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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

The following is a response by the Division of Public Utilities (Division or DPU) to a Motion of Beehive Telephone to Strike Pleadings and for Summary Disposition and its response to the Motion of the DPU and the Committee, the All American Motion to Strike the Pleading of the Committee and its response to the Motions of the Division and Committee, and a variety of other responses by Qwest, AT&T and the Utah Rural Telephone Association.

INTRODUCTION

Since the passage of the Utah Telecommunications statute (54-8b) and the passage of the 1996 Federal Telecommunications Act, only one certificate has been

issued for a CLEC in a non-Qwest exchange whether that exchange, was over or under the 5,000 access line limit.[1] The application by All American in its Certificate proceedings Docket No. 06-2469-01 to provide service in Beehive's service territory received a great deal of attention, including intervention by URTA. The Division's Memorandum dated January 16, 2007 (Attachment 1) brought up issues of public policy that needed to be heard in a full proceeding. That full proceeding never took place because All American voluntarily and with full knowledge amended their application to state that they would only serve in the Qwest area. The Commission should keep these facts in mind in reviewing the history of what has taken place in the three All American dockets and in evaluating the legal arguments presented by Beehive and All American. Service in non-Qwest exchanges is not well established in Utah and in particular the policy implications of service in areas with less then 5,000 access lines has not ever been heard by the Commission in a fully adjudicated proceeding.

Additional information on the history of the All American dockets[2] will aid the Commission in evaluating the legal arguments presented by Beehive and All American.

Docket 06-2469-01 The Certificate proceeding- In its Memorandum, All American alleges that in its Certificate application it provided all the information needed

[1]In November 2007 the Commission granted a Certificate to Bresnan Broadband LLC to provide service in the Vernal area, which has more, then 5000 access lines. Docket No. 07-2476-01. That proceeding was contested by both the ILEC that provides service in Vernal and URTA. Significant issues of public policy were addressed in the Commission's Order weighing both the positive effects of competition against the negative effects on the State USF. Prior to that Docket the Commission had denied ETC status for Western Wireless 98-2216-01who wanted to provide ETC type service in both Qwest and non-Qwest ILEC exchanges. The Commission only denied ETC status in the non-Qwest exchanges. The PSC denial was mainly based on the effect an ETC would have on the state USF fund. Currently a Certificate Application has been filed by Beehive's CLEC to provide service in non-Qwest exchanges above 5,000 access lines such as Moab, Vernal and Price. (Docket No. 09-051-02). The All American Application in Docket No. 06-2469-01 was the first request of a CLEC to provide service in an exchange of less then 5,000-access lines.

[2] The relevant All American Dockets are: Docket 06-2469-01 (Order granting a Certificate to All American to serve in Qwest exchanges), Docket 07-051-01, 02 and 03 (the Beehive All American Interconnection Dockets) and 08-2469-01 (All American's Nun Pro Tunc Docket).

by the Commission to make a decision on its Application. (Memorandum P. 2). Even though certain information was provided in order to issue a Certificate in the Qwest exchanges, information sufficient to obtain a Certificate in the Beehive exchanges was never presented. This clearly can be shown by the amendments that All American filed in response to this issue. All American's original Application for a Certificate stated that it intended to provide service to all areas in the state including small exchanges such as Beehive. On August 28, 2006 All American Amended its application to exclude all small rural exchanges except Beehive. After the amendment, the Division responded recommending that the Certificate be granted in the Qwest area. The Division raised issues surrounding service in the Beehive area and recommended, "the significant competitive entry issues raised in All American's Petition be heard by the Commission. The Division believes that this issue is precedential and could affect the USF and customer service rates."[3] This Memorandum was filed with the Commission on January 16, 2007. On February 20, 2007 All American again amended its Application to state that the only area to which they intended to provide service was in the Qwest area. With these amendments it is hard to understand how All American or Beehive misconstrued the Certificate to allow them to serve in the Beehive service territory. Based on these representations the Certificate was granted. The Commission heard no inquiry into the public interest issues of providing competitive services in a rural exchange. Both the DPU and URTA withdrew their concerns under the assumption that All American would only provide service in the Qwest area.

