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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Petition of All American Telephone Co., Inc., for a *Nunc Pro Tunc* Amendment of Its Certificate of Authority to Operate as a Competitive Local Exchange Carrier within the State of Utah.	Dkt. No. 08-2469-01

BEEHIVE'S REQUEST FOR RECONSIDERATION

Beehive Telephone Company, Inc. ("BTC" or "Beehive"), submits this request for reconsideration of the report and order which the Utah Public Service Commission (the "UPSC" or "Commission") entered in this docket on April 26, 2010. That report and order denied a petition of All American Telephone Company, Inc. ("All American" or "AATCO"), for a certificate of public convenience and necessity to serve in one of

Beehive's local exchanges. Beehive respectfully submits that the report and order should be reconsidered and reversed for the reasons set forth below.

I. The Petition for Certification was Deemed Granted by Virtue of Utah Code, Section 54-8b-2.1(3)(d). The Commission's Proceedings After that Occurrence Were Moot and Without Legal Effect.

On April 23, 2008, All American, a certificated competitive local exchange carrier ("CLEC"), filed a petition for an amended certificate of public convenience and necessity ("CPCN") with the UPSC. All American already held a CPCN to serve in Qwest territory, but sought an amendment in order to compete in one of Beehive's telephone exchanges.

Applications for CLEC certifications are governed by Utah Code, Section 54-8b-2.1. If an application involves a request to serve in territories, such as Beehive's exchange, with few access lines, it also is governed by subpart (3)(c) of Section 54-8b-2.1. In all events, the time-line for granting or denying such applications is found at Section 54-8b-2.1(3)(d) which provides that the Commission shall either grant or deny such applications within 240 days from the date on which they are filed. If the Commission fails to grant or deny an application within this time-line, the application, by statutory command, is deemed granted. Since the All American application, in this case, was filed April 23, 2008, Section 54-8b-2.1(3)(d)'s 240 day deadline expired no later than December 24, 2008.

Pursuant to Section 54-8b-1.2(3)(b), Beehive automatically became a party in the docket created by the AATCO application. The Utah Division of Public Utilities ("UDPU" or "Division") also became a party in the proceeding pursuant to Utah Code,

Section 54-4a-1(1)(a). The Division did not answer the AATCO application and nothing of substance occurred until the Division raised a discovery dispute and moved to dismiss the application on October 23, 2008.

On December 3, 2008 -- approximately 3 weeks shy of Section 54-8b-1.2(3)(d)'s 240 day deadline -- the Commission entered a pretrial scheduling order, fixing due dates and briefing cycles so that parties could address whether the docket should be treated under the informal adjudication procedures of the Utah Administrative Procedures Act -- and for third parties who might wish to seek intervention in the docket.

On December 23, 2008 – one day prior to the expiration of Section 54-8b-1.2(3)(d)'s 240 day deadline -- 5 other entities, Qwest Corporation, Qwest Communications Company, LLC, AT&T Communications of the Mountain States, Inc., TCG Utah, and the Utah Rural Telecom Association, moved to intervene, seeking to become parties in interest. All American and Beehive opposed these motions to intervene as being untimely and for other reasons.

On December 24, 2008, Section 54-8b-1.2(3)(d)'s 240 day time-line expired. As of that date, the Commission had neither granted nor denied the AATCO application for an amended CPCN to serve in Beehive's territory. Therefore, on that date, by legislative command, All American's application was "considered granted."

On January 7, 2009 – after All American's application had been deemed granted by operation of law – counsel purporting to act for the then Utah Committee of Consumer Services (since re-named the Office of Consumer Services) ("OSC" or the "Committee") filed a pleading which was denominated as a response to AATCO's petition and a memorandum in support of the Division's request for dismissal. The OSC's pleading

raised issues, for the first time, about revocation of All American's original CPCN to serve in Qwest territory.

On January 20 and February 18, 2009, the UPSC made rulings which determined that issues in the docket would be adjudicated formally and that Qwest, AT&T, and others could intervene. Qwest and AT&T, upon intervention, were permitted to echo the request made in the OSC pleading (filed January 7, 2009) for rescission or alteration of All American's original CPCN to serve in Qwest territory.

In early April, 2009, after further pretrial scheduling conferences, All American and Beehive filed motions with the Commission, seeking summary disposition of the AATCO application on two, distinct grounds: (1) that the application had been deemed granted by force of law pursuant to Section 54-8b-1.2(3)(d), and (2) that it should be granted on the merits in any event.[1]

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[1] On the merits, Beehive maintained that the UPSC's report and order which granted the original CPCN to AATCO for service in Qwest territory, if given collateral estoppel effect and combined with Beehive's consent to serve in its exchange, would compel a conclusion that AATCO's application for an amended CPCN had satisfied all applicable standards under Section 54-8b-2.1.

AATCO made a similar (although not the same) argument, but, rather than invoking its original certificate as the basis for collateral estoppel, it relied upon still another order of the UPSC, one that had approved an interconnection agreement between AATCO and Beehive pursuant to 47 U.S.C. Section 252. According to AATCO, the findings and conclusions which necessarily were made by the UPSC in approving this interconnection agreement were identical to the findings and conclusions necessary to approve its application for an amended CPCN to serve in Beehive territory. AATCO reasoned that the former findings and conclusions, if given preclusive effect, would result in a granting of the application for an amended CPCN.

