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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION OF ALL AMERICAN TELEPHONE CO., INC. FOR A *NUNC PRO TUNC* AMENDMENT OF ITS CERTIFICATE OF AUTHORITY TO OPERATE AS A COMPETITIVE LOCAL EXCHANGE CARRIER WITHIN THE STATE OF UTAH.	)	**ALL AMERICAN TELEPHONE COMPANY'S RESPONSIVE POST-HEARING BRIEF** Docket No. 08-2469-01

Pursuant to the briefing schedule established by the Presiding Officer at the close of the hearing on March 3, 2010, All American Telephone Company, ("All American") respectfully submits the following Responsive Post-Hearing Brief to address certain issues raised by the intervening parties in their Initial Post-Hearing Briefs filed with the Commission on March 24, 2010.

ARGUMENT

I. The Public Interest Standard.

Before addressing the intervenors' arguments regarding the substantive merits of All American's petition, it is important to first discuss the meaning of the term "public interest," as it is used in Utah Code Ann. § 54-8b-2.1(2). This is because the Division's opposition to All American's petition is based on its presumption that a higher public interest standard applies to

CLECs seeking to operate in a rural territory, regardless of whether the ILEC in that territory objects. In fact, the Division believes this standard is so high that it creates a presumption against the granting of certificates to CLECs for rural areas.[1] However, the Division's subjective belief regarding the appropriate policy to be applied in this case is inconsistent with the applicable statutory language.

Utah Code Ann. § 54-8b-2.1 discusses the standards a CLEC must satisfy in order to be granted a CPCN to operate in either the Qwest territory or a rural territory:

> (1) Notwithstanding any provision of Section 54-4-25 to the contrary, the commission may issue a certificate to a telecommunications corporation authorizing it to compete in providing local exchange services or other public telecommunications services in all or part of the service territory of an incumbent telephone corporation.... The procedure specified in Subsection (3)(c) for excluding competition within a local exchange with fewer than 5,000 access lines shall apply on December 31, 1997 or thereafter.
>
> (2) The commission shall issue a certificate to the applying telecommunications corporation if the commission determines that:
> (a) the applicant has sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for; and
> (b) the issuance of the certificate to the applicant is in the public interest.
>
> (3) (a) The commission shall process the application in accordance with Title 63G, Chapter 4, Administrative Procedures Act.
> (b) Each telecommunications corporation holding a certificate to provide public telecommunications service within the geographic area where an applicant is seeking to provide telecommunications service shall be provided notice of the application and granted automatic status as an intervenor.
> (c) An intervening incumbent telephone corporation serving fewer than 30,000

[1] *See* Div. Post Hearing Brief at 2-3 ("It is the DPU's position that a more stringent standard applies to rural exchanges regardless of whether the incumbent objects to the issuance of the certificate or not. The statute almost creates a presumption against granting certificates, at least, in exchanges of less than 5,000 access lines, and the Commission has made it clear in other rural certificate applications that it will evaluate the request more stringently then it would a request only in a Qwest exchange.").

> access lines in the state may petition the commission to exclude from an application filed pursuant to Subsection (1) any local exchange with fewer than 5,000 access lines that is owned or controlled by the intervening incumbent telephone corporation. Upon finding that the action is consistent with the public interest, the commission shall order that the application exclude such local exchange**.**

The foregoing, statute establishes two alternative standards by which the Commission must determine whether to approve a CLEC's entry into a rural ILEC's territory. First, if the ILEC objects to the CLEC's entry, the Commission must exclude the ILEC if such exclusion is found to be in the public interest, as required by Subections (3)(b)&(c). This first standard is only applied if the rural ILEC in that territory affirmatively petitions the Commission to exclude the CLEC from the territory.

The statute's second alternative applies i the ILEC does not object to the CLEC's entry. In such a case, the CLEC's application is reviewed pursuant to Subsection (2), which states that the Commission shall issue the requested CPCN if "the issuance of the certificate to the applicant is in the public interest." Utah Code Ann. § 54-8b-2.1(2)(b). This is the same public interest test that is applied to any CLEC seeking a certificate to operate in the Qwest territory – not the higher standard the Division argues should apply.

