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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.	))))))))))	**REPLY MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY DECISION AND IN SUPPORT OF PETITIONER'S MOTION TO STRIKE THE COMMITTEE OF CONSUMER SERVICES' MOTION TO DISMISS** Docket No. 08-2469-01

Petitioner, All American Telephone Company, Inc. ("All American"), by and through undersigned counsel, hereby submits the following Memorandum in Support of its Motion for Summary Decision and in support of its Motion to Strike the Committee of Consumer Services' Motion to Dismiss.

ARGUMENT

I. Motion to Strike the Committee's Motion to Dismiss

All American has moved to strike the Committee's Motion to Dismiss on the grounds that (1) the Committee has never taken a formal position regarding the merits of All American's Petition, and (2) the motion addresses issues that exceed the statutory interests which the

Committee has been directed to protect. In response, counsel for the Committee asserts that the Commission "may not entertain" the question of whether the Committee is entitled to participate in this proceeding. In turn, he states that any instructions he may have received regarding his participation in this matter are protected by the attorney-client privilege. Finally, he argues that the Committee's Motion to Dismiss is authorized by statute because it allegedly has duty to oversee the Commission and ensure that it properly performs its duties. However, as will be shown more fully below, each of these arguments is without merit.

A. The Commission Has the Authority to Exclude the Committee from this Proceeding.

In an attempt to sidestep the question of whether the Committee has ever taken a formal position regarding All American's Petition, counsel for the Committee argues that "All American and Beehive lack standing to litigate the issue and the Committee lacks jurisdiction to decide it." However, this argument is nonsensical. All American is a party to this proceeding. As such, it certainly has the ability to challenge a third party's attempt to intervene in the proceeding, especially where the third-party is taking a position that is adverse to that of All American.

The Committee's reliance on the doctrine of standing is misplaced. Standing does not limit a person's ability to raise legal issues in a proceeding to which the person is already a proper party. Rather, the doctrine limits a person's ability to *initiate* a lawsuit if the person does not have a recognizable stake in the litigation. *See* Black's Law Dictionary 1405 (6th Ed. 1990) (standing is "the right to take the initial step that frames legal issues for ultimate adjudication by

court or jury." It is satisfied when "the plaintiff has a legally protectible and tangible interest at stake in the litigation."). In fact, all of the cases which the Committee cites involve scenarios where a party was attempting to initiate litigation. *See Jones v. Barlow,* 2007 UT 20, ¶¶ 3-9, 154 P.3d 808 (analyzing whether plaintiff had standing to initiate suit seeking a decree of custody and visitation); *Sierra Club v. Utah Air Quality Bd.,* 2006 UT 73, ¶ 1, 148 P.3d 975 (analyzing whether Sierra Club had standing to file petition for administrative action); *Sierra Club v. Utah Air Quality Bd.,* 2006 UT 74, ¶ 1, 148 P.3d 960 (same).

Moreover, the Committee has failed to cite a single case in which a plaintiff/petitioner was prevented from challenging the intervention of a third party into a legal proceeding. A petitioner obviously has an legal interest in prohibiting participation by third-parties who have no legally protectible interest in the underlying subject matter. There is no purpose to be served by allowing disinterested parties to raise issues that are of no concern to the real parties in interest.

If the Committee's position is accepted by the Commission, then the Committee essentially has an unfettered ability to intervene in any matter, regardless of the subject matter. Neither the Commission nor the parties would ever be allowed to challenge the intervention because the Committee believes no one has the ability to explore the reasons behind the intervention. Such reasoning is inconsistent with our governmental system of checks and balances and serves no legal purpose.

Based on the foregoing, it is clear that the standing doctrine does not limit All American's ability to challenge the Committee's intervention into this matter. Therefore, the

Commission has the power to decide All American's Motion to Strike on the merits and exclude the Committee from challenging All American's position.

B. The Question of Whether the Committee Instructed the Attorney General's Office to Oppose All American's Petition is Not Protected by the Attorney Client Privilege.

All American moved to strike the Committee's Motion to Dismiss because there is nothing in the public record which indicates that the Committee ever instructed the Attorney General's Office to oppose All American's Petition. *See* Utah Code Ann. § 54-10-7 (Giving the Committee's attorney the authority "to prosecute all actions ***which the Committee of Consumer Services deems necessary*** to enforce the rights of residential and small commercial consumers of such utilities.") (emphasis added). In doing so, All American submitted the minutes from the relevant Committee meetings which showed that All American's Petition was never even discussed by the Committee.