The Commission overruled these arguments going to the merits of the application, however, holding that summary disposition was not appropriate because, in its view, material facts remained in dispute respecting some of the elements of proof under Section 54-8b-2.1.

On June 16, 2009, by a report and order (the "June Order"), the Commission denied the AATCO and Beehive motions. The Commission ruled that All American had waived Section 54-8b-1.2(3)(d)'s 240 day deadline and that this waiver vitiated the rights of all other parties in the docket, including Beehive, to enforce this statutory mandate.[2]

On July 16, 2009, All American and Beehive filed requests for reconsideration of the June Order. On August 5, 2009, the Commission granted these requests to reconsider, but then, on August 20, 2009, after reconsideration, re-affirmed the June Order.

The August 20, 2009, report and order of the Commission (the "August Order") again denied those arguments which All American and Beehive had made which went to the merits of the application and the standards for relief under Section 54-8b-1.2. Please see footnote 3 of this brief for an outline of these merits arguments. The August Order additionally held that Section 54-8b-1.2(3)(d)'s "considered granted" language did not apply under the circumstances of this case.

The August Order noted that any party wanting judicial review of final agency action must seek that review by appeal to the Utah Supreme Court within 30 days. Believing that the Commission's refusal to obey the statutory mandate of Section 54-8b-1.2(3)(d) constituted final agency action, on September 23, 2009, Beehive filed a petition

[2] The June Order indicated for the first time that, "[t]o the extent not done previously, the Commission gives notice to All American that this docket shall consider to what extent its [original] certificate [to serve in Qwest] territory should be rescinded, altered, or amended[.]" At some point in time thereafter, the caption for pleadings in this docket unilaterally was changed by some parties, including the UPSC. Parties adopting this change added language respecting rescission or alteration of AATCO's original CPCN to the style of the case.

for review of that aspect of the August Order with the Utah Supreme Court. That case presently is pending on appeal.

In the meantime, the Commission continued to conduct proceedings in this docket -- as though nothing had happened and Section 54-8b-1.2(3)(d) had no legal effect. It even ordered AATCO to file an "amended application" as though this legal charade somehow could re-start the clock which had stopped ticking in December of the year before. In one of the larger ironies which have informed this proceeding, after AATCO filed this amended application (under protest), the Commission and other parties to this docket were punctilious in their insistence that the 240 day deadline of the statute be observed. After considerable pre-trial activity, hearings were held and the Commission issued its report and order which is the subject of this request for reconsideration. The report and order denied the AATCO petition which, pursuant to Section 54-8b-1.2(3)(d), already had been deemed granted the previous December.

The UPSC is a creature of the Utah State Legislature and, as such, is bound to obey legislative commands which are enacted by statute. The Legislature has adopted a policy which encourages competition in the telecommunications marketplace. The Legislature does not want that pro-competitive policy defeated or deferred by bureaucratic foot-dragging -- including administrative delays in processing applications by CLECs for CPCNs in local exchanges. To insure that undue delay does not occur, the Legislature enacted the 240 deadline in Section 54-8b-2.1(3)(d). The plain terms of that statute require the UPSC to choose between two options and two options only, granting or denying an application. This choice must be made within 240 days. If either approval or denial of an application does not occur by that deadline, a default consequence, *viz.*

approval, is statutorily mandated. The statute does not permit and, by its terms, expressly or practically debars any other alternative, including the alternatives of postponement, waiver, or the like. Since the UPSC did not deny the All American application within 240 days, that application is deemed granted by the plain terms of Section 54-8b-2.1(3)(d). The UPSC should comply with this reading of the statute and treat the All American application as deemed granted as of the expiration of the 240 day deadline. This expiration date, as noted above, was December 24, 2008.

As noted above, All American's petition was filed April 23, 2008. Section 54-8b-2.1(3)(d) mandates that applications respecting CLEC certification shall be approved or denied within 240 days after filing. The statute further mandates that, if either of these options, approval or denial, is not exercised within that 240 day time line, the petition shall be deemed granted.[3]

The language of Section 54-8b-2.1(3)(d) could not be plainer. Where proceedings respecting certification are commenced, the Commission shall act on those petitions within 240 days. What is more, the action mandated is confined to one of two alternatives, namely, approval or denial of the request for certification. Finally, if neither of these alternatives is adopted before the stipulated deadline, the statute mandates a result by default, namely, that the petition shall be deemed approved. In other words, the legislature is directing the Commission to enter a final order on petitions within 240 days, telling the Commission that it must select one of two alternatives when acting within this

[3] Section 54-8b-2.1(3)(d) provides that: "The commission shall approve or deny the application under this section within 240 days after it is filed. If the commission has not acted on an application within 240 days, the application is considered granted."

limited time frame, and mandating an outcome by default – approval of the application -- when the Commission fails to approve or deny within that deadline.

The Commission cannot ignore the clear, strict, and unforgiving terms of Section 54-8b-2.1(3)(d). The Utah Supreme Court has directed that statutes be interpreted according to the plain meaning rule.[4] Section 54-8b-2.1(3)(d) says that the Commission "shall" pick between approval or denial within 240 days. "Shall" plainly means "must" and not "may."[5] And this plain meaning is reinforced by Section 54-8b-2.1(3)(d)'s

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[4] In Utah, a statute's meaning, in the first instance, is ascertained by what plainly is indicated or obviously inferred from the relevant text. Indeed, if the words of the statute are straightforward and unambiguous, there is no need to go further in a search for meaning. *See, e.g., J. Pochynok Co., Inc. v. Smedsrud,* 116 P.3d 333, 357 (Utah 2005).

