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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 June 16, 2009. That report and order denied Beehive's motions respecting the standing of the Office of Consumer Services ("OCS" or "Committee") and for summary disposition of the application of All

American Telephone Company ("AATCO" or "All American") for an amended certificate of public convenience and necessity.

I. PROCEDURAL BACKGROUND

On April 19, 2006, in docket number 06-2469-01, and pursuant to Utah Code, Section 54-8b-2.1, All American applied for authority to serve as a competitive local exchange carrier in the state of Utah. On March 7, 2007, the UPSC granted this application, issuing a certificate to serve in Qwest territory.

On May 24 and June 11, 2007, in docket numbers 07-051-01, 07-051-01, and 07-051-03, and pursuant to 47 U.S.C. Sections 252(a) and 252(e)(1), Beehive filed for approval of certain interconnection agreements with All American. On August 23 and September 10, 2007, pursuant to 47 U.S.C. Section 252(e)(4), these interconnection agreements were "deemed approved" by the Commission.[1]

On May 2, 2008, in this docket number 08-2469-01, and pursuant to Utah Code Section 54-8b-2.1, All American filed a petition which requested an amendment to the certificate granted in docket number 06-2469-01, an amendment which would allow it to serve in Beehive territory. At the same time, Beehive executed and submitted a form of consent to the All American petition.[2]

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[1] Qwest Corporation and Qwest Communications Corporation, by order of the Commission, were allowed to intervene in these dockets. The Qwest entities argued that the interconnection agreements should not be approved because Beehive and All American allegedly were going to engage in something which the Qwest entities called "traffic pumping."

[2] Beehive believes that the provisions of Utah Code, Section 54-8b-2.1, in whole or in part, may be pre-empted by the 1996 Federal Telecommunications Act. Beehive, therefore, executed and submitted the form of consent, noted above, merely as a precautionary matter. Its position is that, if All American must obtain certification pursuant to the terms of Utah Code, Section 54-8b-2.1, that certification has been deemed granted pursuant to the terms of Utah Code, Section 54-8b-1.2(3)(d) or should be granted on the other grounds articulated in Beehive's papers in this docket..

On October 23, 2008 (six months into the eight months which Utah Code, Section 54-8b-2.1(3)(d) allots for processing applications under Utah Code, Section 54-8b-2.1), the Utah Division of Public Utilities ("UDPU" or "Division") filed a motion to dismiss the All American petition. In essence, the Division argued that any request to by-pass the so-called "rural exemption," found in Utah Code, Section 54-8b-2.1(3)(c), presents a question of policy which should be addressed formally and fully. In light of All American's request to serve in territory which is certificated to Beehive, a rural carrier, the Division's motion expressed concern respecting the form of All American's petition, namely, that it sought an informal adjudication and *nunc pro tunc* relief. The All American petition, according to the Division, also failed to comply with UPSC R746-349-3. In the event that the Commission did not dismiss the All American petition, the Division sought an order compelling discovery from All American.

On December 2, 2008, at the request of the parties, a scheduling conference was convened with the Honorable Ruben H. Arredondo, the Commission's Administrative Law Judge. As a result of this conference, the Commission issued an order which scheduled argument respecting whether the proceeding should be conducted informally. In the event that All American's request for informal adjudication was denied, the Commission's order established procedures for the regulation of motions to intervene and further pretrial business.

On January 7, 2009 (five days after the expiration of Section 54-8b-2.1(3)(d)'s deadline for processing applications under Section 54-8b-2.1), the Office of the Attorney General for the State of Utah (the "Attorney General" or "AG"), purporting to act on behalf of the OCS, filed a pleading styled, "Utah Committee of Consumer Services' [sic]

Response to Petition and Memorandum in Support of Motion to Dismiss." In this pleading, the AG argues that the All American petition should be dismissed -- because that petition was filed in this docket rather than docket number 06-2469-01. The AG averred that the All American petition should be formally rather than informally investigated, especially in regard to prior dealings which, in his view, raise the specter of something called "traffic pumping," and that this formal investigation only can take place in the original, as distinct from, the present docket. The AG did not seek intervention on behalf of the OCS.

Late in December, 2008, just days before expiration of the 240 day deadline found in Section 54-8b-2.1(3)(d), other parties, the Utah Rural Telecom Association ("URTA"), AT&T Communications of the Mountain States, Inc., and TCG Utah ("AT&T"), and Qwest Corporation and Qwest Communications Corporation ("Qwest"), filed petitions for intervention in this docket. On February 18, 2009, after expiration of the 240 day deadline, noted above, the UPSC entered orders granting intervention to these parties.

