in *Kennecott Copper Corp. v. Salt Lake Cty.*, 575 P.2d 705 (Utah 1978), wherein the court outlined a test for determining whether the use of the words "shall" and "must" in statutes should be interpreted as having mandatory effect, as opposed to being simply directory. It stated as follows:

> The general rule is that a statute, prescribing the time within which public officers are required to perform an official act, is directory only, unless it contains negative words denying the exercise of power after the time specified or the nature of the act to be performed....

Id. at 706 (citation omitted).

In this case, the deadline set forth in § 54-8b-2.1(3)(d) is clearly mandatory because it is followed by negative words which prohibit the Commission from denying an application for competitive entry after the 240-deadline has passed. As such, the parties cannot override the will

of the Legislature and waive the deadline where the statute contains no provision allowing such waivers.

Finally, the Commission's Order states that while All American's Petition must be decided using the factors outlined Utah Code Ann. § 54-8b-2.1, it is really governed by § 54-7-14.5, which relates to the "[r]escission or amendment of orders." In turn, the Order states that § 54-7-14.5 does not contain any deadline for the Commission to consider an amendement. However, this statute has no application to All American's Petition. Rather, it states that "[t]he commission may, at any time after providing an affected utility notice and an opportunity to be heard, rescind, alter, or amend any order or decision made by the commission." Utah Code Ann. § 54-7-14.5(1). In other words, it applies to instances in which the Commission initiates agency action for the purpose of reviewing one of its previous orders. There is no deadline for decision because the order being reviewed would remain in place while the proceeding is ongoing. In this case, however, a regulated third-party is requesting agency action. Therefore, § 54-7-14.5 has no application to this proceeding.

Based on the foregoing, All American respectfully requests the Commission to review and reverse its Order denying All American's Motion for Summary Decision.

II. The OCS's Arguments Must be Stricken From the Record.[3]

[3] The entity formally known as the Committee of Consumer Services was recently re-organized by statute into the Office of Consumer Services. Its powers are currently governed by the Office of Consumer Services Act, Utah Code Ann. §§ 54-10a-101 – 303. However, at the time All American filed the motion that is now subject to review, this entity was still known as the Committee of Consumer Services and was governed by former statutes. Therefore, the arguments presented herein are based on those previous statutes and the OCS will be referred to as the "Committee."

In determining whether All American's Motion for Summary Decision should be granted, the Commission should not consider arguments filed by the Committee. This is because the Committee never adopted a position regarding All American's Petition prior to the Attorney General's decision to file the motion. Second, even if the Committee had adopted a position in this matter, its motion cannot not be considered because All American's Petition does not involve issues or concerns that fall within the Committee's responsibility.

The Committee is a public entity created by the Utah Legislature, which in turn placed limitations on the Committee's duties and responsibilities. Such limitations are as follows:

> The Committee of Consumer Services shall have the following duties and responsibilities:
> (1) The Committee shall assess the impact of utility rate changes and other regulatory actions on residential consumers and those engaged in small commercial enterprises in the state of Utah.
> (2) The Committee shall assist residential consumers and those engaged in small commercial enterprises in appearing before the Public Service Commission of the state of Utah.
> (3) The Committee shall be an advocate on its own behalf and in its own name, of positions most advantageous to a majority of residential consumers as determined by the Committee and those engaged in small commercial enterprises, and may bring original actions in its own name before the Public Service Commission of this state or any court having appellate jurisdiction over orders or decisions of the Public Service Commission, as the Committee in its discretion may direct.

Utah Code Ann. § 54-10-4 (2008). In addition, the Utah Legislature instructed the Attorney General to assign at least one attorney to represent the Committee. Utah Code Ann. § 54-10-7 (2008). This attorney is given the authority "to prosecute all actions ***which the***

Committee of Consumer Services deems necessary to enforce the rights of residential and small commercial consumers of such utilities." *Id.* (emphasis added).