[5] The Utah Supreme Court has said that, when the term "shall" is used in a statute or rule, it is mandatory rather than directory. *See, State v. Wanosik,* 79 P.3d 937, 943-944 (Utah 2003) (reading Rule 22, Utah Rules of Criminal Procedure, to forbid practice of *in absentia* sentencing; the phrase, "shall afford," in Rule 22 means that the accused and counsel must be given an opportunity to appear and speak in self-defense prior to sentencing); *Ostler v. Buhler,* 989 P.2d 1073, 1076 (Utah 1999) (the word, "shall," as used in Rule 24, Utah Rules of Civil Procedure, is "mandatory[ ]"), citing *Landes v. Capital City Bank,* 795 P.2d 1127, 1131 (Utah 1990) ("shall," as used in joinder rules, is mandatory), and also citing *Board of Educ. of Granite Sch. Dist. v. Salt Lake County,* 659 P.2d 1030, 1035 (Utah 1983) (when "shall" is used, it is presumed to require a person "to comply strictly with the terms of the statutes" at issue).

Other state courts take a similar approach. *See, e.g., OEC v. OG&E,* 982 P.2d 512, 514 (Okla. 1999) (Oklahoma constitution provides that there "shall" be voter approval before the grant of any municipal franchise: "Generally, the term 'shall' is mandatory and precludes alternative means of carrying out a mandate[ ]" [citation omitted]); *Smith, etc. v. State Bd. of Equalization,* 630 P.2d 1264, 1266 (Okla. 1981) (under Oklahoma constitution, State Board of Equalization constitutionally required to certify certain revenue accruals: "'Shall' is *commonly understood* to be a word of command which must be given a compulsory meaning") (emphasis supplied) (footnote omitted); *State ex rel. Billington v. Sinclair,* 183 P.2d 813, 816-819 (Wash. 1947) (when state constitution uses "shall," meaning usually is mandatory; even when "may" is used, the meaning, in context, may be compulsory). *Cf. State v. Wanosik,* 79 P.3d at 944 (Utah courts may look to other jurisdictions for general guidance in defining terms in rules and statutes).

default clause which stipulates a consequence – if neither option, approval or denial, is ordered within the 240 days allotted, the application "is" considered granted. Because the language of Section 54-8b-2.1(3)(d) is so clear, resort to extra-textual interpretive aids is unnecessary. But even the policy context for Section 54-8b-2.1(3)(d) supports the alacrity compelled by the statutory text.[6]

The federal judiciary concurs. *See, e.g., National Ass'n v. Defenders of Wildlife,* 127 S. Ct. 2518, 2531-2532 (2007), citing *Lopez v. Davis,* 531 U. S. 230, 241 (2001) (Congress uses "shall" to "impose discretionless obligations"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U. S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"); *Association of Civilian Technicians v. FLRA,* 22 F.3d 1150, 1153 (D. C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive").

[6] Under conventional rules of statutory construction, as applied in the past by the Utah Supreme Court, where a law's meaning is plainly indicated by the statutory text, any resort to extrinsic aids, such as legislative history or policy considerations, to decipher meaning is not only unnecessary but also, in many instances, inappropriate.

Nevertheless, it may be instructive for the Commission to re-consider the policies to be served through the enactment and implementation of Section 54-8b-2.1(3)(d) and statutes like it serving a similar purpose.

The Utah Legislature, by statute, has declared the policies to be served by Section 54-8b-2.1(3)(d). *See,* Utah Code, Section 54-8b-1.1. These include the use of competition and reductions in regulation as means towards the end of increasing access to quality telecommunications services for all residents and businesses throughout the state of Utah. These policies will be permanently defeated or temporarily derailed if applications by CLECS to serve in local exchanges like those presently monopolized by Beehive are entangled in the red tape of protracted regulatory proceedings.

Streamlined, swiftly conducted proceedings benefit not only the CLEC which has lodged an application, but also the local exchange carrier whose territory might be subjected to competition in the event that application is granted. A local exchange carrier needs to know whether to prepare for the impact of competition, and it needs to know this expeditiously so that it may plan its business accordingly. Planning can't be done overnight, and, to the extent it may require re-engineering or re-configuration of a network, this can be expensive as well. When proceedings drag on, circumstances change in the interim, and this requires adaptation, changes in plans, repeated re-tooling and corresponding expense. In other words, delay and the uncertainty spawned by delay

Because the statute is mandatory, leaving no discretion for delay with the UPSC, the parties to this docket, by agreement, may not waive the 240 day deadline. And even if the parties' waiver could override the legislative directions found in Section 54-8b-2.1(3)(d), that waiver would have to come from all parties, including, especially, the one party -- the local exchange carrier, Beehive -- which is the intended beneficiary of those legislative directions. This is true for at least 3 reasons.

First, the plain language of Section 54-8b-2.1(3)(d) does not countenance any disobedience by the UPSC – let alone by parties through waiver -- to these legislative directions. Under that language, the Commission, not only is required to act on petitions for certification within 240 days, but also the "action" it is authorized to take expressly is

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is inimical to good business planning. Thus it is not only contrary to the legislative intent, but also harmful to the very carriers which the statute is designed to protect, to interpret Section 54-8b-2.1(3)(d) in a manner which tolerates delay beyond the 240 day expiration point.