After the questions respecting the intervention of URTA, AT&T, and Qwest were resolved by order of the Commission, AATCO and Beehive asked the Commission to rule that the OCS did not have standing to participate in these proceedings. At the same time, AATCO and Beehive moved for summary judgment on the merits of the AATCO application under Section 54-8b-2.1. By report and order dated June 16, 2009, the UPSC denied the requests of AATCO and Beehive in this regard. Beehive hereby asks the Commission to reconsider and overrule those parts of the June 16th report and order.

II. THE STANDING ISSUE

The OCS has not established standing to appear and be heard in this proceeding. Its arguments, as advanced by the AG, therefore should be disregarded.

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 pleading, noted above, qualifies as an "original action" within the meaning of Section 54-10-4,[3] it is action which only may be taken "as the committee in its discretion may direct."

[3] 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

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.[4]

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

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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.

[4] 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."

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.[5]

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.

[5] 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 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.

But the pleading in question does not indicate 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 pleading's arguments, in every instance, carry 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. As ostensible support for these arguments, moreover, the Committee cites an FCC report, issued in 2002, treating issues under federal interstate tariffs.[6]

In short, the thrust of the Committee's pleading is 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.

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[6] The OCS pleading is especially misleading in this regard. The Committee cites an FCC decision, *In the Matter of AT&T Corporation v. Beehive Telephone Company*, 17 F.C.C.R. 11641 (June 20, 2002), which held that Beehive had over-earned pursuant to its filed tariff for interexchange access charges. Based upon this ruling, the OCS insinuates that Beehive may be an inveterate law-breaker, likely to violate "traffic pumping" rules. The over-earning issue is irrelevant in this docket, however, not only because certification is proposed for All American, rather than Beehive, but also because the tariff at issue involved federal, not state, issues, and, in any case, is much mooted since Beehive now, for interexchange purposes, is a member of the NECA pool. But most egregious of all, the Committee fails to inform the UPSC that, insofar as "traffic pumping" (the ostensible reason for continued investigation in this docket) is concerned, the FCC hasn't yet defined a form of "traffic pumping" which may be illegal, and the FCC specifically held, in the very ruling which is cited, that the terms and conditions of the Beehive-Joy relationship in fact were lawful. *Id.* at 11655. The cited FCC report, moreover, treats events which are more than 7 years old, and bears no relationship whatsoever to Beehive's existing business practices.

C. The Commission's Ruling Did Not Address the Standing of the OCS. The Commission's report and order did not address the merits of Beehive's standing arguments respecting the OCS. The Commission instead ruled that those arguments improperly were raised in a motion to strike. The rule of civil procedure governing motions to strike, according to the Commission, was inapplicable or misapplied in this context.

Neither the OCS nor any other party raised the procedural argument upon which the Commission relied in refusing to rule on the question of standing. This raises due process concerns in Beehive's view because (a) when the UPSC acts in a quasi-judicial capacity and *invents* arguments which support one party at the expense of another the Commission loses the appearance of impartiality and (b) it is procedurally unfair to raise an argument in a decision without first giving notice and an opportunity to be heard on the point.

Putting aside these due process concerns, the Commission's ruling seems to be that (a) motions to strike, under the applicable rule of civil procedure, may be used to challenge initiatory pleadings, but not motions, (b) the OCS's papers in this docket were motions, not pleadings, and therefore (c) use of a motion to strike to defeat those motion papers was inappropriate. Beehive, however, is challenging the standing of the OCS to be in this docket. Questions of standing are jurisdictional in nature. They may be raised at any time and in any manner. The form in which that question is raised, by motion to strike or otherwise, should not conclude the substantive concern respecting agency power. Indeed, the Commission, like every other tribunal, may have a duty to resolve jurisdictional questions whether or not they are raised by the parties in a docket.

What is more, in light of the Commission's procedural ruling on motions to strike, how should a party raise the standing of the OCS in this docket? The OCS simply appeared, filing papers which defy classification, and without a petition to intervene or any other, conventional, so-called initiatory pleading – unless we take the first papers that a party files in a docket as "initiatory," a sense which the Commission apparently did not contemplate in relation to the OCS pleading. Does this mean that, when a party like the OCS disobeys the rules regarding intervention, failing to file an initiatory pleading in the conventional sense, it may avoid a challenge to its standing in a case? The standing question will not go away in this docket. Beehive will continue to raise that question, finding, at some point, a "procedurally appropriate" way in which to do so. At that point, the Commission will be required to address the OCS's standing on the merits. In Beehive's view, the Commission, without further delay, would be well-advised to take the opportunity presented on this motion for reconsideration to do so.