If the Commission believes it is appropriate to deviate from the foregoing statute and apply a heightened public interest standard to CLECs seeking to operate in a rural territory where the rural ILEC does not object, it should not do so in the context of this proceeding. This is because the Commission has never previously announced any policy decision in this regard.[2] It would be

[2] *In re Bresnan Broadband, LLC*, Docket No. 07-2476-01, the Commission did discuss a the public interest standard in deciding whether to award a CPCN for a rural territory. However,

fundamentally unfair to retroactively apply a heightened standard of review to All American's petition because All American had no notice of the policy change at the time of filing or at the hearing. Furthermore, given its unique set of facts, this case should not be used to establish precedent that will be applied to all future applicants for CPCN's for rural territories. For the Commission to apply a heightened standard violates the straightforward language of the statute. Moreover, to apply a different and higher standard *retroactively* to the parties in this adjudication who have no notice, no ability to comply and no opportunity to be heard on this new standard also violates the law. Adjudication is not the proper forum or means for the Commission to create a new standard if it wants to do so. And to create a new standard in an adjudication and then apply the new standard retroactively solely to these specific parties is clearly a violation of law. This is the thrust of URTA's brief and its objection.

The more proper course of action would be for the Commission to open a separate rulemaking docket to discuss potential rules that would apply in the future when a rural ILEC does not oppose a CLEC's entry into its territory. This would allow for a wider range of interests to be heard, would result in a more sound policy, and would not violate any party's due process rights. However, since no such rules or policies are in effect at this time, and since Beehive does not oppose All American's petition, All American should be judged under the public interest standard set forth in Utah Code Ann. § 54-8b-2.1, as opposed to the heightened standard which the Division seeks to have applied.

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the ILEC in that case had filed an objection to the CPCN. This fact makes the *Bresnan* decision highly distinguishable from the present dispute.

II. The Commission Must Not Deny All American's Petition In Order to Punish the Company for Its Past Mistakes.

The overall theme of the intervenors' arguments is that All American does not deserve a CPCN to operate in Beehive's territory because it did not indicate its intent to operate in Beehive's territory when it applied for and received its initial CPCN. In other words, the intervenors want the Commission to punish All American for its past mistakes, even though there is no evidence that All American's activities in Beehive's territory have adversely affected the public in any way. In fact, the Division goes so far as to characterize the proposed amendment as a "reward"[3] that All American does not deserve to receive. However, a CPCN is not a reward that may only be given out for good behavior. Rather, a CLEC is entitled to a CPCN if it can otherwise meet the necessary statutory requirements. The fact that All American opened this docket voluntarily and it did so to attempt to rectify its past mistakes by seeking an amendment to its CPCN should not be used as a basis to deny relief or revoke All American's existing certificate. Rather, the Commission's policy should be to encourage utility companies who find themselves in violation of the law to come forward and rectify any non-compliance issues.

As an initial matter, All American vehemently denies that any of its past mistakes regarding certification were wilfully designed to deceive the Commission. In fact, the intervenors' arguments in this regard are not based on the evidence, but rather on their own speculation and mischaracterizations. The objective evidence regarding the bases for All American's mistakes was

[3] *See* Div. Post Hearing Brief at 3 ("AATCO should not be rewarded by now expanding its certificate.")

that it received bad advice from its attorneys and that is mistakenly relied on this advice.[4] Mr. Goodale has also testified that it is his intent to rectify All American's past mistakes. As he stated at the hearing:

> I'm not an attorney, I don't have all the answers. I tried to comply with the laws. And I've tried to comply with the Commission. And I've done everything that I thought was the right thing to do at the time.
>
> That's why I'm here today. I'm trying to get these problems put aside. And get the permission granted to do what we need to do in the State of Utah. This is what my objective is. This is what I'm striving to accomplish.
>
> * * *
>
> It's quite obvious I've gotten -- I've received some bad counsel. I am aware of that. And I, I'm not very proud of the fact that I've done some things that have not been to the best interest of our own company. By far more troublesome than I'd ever imagined.
>
> And I'm here today trying to rectify that. And I have competent counsel that's trying to help me get through this. And I believe to be excellent counsel. I have never been perfect. I don't profess to be perfect today. But I do profess to try and do what is right to meet the letter of the law, if not exceed the minimum of the letter of the law. And get through this and get on with the process of being productive.
>
> You know, we keep rehashing what I did wrong and what wasn't done just right. I want to know what I can do right now to make things right and move forward.[5]

The intervenors' response to this testimony has been to simply ignore and dismiss it, albeit in the absence of any contrary evidence. For example, there is no testimony from any third parties stating that Mr. Goodale or All American were trying to deceive the Commission. Nor is there any evidence of correspondence or other communications which show anything *other than* the fact that All American received poor advice from its attorney and mistakenly relied on this advice. This certainly does not rise to the level of willful malfeasance or fraud.