Parallel statutes in the 1996 Telecommunications Act perform the same function and serve the same ends as Section 54-8b-2.1(3)(d). One of those statutes, 47 U.S.C. Section 252(e)(4), mandates the swift disposition (within 90 days) of any petition for approval of negotiated interconnection agreements, and provides that such agreements shall be deemed granted in the event that local commissions do not act to approve or reject these agreements within this limitation period. The Conference Report for the 1996 Telecommunications Act notes that Section 252(e)(4) involved a compromise wherein the conferees agreed upon "a *specific timetable* for State action." (Emphasis supplied.) The timetable's purpose, of course, is to accelerate, to the extent possible, achievement of the congressional goal of competitive markets in the telecommunications industry. *See, e.g., A T & T Communications Systems v. Pacific Bell,* 203 F.3d 1183, 1186 ((9th Cir. 2000) (referencing Section 252(e): ". . . the strict timelines contained in the Telecommunications Act indicate Congress' [sic] desire to open up local exchange markets to competition without undue delay[ ]"), citing and quoting *GTE South, Inc. v. Morrison,* 199 F.3d 733, 744 (4th Cir. 1999) ("Congress intended that competition under the Telecommunications Act take root 'as quickly as possible[ ]'") (citation omitted); *AT&T Communications of South Cent. v. Bellsouth,* 20 F. Supp. 2d 1097, 1102 (E. D. Ky. 1998) ("[w]hen it comes to the PSC carrying out its duties [under Section 252], time is clearly of the essence[ ]").

limited to approval or denial of the petition and does not include deferral of the proceedings. This express limitation as to permissible action is underscored by the requirement that, in the event one of these two alternatives is not selected within the 240 days, the petition shall be deemed granted. The case law respecting statutory interpretation, discussed above, supports this reading of Section 54-8b-2.1(3)(d).[7] And the jurisprudence of the Utah Supreme Court respecting temporal bars on agency action – bars which are jurisdictional in nature -- reinforces this textual analysis. In the event, of course, parties, by stipulation or otherwise, cannot overthrow the jurisdictional limitations which the legislature has imposed on a court or agency.[8]

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[7] In addition to that case law which focuses on the text at issue, it should be observed that this text could have been worded differently by the legislature and that the ease with which this re-wording could have been accomplished creates an inference that the lawmakers meant what they said and did not intend to allow for postponements of proceedings under Section 54-8b-2.1. Statutory deadlines for the taking of action often provide for tolling or other exceptions. Although an allowance for such exceptions is a common practice and the language of exception is easily drafted, Section 54-8b-2.1(3)(d), not only lacks such a proviso, but, in addition, affirmatively closes the door on exceptions by mandating a consequence – approval of a certificate – in the event the deadline goes unmet. *Compare, e.g., Taylor v. Freeland & Kronz,* 503 U. S. 638, 644 (1992) (30 day deadline for objection to debtor's exemptions under bankruptcy statute "[u]nless, within such period, further time is granted by the court[;]" no objection or request for extension timely was filed; objector was barred; "[d]eadlines may lead to unwelcome results, but they prompt parties to act, and they produce finality[ ]").

[8] The Utah Supreme Court has opined that, in a proper case, where, as here, the statutory deadline is clear, an agency may not transgress that temporal barrier, indicating, moreover, that such a bar may be jurisdictional in nature. *See, e.g., Beaver County v. Utah State Tax Com'n*, 916 P.2d 344, 351 (Utah 1996) (describing when agency deadlines have jurisdictional effect), following *Kennecott Copper Corp. v. Salt Lake County*, 575 P.2d 705, 706 (Utah 1978) and *State ex rel. Wight v. Park City School Dist.*, 133 P. 128, 129 (Utah 1913).

Indeed, in an analogous context, Qwest recently argued before the Colorado Public Utilities Commission that, once interconnection agreements are "deemed approved" under Section 252(e)(4), the state regulatory agency's "jurisdiction [is] extinguished to explicitly approve or reject them." *Approval of a Wireline Interconnection Agreement*

Second, it goes without saying that the parties to this docket are not the legislature. Hence, even if those parties expressly consented to waive the deadline, they cannot exercise legislative authority to amend the statute. Put differently, where the legislature, by statute, has required the Commission to exercise power pursuant to certain standards, that power may not be abdicated or those standards altered through a stipulation of the parties. The Utah Supreme Court already has spoken to this point,

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between Qwest and MCImetro Access, 2007 WL 2297786, at 1 and 6 (Col. P.U.C. 2007). This result, according to Qwest in that proceeding, followed on account of the "strict" timing for agency action under Section 252(e)(4), and required the cancellation of a previously entered scheduling order. *Id.*

This jurisdictional reading of Section 54-8b-2.1(3)(d), additionally, would be in harmony with Utah's jurisprudence respecting the Commission's general subject-matter jurisdiction. The Utah Supreme Court repeatedly has held that the Commission, as a creature of the legislature, is an agency of limited jurisdiction, must not exceed the authority which is statutorily granted, and has no inherent regulatory power. All doubts respecting the existence of power, moreover, must be resolved against the exercise of that power. *See, e.g., Hi-Country Estates v. Bagley & Co.*, 901 P.2d 1017, 1021-1022 (Utah 1995). In this instance, of course, the plain language of Section 54-8b-2.1(3)(d) leaves no room for doubt; the temporal restraint on certification proceedings is unqualified; the consequence of failing to act in one of the two ways allowed within that time-line is mandatory; if the Commission fails to say "yes" or "no" to a petition within 240 days after filing, the legislatively prescribed answer is "yes."

