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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

POSITION STATEMENT OF BEEHIVE TELEPHONE COMPANY, INC.

Beehive Telephone Company, Inc. ("Beehive"), submits this position statement in connection with the matters presently under discussion in this docket, and shows the Utah Public Service Commission ("UPSC" or "Commission") as follows.

PROCEDURAL BACKGROUND

The historical background which, in Beehive's view, may be important to an understanding of the matters under discussion in this docket is as follows.

On April 19, 2006, All American Telephone Co., Inc. ("All American"), applied for authority to serve as a Competitive Local Exchange Carrier in Utah. This was in UPSC Docket No. 06-2469-01. In this petition, All American asked for statewide authority, including the territory served not only by Beehive but also by every other rural carrier. After negotiations among the parties in interest, a compromise was reached. All American believed that this compromise allowed for a certificate in Qwest as well as Beehive territory. The certificate as granted, however, was limited to Qwest territory.

Consistent with this mistaken understanding respecting the scope of the territory to be served, on May 24 and June 11, 2007, pursuant to 47 U.S.C. Sections 252(a) and 252(e)(1), Beehive filed for approval of certain interconnection agreements with All American. This was in UPSC Docket Nos. 07-051-01, 07-051-02, and 07-051-03.

The Utah Division of Public Utilities ("DPU"), by statute, Utah Code, Section 54-4a-1(1)(a), was entitled to participate and in fact participated in these interconnection dockets as a party in interest. Qwest Corporation and Qwest Communications Corporation ("Qwest"), by formal petition and order of the Commission, obtained intervention in these dockets as parties in interest. Their rights of participation in that regard were unlimited. The Qwest intervention petition charged that Beehive was going to engage in "traffic pumping," an allegedly unfair telecommunications practice that has been the subject of proceedings before the Federal Communications Commission ("FCC").

After the filings for approval of the interconnection agreements noted above, the Commission had 90 days within which to approve or disapprove these proposed contracts under the timeline mandated in 47 U.S.C. Section 252(e)(4). Pursuant to Section 252(e)(2)(A), an interconnection agreement may be disapproved if it is not consistent with the "public interest, convenience, and necessity[.]" Those deadlines for disapproval on this or any other ground expired, however, on August 23 and September 10, 2007. As of those dates, the Beehive/All American interconnection agreements were "deemed approved" pursuant to the express terms of Section 252(e)(4).

On May 2, 2008, after realizing that the certificate of public convenience and necessity which the Commission had granted did not embrace the Beehive territory, as originally contemplated, and realizing that this omission created an incongruous circumstance in relation to the Commission's approval of the interconnection agreements noted above, All American filed the instant petition for a *nunc pro tunc* amendment to its certificate.

Because this petition, on one view, triggered application of Utah Code, Section 54-8b-2.1, All American obtained a form of consent from Beehive.[1] Beehive authorized its counsel to sign this form of consent on April 16, 2008, and the form of consent was filed with All American's petition on May 2, 2008. Insofar as the conditions of Section 54-8b-2.1 have relevance to this proceeding or, assuming relevance, remained unmet notwithstanding Beehive's consent, the deadline for adjudicating any and all such issues

[1] As noted below, however, Beehive does not concur in the view that compliance with Section 54-8b-2.1 is required in this proceeding. Signing the form of consent, therefore, was authorized only as a precautionary measure.

arising under those conditions expired 240 days after the filing of the petition, or, in other words, on or about January 2, 2008.[2]

All American's petition, in paragraph 7, specifically invoked then Utah Code, Section 63-46b-4 (since recodified at Utah Code, Section 63G-4-202(3)), and UPSC Rule R746-110-1, and requested an informal adjudicative process.

The primary differences between formal and informal adjudicative proceedings under the Utah Administrative Procedures Code, of course, are that, for informal proceedings: (1) no responsive pleading within an applicable deadline of 20 to 30 days is required from any party in interest, Utah Code, Section 63G-4-203(1)(a), (2) discovery is forbidden or conducted informally or by agency order, Utah Code, Section 63G-4-203(1)(e), (3) intervention is limited, Utah Code, Section 63G-4-203(1)(g),[3] and (4) judicial review of final orders is obtained *de novo* in a Utah district court rather than through other standards of review at the Utah court of appeals or the Utah Supreme Court, Utah Code, Section 63G-4-402(1)(a).

The Commission never ruled upon All American's request for informal adjudication. Time passed. The DPU appears to have treated this matter as an informal proceeding because no responsive pleading was filed within 20 to 30 days as otherwise contemplated under the code and rules, and because discovery, from Beehive's standpoint, has been conducted informally. No party in interest, moreover, until recently, attempted to intervene.

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[2] Utah Code, 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." (Emphasis supplied.)

[3] Section 63G-4-203(1)(g) provides that, "Intervention is prohibited, except that the agency may enact rules permitting intervention where a federal statute or rule requires that a state permit intervention."

In November, after data requests went unanswered, the DPU filed a motion to compel discovery and to dismiss the petition. All American demurred, suggesting that, absent a ruling on its request for informal adjudication, parties in interest had no procedural bearings and, thus, this threshold question required an answer before further proceedings could be held in this docket. A scheduling conference to address these concerns was convened December 2, 2008. At that conference, a schedule was established to brief whether the subject matter of this docket should be conducted formally or informally. It was believed that, once this question was answered, thereby laying the procedural ground rules for further proceedings, the balance of the issues respecting discovery, dismissal, intervention, and the like could be addressed. Indeed, they cannot be addressed, as a practical matter, and in fairness to all parties, until All American's May 2nd request for informal treatment is either granted or denied.