[3] DPU Attachment 1.

Docket 07-051-01 and 03- Beehive has filed three interconnection agreements after the issuance of the Certificate to All American.

Docket 07-051-01 was an agreement between All American and Beehive Telecom. (Beehive's CLEC). This agreement was filed with the Commission on May 24, 2007. Docket 07-051-02 was an agreement between Beehive Telephone and Beehive Telecom. Docket 07-051-03 was an agreement between Beehive Telephone and All American. These agreements were filed with the Commission on June 11, 2007. On July 9, 2007 Qwest filed its Petition to Intervene in Docket 07-051-01 and 03. In its Petition to Intervene, Qwest raised, for the first time, issues surrounding so called traffic pumping. They claimed that certain CLEC's and ILECs are engaging in illegal, unfair and fraudulent practices of obtaining terminating switched access charges from Qwest for which they are not entitled.[4] Qwest argued that based on its Petition and the proposed interconnection agreement it appeared possible that All American and Beehive would engage in what Qwest claimed to be illegal practices. Qwest asked to conduct discovery to determine what services All American planned to offer. Qwest's Petition to Intervene was granted on August 1, 2007. Once Qwest raised this issue, the DPU sent data requests to both Beehive and All American on the claimed possible illegal activities.[5] Qwest sent its first data request to All American on September 19, 2007. Arguably, the 90-day approval period under the Federal Telecommunications Act had already past. The Division sent a second set of data requests to both All American and Beehive on November 14, 2007. Neither the DPU's second nor Qwest's sole data request were answered. Instead on November 13, 2007 Beehive sent a letter to the ALJ with a draft

[4] Qwest Petition to Intervene Docket 07-051-01 and 03 July 9, 2007 P. 2.
[5] Data requests were send to Beehive and All American on July 13, 2007 and responses were received July 30, 2007.

Order that would put in place the interconnection agreements by operation of law. On December 5, 2007 Qwest filed a Motion to Compel, which was answered on December 10. The ALJ held a Status conference where the 90-day time period was discussed. As a result of that discussion, the proceeding essentially ended. Nothing occurred after the Status conference. Importantly, the Commission did not issue either an Order acting on the interconnection agreements or issue an acknowledgement of the interconnection agreements that the Commission normally sends out after reviewing an interconnection agreement.[6] These acknowledgement letters allow the agreement to go into effect at the end of the 90-day time period. As a result of the passage of the 90-day time period, no hearing was ever held on All American serving in the Beehive area or the claimed illegal activities that served as the bases for the Qwest intervention. No findings of fact were ever made by the Commission. All American claims that the Division made no objections to the interconnection agreements and should not be able to object to serving in the Beehive area today because they did not object them at the time the interconnection agreements were before the Commission. The 90-day window had passed before the DPU could have made an objection or asked the PSC to reject the agreement for lack of a Certificate to serve in the Beehive territory. Neither URTA, the Committee nor AT&T participated in these interconnection dockets.

Docket 08-2469-01 - In this Docket, Beehive, not All American, claims that the 240-day time period for a decision on a Certificate has past. Therefore, they claim that All American's request to serve in the Beehive area dating back to the time of their original Certificate has gone into effect by operation of law. Beehive fails to provide

[6] Those acknowledgement letters from the Commission note the recommendations of the DPU and state that there being no recommendation to reject the agreement that it is deemed approved 90 days from the date of filing pursuant to 47 USC Section 252(e).