Finally, this jurisdictional reading of Section 54-8b-2.1(3)(d) may be reinforced by analogous law respecting statutes of limitation. Section 54-8b-2.1(3)(d) is not a statute of limitation, of course, and, therefore, analogies to the law of limitation periods may be imperfect. Nevertheless, limitation periods with definite deadlines are treated as statutes of repose. These statutes are jurisdictional in character, and, as with all jurisdictional time-lines, cannot be waived or abridged through the consent or estoppel of parties. *See, e.g., AAA Fencing Company v. Raintree Development and Energy Company*, 714 P.2d 289, 290-292 (Utah 1986). Section 54-8b-2.1(3)(d) is not unlike a statute of repose; it forecloses the rights of parties, since, in the event there is a failure to act within the stipulated time, a specific outcome legislatively is decreed. It therefore is jurisdictional in character and effect, and its requirements cannot be subverted through either express agreement, implied acquiescence, or circumstances of estoppel.

stating forcibly that the UPSC may not leave the implementation of statutory commands to private parties in Commission proceedings.[9]

Third, in any event, all the parties to this docket did not stipulate to an extension of the 240 day deadline. All American and the Division, through their pleadings, may have agreed that the deadline could be extended. But even if their pleadings are given that reading, Beehive did not consent to any such extension, and, indeed, consistently has maintained that the 240 day expiration date applies, is non-waivable, and should be enforced.

As indicated above, and as Section 54-8b-2.1 plainly shows, the statutory standards are there to protect Beehive, the local exchange carrier. When a CLEC

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[9] *See, Bradshaw v. Wilkinson Water Co.*, 94 P.3d 242, 247-249 (Utah 2004) (UPSC may not approve settlement stipulation which, in effect, requires the Commission to defer to private standards in derogation of its statutory duty to consider the public interest in fixing rates; this would have "impermissibly delegated to the parties the task of determining standards[ ]"). Indeed, the legislature may have written Section 54-8b-2.1(3)(d), limiting Commission alternatives, mandating action within strict time-lines, and eschewing deferrals by private stipulation, in order to avoid constitutional problems. The legislature obviously believed that furthering competition in the telecommunications industry was a matter of public interest and, moreover, knew that delays in certification proceedings, by blunting competition, might be inimical to that interest. Hence, allowing private parties, through stipulations before the Commission, to override this carefully crafted statutory implementation of legislative policy well could be an unconstitutional delegation of public power to private parties. *See, Stewart v. Utah Public Service Commission,* 865 P.2d 759, 776 (Utah 1994) (legislature delegates ratemaking power to UPSC; Commission exercises this power to promulgate incentive regulation plan for public telephone utility, giving utility choice respecting implementation of plan; delegation of power of choice to utility is unconstitutional; "the Legislature cannot constitutionally delegate to private parties governmental power that can be used to further private interests contrary to the public interest." If the Commission defies the plain language of Section 54-8b-2.1(3)(d) and permits extensions of the 240 day deadline in certification proceedings in light of private stipulations, it will have to address the constitutionality of the statute as thus applied and in light of the *Stewart* doctrine. Where appropriate, a construction of the statute which avoids this constitutional question, naturally, is preferred. Such a construction in this case, as demonstrated above, not only is appropriate, but also required by the plain words of Section 54-8b-2.1(3)(d).

petitions to invade Beehive's territory, Beehive is protected not only by the substantive standards which must be applied in determining whether competitive entry is appropriate, but also by the temporal limits which are imposed on the duration of the litigation involved. Litigation is expensive. Protracted litigation is more expensive. The uncertainty of outcome in certification proceedings (will there be competition or not – if competition is allowed, what will be the terms and conditions and qualifications upon which it is permitted) may interfere with the local exchange carrier's business plans and planning process – for the short or long haul. This uncertainty becomes an opportunity cost. Prolonged uncertainty increases that cost.

In short, Beehive is the party which, in the main, is protected by the statute, including and especially the 240 day time limit on knowing whether an applicant will be allowed to fish or must be compelled to cut bait, and that protection, if it is waivable, should not be waived in the absence of Beehive's permission. It is undisputed that this permission was not forthcoming in the proceedings below.

Every conceivable rule of statutory construction requires the reading which Beehive has given to Section 54-8b-2.1(3)(d) in this request for reconsideration. The plain text of Section 54-8b-2.1(3)(d) stipulates this result. The overall context of Section 54-8b-2.1, which provides for substantive standards and timing mechanisms to protect the incumbent local exchange carrier, Beehive, from undue delays which spawn litigation drains and opportunity costs, does likewise. The parallel provision in the 1996 Telecommunications Act, 47 U.S.C. Section 252(e), which facilitates interconnection between carriers competing in the same territory and which is designed for coordination with state certification requirements such as Section 54-8b-2.1, also argues for expedition

in the processing of applications for entry. The policy underlying all of these provisions, whether state or federal, is to further competition in the telecommunications market, as a means to generating quality access to telecommunication services, a policy that will be blunted or defeated in the event that there is undue administrative delay in processing applications by carriers which seek entry into that market. Reading Section 54-8b-2.1(3)(d) to allow parties, by agreement, to alter these statutory standards creates constitutional issues about the delegation of public power to private concerns, and an interpretive approach which avoids this constitutional issue, naturally, is favored. The UPSC accordingly should reconsider and reverse its orders which have refused, in the case of AATCO's application, to enforce the legislative mandate of Section 54-8b-2.1(3)(d). The Commission should accept the statutorily dictated consequence of a failure to act – by granting or denying an application -- within the 240 day time limit. That consequence, according to the terms of Section 54-8b-2.1(3)(d) is that the application is considered granted."

