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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

IN THE MATTER OF THE PETITION OF )	<b>REPLY MEMORANDUM IN</b>
ALL AMERICAN TELEPHONE CO., )	<b>SUPPORT OF ALL AMERICAN'S</b>
INC. FOR A <i>NUNC PRO TUNC</i> )	<b>MOTION FOR STAY</b>
AMENDMENT OF ITS CERTIFICATE )	
OF AUTHORITY TO OPERATE AS A )	Docket No. 08-2469-01
COMPETITIVE LOCAL EXCHANGE )	
CARRIER WITHIN THE STATE OF )	
UTAH. )	

Petitioner, All American Telephone Company, Inc. (“All American”), by and through undersigned counsel, hereby submits the following Reply Memorandum in Support of Motion for Stay.

**INTRODUCTION**

All American has moved the Commission to stay any further proceedings in connection with its Petition until the resolution of its Application for Rehearing and Review of the Commission’s June 16, 2009 Order, as well as any subsequent judicial review. Most of the parties, e.g., the Utah Rural Telecom Association (“URTA”), Beehive, AT&T and Qwest, have not opposed the motion. The only parties who have opposed the proposed stay are the Office of Consumer Services (“OCS”) and the Division of Public Utilities (“Division”). They argue that

any stay is inappropriate because the June 16, 2009 Order (the “Order”) is not a “final agency action” that is to be subject to judicial review under the Utah Administrative Procedures Act (“UAPA”).<sup>1</sup>

As an initial matter, the OCS and Division’s arguments assume that the Commission would not grant All American’s application. However, on August 5, 2009, the Commission did grant the application and stated that a decision regarding the issues raised in the application would be forthcoming. Therefore, it would be appropriate to at least stay the matter until the Commission renders its decision, as it could potentially change the nature of this proceeding going forward.

Nevertheless, even if the Commission’s decision does not modify the Order, a stay pending judicial review is still appropriate. The question of whether the Order is a “final agency action” is not one for the Commission to decide. Rather, it is a jurisdictional issue that the appellate courts will have to determine if judicial review becomes necessary. In any event, the Order is a final agency action because it conclusively disposed of three important issues in this case: (i) the Commission’s ability to grant *nun pro tunc* relief, (ii) the preclusive effect, if any, of Beehive and All American’s interconnection agreement, and (iii) whether the 240 day deadline set forth in Utah Code Ann. § 54-8b-2.1(3)(d) has any application to All American’s Petition.

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<sup>1</sup> The OCS goes as far as to argue that Commission itself cannot review the Order because Utah Code Ann. § 63G-4-302(1)(a) only allows agencies to reconsider or review orders “if the order would otherwise constitute final agency action.” *Id.* However, this statute has no application to the present issue because All American filed its application pursuant to Utah Code Ann. § 63G-4-301(1), which allows parties to seek agency review of *any* order issued by the agency. Therefore, the OCS’s argument regarding All American’s ability to seek agency review must be rejected.

Finally, a stay would be appropriate because the legal rights All American is seeking to secure would be significantly diminished if it was required to litigate this matter while judicial review is pending.

## **ARGUMENT**

### **I. The Commission Should Restrain from Opining as to Whether its Order Is Subject to Judicial Review.**

The Division and the OCS argue that All American's Motion to Stay must be denied because the relevant Order is not subject to judicial review. By doing so, the Division and the OCS are asking the Commission to make a legal determination as to whether the Order is a final agency action that may be reviewed pursuant to Utah Code Ann. § 63G-4-401(1). However, the Commission is not required to make this decision. Rather, the proper forum for this question is the appellate court system because it directly relates to the courts' jurisdiction over these types of cases. In fact, if the Commission did render a decision on this issue, it would be purely advisory and would have no binding effect on the appellate courts. As such, the Commission should exercise judicial restraint and allow the courts to decide this issue in the proper context. *See State v. Ortiz*, 1999 UT 84, 987 P.2d 39 ("Where there exists no more than a difference of opinion regarding the hypothetical application of a piece of legislation to a situation in which the parties might, at some future time, find themselves, the question is unripe for adjudication.").

Rather than concerning itself with the appellate courts' ability to review the Order, the Commission should focus on the extent to which All American may be prejudiced or harmed if they are required to engage in litigation while judicial review, including consideration of the

jurisdictional issue, are resolved. All American's position is that it should not be required to participate in discovery and a formal hearing because it is entitled to relief as a matter of law. If it is required to engage in litigation and discovery while an appeal over these issues is ongoing, the interests All American is trying to protect would essentially be rendered moot. Therefore, the Commission should stay these proceedings pending judicial review. If the appellate courts determine that they lack jurisdiction, then the stay would be lifted and the parties would proceed towards a formal hearing.