both the fact that All American does not believe the 240-day time period applies to this proceeding and, therefore, they had no problem in waiving the 240-day time period. In its request for extension of time dated November 7, 2008 All American "stipulates and agrees that the 240 day deadline set forth in Utah Code Annotated 54-8b-2.1(3)(d) does not apply to this proceeding. As such, Petitioner stipulates and agrees that the Commission is not required to approve or deny the Petition in this matter within 240 days of its filing and that the Petition will not be considered granted if it is not acted upon within 240 days of its filing."[7] This waiver was made at the request of the Division, which would have asked the Commission to reject the Nunc Pro Tunc Petition absent the representations made by All American. As a result of their representations, the Commission scheduled further proceedings relying on the representations of All American. One must remember that not until the Commission issued its January 20, 2009 did this proceeding actually become formal adjudication. Before that time, Petitioner was treating the docket as informal, refusing to answer data requests and opposing intervention. Petitions to Intervene were not filed until December 22 and 23, 2008 and were not acted on until mid February, 2009, in theory well after the 240 day time period had passed. Not until the filing of its Position Statement on January 8, 2009 did Beehive raise the 240-day issue. It was raised at a point where neither the Commission nor any other party can take action and deal with the possible 240 day time period. Finally, so far in this Docket, the public interest issues of All American serving in Beehives territory have not been heard, nor have the issues raised by Qwest and AT&T on the possible illegal activities of All American been heard.

[7] Petition's request for extension of time dated November 7, 2008 p. 2.

Therefore, neither in the original certificate proceeding, the interconnection agreement proceedings, or in this proceeding, have the public interest issues surrounding a CLEC serving in Beehive's territory been heard.

A NUNC PRO TUNC PETITION IS NOT AN APROPIATE REMEDY

It is the DPU position that the Commission should not, without a full proceeding, enter a Nunc Pro Tunc order or prospectively grant All American an amendment to its Certificate to provide service in Beehive's territory without adjudication. This adjudication can take place either in this proceeding, in the original docket 06-2469-01 or in a new docket. Such relief, however, should be prospective only. The Division does not particularly care where it takes place as long as the Commission has the opportunity to deal with the issue of a CLEC serving in Beehive's territory and with sufficient time to address the public interest issues. The Commission can clearly take administrative notice of all the records in the past dockets in whichever docket adjudication takes place. Just an understanding of what Nun Pro Tunc is can provide the Commission grounds to deny the request.

West's Encyclopedia of American Law states that Nunc Pro Tunc's most common use is to correct clerical errors where the judgment or action done is not actually reflected in the court's order. The court corrects for its error back to the time of the original judgment. It is to make what was intended to happen actually happen. Neither party should be prejudiced by the action since the courts action actually reflects what the court intended.

In Utah, the only place in the code where nunc pro tunc is mentioned is in the domestic relations section.[8] Therefore, a court outside of the statute is acting under common law and in equity. The Utah courts in applying nunc pro tunc have limited its application. Those decisions make it clear that it is an inappropriate remedy here.

In Utah, the Court of Appeals provided a good explanation of when a nunc pro tunc order is appropriate. The Court provided:

> At common law, nunc pro tunc allowed a court to correct its earlier error or supply its omission so the record accurately reflected that which in fact had taken place. Cases in which courts traditionally have applied the nunc pro tunc doctrine fall into two categories:
> . . .(2) those in which judgment has in fact been rendered by the lower court, but the clerk has failed to perform the ministerial function of entry.
>
> Bagshaw, 788 P.2d at 1060 (quoting 6A James W. Moore, Moore's Federal Practice § 58.08 (1989)) (citations omitted) (emphasis in original). Thus, nunc pro tunc orders are used to correct the court's omission or error. Further, any issue addressed in the order must have been previously submitted to the court. . . .
>
> The Utah Supreme Court has noted:
>
> A motion nunc pro tunc is used to make the record speak the truth; it may not be used to correct the court's failure to speak. In other words, the function of a nunc pro tunc order is not make an order then for now, but to enter now for then an order previously made.
>
> Preece v. Preece, 682 P.2d 298, 299 (Utah 1984) (citations omitted). "A nunc pro tunc order may not be used 'to show what the court might or should have decided, or intended to decide, as distinguished from what it actually did decide.'" Diehl Lumber, 802 P.2d at 743 (quoting Larson v. Bedke, 211 Neb. 247, 318 N.W.3d 253, 258 (Neb. 1982)) (emphasis deleted).[9]