In response, counsel for the Committee states in a footnote that All American's position is an "inappropriate and irrelevant contention unworthy of consideration" because the question of whether the Committee authorized the relevant motion is protected by the attorney-client privilege. Opp. Memo at 14, fn 11. However, any instructions the Committee may have given to its attorney regarding All American's Petition are not privileged. *See Southern Utah Wilderness Alliance v. Automated Geographic Reference Center*, 2008 UT 88, ¶ 33 (mere existence of attorney-client relationship does not ipso facto make all communications between lawyer and client confidential.). This is because discussions between a government agency and its attorney

are only privileged if the "purpose of the transfer [of information] was to obtain legal advice." *Id.*. The Committee's actual decision whether to participate in this litigation does not involve legal advice. Rather, it is simply an exercise of statutory power.[1] Therefore, counsel for the Committee can certainly disclose whether or not he received instructions regarding this matter.

Finally, the Committee's minutes conclusively show that it never made any formal determination regarding the merits of All American's Petition. Under the Open and Public Meetings Act, the Committee is required to create minutes for all of its meetings which memorialize "the substance of all matters proposed, discussed, or decided" during the meeting. Utah Code Ann. § 54-4-203(2)(c). Therefore, any decision the Committee made regarding All American's Petition would have had to be included as part of its meeting minutes. The absence of any reference to All American's Petition in these minutes speaks volumes about the appropriateness of its attorney's motion.

C. The Committee's Motion Falls Outside the Scope of Its Jurisdiction

All American contends that even if the Committee authorized the Motion to Dismiss, it must still be stricken because the issues raised in All American's Petition do not fall within the scope of the Committee's jurisdiction. *See* Utah Code Ann. § 54-10-4. Specifically, the motion does not explain why the proposed amendment to All American's CPCN is not "advantageous to a majority of residential consumers ... and those engaged in small commercial enterprises." Utah Code Ann. § 54-10-4(3).

[1] In other words, while the Committee could certainly seek confidential advice from its attorney

In response, the Committee fails to even cite or discuss the foregoing statute. Rather, it makes a generalized statement that "[c]onsumers have an interest in the Commission diligently performing its duties in connection with applications for certificates of public convenience and necessity." Opp. Memo at 3. In other words, the Committee apparently believes that in addition to protecting consumer interests, it also has the responsibility to oversee the Commission to ensure that the Commission follows the law. However, the Utah Legislature has never given the Committee any oversight duties. Nor is it the Committee's role to advise the Commission as to how it should perform its duties. Rather, it is the Division's role to provide the Commission with legal advice regarding applications for certificates and how they should be handled. *See* Utah Code Ann. § 54-4a-1(1)(g)("There is established within the Department of Commerce a Division of Public Utilities that may ... review applications filed with the Public Service Commission and present recommendations to the commission on the disposition of those applications...."). The Committee should not be permitted to usurp the Division's responsibilities in this regard.

Finally, the Committee cites two PSC cases which supposedly support its position. *See In re Application of Bresnan Broadband of Utah*, Docket No. 07-2476-01; *In re Application of Rocky Mountain Power*, Docket No. 08-035-42. However, these cases have no application to the present dispute. Neither of them discuss the statutory scope of the Committee's power to intervene in pending matters. In fact, *Rocky Mountain Power* does not even involve an application for a certificate of public convenience and necessity ("CPCN"). Furthermore, unlike

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regarding whether or not to become involved in litigation, its final decision and its communication of this decision to its attorney are not confidential.

the present dispute, the *Bresnan* matter involved Bresnan's *contested* entry into another CLEC's territory. Therefore, these cases do not support the Committee's desire to challenge the procedural aspects of this case.

In sum, there is nothing which indicates that the Committee has ever formally decided to challenge All American's Petition, as is required for its participation under Utah Code Ann. § 54-10-7. Furthermore, even if it had made such a determination, All American's Petition does not raise any issues that fall within the scope of its jurisdiction. Therefore, All American respectfully requests the Commission to grant its Motion to Strike.