II. The OSC Lacked Standing to Participate in This Docket. Its Participation, Without Standing to Do So, Tainted the Proceedings.

The OCS never has established standing to appear and be heard in this proceeding. Its participation, without standing to do so, irremediably tainted the proceedings.

A. The Question of Authorization. The OCS has not authorized anybody to appear or participate on its behalf in this docket. Agencies like the OCS, as creatures of statute, may not act in excess of their "jurisdiction," the power conferred upon them by a governing legislative enactment. For the OCS, that power is defined and circumscribed

in Utah Code, Section 54-10-4. As germane to this proceeding, that statute provides that the Committee "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*." (Emphasis supplied.) Even if the OSC's pleading, noted above, which launched its participation in this docket, qualifies as an "original action" within the meaning of Section 54-10-4,[10] it is action which only may be taken "as the committee in its discretion may direct."

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[10] The pleading filed by the AG is not an "original action," and the statute's "original action" limitation upon the Committee's power is still another, independent reason to strike the OCS's pleadings in this docket.

Indeed, insofar as this "original language" limitation qualifies the Committee's powers, it is not apparent that the OCS even could appear through an application to intervene in this docket.

In any event, even if the Committee could appear through intervention (in apparent contravention of the "original action" limitation), that appearance could not be made automatically and absent a request pursuant to Utah Code, Section 63G-4-207. Speaking generally, the grant of power to the UDPU found in Utah Code, Section 54-4a-1(1)(a), giving the Division, among other rights, automatic status as a party in interest before the Commission, stands in stark contrast to the absence of any such grant to the OCS, and especially in contrast to the limiting language respecting "original actions" noted above. Speaking specifically to the circumstances of this docket, Beehive, as the interested incumbent local exchange carrier, automatically is vouchsafed standing as a party pursuant to the express terms of Utah Code, Section 54-8b-1.2((3)(b) ("granted automatic status as an intervenor"), but no similar language authorizes the participation of the OCS in these proceedings. The negative inference from the language in these statutes is that the Committee does not have the status of a party in this docket automatically and must apply for that status through a motion to intervene.

The OCS did not file an application to intervene pursuant to Section 63G-4-207. In Beehive's view, at a minimum, and assuming that we all should wink at the "original action" limitation found in the Committee's charter, the OCS should have done so. This failure to satisfy the conditions for intervention is still another ground for disregarding the arguments of the OCS.

A comparison of Utah Code, Section 54-10-2 with Utah Code, Sections 54-10-5 and 54-10-7, demonstrates that the Committee is distinct from the executive director and other staff. Moreover, making sure that these personnel do not leave the reservation, all are closely tethered by express provisions in both Section 54-10-5 and Section 54-10-7 so that they act only as directed by the Committee.[11]

Hence, the OCS may exercise its power to bring "original actions" only as directed by the committee as a whole. It does not appear, however, that the pleading in our case was authorized in this regard. A review of the Committee's agendas, as posted on its website, from May, 2008, through March, 2009, does not reveal that the All American petition ever was the object of review by the Committee. The pleading, therefore, may have been prompted by an executive director decision, or by counsel for the Committee. In either case, however, given the express terms of title 54, chapter 10, such license should not have been taken. The pleading complains that All American acted beyond the scope of its original certificate. There is no small irony, then, that the pleading itself goes beyond the pale established by Section 54-10-4. Absent a showing that the Committee itself authorized this pleading, it must be disregarded.[12]

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[11] Section 54-10-5, for example, not only provides for an executive director apart from the Committee, but also allows that director to represent the interests of consumers only "as directed by the committee of consumer services." Section 54-10-7, which provides for representation by the attorney general, states that this representation is of the "committee," and that the attorney who fills this role "may prosecute all actions which the committee . . . deems necessary to enforce the rights of residential and small commercial consumers of such utilities."

[12] Recent legislative action underlines the importance of Committee authorization as a substantive requirement. During the 2009 General Legislative Session, Senator Valentine introduced SB 214. As initially proposed, this legislation would have transformed the Committee into a mere advisory council, leaving actual decision-making power in the hands of an executive director. Ratepayer groups and consumer advocates fought against

B. The Question of Authority. Even if the OCS produces proof that its presence in this docket is authorized by a vote of the Committee, its pleading still is *ultra vires,* given the statutory limitations upon the Committee's powers. Subparts (1) and (2) of Section 54-10-4 allow the Committee to "assess" regulatory issues and to "assist" consumers in their appearances before the UPSC. But subpart (3) of Section 54-10-4 addresses those instances when the Committee itself is allowed to engage in litigation before the Commission. Subpart (3) provides that, "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." Thus, where it proceeds in its own name before the Commission, the Committee only may sponsor positions "most advantageous to a majority of *residential consumers* . . . and those engaged in *small commercial enterprises[*.]" (Emphasis supplied.) Both terms, "residential consumers" and "small commercial enterprises," of course, are defined in Utah Code, Section 54-10-1.