[8] Utah Code Annotated 30-4a-1 provides "upon a finding of good cause and giving such notice as may be ordered, enter an order nunc pro tunc in a matter relating to marriage, divorce, legal separation, or annulment of marriage."

[9] In the Matter of the Estate of Catherine Leone v. Frank Leone and Sam Leone, 860 P.2d 973, 977-78 (Utah 1993). Category 1 is on an unrelated subject.

Even under the "good cause" provisions of the statute on domestic relations, the courts have ruled that "a nunc pro tunc order must, even under the more liberal requirements of section 30-4a-1, still be entered for the purpose of making the record reflect what actually was meant to happen at a prior time…a nunc pro tunc order may not be used to show what the court might or should decided, or intended to decide, as distinguished from what it actually did decide…. a nunc pro tunc order cannot be used to correct a court's failure to speak…"[10]

Applying these principals to the facts in this case leads to the conclusion that the Commission, in the original certificate proceedings, actually intended not to issue a Certificate to provide service in the Beehive area. No intent to expand the Certificate can be inferred by the silence of the Commission in the interconnection dockets. No acknowledgement of the interconnection agreements occurred by the Commission. It is illogical to conclude that when the Commission specifically intended not to allow All American to provide service in the Beehive area that its intent could be overruled by its silence in the interconnection docket.

Finally, a nunc pro tunc petition is asking for equitable relief. It is questionable that an administrative agency whose powers derive from statute has the equitable power to grant the relief All American seeks particularly when such action may be against the public interest.

[10] Behrman v. Behrman 139 P3d 307, 310-311(Utah Court of Appeals2006)

THERE IS NO APPLICATION OF RES JUDICATA FROM THE INTERCONNECTION DOCKETS ALLOWING EXPANDION OF THE CERTIFICATE LIMITING ALL AMERICAN'S SERVICE TO THE QWEST TERRITORY

Both All American and Beehive claim that by allowing the interconnection agreements to go into effect by operation of law, the Commission has implicitly made the "public interest" findings necessary under 54-8b-2.1. Both parties point out that Beehive does not object to All American serving in its territory and therefore the so-called rural exemption cannot come into play and the Commission need not address the rural exemption issues. Petitioners argue that the Commission allowing the interconnection agreements to go into effect by operation of law has satisfied the public interest findings necessary for both a certificate and an interconnection agreement. All American argues that the Commission, by its silence, has implicitly determined that the interconnection agreements were consistent with the public interest. Finally, All American and Beehive argue that the Division was silent in the interconnection docket about any objections to serving in the Beehive area and are now asking for a second bite at the apple, which they claim is precluded by concepts of res Judicata.

Both parties provide vague and general definitions of res judicata. Both cite Salt Lake Citizens Congress v. Public Service Commission, 846 P.2d 1245 (Utah 1992) (the Charitable case)[11] as their main authority. Both that case and other Utah cases provide a more detailed analysis of the concepts of res judicata. They make a distinction between claims preclusion and issues preclusion or collateral estoppel as both encompassing concepts that can preclude subsequent procedings. Neither All American nor Beehive

[11] Even the Charitable case does not provide support for applying res judicata. The Court stated, "…res judicata bars a second adjudication of the same facts under the same rule of law." 846 P.2d 1245 at 1251. No adjudication has taken place, the facts of a Certificate are different then the facts needed for an interconnection agreement, and the rules of law are different.

define which concept they are attempting to apply. It is the DPU position that neither concept can expand All American's Certificate based on the interconnection agreement going into affect by operation of law.