III. THE 240 DAY DEADLINE ISSUE

As noted above, All American's petition was filed May 2, 2008. Section 54-8b-2.1(3)(d) mandates that petitions respecting CLEC certification shall be approved or denied within 240 days after the filing of a petition seeking certification. 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.[7]

A. The Statutory Mandate. 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

[7] 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."

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

B. The Reasons the Statutory Mandate Cannot Be Ignored. The Commission cannot ignore the clear, strict, and unforgiving terms of Section 54-8b-2.1(3)(d). But how might the Commission attempt to circumvent the requirements of this statute?

Perhaps the UPSC will contend that, even though Section 54-8b-1.2(3)(d) uses "shall" twice, once when directing the Commission to approve or deny a petition within 240 days, and again when dictating the outcome of approval in the event the Commission fails to pick one of those two options within that time frame, the legislature really meant "may." The law will not support this reading of the statute, however, since, in Utah, the plain meaning rule applies,[8] and "shall" plainly is mandatory[9] rather than directory.[10]

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[8] 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).

[9] The Utah Supreme Court has said that, when the term "shall" is used in a statute or rule, it 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).

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").

[10] Under conventional rules of statutory construction, as applied 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 inappropriate. Nevertheless, it may be instructive for the Commission to consider the policies to be served through the enactment and implementation of statutes in the 1996 Telecommunications Act which are similar to or perform the same function as Section 54-8b-1.2(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, providing that such agreements shall be deemed granted in the event that local commissions do not act to approve or reject these agreements with 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[ ]").

Perhaps the UPSC will contend that, even though Section 54-8b-1.2(3)(d) is a legislative edict to a state agency, the parties to this docket, by agreement, may waive the 240 day deadline. But this contention won't wash for at least 3 reasons.

First, the plain language of Section 54-8b-1.2(3)(d) does not permit this result. 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 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.[11]

Second, the parties to this docket are not the legislature; 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 and adhere to standards, that power may not be abdicated or those standards altered through a stipulation of the parties. *See, Bradshaw v. Wilkinson Water Co.*, 94 P.3d 242, 247-249 (Utah 2004) (public service commission 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

[11] 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[ ]").

fixing rates; this would have "impermissibly delegated to the parties the task of determining standards[ ]").[12]

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.[13]

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[12] Indeed, the legislature may have written Section 54-8b-1.2(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 public service commission; 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-1.2(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.

[13] Section 54-8b-2.1(3)(d) is not a statute of limitation, 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.

This reading of Section 54-8b-2.1(3)(d), moreover, would be in harmony with Utah's jurisprudence respecting the Commission's subject-matter jurisdiction. Our Supreme Court repeatedly has held that the Commission, as a creature of the legislature, is an agency of limited

Finally, perhaps the UPSC will contend that adherence to the 240 day deadline is "unfair" under the circumstances as they have evolved in this docket. But enforcement of the 240 day deadline cannot be unfair to the Committee or the Division. It is difficult to know how the Committee, a party which did not enter an appearance until after the deadline had expired, might attempt to articulate this unfairness. But the Committee, echoing the Division, might suggest that All American stonewalled on discovery, discovery designed to get to the bottom of what they perceive to be a suspect relationship between All American and Beehive, and that this stonewalling behavior should not be rewarded, that, indeed, it should serve judicially to estop All American from obtaining the relief requested in its certification petition. If this were the contention of the Committee, as allied with the Division, it would be to no avail for 3 reasons.

First, there is no "unfairness exception" in the plain language of Section 54-8b-2.1(3)(d). As noted above, the statute says what it says, without qualification. The legislature presumably was aware that certification dockets, like other agency

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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, however, the plain language of Section 54-8b-1.2(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."

Indeed, in an analogous context, Qwest recently argued before the Colorado Public Utilities Commission that, once ICAs 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 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.*

proceedings, may become bottlenecked with all kinds of disputes, including those involving discovery. The legislature, notwithstanding this awareness, fixed a definite deadline within which, in its contemplation, these dockets could be processed. If such processing failed of completion within the allotted time, a consequence, namely, approval of the requested certification, was legislatively mandated. This Commission does not have jurisdiction to change the plain meaning of this statutory text – especially where the insertion of an "unfairness exception" not only adds to but also alters that meaning.