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[4] *See* Ex. P-2 at lines 24-43.

[5] Tr. at 99:1-10, 136:14 – 137:7.

All American's conduct since receiving its existing CPCN also does not evidence an intent to conceal the scope of its actual operations from the Commission. Rather, All American has been open and honest about its operations. A few months after receiving its CPCN, All American and Beehive approached the Commission and made a public and open application for an interconnection agreement.[6] By filing this agreement with the Commission, All American openly and publicly stated its intent to operate in Beehive's territory. None of the intervenors objected to this Agreement. As such, the Commission approved the agreement, despite the scope of All American's existing certificate.[7]

After receiving approval of its interconnection agreement, All American again decided to take additional steps to bring itself into compliance. It filed its petition in this docket in an effort to resolve any discrepancies that existed between its original certificate, its interconnection agreement with Beehive, and the operations it was providing. By doing so, All American's management was exhibiting its desire to comply with the law now and in the future. Such conduct is not indicative of a company intent on violating the law, but rather of a company that is taking all the steps necessary to bring itself voluntarily into compliance.

The intervenors also try to disparage All American's attempts at compliance by pointing to the advantages All American will achieve in its ongoing litigation with the IXCs if its petition in this case is granted. What are the intervenors actually saying? That *because* All American discovered its previous mistakes in the course of litigation elsewhere, it should now be punished for honestly

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[6] Exhibit P-1 at lines 111-142.

[7] *Id.*.

trying to correct those mistakes in good faith? Or that it should even be prohibited for trying to correct its mistakes? In reality, All American's motivation for trying to comply with state law is irrelevant. In fact, the better policy is for the Commission to encourage all utility companies who find themselves out of compliance with the law to come forward and voluntarily rectify any deficiencies, regardless of a company's motivation for doing so.

If the Commission chooses to punish All American for coming forward and trying to rectify its past mistakes, it will be establishing an unfortunate precedent that will undoubtedly discourage other utility companies from correcting any non-compliance issues they may discover. If a company knows that its license to operate could be revoked if it comes forward and voluntarily discloses its non-compliance to the Commission, then what would be the company's motivation for doing so? The company would gain nothing by coming forward because it would face the same punishment if it did nothing and the Commission discovered the non-compliance on its own. In fact, if the company self-discloses voluntarily, it would be much worse off because the Commission could, as here, move to revoke its certificate. Such a precedent is very bad public policy. If the Commission does as the intervenors urge and punishes All American's self-disclosure and attempt to come into compliance by refusing to amend its certificate and even by revoking its certificate, the Commission's decision will constitute a billboard for all other public utilities, and the billboard will read in large, bold letters: "Whatever you do, don't open a docket and don't voluntarily disclose your mistakes, because if you do, the Commission will punish you and may even put you to death." If the Commission is truly concerned about the public interest, it should adopt a policy that will encourage utilities voluntarily to come forward, comply with the law and correct any legal

deficiencies in an open and honest manner. Unfortunately, the punitive denial of All American's petition in this case would certainly undermine any policy of voluntary compliance.

Instead of focusing on the past, the Commission should instead look – and the statute requires that it look – to whether All American's operations in Beehive's territory are in the public interest. The evidence at the hearing clearly documents that it is in the public interest for All American to continue to operate in Beehive's territory:

- All American's operations facilitate a valuable service to the public which is free conference call servicing. This benefits all types of people who want to speak together in groups: Clubs of all kinds, including kids clubs, scouting groups, church groups, book clubs; homeowner associations, bridge clubs, alumni groups, political groups, and far-flung employees of the same or separate companies, etc.

- All American's operations have a positive effect on the local economy of Garrison, Utah;

- All American's operations provide additional revenue to Beehive Telephone Company which, in turn, enables Beehive:

  -- to grow, create more jobs, and hire more employees;
  -- to upgrade its switches and other infrastructure;
  -- to lay miles and miles of fiber optic cable to provide better service and clarity to its customers; and
  -- to keep its customers' rates low.