In addition, neither All American nor Beehive inform the Commission that, even if the concept of res judicata applies, public policy considerations can enter into the decision of whether to apply those concepts. The Utah Court of Appeals has stated: "Moreover, collateral estoppel can yield an unjust outcome if applied without reasonable consideration and due care… Courts then must carefully consider whether granting preclusive effect to a prior decision is appropriate…. Collateral estoppel is not an inflexible, universally applicable principal… policy considerations may limit its use where… the underpinnings of the doctrine are outweighed by other factors."[12] Here, even if one believed that the standards for res judicata have been met, the public interest consideration of charging just and reasonable rates, having adequate phone service, and having universal phone service without undue impacts on the USF all lead to the conclusion that any application of res judicata is outweighed by the obligations of the Commission to promote competition while carrying out the above obligations.

In order for res judicata or claims preclusion to apply, the Courts have held that "both sides must involve the same parties or their privies and also the same cause of action; and this precludes the re-litigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action."[13] None of the factors for the application of res judicata exist in this case. The parties are not the same. URTA, the Committee, and AT&T did not participate in the interconnection docket. This is

[12] 3D Construction and Development v. Old Standard Life Insurance Company, 117 P.3d 1082, 1088 (Utah Court of Appeals 2005).
[13] Schaer v. Department of Transportation, 657 P2d 1337, 1340(Utah 1983)

particularly relevant since URTA and the Committee both participated in the original Certificate proceeding that limited All American activities to the Qwest service area. Second, the cause of action is different in the interconnection docket versus a Certificate docket. All American and Beehive both point out that the public interest test is involved in both. However, obviously, the statutes involved are completely different. Therefore, just on the surface res judicata does not apply since the cause of action is under different statutes. In a Certificate proceeding the Commission is being asked to weigh the benefits of competition against a case of first impression. Under what conditions should a CLEC be allowed to compete in a rural exchange with less then 5000-access lines? The Commission is being asked to address the public interest of just and reasonable rates for Beehives customers, adequate service, the effect on the state's USF, and provisioning of universal service in rural Utah against the benefits of competition. None of those issues are traditionally addressed in an interconnection agreement docket since they would have been addressed when the CLEC obtained its certificate. Here those issues were not addressed when All American received its Certificate to provide service in the Qwest area.

Collateral estoppel or issues preclusion also does not apply in this case. Four elements of issues preclusion are required for collateral estoppel to apply. First, the issue decided in the prior litigation must be identical to the one in action in question. Second, there must be a final judgment on the merits. Third, the party against whom the plea is asserted must be a party in privity to a party in the prior action. Fourth, the issues in the first action must be completely, fully and fairly litigated.[14] Again none of the elements needed for collateral estoppel to apply exist in this case. First, as discussed above, the

[14] Career Service Board v. Department of Corrections, 942 P.2d 933 (Utah 1997).

issues are not identical between a certificate proceeding and an interconnection docket. The statutes are different and the purposes to be reached in each are different. The fact that they both may use the term public interest does not make the issues identical.[15] In the interconnection docket there was no final judgment on the merits. In fact there was no judgment at all. At best, the so-called final judgment is that the agreement went into effect by operation of law. Third, as discussed above, the parties in the two dockets are different. URTA, the Committee and AT&T did not participate in the interconnection docket while at least two of them did participate in the original Certificate proceeding. More importantly, since the issue is an issue that affects the public (i.e. ratepayers), even if all the parties were the same, the Commission, using its discretion and its obligation to protect the public, could choose not to apply collateral estoppel. Fourth, there is no question that the interconnection docket was not completely, fully and fairly litigated.