But the pleading in question (as well as the subsequent participation by the OSC) have not indicated how, if at all, the position taken and relief sought by the Committee in this docket will be advantageous to either a majority of residential consumers or small commercial enterprises. To the contrary, that OCS's arguments, in every instance, carry

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this change, and the bill, as passed, left the exercise of discretionary power in the Committee's hands, and did not replace the Committee, as the real decision-maker, with a director.

water for Qwest, AT&T, and other interexchange carriers, express concern respecting the access rates which those carriers might have to pay to All American or Beehive, and demand investigation into something called "traffic pumping," an undefined practice which impliedly may be injurious to those same parties.

In short, the thrust of the Committee's participation in this docket has been to protect the interests of the interexchange carriers, not small consumers, and the vaunted justification for making this thrust is a stale report dealing with federal, interstate legal concerns. Neither the protection of carriers such as AT&T and Qwest, nor matters involving interstate traffic, are within the scope of Section 54-10-4 or the authority of the Committee. For this additional reason, the Committee's position, as reflected in its pleading, should be overruled.

III. The UPSC Applied the Wrong Standards for Determining Whether AATCO Should Receive a CPCN to Serve in Beehive Territory.

The UPSC applied Section 54-8b-1.2(3)(c) in determining whether AATCO should be certificated in Beehive's territory. But Section 54-8b.1.2(3)(c) has been pre-empted by federal law in several respects.

Where federal law explicitly or implicitly conflicts with a state statute, under the Supremacy Clause of the United States Constitution, the federal law will pre-empt the state statute. *See, e.g., Geier v. American Honda Motor Co.,* 120 S. Ct. 1913 (2000); *Southland v. Keating,* 465 U. S. 1 (1984); *Burbank v. Lockheed Air Terminals,* 411 U. S. 624 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U. S. 132 (1963).

Sections 251(f) and 253 of title 47 of the United States Code at least implicitly conflict with and therefore pre-empt the provisions of Section 54-8b-1.2(3)(c). In the

event, the different standards, both substantive and procedural, set forth in those provisions of the 1996 Telecommunications Act, rather than Section 54-8b-1.2(3)(c), should have been but were not applied in this docket.

What is more, the Commission, in Beehive's view, misapplied the language of Section 54-8b-1.2(3)(c), even assuming the absence of federal pre-emption. All American's petition sought certification as a competitive local exchange carrier in Beehive's territory. Local competitive entry issues (to the extent they have not been pre-empted by federal law) are governed by and delineated in Section 54-8b-1.2. Section 54-8b-1.2(2) provides that the Commission shall issue a certificate to an applicant 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."

Pursuant to Section 54-8b-2.1(3)(c), where the applicant seeks competitive entry in the territory of an incumbent local exchange carrier which serves fewer than 30,000 access lines in the state, that incumbent local exchange carrier "may petition" the Commission "to exclude from . . . [such] application . . . any local exchange with fewer than 5,000 access lines that is owned or controlled" by such ILEC. If the ILEC exercises this option to petition for an exclusion, then such exclusion may be authorized upon a "finding that the action [of exclusion] is consistent with the public interest[.]"[13]

[13] Section 54-8b-1.2(3)(c) provides in full as follows: "An intervening incumbent telephone corporation serving fewer than 30,000 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." From the context, it is clear that the reference to "an intervening

In other words, Section 54-8b-1.2 provides that, as a general rule, CLEC certifications are granted upon the showing required in subpart (2). Subpart (3)(c) sets forth an exception to this general rule, but that exception comes into play or becomes applicable only in the event that the ILEC involved specifically petitions for an exclusion. In the event of such a petition, an exclusion may be granted upon a showing that the exclusion, not general certification, is in the public interest.

Hence, the public interest tests under subpart (2) and subpart (3)(c) are entirely different – both as a matter of procedure and substance. Speaking procedurally, the question of the exclusion cannot be raised or reached, absent a petition from the ILEC whose territory is threatened. Speaking substantively, the Commission must decide, in any rural area where the ILEC has petitioned for a "carve out," whether a perceived need for the continued protection of monopoly status outweighs the benefits which the legislature, as a matter of policy, seeks to encourage through competitive entry.

Under the statute's language, the rural carve out does not come into play unless the affected carrier objects. If the carve out is triggered by objection, the affected carrier has the burden of demonstrating that the public interest warrants a denial of competition and continuation of a monopoly within the exchange. This public interest test is different -- substantively and procedurally -- from the public interest test where the carve out is not at issue. It is different substantively because (a) the requirement may be vitiated through lack of objection by the affected carrier and because (b) the criteria are peculiar to the

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incumbent telephone corporation" in Section 54-8b-1.2(3)(c) means the ILEC referenced in Section 54-8b-1.2(3)(b), namely, the ILEC whose territory is threatened by the applicant for competitive entry, which ILEC is "granted automatic status as an intervenor."

rural context.[14] It is different procedurally because (a) it is triggered conditionally through the affected carrier's objection and because (b) the risk of non-persuasion is shifted from the applicant to the incumbent carrier which desires to preserve its monopoly status. The legislature logically tied the requirement of an objection to this risk of non-persuasion: Absent an objection, litigation over the carve out would be futile, if not pointless, because, in the event, there is no incumbent carrier willing to shoulder any burden of proof.