II. All American's Motion for Summary Decision.

All American has moved for a summary decision on its Petition because all of the factual determinations needed to grant the Petition were made by the Commission when it approved the interconnection agreement between All American and Beehive Telephone Company, Inc. ("Beehive") on September 10, 2007. This motion has been opposed by Qwest, the Utah Rural Telecom Association ("URTA"), the Division and the Committee. The following is All American's response to the arguments presented by these parties.[2]

A. The Commission's Previous Factual Findings Have a Preclusive Effect in This Matter.

When the Commission approved the interconnection agreement between All American

[2] In its memorandum opposing summary decision and in support of dismissal, the Committee makes a number of factual allegations regarding All American and its operations. However, since the parties' pending motions were filed prior to discovery, they should be treated motions for judgments on the pleadings. In other words, the issues are limited to whether the All American's Petition should be granted or denied as a matter of law. Therefore, the Committee's allegations, many of which are

and Beehive, it necessarily determined that the activity outlined in the agreement was in the public interest. All American contends that this factual determination has a preclusive effect on the present matter and allows the Commission to grant All American's Petition as a matter of law. This is because the only legal requirement that All American needs to satisfy in order to obtain its requested amendment is that the amended CPCN be in the public interest.

In response, the parties challenge the preclusive effect of the Commission's factual finding. For example, Qwest claims that res judicata has no effect because the question of whether All American and Beehive's relationship is in the public interest was never "fully litigated." The Committee claims that res judicata should not apply because All American allegedly "mislead" the Commission regarding the scope of its CPCN when it submitted the relevant interconnection agreement for approval. However, both of these arguments are without merit.

Contrary to Qwest's position, the issue of whether All American's entry into Beehive's territory is in the public interest was "fully litigated" as part of interconnection agreement's approval process. For purposes of res judicata, Utah courts have held that an issue has been "fully litigated" in a previous action if the opposing parties received notice that sufficiently apprised them of the previous action's pendency and afforded them an "opportunity" to present their objections. *See 3D Const. and Development, L.L.C. v. Old Standard Life Ins. Co.,* 2005 UT App 307, ¶ 20, 117 P.3d 1082; *see also Career Serv. Review Bd. v. Utah Dep't of Corr.,* 942 P.2d

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unsupported, spurious and contested, should not be considered in conjunction with these motions.

933, 939 (Utah 1997) ("[O]ur case law does not require either a motion or a hearing for full and fair litigation but says only that 'the parties must receive notice, reasonably calculated, under all the circumstances, to apprise them of the pendency of the action and afford them an *opportunity* to present their objections.' " (emphasis added) (citations omitted)).

In this case, all of the parties had notice that All American and Beehive had submitted an interconnection agreement to the Commission for approval. The proposed agreement was filed on July 11, 2007, placed on the public docket and given Docket No. 07-051-03. In fact, both the Division and Qwest intervened in the matter and made appearances in the docket. Any of the parties could have objected to the Commission's approval of the interconnection agreement or All American's entry into Beehive's territory in the course of that proceeding. They chose not to do so. Rather, the agreement was approved as a matter of law after the statutory deadline for rejection passed.

Furthermore, the Committee's spurious allegation that All American intentionally mislead the Commission by misrepresenting the scope of its CPCN is wholly without merit. Nowhere did All American affirmatively state that its CPCN included Beehive's territory. Moreover, its CPCN was a matter of public record and could have been reviewed by the Committee, the Division, Qwest or any of the other parties to this case. In fact, if All American truly had a fraudulent intent, it would not have filed its Petition and try to conform its CPCN to the terms of the approved interconnection agreement. Rather, the Petition demonstrates All American's desire to work with the Commission and comply with the applicable regulations.

The principles of consistency, finality and judicial economy would be severely compromised if the parties are allowed to re-litigate whether All American's entry into Beehive's territory is consistent with the public interest. It would be entirely inconsistent for the Commission to approve the interconnection agreement and then deny an amendment to All American's CPCN that is consistent with the agreement. Moreover, the Commission's approval of the interconnection agreement would be rendered meaningless if the parties are allowed to re-open and re-litigate issues that were already decided in the approval process.

If the parties wanted to argue that All American's entry into Beehive's territory was not in the public interest, they should have raised such concerns in the previous proceeding. By failing to do so, res judicata principle preclude them from re-opening such issues in this case. Therefore, the Commission should give preclusive effect to its approval of the interconnection agreement and grant All American's petition as a matter of law.

B. The Commission's Decision in Docket No. 09-2218-01 Does Not Preclude a Summary Decision in this Matter.

Qwest also argues that the Commission's rejection of an interconnection agreement between Beehive Telecom, Inc. ("Beehive Telecom") and Citizens Telecommunications Co. of Utah ("Citizens") in Docket No. 09-2218-01 precludes a summary decision in this case. In that case, the Commission rejected the agreement because Beehive Telecom's CPCN did not authorize it to operate as a CLEC in Citizen's territory. However, that decision has no impact on this case. If anything, it shows that the Commission's approval of interconnection agreements are not ministerial acts. If the Commission believed that All American's interconnection

agreement with Beehive was not in the public interest due to its CPCN, it could have rejected the agreement just as it did in the Citizens case. It chose not to do so. Rather, it approved All American's agreement and determined that the activities outlined in the agreement were in the public interest. As stated more fully above, the opposing parties should not be allowed to re-open the Commission's previous determination regarding All American.