Without waiting for this ruling, however, four parties have formally or informally requested intervention. The Utah Rural Telecom Association, AT&T, and Qwest formally have requested intervention. The Utah Committee of Consumer Services, while not seeking intervention per se, nevertheless has filed a pleading which appears to endorse the DPU's position respecting the All American petition.

BEEHIVE'S POSITION

Beehive believes that the confusion in this docket would have been avoided if the Commission had addressed All American's May 2nd request for informal adjudication at the outset, letting the parties know upon what footing the proceeding should have been conducted. All American, it would appear, has been whipsawed, first into believing that the proceedings might be informal, and then, in a sudden burst of formality, into facing

the DPU's motions to compel and dismiss. In fairness to all concerned, and in deference to the Commission's December 2nd ruling, the question of formal vs. informal adjudication first should be resolved, and then, when parties know the procedural terms and conditions of future proceedings, a new scheduling conference should be held which establishes a discovery and briefing schedule. If a new pretrial scheduling conference isn't held after granting or denying the May 2nd request for informal adjudication, then the confusion which has resulted from leaving that request unanswered and the procedural posture of this docket in limbo for so long, will work an unfair prejudice upon all parties, and especially All American and Beehive.

Accordingly, if the Commission determines that it wants a formal adjudicative proceeding, and in the further event, at that juncture, that discovery remains unanswered and the DPU wants to press for dismissal, parties in interest should be given an opportunity to answer the discovery, or explain why the discovery need not be answered, and respond to the motion to dismiss. If the Commission determines that it will proceed informally, the discovery motion and motion to dismiss should become moot.

Likewise, in view of the above, the questions respecting intervention seem premature at this point. Absent a ruling as to the type of proceeding this should be, formal or informal, nobody knows how to respond to the pending motions seeking intervention. If the proceeding is conducted formally, there is one test, and, if informally, another. Parties cannot determine whether it is worth arguing or, if argument is desired, how to argue, without a ruling that tells them whether the All American May 2nd request for informal adjudication will be granted or denied.

In the meantime, and for the record, Beehive reserves the right to argue (once the mode of proceeding is established) that neither AT&T, Qwest, URTA, nor the CCS has standing to intervene in this proceeding. Even if these parties can demonstrate standing, AT&T and Qwest should not be allowed to intervene, since the traffic-pumping issue which they wish to raise has no relevance to the matters in this docket and because, as a question of federal concern, it has been and continues to be treated at the FCC. What's more, even if traffic pumping has relevance in this docket, AT&T and Qwest are barred by the doctrines of claims preclusion and issue preclusion from raising it against All American and/or Beehive.

Finally, after the Commission enters a pretrial scheduling order, as requested above, and on the merits of this dispute, Beehive will argue as follows. (1) Assuming that Section 58-8b-2.1 applies to the All American petition, that petition has been deemed granted pursuant to Section 58-8b-2.1(3)(d). The 240 day deadline is absolute, a statute of repose, and, as a jurisdictional bar, cannot be waived by any party in interest. (2) Assuming that Section 58-8b-2.1 applies to the All American petition, that petition, if not deemed granted already, must be approved as a matter of law. Section 58-8b-2.1(3)(c) provides that, in order for the Commission to "carve out" a rural exchange from a requested certification, two conditions must be met. First, the affected local exchange carrier must intervene and protest the certification, and, second, the Commission must find that the "carve out" is "consistent with the public interest." Neither of these conditions can be satisfied here, however. Beehive has not requested a "carve out." In fact, Beehive has consented to All American's certification in Beehive territory. And the Commission, by approving the interconnection agreements between All American and

Beehive, as noted above, perforce has found that All American's operation in Beehive territory is consistent with the "public interest" and now is precluded from finding otherwise. Likewise, the DPU and Qwest, as parties in those dockets, are barred by *res judicata* and claims preclusion from arguing otherwise. (3) In all events, Section 58-8b-2.1 does not apply to the All American petition, as Utah's carve-out protection for rural carriers has been pre-empted by federal law under the 1996 Telecommunications Act.

CONCLUSION AND RECOMMENDATIONS

Beehive's position is that, as a first order of business, the Commission should decide whether to grant All American's May 2nd request to treat this proceeding informally. That, indeed, seems to be the sense behind the order entered at the December 2nd scheduling conference. Once a ruling is made on that issue, a further pretrial conference should be scheduled so that the parties may assess their options and determine their course respecting the future of this proceeding.

If the Commission denies the All American request for informality, determining that this shall be a formal adjudication, then (a) a reasonable time should be set for the outstanding discovery to be answered, with the motion to compel denied without prejudice, (b) the motions to intervene filed by URTA, Qwest, and AT&T should be deemed filed as of the date of the pretrial conference, and parties opposing those motions given a reasonable time within which to respond to the same, and (c) the motion of the DPU to dismiss this proceeding should be declared moot, or parties should be afforded an opportunity to respond to that motion and to make countervailing motions of their own on the merits of the issues in this docket.

If the Commission grants the All American request for informality, (a) the outstanding discovery and motion to compel should be denied as moot, (b) the motions to intervene filed by URTA, Qwest, and AT&T should be denied as moot, and, if these parties wish intervention on the terms permitted under an informal adjudication, they can file motions which address those terms, and (c) the motion of the DPU to dismiss should be denied as moot, or parties should be afforded an opportunity to respond to that motion and to make countervailing motions of their own on the merits of the issues in this docket.

Dated this 7th day of January, 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing pleading, Position Statement of Beehive Telephone Company, Inc., was served this 7th day of January, 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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