Both parties seem to argue that because Beehive has consented to All American's entry into their service area that the Commission is limited in what it can look at in a Certificate proceeding. Private parties, by their agreement, cannot remove the obligation of the Commission to act in the public interest, and ensure that rural rates remain just and reasonable, that service remains adequate, that impacts on the rest of the state are outweighed by the benefits of competition and that the parties are engaging in legal

[15] In looking at these issues, the Commission should review the issues in the only other non-Qwest Certificate that has been approved. This was a certificate for Bresnan Broadband of Utah to serve in Vernal a city with more than 5000 access lines but also a rural ILEC. Docket 07-2476-01 Order issued November 16, 2007. The issue in the Bresnan certificate docket is the type of issue relevant to having All American serve in the Beehive area. Compare this to the interconnection agreement docket between Bresnan and UBET-UBTA currently pending before the Commission (Docket 08-2476-02). The issues are completely different even though both use a public interest test.

activities. It is irrelevant to the Commission's obligations what Beehive and All American may have agreed in order to promote their own self-interest.[16]

BEEHIVE'S ARGUMENT THAT THE 240 DAY TIME PERIOD APPLIES TO THIS CASE HAS NO MERIT

As was stated above, All American's position is that the 240 day time period contained in 54-8b-2.1 does not apply to their Nunc Pro Tunc Petition. As a result, they had no problem waiving the 240-day statutory time period, which was requested by the Division in order to be sure that All American did not claim their Petition had been granted by operation of law. Once the Commission received All American's filing, the Commission scheduled further proceedings leading eventually to where we are today. If Beehive had filed its objection at that time, the Division would have requested that the Commission deny or reject their Petition. However, Beehive was silent until their objections had no meaning. It is the DPU position that Beehive has no standing to assert the 240-day time period. It is also the DPU's position that if they can assert it, that they waived any right to assert the 240-time period by not objecting when it had some meaning.

It is All American's position that their Petition did not bring into play the 240 day statutory time period. Beehive is not the Petitioner and cannot create a Petition where the 240-day time period would apply if the Petitioner does not so request. Only All American could have asserted that the 240 day time period applied to their Petition. It is possible that All American took this position because they recognized that any true

[16] In Bradshaw v. Wilkinson Water Company, 94 P.3d 242, 250 (Utah 2004), the Supreme Court defined the Commission role in settlements. The Court provided: "Unlike traditional court proceedings, hearings before the Commission are not designed to consider only the interests of litigating parties. The Commission must consider the interest of the public…. Accordingly, the Commission cannot be bound by stipulated standards in contravention of its statutory mandate to serve the public interest."

Amendment to their Certificate that would start the 240-day clock and would have to be formal adjudication. All American up until the PSC issued its January Order was acting as if the docket was informal. Informal adjudication does not allow discovery or intervention. Beehive also treated this docket as informal, but, now wants to argue that the 240 time period began to run when they originally filed their Nun Pro Tunc Petition. Therefore, Beehive does not have standing to claim the Petition was filed under a 240 day time period when the Petitioner says it was not.

Beehive, by not objecting at the time All American filed its request for extension of time which dealt with the 240 day time period, waived its ability to now object where such objections are meaningless to the process. Both the Commission and all parties relied on All American's position on the 240 days time period and allowed the proceedings to proceed to where it is today. If Beehive had objected in a timely way the Commission could have dealt with the 240 day time period before it expired. Just like when a party fails to object to the introduction of evidence, they cannot object at a later time when their objection is meaningless. In that instance, their silence is a waiver of any objection. Here Beehive was obligated to object when such an objection had some meaning and their failure to object should constitute a waiver.

Finally, if the Commission believes that there is a 240 day time period issue, it should not start to run until the January 20, 2009 Order was issued making this formal adjudication. Neither Beehive nor All American should be able to make their use of informal adjudication where they did not answer discovery or permit intervention as a way of asserting the 240-day time period had passed. Finally, if the 240 day time period does begin to run on January 20, 2009 the DPU would request that the nunc pro tunc

docket not be used to address the Amendment to their Certificate but that they be required to file an Amended Certificate request to serve in the Beehive area. This would ensure the full 240 days to address relevant issues.