In this case, the Attorney General's Office filed a memorandum in opposition to All American's motion on the Committee's behalf. However, it appears that the attorney may have exceeded his authority because there is no public record which indicates that the Committee ever took a position as to whether All American's Petition is in the interest of the Committee's constituents. As part of its Motion to Strike, All American attached copies of minutes from all Committee's meetings held between the time All American filed its Petition and the time the Attorney General's Office filed its memorandum. According to these minutes, All American's Petition was never brought to the Committee's attention or otherwise discussed by its members. More importantly, the Committee never formally instructed its attorney to oppose the Petition. As such, since it appears that the Attorney General's memorandum was never formally authorized by its client, it should be stricken from the record as moot.

Nevertheless, assuming *arguendo* that the Committee did authorize the opposition memorandum, it must still be stricken because the issues raised in All American's Petition do not fall within the scope of the Committee's jurisdiction. For example, the memorandum does not explain why the proposed amendment to All American's CPCN is not "advantageous to a majority of residential consumers ... and those engaged in small commercial enterprises." Utah Code Ann. § 54-10-4(3) (2008). In fact, the memorandum does not discuss the impact of the proposed amendment on consumers' utility rates whatsoever. Rather, the memorandum is

limited to a discussion of the proper forum in which All American's proposed amendment should be handled. The statute outlining the Committee's duties and responsibilities do not identify these types of procedural matters among the topics with which the Committee should concern itself. This is not surprising because such matters simply do not have any substantive impact on consumers or their utility rates. Therefore, even if the Committee authorized the opposition memorandum, it must be stricken because it does not raise any issues that fall within the scope of Utah Code Ann. § 54-10-4 (2008).

In its Order, the Commission does not address the substance of All American's Motion to Strike. Instead, the Commission determined that there are no rules which authorize it to strike a motion or memorandum. It states that the only rule governing motions to strike is Utah R.Civ. P. 12, and it only addresses the striking of pleadings. However, this conclusion ignores the fact that Rule 12's scope is limited to the manner in which defendants in civil actions may respond to Complaints, and therefore there would be no reason for it to address instances in which motions and memoranda may be stricken. In any event, the Committee's memorandum could be characterized as a pleading because the Committee had never previously filed a response to All American's Petition. Rather, the memorandum was the Committee's initial response and therefore should be considered a response to a request for agency action.

The fact is that the Commission has the full authority to exclude a third-party from participating in a case if the third-party is not authorized by statute to do so. Utah Code Ann. § 54-4-1 (Commission is "vested with power and jurisdiction to supervise and regulate every

public utility in this state, ... and to do all things, ***whether herein specifically designated or in addition thereto***, which are necessary or convenient in the exercise of such power and jurisdiction.") (emphasis added). In fact, under the Commission's rationale, any third-party could come in off the streets and file a memorandum in a proceeding and the parties-in-interest would have no ability to exclude the filing. Such a result is non-sensical. Therefore, the Committee should reconsider its Order and grant All American's Motion to Strike.

CONCLUSION

Based on the foregoing, All American respectfully requests the Commission to grant its Application for Review and Rehearing of the Order issued by the Commission on June 16, 2009.

Dated this 15th day of July 2009.

JENSON & GUELKER, LLC

By:
JANET I. JENSON
GARY R. GUELKER
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May 2009, the foregoing **ALL AMERICAN'S APPLICATION FOR REVIEW AND REHEARING OF THE COMMISSION'S JUNE 16, 2009 ORDER** was sent by electronic mail and mailed by U.S. Mail, postage prepaid:

Michael L. Ginsberg
Assistant Attorney General
160 East 300 South 5th Floor
Heber Wells Building
Salt Lake City, UT 84111
mginsberg@utah.gov

Paul Proctor
Assistant Attorney General
160 East 300 South 5th Floor
Heber Wells Building
Salt Lake City, UT 84111
pproctor@utah.gov

Judith Hooper
Beehive Telephone Company
Beehive Telecom
2000 E. Sunset Road
Lake Point, UT 84074
Hooper@Beehive.net

Alan L. Smith
Attorney for Beehive Telephone
1492 East Kensington Avenue
Salt Lake City, UT 84105
Alanakaed@aol.com

Stephen F. Mecham
Callister Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, UT 84133
sfmecham@cnmlaw.com

Roger Moffitt
645 East Plumb Lane, B132
P.O. Box 11010
Reno, NV 89502
roger.moffitt@att.com

George Baker Thomson, Jr.
Qwest Corporation
1801 California St., 10th Flr.
Denver, CO 80202
george.thomson@qwest.com