Second, in any event, to label the discovery difficulties in this docket "unfair," or to attribute those difficulties to "stonewalling" by either All American or Beehive would be incorrect. Both All American and Beehive had responded to data requests from the Division. Both had volunteered further informal exchanges of relevant information. Only when the Division pressed beyond these points did All American and Beehive seek a pause in the proceeding in order to obtain clarification respecting the manner and scope of the investigation to be conducted, and the relevance of further discovery in view of the standards contained in the certification statute.

These are legitimate concerns which All American and Beehive should not have to apologize for raising. Perhaps if the Division had made clear at the outset, through timely answering the petition, as contemplated by the rules, or otherwise, that it was going to use this docket as a platform for rulemaking on traffic pumping issues, the needed clarification could have been attended to earlier in the process. Or perhaps if the issues, as the Division wished to define them, had been raised prior to late October, when its motion to dismiss was filed, the legislative allotment of 240 days might have been squeezed to accommodate those concerns. And the Committee's appearance in the

docket, after expiration of that deadline, leaves it little room to complain of delays or unfairness bred by delay. Thus, even if unfairness as a product of delays could provide a legitimate basis to overcome the plain deadline found in Section 54-8b-2.1.(3)(d), the delays in this docket, at best, are of everybody's making and should not be used to penalize All American or Beehive.

Third, putting any and all questions of discovery disputes, reasonable or unreasonable delays, and litigation posturing to one side, the real, practical problem in this docket, as shown in more detail below, is that the Division and the Committee (as well as AT&T and Qwest as intervenors) want to investigate the issue of "traffic pumping," and this issue, in all of its complexity and uncertainty, realistically cannot be addressed in 240 days. To Beehive's knowledge, the "wrong" of "traffic pumping," if there is such a beast, has yet to be defined in this jurisdiction. We are not aware of any adjudications in this regard. Nor are we aware of any rulemaking that has been initiated on this front. What behavior might qualify as the "wrong" of "traffic pumping" has been the subject of exploration, in relation to interstate access tariffs, at the FCC for years. Thus far, no judicial tribunal or administrative agency has held that it was unlawful for an incumbent local exchange carrier, such as Beehive, to impose tariffed charges for transporting traffic bound for a conference calling company. The adjudicated cases in fact have held that those business relationships which have been the subject of traffic pumping accusations by interexchange carriers are entirely lawful. The FCC commenced a rulemaking in 2007 to determine whether it should modify its tariff rules to ensure that tariffed rates remain just and reasonable if there is a significant increase in demand caused by calls to a conference calling company. Iowa presently is looking at the issue,

insofar as intrastate access tariffs are concerned, but that investigation likewise has been ongoing for a number of years. In short, agency efforts to understand and regulate this phenomenon called traffic pumping, if experience is our guide, take a matter of years, not 240 days.

Indeed, the Division, the Committee, and Qwest have had two dockets prior to this one wherein they have had an opportunity to explore the alleged wrong of traffic pumping insofar as that legitimately might be an issue in relation to All American and Beehive. All parties had 240 days during the first certification request of All American. All parties had another 90 days during Beehive's request for approval of its interconnection agreement with All American. All parties were given still another 240 days in the instant docket. What's more, in between these three dockets, the processing of which has spanned a period of 3 years, all parties, including the Division and the Committee, if they had authorization and standing to do so, could have opened a rule-making docket to define what they mean by "traffic-pumping," to regulate any wrongs which, in their view, flowed from this practice, once it was defined, and to apply that rule to whatever relation existed between All American and Beehive, if good faith allegations could be made that, as interconnecting carriers, they were in violation of an actual Commission rule.

For reasons known only to the Division and the Committee, they have sat back and done nothing for lo these three years. The Division raises the issue within 60 days of the expiration of the 240 days in this docket. The Committee raises the issue after the 240 day deadline in fact has expired. All American and Beehive cannot be blamed for

these missed opportunities, three dockets worth. Nor are they responsible for the three years of inaction by these regulatory bodies.

In any case, the legislature would not have us wait; Section 54-8b-2.1(3)(d)'s mandate is clear and unforgiving; the time has passed; the consequence is foregone; the All American petition for certification, as a matter of law, is deemed approved, as of January 2, 2009.