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

In this case, Beehive, the ILEC in question, has *not* petitioned for exclusion under subpart (3)(c). Indeed, Beehive has filed a form of consent to All American's petition for certification in Beehive territory. Accordingly, the procedural condition for raising and reaching the question of any "carve out" has not been met. By the same token, the substantive issue -- whether an exception to general certification under subpart (2) by granting a particular exclusion under subpart(3)(c) is in the "public interest" -- has not been raised and cannot be reached.

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

This means, in turn, that the All American petition presented only two issues for decision by the Commission within the 240 day time limited argued above, namely, the issues respecting feasibility under subpart (2)(a) and public interest under subpart (2)(b), the same two issues which were decided in favor of All American when the Commission issued the original certificate to All American on March 7, 2007, in docket number 06-2469-01. In that respect, the Commission's findings in that original docket well might be binding in this proceeding. *See, e.g., Salt Lake Citizens v. Mountain States*, 846 P.2d 1245, 1251-1252 (Utah 1992). *See also*, Utah Code Annotated, Section 54-7-14. *See generally*, A. C. Aman, Jr. and W. P. Mayton, ADMINISTRATIVE LAW, Section 11.1 (1998).[15] But even if those findings do not have preclusive effect, the Commission's sudden about-face, reversing its decisions in two previous dockets, presents an inconsistency which it has not adequately explained and which, on its face, appears to be arbitrary and capricious.

Even if the UPSC properly reached the merits under the carve-out provisions found at Section 54-8b-1.2(3)(c), it was Beehive's burden to persuade the Commission that the *exclusion* of AATCO *from service in Beehive's territory* was in the public interest. Beehive did not undertake to do so, and, with respect, the UPSC findings respecting the public interest did not bear upon service in Beehive's territory specifically as distinct from service throughout the state generally.

[15] The Commission perforce reached the same conclusion when it allowed the interconnection agreement between Beehive and All American to become effective by operation of law pursuant to 47 U.S.C. Section 252.

IV. Jurisdictional, Procedural, and Due Process Objections.

A. Jurisdictional Objections. The UPSC, in effect, found that AATCO was not providing a telecommunications service within the meaning of Utah's Public Utilities Code, and, hence, was not subject to the jurisdiction of the Commission. This finding cannot be reconciled with the Commission's *de facto* assumption of jurisdiction over All American and the Commission's findings and conclusions to the effect that All American could not qualify for certification as a CLEC in Beehive's territory or that All American, as an uncertificated carrier, was operating illegally.

Beehive and All American continue to have an interconnection agreement which has been approved by the Commission pursuant to 47 U.S.C. Section 252. That interconnection agreement qualifies AATCO to render service for interstate purposes. To the extent that the UPSC decision purports to treat any federal question in this regard, including the propriety of so-called traffic pumping at the federal level, the Commission has no jurisdiction to do so.

B. Procedural and Due Process Objections. Beehive continues to believe that whatever certification issues the UPSC had jurisdiction to consider in this matter should have been treated under Section 54-8b-2.1's umbrella, including its 240 day time-line, but that -- precisely because of this temporal compression, the docket should have been confined strictly to the issues noted in that statute. Indeed, from the beginning, at several pretrial, scheduling conferences, Beehive expressed concern about a docket that might lurch out of control with insufficient time for preparation and resolution of a myriad, extra-statutory questions. Fearing that the parties would attempt to raise and that the Commission might allow for an extra-statutory and hence overbroad range of issues,

Beehive even asked for a bill of particulars so that, at the very least, parties could know on what issues they should conduct discovery and otherwise prepare for trial. The Division and the Committee rebuffed this request, asserting that the issues in this docket could not be pinned down since they were "evolving." In the event, the Commission did not enter an order which brought any definition, clarification, or limitation in this regard. The upshot was a docket run riot. Six parties, mostly intervenors, opposed the application. None filed a pleading by which issues could be joined. None were limited to the issues presented in Section 54-8b-1.2. Most if not all spoke to issues that were federal rather than state in character, issues over which the Commission had no jurisdiction whatsoever. If a party contemplated an objection to discovery requests, since it was apparent that the Commission was going to allow matters extraneous to the statute to be considered, but since there was no definition of what those matters might entail, there never was any yardstick by which to measure relevance and hence to gauge the merits or demerits of that objection. It does not matter that, in the final analysis, when the report and order was issued, the Commission, for the most part, addressed the statutory elements for certification. The parties had no notice of what the issues at trial would entail and therefore could not prepare effectively to address those issues during the pretrial stage of the proceeding. This lack of notice, as well as forcing the parties to address not only the issues framed by Section 54-8b-1.2 but also a myriad of extra-statutory concerns within a mere 240 days, not only was procedurally prejudicial but also tantamount to a violation of due process.

V. Conclusion.

Beehive asks the Commission to reconsider and reverse its report and order dated April 26th, and to grant certification for AATCO in Beehive's territory.

Dated this 26th day of May, 2010.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing pleading was served this 26th day of May, 2010, by e-mailing a copy of the same to all parties who have entered an appearance electronically in this docket.

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