C. The Commission Does Have the Authority to Amend All American's CPCN *Nunc Pro Tunc*.

In its opposition to All American's motion, the Committee argues that the Commission is not authorized to grant relief *nunc pro tunc* because such relief is equitable and therefore beyond the scope of the Commission's authority. Likewise, URTA argues that it is "impossible for All American's proposed amendment to be effective nun pro tunc." However, these arguments are misplaced because they ignore the high degree of flexibility that Utah courts have afforded administrative agencies in order to resolve disputes. In fact, there is no rule that prohibits administrative bodies from employing equitable measures, as long as such measures are consistent with statutory mandates. In this case, the Utah Legislature has expressly given the Commission wide latitude in its ability to regulate public utilities and has not prohibited the Commission from granting equitable relief.

The Committee's position is based largely on case law which outlines specific circumstances in which judges are permitted to enter *nunc pro tunc* orders. However, these rigid rules are not applicable to administrative proceedings. This is because "[a]dministrative proceedings are usually conducted with greater flexibility and informality than judicial

proceedings." *Pilcher v. Utah Dep't of Social Services*, 663 P.2d 450, 453 (Utah 1983). As such, "[r]igid adherence to judicial procedures in administrative actions is generally inappropriate because it ignores basic differences between judicial and administrative proceedings." *Id.*.

Furthermore, the Legislature has given the Commission a great deal of discretion over matters within its jurisdiction. The Utah Code states that the Commission is "vested with power and jurisdiction to supervise and regulate every public utility in this state, ... and to do all things, ***whether herein specifically designated or in addition thereto***, which are necessary or convenient in the exercise of such power and jurisdiction." Utah Code Ann. § 54-4-1 (emphasis added). In other words, the Commission does have powers that go beyond those expressly set forth in its governing statutes.

Based on the foregoing, the Commission certainly has the ability to amend All American's CPCN *nunc pro tunc*. It has been given the authority to issue certificates authorizing competitive entry. *See* Utah Code Ann. § 54-8b-2.1. Furthermore, while the Legislature provided standards that must be considered before a certificate can be issued, it did not set forth precise procedures that govern exactly how the application process must be administered. Therefore, there is nothing which prevents the Commission entering orders *nunc pro tunc,* as long as the appropriate factual findings are made.

The cases cited by the Committee have no bearing on the foregoing analysis. For example, the Committee relies on the decision in *Bevans v. Industrial Comm'n of Utah*, 79 P.2d

573 (Utah App. 1990) to argue that administrative agencies cannot grant equitable relief. However, this misrepresents the court's holding. The *Bevans* decision simply stated that the Industrial Commission did not have the discretionary authority to deviate from the statutory formula for damages in disability cases. *Id.* at 577. In other words, the court simply held that state agencies cannot grant relief that *contradicts* a statutory directive. Likewise, the court's decision in *Mountain States Telephone & Telegraph v. Public Service Commission*, 754 P.2d 928 (Utah 1988) never addressed whether administrative agencies are permitted to grant equitable relief in adjudicative proceedings. Rather, the only issue was whether the Commission had the authority to fund a discounted phone service through a surcharge on state-wide telephone carriers. *Id.* at 929.

Based on the foregoing, it is apparent that the Commission has the power and authority to grant the *nunc pro tunc* amendment which All American seek in its Petition. There is simply nothing which limits the Commission's authority to grant such relief under the circumstances of this case.

III. If All American's Motion Is Denied, its Petition Should Proceed under this Docket.

Both the Division and the Committee have asked the Commission to dismiss All American's Petition and require All American to file a separate Petition for an amendment to its CPCN. However, these motions were filed prior to the Commission's decision to designate this matter as a formal proceeding, which in turn requires a formal hearing if All American's current motion is denied. Furthermore, neither Qwest nor URTA has any objection to resolving All

American's Petition under the current docket. Therefore, in the event the Commission is inclined to deny All American's motion, there is no justifiable reason to dismiss this action and require that a separate petition be filed.

CONCLUSION

Based on the foregoing, All American respectfully requests the Commission to (1) grant its Motion for Summary Decision, (2) strike the Committee's Motion to Dismiss from the record, and (3) deny the Division's Motion to Dismiss on the merits.

Dated this 4th day of May 2009.

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