C. The Commission's Ruling Is Unresponsive to the Statutory Mandate and the Reasons Why It Must Be Enforced as a Matter of Law. The Commission nowhere addresses the express language of Section 54-8b-1.2(3)(d) and the bar which that language poses – viewed jurisdictionally or otherwise – in this proceeding. As with the motion to strike and the OCS's standing, the Commission attempts to resolve these questions by indirection instead. The Commission says that this docket should remain open so that it can rule on the requests to revoke AATCO's certificate, requests which do not have any time bar associated with them. This circumstance, in the Commission's view, trumps the 240 day deadline. The Commission also says that it has allowed waivers of the 240 deadline in other dockets and, out of a concern for agency consistency, will not change course respecting waiver of the deadline in this docket.

As argued at length above, Beehive does not believe that the 240 day deadline may be extended by a party's interjection of additional issues, whether of decertification, traffic pumping, or other concerns, into a docket under Section 54-8b-1.2. The statutory text does not allow for this, and, if the text is bent in this regard, the legislative will, expressed in that text, will be broken. Indeed, if the Commission's approach is adopted,

parties will gain incentive to defeat the deadline by cluttering certification dockets with all sorts of ancillary issues.

Beehive further notes the logical incongruity of the Commission's argument in this regard. The Commission, in effect, is using an apparent request for decertification[14] to prolong a proceeding where amended certification is being requested but hasn't been granted in the first instance. The Commission's premise in taking this approach, moreover, seems to be that, even if Section 54-8b-2.1(3)(d)'s time line is honored and amended certification is deemed granted, the Commission cannot go back to entertain any decertification issues which legitimately might be raised – as though, contrary to the name of the relief in question, "revocation" of a certificate could not be considered after the fact of certification – whether that certification has been granted – or deemed granted -- originally or by amendment.

Indeed, Beehive maintains that – as a procedural matter – decertification isn't properly at issue in this docket. Certain intervenors have raised the spectre of decertification, but those parties (a) weren't allowed intervention until after the 240 day deadline had run in the first instance and (b) can't raise issues not present in the docket already. The Commission's report and order confuses the ability of an intervenor to argue that AATCO's allegedly *ultra vires* activity in a Beehive exchange may go to the "public interest" questions inherent in granting a certificate (questions which perforce have been resolved by the 240 day drop dead date) and the ability of an intervenor to enter a docket and, without more, raise claims and seek relief outside the scope of the application at hand. The same analysis holds for the OCS, of course, since it also was too

[14] Beehive says "apparent request for decertification" since no formal request for agency action has yet been filed in this regard.

late in making an appearance in this proceeding, it also must proceed by intervention and is confined to the issues as framed by the applicant, and, moreover, it has no standing in any event as argued above.

Beehive also disagrees with the Commission's analysis of agency inconsistency and waiver of the deadline. There can be no inconsistency here, since the Commission never has ruled directly on the precise issues which Beehive raises in this docket – (a) whether the statute's language is jurisdictional and (b) whether, in any case, it can be waived by the parties or the commission and (c) whether the 240 day deadline can be waived by agreement between fewer than all the parties in a particular docket. Even if the Commission had ruled on any or all of these issues, the law respecting agency inconsistency would not prevent a change in that ruling. The law simply requires that the Commission give a reasoned explanation for changes in approach. That reasoned explanation easily is supplied on the facts and the law in this case.[15]

IV. THE COLLATERAL ESTOPPEL ISSUE

All American's petition seeks 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 Utah Code, Section 54-8b-

[15] Beehive believes that the form of relief which AATCO seeks in connection with the application for an amended certificate is much mooted. Beehive concurs with AATCO's arguments that the Commission has power to grant relief on a *nunc pro tunc* basis. The Utah Supreme Court has ruled that the power to grant equitable relief, such as refunds for ratepayers, is part of the implied power contained in the jurisdictional grant to the UPSC. The facts of this case, moreover, argue in favor of the exercise of that power in connection with the AATCO petition. But in all events, the AATCO petition, in view of the language of Section 54-8b-2.1(3)(d) is deemed granted, *nunc pro tunc* relief and all. As argued above, if the parties in interest wanted to contest the exercise of this power, for any reason, they should have done so prior to expiration of the 240 day deadline. And if the Commission had reservations in this regard, it too could have ruled before the statutory mandate required a different result. Those options, however, have been foreclosed by legislative edict -- to either parties or Commission -- at this juncture.