## **II. The Order is a Final Agency Action That Is Subject To Judicial Review.**

Notwithstanding the foregoing, Utah appellate courts will most likely determine that the Order is a final agency action that is subject to judicial review pursuant to Utah Code Ann. § 63G-4-401(1). While UAPA does not specifically define "final agency action," the Utah Supreme Court has reviewed the act and has established extensive guideline for determining which agency opinions are subject to judicial review.

For example, in *Barker v. Utah Pub. Serv. Comm'n*, 970 P.2d 702 (Utah 1998), the Supreme Court stated as follows regarding the finality of agency actions:

Because of the nature of agency proceedings, final actions often take place seriatim, disposing completely of discrete issues in one order while leaving other issues for later orders. ***Such orders will be final as to any issue fully decided by that order.***

*Id.* at 706 (emphasis added). In other words, the Supreme Court held that a "final agency action" refers to questions that have been "fully decided." *Union Pacific Railroad Co. v. State Tax Comm.*,

2000 UT 40, ¶ 13, 999 P.2d 17.

The Supreme Court has established a three part test for determining whether an agency action has “fully decided” a particular issue:

- (1) Has administrative decision making reached a stage where judicial review will not disrupt the orderly process of adjudication?
- (2) Have rights or obligations been determined or will legal consequences flow from the agency action?; and
- (3) Is the agency action, in whole or in part, not preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action?

*Id.* at ¶ 16.

Based on the foregoing analysis, it is clear that the Commission’s Order is a final agency action with respect to the issues that All American raised in its Application for Review and Rehearing. In this Order, the Commission made several legal determinations that will preclude All American from obtaining the relief sought by its Petition. For example, it conclusively determined that it does not have the authority to grant *nunc pro tunc* relief because such relief is equitable in nature. *See* Order at 12. The Commission also concluded that the 240-day deadline found in Utah Code § 54-8b-2.1(3) does not apply to this proceeding. *See* Order at 13-14. Nevertheless, it also concluded that if the deadline did apply, the deadline could be waived by All American and that All American did waive the deadline mid-way through the proceeding. *See* Order at 12-13. Finally, the Commission held that its approval of the interconnection agreement between All American and Beehive has no preclusive effect in this proceeding. *See* Order at 14-15. This means that All American must show that the proposed amendment to its certificate is in the public interest, even though the Commission previously made this

determination.

All of these legal determinations were final agency actions because they completely disposed of the underlying issues for the remainder of this proceeding. *See Barker*, 970 P.2d at 706 (“[F]inal actions often take place seriatim, disposing completely of discrete issues in one order while leaving other issues for later orders. Such orders will be final as to any issue fully decided by that order.”). They did not address preliminary or procedural aspects of the case. Rather, they were substantive decisions that relate to core issues such as the Commission’s continuing jurisdiction and the preclusive effect of the Commission’s findings in related proceedings.

Most importantly, the Commission’s Order had substantial legal consequences on the merits of All American’s Petition. At its core, All American’s Petition sought a recognition from the Commission that All American was authorized to operate as a CLEC in Beehive’s territory as of the time the Commission approved All American’s interconnection agreement with Beehive. In fact, the reason it sought to designate this matter as an informal proceeding was so that the Commission could memorialize the implicit amendment of All American’s certificate without a formal hearing. All American believed that a formal hearing was unnecessary because the Commission had already made the necessary factual findings when it approved the interconnection agreement. By determining that *nunc pro tunc* relief is unavailable and that the interconnection agreement’s approval has no legal effect, the Commission essentially dismissed All American’s Petition. In fact, the Commission has given this proceeding an entirely new

name and has ordered All American to file an Amended Petition that sets forth a different request for relief. *See Union Pacific Railroad Co.*, 2000 UT 40 at ¶ 13 (In determining whether agency action was final, courts look to whether “rights or obligations been determined” or whether “legal consequences flow from the agency action”).

Finally, judicial review of the Commission’s Order at this stage in the proceedings “will not disrupt the orderly process of adjudication.” *Id.* To the contrary, this is the ideal stage in the proceedings to deal with All American’s concerns. By ordering this action to be renamed, the Commission has changed the relevant issue to whether All American’s certificate of authority should be amended, modified or revoked. This is a severe departure from the relief All American initially sought. Therefore, it makes sense to address All American’s concerns now before the scope of the proceeding takes such a drastic turn.

Based on the foregoing, All American submits that Utah’s appellate courts will likely find that the Commission’s Order is a final agency action and that they have the jurisdiction to review the foregoing issues. As such, the Commission should grant All American’s request for a stay until any such judicial review is resolved. Otherwise, the rights All American is seeking to secure via the appeal would be severely diminished.

### **CONCLUSION**

Based on the foregoing, All American respectfully requests the Commission to grant its Motion for Stay.

Dated this 10th day of August 2009.

**JENSON & GUELKER, LLC**

By:

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009, the foregoing **REPLY MEMORANDUM IN  
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