- All American's operations directly benefit the State's Universal Service Fund. All American provides revenue to Beehive Telephone Company so that Beehive does not, in fact, draw down on the state Universal Service Fund. Because Beehive does not need or use the USF:

  -- The USF monies are and remain available to other rural telecom providers to be used to keep their rural customers' rates equivalent to the rates of urban customers;

  -- Qwest and the other companies who provide local exchange services do not have to make higher contributions to the USF; and

  -- Because Qwest and other local exchange providers don't have to increase their contributions to the USF, their customers statewide don't have to absorb the cost of

those increases in higher phone rates.

- All American's traffic supports and makes possible the Utah Fiber Network which, in turn, generates additional revenue for its members who are the rural telecommunication providers. This is revenue that these small rural companies use to maintain and upgrade their equipment and to make their customers' rates equivalent to those in urban areas.

In response to all these public benefits, the intervenors argue only that mistakes were made. But All American testified that if its CPCN is not amended or is revoked, it will re-engineer its network and its equipment to re-route all its traffic through Nevada. If that happens, All American's revenue will go to Nevada and Nevada's telecom providers. It will be readily apparent then what public benefits result from All American's operations:

- The Utah Fiber Network will likely fail, and all that revenue will be lost to small rural providers;
- Beehive may need to draw down on the Universal Service Fund meaning that contributions by Qwest and others will likely need to be increased; and
- Any such increases in the USF will be passed through to Qwest customers in higher rates.

Yes, the Commission may find that All American's past mistakes should be punished, but it should be very careful that the consequences of such punishment fall not on All American but on the telephone companies and the telephone customers of Utah.

III. The FCC's Decision in *Farmers & Merchants* Has No Bearing On Whether All American Is Entitled to an Amendment to Its CPCN.

In an effort to prevent All American from expanding the scope of its CPCN, both the Division and the OCS rely on the FCC's recent decision in *Qwest Communications Corp. v. Farmers*

& Merchants Mutual[8] ("*Farmers*") to argue that All American's activities in Beehive's territory are somehow illegal or contrary to state and federal law. However, the Division and OCS vastly overstate the scope of *Farmers* decision and its impact on this case. This is because *Farmers* did not prohibit CLECs from providing switched access services to conference call companies, such as All American provides to Joy Enterprises. Nor does it prohibit CLECs from entering into business relationships designed to increase the CLEC's interstate traffic. Rather, the case was a simple billing dispute over the appropriate interstate access charge rate a CLEC could charge IXCs for calls the CLEC terminated with a conference call company.

In this case, All American's petition does not involve a billing dispute. Rather, the pertinent issue is whether the services All American provides in Beehive's territory are consistent with the public interest. The *Farmers* decision never states that business arrangements between CLECs and conference call companies such as that which exists between Beehive and All American are undesirable or against the law. Therefore, the OCS and Division's reliance on this decision is completely misplaced.

A. Overview of the *Farmer*'s Decision

The *Farmers* case was initiated by a Petition filed by Qwest Communications Corp. ("Qwest") with the FCC in which Qwest challenged the imposition of interstate access charges by Farmers, a small ILEC serving rural areas of Iowa. Farmers had entered into a number of commercial arrangements with conference call companies for the purpose of increasing its interstate

[8] *See* FCC 09-103, File No. EB-07-MD-001.

switched access traffic and revenues. Under the agreements, conference call companies sent their traffic to numbers located in Farmers' exchange and, in return, Farmers paid the companies money or other consideration. Due to this agreement, the amounts of Farmers' monthly bills to Qwest for terminating access charges increased significantly.[9]

The FCC decision cited by the OCS and the Division addressed the issue of whether Farmers' interstate access charges to Qwest were consistent with Farmers' interstate tariff. Qwest argued that the tariff did not allow Farmers to assess terminating access charges on calls to conference call companies because the service provided did not constitute switched access service as defined in Farmers' tariff.[10] In other words, the decision did not involve the legality of Farmers' business relationship with these particular conference call companies; nor did it address whether Farmers should be authorized to operate in these rural areas. Rather, the decision was very specific and focused. It was limited to the legal interpretation of one single tariff and whether Farmers' services fell within the scope of that tariff.