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 Utah Code, 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[.]"[16]

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.

[16] 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 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."

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.

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.

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 are binding and have preclusive effect. *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).

But the Committee has raised a concern about "traffic pumping," insisting that this concern must be explored formally and fully before All American is allowed to operate in Beehive territory. Insofar as the Committee's pleadings are not stricken, and the bar of Section 54-8b-1.2(3)(d) is not enforced, the Commission may have to decide whether that issue is germane to this docket. Beehive believes that it is not for several reasons which are legal, logical, and practical.

On the legal front, the Committee seems to be arguing that (i) All American and Beehive are engaging or will engage in a so-called "conferencing arrangement" of some sort, (ii) that this arrangement will result in "unlawful practices" under telecommunications law, and (iii) in the event, the amended certification which All American seeks in this docket cannot be in the "public interest." The problem with this argument, however, is that it proceeds from a false premise. Thus far, the FCC has ruled that the types of arrangements in which All American and others have engaged are not unlawful. The FCC has made four such rulings. *See, AT&T Corp. v. Jefferson Telephone Co.,* 16 FCC Rcd 161130 (2001); *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041 (2002); *AT&T v. Beehive Telephone Co.*, 17 FCC Rcd 11641 (2002); *Qwest Communications Corporation v. Farmers & Merchants Mutual Telephone Company*, 22 FCC Rcd 17973 (October 2, 2007). And it may go without saying that, if the Committee or the Division truly believed that All American likely would engage in "unlawful" conduct, these so-called "traffic pumping" allegations could have and should have been raised in the original certification docket. They were not,

however, and the Commission granted a certificate, finding that All American's services would be consistent with the "public interest," and that finding should not be challenged collaterally in this proceeding.

On the logical front, the Commission should handle any concerns which it may have respecting "traffic pumping" in a separate rulemaking proceeding. This is because, speaking conceptually, the debate over "traffic pumping" primarily concerns the fairness of rates and policies of rate reform. It bears only tangentially, if at all, upon the issues of competitive entry which are treated in Section 54-8b-2.1 of our public utilities code. This approach in fact has been taken at the federal level by the FCC. *See, e.g., In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd 17989 (2008).[17]

[17] As noted above, "traffic pumping" raises policy questions respecting fair ratemaking, not competitive entry. The IXCs making these complaints believe that, since geographic rate averaging forces them to lose money by serving rural areas, the ILECs in those areas should not be allowed to attract businesses which create large volumes of traffic. The IXCs believe that those types of businesses should only be located in urban areas where access rates are low. Those beliefs may or may not have merit, but in any event the IXCs were not forced to use geographic rate averaging. They can elect to go back to the old method where there was a different rate to each end location, normally determined by distance from the calling party. That was called time and distance billing. They selected instead the "one-size-fits-all" rate for competitive reasons. Some have even made it worse for themselves by adopting a flat rate. These "all-you-can-eat" rate plans, where the revenue earned will not be tied to minutes of use – also was selected, by the IXCs, for their own competitive ends. They have a cap on revenue, but none on expenses, expenses such as the access charges which must be paid when traffic is carried to end users in high cost areas. Should the Commission bail out the IXCs, saving them from the consequences of their own competitive choices? Should the Commission become a social engineer, making decisions which determine the level of economic development in rural as opposed to urban areas? Should the Commission not discourage growth in rural areas, growth that may relieve stress on high cost funds while at the same time advancing the goals of universal service in every geographic sector of the state of Utah? Should the Commission prefer the competitive ends of IXCs over the developmental needs of rural ILECs?

Any policy resolution in this regard will be a long time coming, but, in the meantime, as shown above, the FCC has opined that these arrangements are lawful and therefore consistent with the public interest. Under these circumstances, it seems premature, if not illogical, to deny entry to a prospective CLEC on policy grounds (or, put differently, "public interest" grounds) which, at best, are unknown at this time, and which, indeed, never may be formulated or implemented.

