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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Consideration of the Rescission, Alteration or Amendment of the Certificate of Authority of All American Telephone Co., Inc. to Operate as a Competitive Local Exchange Carrier Within the State of Utah	Docket No. 08-2469-01 UTAH OFFICE OF CONSUMER SERVICES' RESPONSE TO ALL AMERICAN'S AND BEEHIVE'S REQUESTS FOR REVIEW, REHEARING AND RECONSIDERATION, AND MOTION TO STAY PROCEEDINGS
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All American Telephone Co. and Beehive Telephone Company have requested the Utah Public Service Commission to review or reconsider the Commission's June 16, 2009 order that denied certain motions filed by the Utah Office of Consumer Services, All American and Beehive. The telephone utilities also request a stay of the proceedings pending such review and an appeal of the Order in the event the Commission denies the review. Both the request for review

and the request for a stay are improper because the June 16, 2009 Order is not a final order.

The Utah Administrative Procedures Act allows the agency to reconsider or review an order only "if the order would otherwise constitute final agency action." Utah Code §63G-4-302(1)(a); *Barker v. Utah Public Service Commission*, 970 P.2d 702, 705 (1998). Commission orders are subject to judicial review only if they are the subject of a request for Commission review or rehearing and only if the order is a "final agency action resulting from formal adjudicative proceedings." Utah Code §54-7-15; Utah Code §63G-4-403(2)(a).

While the Utah APA does not specifically define "final agency action", *Barker* specifically does. The relevant considerations in determining finality are whether the process of administrative decision making has reached a stage where judicial review will not disrupt the orderly process of adjudication; whether rights or obligations have been determined or legal consequences will flow from the agency action; and, the whole or a part of any action which is not "preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency." *Barker* at 706, citing 1981 Model State Admin. P. Act 5-102(b)(2), *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970); *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) (interpreting Administrative Procedure Act, 5 U.S.C. 704 (1988)).

Union Pacific Co. v. Utah State Tax Commission, 2000 UT 40 ¶13

summarizes Barker by stating: “In effect, we held that a "final agency action" refers to questions that have been "fully decided." The Court then states:

Thus, the appropriate test to determine whether an agency action is final under Utah law includes three parts:

- (1) Has administrative decision making reached a stage where judicial review will not disrupt the orderly process of adjudication?;
- (2) Have rights or obligations been determined or will legal consequences flow from the agency action?; and
- (3) Is the agency action, in whole or in part, not preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action? *Id.* ¶16

The June 16th Order denies the motions and then states:

To the extent not done previously, the Commission gives notice to All American that this docket shall consider to what extent its certificate should be rescinded, altered, or amended, and whether its certificate should permit it to operate in Beehive’s territory or to what extent it should be excluded from serving local exchanges with less than 5,000 access lines controlled by incumbent telephone corporations with fewer than 30,000 access lines. The caption in this docket shall be changed to be as follows: “In the Matter of the Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah.”

Underlying this Order is the Commission’s description of the facts and regulatory policies that must be examined if the Commission is to consider not only the interests of the litigating parties, but as the Commission must, the interests of the utility’s customers and the interests of the public. Citing *Bradshaw v. Wilkinson*

Water Co., 2004 UT 38, ¶ 36. “It would not be appropriate to grant the petitioner’s requested relief (even if it were properly before the Commission) with this matter still proceeding, and without any significant discovery, public comment, or Commission scrutiny.” *Order* page 12. The Order accurately describes the Commission’s continuing jurisdiction to investigate and determine whether, based upon evidence, All American’s CPCN should be rescinded, altered or amended.

What the Order does is establish the preliminary, preparatory and procedural context in which the disputed facts and issues raised by the parties may be fully and fairly litigated. What the Order does not do is decide fully, or at all, the merits of any claim or defense. The whole of All American’s request for Commission action is in tact. At this time, there is no final agency action to be reviewed, reconsidered or stayed.

RESPECTFULLY SUBMITTED this 30th day of July 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing response was served upon the following by electronic mail sent July 30, 2009:

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