The FCC ultimately determined that the service Farmers provided to the conference call companies was not switched access service as defined in Farmers' tariff.[11] The basis for this decision was the FCC's finding that conference call companies were not "end users" within the meaning of the switched access provisions of Farmers' tariff. This was because in order for an entity to fall within the definition of an "end user" found in Farmer's tariff, the person or entity also had

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[9] FCC 09-103 at ¶¶ 2-5.

[10] *Id.* at ¶ 5.

[11] *Id.* at ¶ 26.

to fall within the tariff's definition of "customer." The tariff defined a "customer" as any entity that subscribed to Farmers' interstate services. In its decision, the FCC determined that the conference call companies did not subscribe to Farmers' services because Farmers never billed them for federal subscriber line charges. In fact, the companies never paid Farmers anything for its services, but instead received compensation from Farmers. Therefore, based on this specific language in Farmers' tariff, the FCC ruled that Qwest was not obligated to pay Farmers' terminating access charges.

The Division and the OCS have now used this limited decision involving the interpretation of a single federal tariff to argue that FCC has somehow condemned all commercial arrangements between LECs and conference call companies that are intended to increase interstate switched access service. However, this a gross misinterpretation of the decision. The FCC did not order Farmers to end its business relationships with conference call companies. It did not make a sweeping ruling that prohibited all LECs from billing access charges for calls terminated with conference calls. Rather, it simply stated that the services Farmers provided under its business relationships with conference call companies did not fall within the scope of its tariff. Therefore, the decision should not be used as a basis to deny All American's proposed amendment to its CPCN because the decision does not preclude All American from providing switched access service to Joy Enterprises.[12]

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[12] The OCS and Division also rely on a decision from the Iowa Utilities Board ("IUB")to argue that All American's business relationship with Joy Enterprises is illegal. *See Qwest Communications Corp. v. Farmers & Merchants Mutual, et al.,* IUB Docket No. FCU-07-2. However, the scope of this decision was the same as the FCC's decision, except that it involved the interpretation of *intra*state tariffs, as opposed to an *inter*state tariff. In interpreting the intrastate tariffs, the IUB determined that the conference call companies did not fall within the

B. The Scope of All American's Tariff Is Significantly Different Than the Tariff Interpreted by the FCC in Farmers.

The OCS and the Division also argue that All American and Beehive should be precluded from operating in Beehive's territory because the *Farmers* decision prohibits All American from billing switched access service charges to IXCs for calls terminated with Joy Enterprises. As an initial matter, this is not an issue that is relevant to the broad public interest. Rather, it involves a potential billing dispute between two private companies. In any event, the access charges All American has billed under its tariff are valid because the tariff's definition of access service is significantly different than the one interpreted by the FCC in *Farmers.*

Like the tariff in *Farmers*, All American's current tariff[13] states that switched access service necessarily involves access between an IXC and an "end user." However, unlike the tariff in *Farmers*, All American's tariff does not state that an "end user" must also be a "customer." Nor does it require an entity to pay All American a subscriber fee in order to be considered an "end user."

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definition of an "end-user" contained in the rural LECs' intrastate tariffs and therefore Qwest was not responsible for any charges made pursuant to the tariffs. However, the IUB never stated that the LECs' business relationships with the conference call companies were illegal. Nor did the IUB revoke any of the LECs' certificates of public convenience and necessity.

[13] All American's current tariff became effective June 17, 2008 and is known as "F.C.C. Tariff No. 1 Revised." (*See* DPU-1). At the hearing and in its brief, the Division argued that this tariff only applies to services provided by All American in Nevada. However, this interpretation ignores a substantive revision that was made to All American's original F.C.C. Tariff No. 1. In the section entitled "Scope," the original tariff states that All American "undertakes to provide Service(s) and the furnishing of interstate transmission of information originating and terminating *in the State of Nevada*." (Page 19, emphasis added). However, the same section of the revised tariff states that All American "undertakes to provide Service(s) and the furnishing of interstate transmission of information originating and terminating *in all of the Company's service areas*." (Revised Page 19, emphasis added). Therefore, it is clear that All American's current tariff encompasses all of its service areas, including Utah.