On the practical front, any resolution to the questions posed by so-called "traffic pumping" simply are too intractable for a 240 day docket. Even if the Committee or Division had raised this issue at the beginning, rather than waiting until the 240 day period expired (the Committee) or was within 2 months of expiration (the Division), there would not have been time enough to address this matter of policy. The debate has been ongoing at the FCC and in other jurisdictions for years, not just months. As noted above, Qwest raised the issue in the Beehive-AATCO interconnection docket in 2007. When that effort failed, because of the 90 day time limit associated with approval of negotiated interconnection agreements, both Qwest and the Division indicated that they would open a docket to address the issue. To date, this docket has not been opened, suggesting that they still are studying this difficult problem in preparation for Commission review, and suggesting further that it is a problem which is unlikely to find a quick solution. Indeed, it is a fair inference from these circumstances that the Utah state legislature did not believe that issues like traffic pumping or access rate reform, issues requiring protracted study, intensive investigation, and extended hearings, ever could be reconciled with the 240 time line of Section 54-8b-1.2(3)(d) and hence never should be considered as part of the public interest equation under Section 54-8b-1.2(2)(b).

In short, at present, even if it were true that All American would have a business relation with Beehive of the type which has been questioned in the regulatory rulings noted above, that type of relationship has not been ruled unlawful or opposed to the public interest. Indeed, the FCC has declared that type of relationship to be entirely lawful. An application for certification should not be deferred or derailed simply because, *at some future time*, such arrangements *might be* delimited or proscribed. In any

case, and for a variety of reasons, the existence of any such relationship is irrelevant to CLEC certification and competitive entry and should be addressed, if at all, following the FCC's example, in a rulemaking docket on the subject of intrastate, interexchange rate reform. As a practical matter, the subject cannot and should not be squeezed into the cubbyhole of a statutorily mandated 240 day time-line.[18]

V. THE COMMISSION OVERLOOKED BEEHIVE'S COLLATERAL ESTOPPEL ARGUMENT

AATCO argued that its application should be granted, in light of Commission approval of the interconnection agreement, on the ground of *res judicata*. Beehive argued that the AATCO application should be granted, not because of the interconnection agreement proceeding, but on a different ground, invoking the doctrine of collateral estoppel as distinct from *res judicata*. The Commission's report and order responded to the AATCO argument, but did not address Beehive's contentions in this regard.

Beehive's preclusion argument proceeded along the following lines. It analyzed the requirements for certification under Section 54-8b-1.2. Where the rural carve-out is not at issue, those requirements essentially are twofold. First, the applicant must show

[18] What's more, there is a chicken and egg aspect to the issue which defies solution in a short term docket. What is traffic pumping? Assuming that such a practice can be defined, does the Commission want to make that practice, once understood, unlawful? Is it fair to deny entry to a prospective CLEC based upon an allegation that, in the future, the CLEC may engage in behavior which, as of this point in time, has yet to be proscribed as unlawful? Might any such future proscription depend upon studies respecting the impact, if any, which the specified practice may have on intrastate, interexchange access rates? Utah has expressed a policy preference for innovative entrepreneurship in the telecommunications industry. What if innovative entrepreneurship takes the form of business connections which increase revenues to rural carriers and decrease reliance upon the high cost fund? Will the sorting of these policy objectives depend upon studies respecting the impact, if any, which the specified practice may have upon intrastate, interexchange rates or financial health of rural carriers? How will those studies be accomplished (except through abstract reliance upon any recorded experience from foreign jurisdictions) if entry is barred in the first instance?

financial strength, technical ability, and managerial competency. Second, the application must be in the public interest. Where the rural carve-out is at issue, the incumbent carrier asserting that exemption has the burden of showing that monopoly maintenance within the affected exchange is in the public interest.

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 rural context.[19] 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

[19] 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.

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.

That means that the only requirements for obtaining an amended certificate in this proceeding are those bearing upon financial ability, technical ability, managerial competency, and satisfaction of the public interest in the generic sense, or, in other words, the same tests that AATCO satisfied when it obtained its initial certificate. The Commission already made findings and conclusions that AATCO satisfied these statutory tests when it granted that initial certificate. These findings from the original certification proceeding, in Beehive's view, must be given preclusive effect as to the same statutory requirements in this amended certification proceeding.[20]

The Commission's report and order either misconstrues or does not respond to *Beehive's* argument in this regard. Beehive did not argue, as the Commission appears to believe, that the Commission's approval of the interconnection agreement between AATCO and Beehive has *res judicata* or collateral estoppel effect in this docket.[21]

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[20] Indeed, the Commission has adopted exactly this approach in other dockets, and, in order to avoid charges of agency inconsistency, should follow suit in this docket.