QWEST AND AT&T'S ISSUS OF POSSIBLE ILLEGAL ACTIVITES DESERVE TO BE HEARD

All American and Beehive point out that issues surrounding revenue pumping have been addressed a number of times by the FCC and are currently being addressed in Iowa. They assert that a review of this issue by the Commission will take a significant amount of time and is not appropriate for proceedings that have a limited time frame such as 90 days or 240 days. The Division has no real opinion on how long a proceeding on the issues raised by Qwest and AT&T would take. It obviously was difficult to address the factual and legal issues raised by Qwest and AT&T within the 90-day interconnection docket window. Whether such a review could or should have taken place in a Certificate proceeding begs the issue that if there are illegal or fraudulent activities taking place that violate state law, then the Utah Commission has authority to hear those issues in some proceedings. That proceeding could be a proceeding to amend their Certificate, it could be a Complaint filed by Qwest or AT&T or, it could be an investigation opened by the Commission to address the issues raised by Qwest and AT&T. Such a proceeding could be heard with a Certificate proceeding or heard separately. The Division recently became aware that on April 15, 2009 AT&T filed an informal Complaint with the FCC against All American, e Pinnacle Communications Inc., and Chasecom for activities in Utah and Nevada similar to what AT&T and Qwest have alleged in their intervention Petitions in Utah. All three of these companies either are or have been certificated to do business in Utah as a CLEC in non-rural exchanges. AT&T is asking the FCC to find that these

CLECs have violated Section 201(b) 47 USC 201(b) and have engaged in unreasonable practices by operating pursuant to sham arrangements rather then as a competitive carrier. AT&T is asking the FCC to rule that they are not required to pay the access charges billed to them by these carriers and are entitled to a refund. The Complaint and attachments is quite long and is being provided to the Commission by the Committee.

COMMENTS ON THE MOTION TO STIKE THE COMMITTEE'S PLEADINGS

Both All American and Beehive go to a great deal of effort to try and get the filings of the Committee out of this docket. They go to a great deal of effort to claim that the Committee itself did not discuss the Committee's filings in this docket and as a result neither its attorney nor director are authorized to file what they did. These parties argue that even if the Committee was authorized to file, they do not show how what they file affects what their statutory responsibilities are but instead is a filing intended to aid large inter-exchange carriers such as Qwest or AT&T. The Division has a couple of comments on these arguments. First, it does not strike the DPU that it is particularly relevant to the issues in this Docket what the internal workings of the Committee are and how they make a decision on what positions to take. The Committee has authority to participate in this proceeding. They did participate in the earlier Certificate docket. The Committee does participate in numerous Dockets before the Commission.

Whether the positions taken by the Committee are for the benefit of those who the Committee represents by statute is properly a decision for the Committee to make. Possibly at a hearing and in testimony the Commission may question the weight to be given the Committee's positions based on the benefits to its constituents, but it does not seem to be a ground for striking the Committee's filings.

CONCLUSIONS

1. The Petition for summary disposition and to the Nunc Pro Tunc Petition should be denied.
2. The Commission should either require All American to file for an Amended Certificate of Public Convenience and Necessity to provide service in the Beehive area, or continue this Docket for that purpose. Such decision should be prospective only. The choice of which proceeding should provide sufficient time for all relevant issues to be heard. In other words, if there is a 240-day time period issue, All American should be required to file a new docket.
3. The Commission should allow the Qwest and AT&T issues be heard in some appropriate forum, which could be the Amended Certificate proceeding, a complaint proceeding, an investigation, or an appropriate FCC proceeding.

RESPECTFULLY SUBMITTED, this _____ day of April 2009.

_____

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing RESPONSE BY DEPARTMENT OF PUBLIC UTILITIES was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the following on April ____, 2009:

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