Rather, All American's tariff defines an "end user" as follows:

> Any person, firm, partnership, corporation or other entity, including, but not limited to conference call providers, chat line providers, ... and residential and/or business service subscribers, which uses the service of the Company under the terms and conditions of this tariff. The End User may be, but need not be, the customer of an Interexchange Carrier as well as a Customer of the Company. End Users may be assessed fees and surcharges, including, but not limited to Subscriber Line Charges, Federal Universal Service Fund charges, state and federal taxes and regulatory fees.

Based on this language, it is clear that Joy Enterprises falls within the definition of an "end user" under All American's tariff. Therefore, the service All American provides to Joy Enterprises under its tariff is switched access service, and All American is entitled to bill the IXCs access charges pursuant to its tariff. In other words, the *Farmers* decision should *not* be considered precedent that prohibits All American's current business operations. This is because it is based on an interpretation of a tariff that has a significantly different scope than All American's current tariff.

C. Any Disputes Over All American's Access Charges Should Not Be Litigated in This Docket.

Even if the Commission has concerns over whether All American can bill the IXCs for access charges pursuant to its federal tariff, this is not the proper forum for such concerns. First, the issue falls outside the scope of the Commission's jurisdiction because it involves *inter*state charges and the interpretation of a federal *inter*state tariff. Therefore, any disputes over the interpretation or application of All American's federal tariff are properly handled by the FCC or federal courts.

Second, any disputes the IXCs may have regarding All American's access charges, including

its intrastate charges,[14] should not be interjected into a certification proceeding. Rather, they should be initiated by the IXCs as part of a separate docket. This would require the IXCs to file a petition that gives the public notice regarding its precise dispute and why it believes the Commission has jurisdiction over the dispute. In fact, both the FCC and IUB cases involving Farmers were initiated by Qwest, as opposed to a certification proceeding involving more general concerns over the public interest. Proceeding in this fashion would also provide All American with notice of the IXCs precise concerns at the commencement of the proceeding, as opposed to the circumstances in this case where All American was not made aware of the intervenors' precise arguments until they were required to file pre-filed testimony less than a month before the hearing.

Finally, the Commission must refrain from making broad policy decisions regarding the business relationships between CLECs and conference call companies such as All American and Joy Enterprises in this docket and then applying the policies retroactively as a basis to deny All American's petition. Rather, the more proper course of action would be to grant All American's petition and then commence a rulemaking docket to discuss whether the Commission should adopt rules or policies that regulate or limit these types of relationships in the future. In fact, this is precisely what the IUB did as part of its decision. Instead of prohibiting these types of relationships

[14] This Division argues that one of the reasons All American's petition should be denied is because it has yet to file an intrastate tariff or price list. However, as is common for CLECs, All American has simply adopted Beehive's intrastate rates, as reflected in Beehive's tariff, for its interstate access charges. In fact, until the end of this proceeding, none of the intervenors has ever objected to this business practice or otherwise sought to require All American to file an intrastate tariff. However, if the Commission determines that All American needs to file an intrastate tariff as a condition for an amended CPCN, it will certainly comply.

as part of its adjudicative docket, the IUB announced that it would initiate a proceeding to consider proposed rules intended to address these business practices in the future.[15] By proceeding in this fashion, the Commission can consider the broad scope of interests that may be affected by any policy decisions in this area.

IV. All American Does Provide Local Exchange Services In Beehive's Territory.

The Division also argues that All American's petition should be denied because it does not provide "local exchange services" pursuant to Utah Code Ann. § 54-8b-2(10) or "public telecommunication services" pursuant to Utah Code Ann. § 54-8b-2(16). Rather, it argues that All American has instead entered into a business relationship with Joy Enterprises. This conclusion is based on the two companies' common ownership, the oral agreement that exists between the companies, and the nature of the calls that All American terminates with Joy Enterprises.

While the Division accurately describes the relationship that exists between All American and Joy Enterprises, its conclusion regarding the type of services All American is providing under Utah law is erroneous. The definition of a "local exchange service" is the "provision of telephone lines to customers with the associated transmission of two-way interactive, switched voice communication within the geographic area encompassing one or more local communities...."[16] In this case, All American does provide a telephone line to its customer, Joy Enterprises.[17] Joy Enterprises uses this telephone line to accept calls, which are then terminated with its intelligent

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[15] *See* IUB Docket No. FCU-07-2, Final Order at p.2.

[16] Utah Code Ann. § 54-8b-2(10).