[21] Beehive's motion papers did not argue that the result in the interconnection docket has preclusive effect in this proceeding. But it does not disagree with AATCO's position in this regard. Interconnection agreements cannot be approved absent a finding and conclusion that they satisfy a public interest test. (And as noted in the Qwest brief, this Commission, where appropriate, has invoked a lack of certification as grounds, under the public interest rubric, to deny approval to interconnection agreements.) As a factual finding, under the public utilities code and our case law, this has collateral estoppel effect on the parties who participated in the docket. Unlike the example cited in Qwest's brief, the interconnection agreement at issue in this proceeding was deemed approved after the Division and Qwest participated as parties in that docket. Contrary to the assertion of the Division, these parties actually litigated their points of contention, including allegedly unlawful traffic stimulation, in that docket. In any case, not only actual litigation but also the opportunity to litigate (which surely was afforded all parties in the interconnection docket) is all that is needed under our cases to achieve collateral estoppel effect. To this extent, all of the elements of collateral estoppel – subject-matter jurisdiction, the same

Moreover, the Commission does not address adequately Beehive's contention that, as a matter of statutory construction, unless the affected carrier (Beehive in this case) invokes carve out protection, that subpart of Section 54-8b-1.2 does not become an issue to be determined in this docket. The Commission's report and order may imply that parties in a certification docket, through their consent, cannot vitiate the Commission's duty to investigate the case and come to an independent determination that an application's approval would be in the public interest, citing the *Bradshaw* decision.

Beehive does not disagree with this proposition as a general statement – assuming proper qualification. But in light of the particular language of Section 54-8b-1.2, that proposition is misapplied here. Section 54-8b-1.2 has two public interest tests. One is in subpart (2)(b) and another is in subpart (3)(c). Beehive agrees that the test in subpart (2)(b) must be satisfied and cannot be waived by the parties, but Beehive argues, as discussed below, that this test can be and has been satisfied through the use of issue preclusion. Beehive contends that the test in subpart (3)(c), in light of the clear statutory text, is an exception to the general rule of subpart (2)(b), and that application of the exception is triggered only by an objection of the affected carrier.

The legislature, therefore, has made a policy judgment that the public interest associated with our rural carve-out provision may be considered only where the incumbent local exchange carrier whose territory is subject to invasion makes objection. This is different from the situation in *Bradshaw*. In *Bradshaw* the UPSC delegated to parties in interest certain responsibilities which the legislature, by statute, had given to the Commission. This delegation was contrary to the statutory directive and, hence,

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parties, an identical issue, and actual litigation or an opportunity to litigate in respect of that issue – have been satisfied. Since the public interest standard was met in the interconnection docket, that standard, on the basis of issue preclusion, should be deemed satisfied in this docket.

unlawful. In this case, the legislature, by statute, has said that there is no need to make any *additional* finding respecting the public interest in the rural carve out situation so long as the affected carrier does not object. This is not about who decides, but whether a decision should be made at all. And to force a decision or add criteria to the decision-making process, where the statute directs otherwise, would be contrary to the legislative will and, hence, unlawful.

The Commission likewise ignores Beehive's actual argument respecting issue preclusion on this motion – namely that the Commission's findings in the original certification docket (not the interconnection docket) respecting financial wherewithal, technical ability, managerial competence, and generic public interest may be applied in this amended certification docket. The Commission already found, in the original certification docket, that the conditions to certification under Section 54-8b-1.2 have been satisfied by AATCO. There are no other tests requiring satisfaction in order to approve the amended certificate. The Commission's findings respecting original certification, by virtue of issue preclusion, must be applied in this docket, and, when applied, they require approval of the AATCO application as a matter of law.

VI. CONCLUSION

Beehive asks the Commission to reconsider its report and order dated June 16th, and to enter a new order which denies standing to the OCS, enforces the 240 day deadline, and treats and adopts Beehive's collateral estoppel argument. Beehive also joins the petition of AATCO for a stay of proceedings in this docket, pending resolution by the Commission of this request for reconsideration of the June 16th report and order. Beehive believes that a stay is warranted in the interest of economy in this proceeding. In

the event that the Commission (or, if an appeal becomes necessary, the Utah Supreme Court) determines that, as a matter of statutory construction, the 240 day deadline, after all, should be enforced, there will be no need for further litigation in this matter. The parties should not be forced to expend further resources until this simple matter of statutory interpretation is resolved definitively by either the Commission or the judiciary.

Dated this 16th day of July, 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing pleading was served this 7th day of April, 2009, by e-mailing a copy of the same to all parties who have entered an appearance electronically in this docket.

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