[17] Ex. P-1 at lines 230-235.

voice response system for the purpose of allowing voice communication.[18] This system is located in Garrison, Utah, the relevant geographic area.[19] Finally, while Joy Enterprises chooses to use All American's phone lines only for the purpose of accepting calls, All American's switches are capable of transmitting outgoing calls as well.[20] Therefore, All American's services are considered local exchange services under the relevant statute.

As support for its argument, the division ignores the technical aspects of All American's services. Rather, it focuses solely on the business relationship that exists between All American, Joy Enterprises and Beehive. For example, it makes much of the fact that Joy and All American have a common owner and that their business relationship is governed by an oral contract. It points to the fact that All American's switches are located in an office that it leases from Beehive and that Beehive previously provided billing services for All American. Finally, it emphasizes the fact that these three parties have agreed to suspend their financial obligations to one another until after their ongoing lawsuits and regulatory cases against various IXCs have been resolved.

While these facts may be true, they have absolutely no bearing on whether All American is providing local exchange services in Beehive's territory. This is because the statutory definition of "local exchange services" makes no mention of the contractual or financial relationship that may exist between a carrier and its customers, nor does it require that any agreement be written or that such carriers and their customers cannot work together during difficult times or for their mutual

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[18] *Id.* at lines 228-244.

[19] *Id.* at lines 328-240.

[20] Tr. at 81:7-15.

benefit. Rather, the definition focuses solely on the technical aspects of a carrier's services to its customer. In this case, the services All American is providing in Beehive's territory satisfy these technical requirements.

Finally, it must be noted that the Division's argument regarding the nature of All American's services is inherently inconsistent with its accusation that All American has exceeded the scope of its existing certificate by operating in Beehive's territory. If All American is not providing local exchange services or public telecommunications services in Beehive's territory, then it does not need a CPCN from the Commission in order to operate in Beehive's territory.[21] Conversely, All American can only be violating the terms of its existing CPCN if the services it is providing in Beehive's territory are considered local exchange services or public telecommunications services. In other words, it appears as if the Division has yet to stake out a clear position as to the nature of All American's services and the regulations with which All American must comply. This fact alone demonstrates the difficultly All American has faced throughout this case in attempting to satisfy the concerns of all parties involved.

V. Beehive's Decision to Block Calls From Sprint Cannot Be Imputed to All American.

Throughout this proceeding, All American has argued that its operations in Beehive's territory are in the public interest because they have not resulted in any harm to Beehive's customers through increased rates or decreased service. In a strained attempt to rebut this fact, the Division and

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[21] *See* Utah Code Ann. § 54-8b-2.1(1) ("the commission may issue a certificate to a telecommunications corporation authorizing it to compete in providing *local exchange services* or *other public telecommunications services* in all or part of the service territory of an incumbent telephone corporation....") (emphasis added).

OCS argue that the ongoing billing disputes between Beehive/All American and the IXCs have resulted in Beehive blocking the Sprint traffic being sent to Beehive's customers. However, All American played no part in Beehive's decision. The decision to block these calls was made unilaterally by Beehive in response to Sprint's decision to not pay any access charges to Beehive for any calls terminated in Beehive's territory, regardless of whether they were terminated with Joy Enterprises or some other residential customer.[22] In other words, the decision to block these calls was not due to All American's conduct. Rather, the blocks were made in response to Sprint's refusal to pay its bills. Moreover, the Honorable Dee Benson denied Sprint's motion for injunctive relief seeking to lift this block because he did not believe Sprint had demonstrated equitable grounds for such relief.[23] Therefore, since the federal court determined that Beehive was justified in blocking Sprint's calls, this fact should not be used as a basis for finding that All American's petition is not in the public interest.

CONCLUSION

Based on the foregoing, All American respectfully requests the Commission to grant All American's petition and amend All American's existing CPCN so as to authorize All American to provide switched access service to conference call companies in Beehive's territory as it is currently doing for Joy Enterprises.

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[22] *See Beehive Tel. Co., Inc. v. Sprint Communications Co.,* Case No. 2:08-CV-00380, United States District Court, District of Utah, Central Division (Docket No. 77).

[23] *Id.* (Docket No. 83).

DATED this 31st day of March, 2010.

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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of November 2010, the foregoing **ALL AMERICAN TELEPHONE COMPANY'S RESPONSIVE POST-HEARING BRIEF** was sent by electronic mail to the following:

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