

MICHAEL L. GINSBERG (#4516)
Assistant Attorney General
PATRICIA E. SCHMID (#4908)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Attorney General of Utah
Counsel for the DIVISION OF PUBLIC UTILITIES
160 E 300 S, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857
Telephone (801) 366-0380

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 OF
DIVISION OF UTILITIES**

Docket No. 08-2469-01

The following is a response by the Division of Public Utilities (Division or DPU) in opposition to the Motion to stay further proceedings by All American Telephone Company:

1. On July 13, 2009 All American Telephone Company (All American) filed a Motion to Stay further proceedings in this docket while it asks the Public Service Commission (PSC or Commission) for rehearing and possibly seeks judicial review. All American filed a Memorandum in Support of its Motion at the same time. Both All American and Beehive also filed Petitions for Rehearing and Reconsideration. The Division is at this time only responding to All American's request to stay further proceedings. The Petitions for Rehearing address issues that have been fully briefed by the parties. If the PSC believes

it needs more information on areas raised in the Petitions for Rehearing, those issues can be addressed later.

2. All American continues to operate in the Beehive territory without a Certificate issued by this Commission. The issues surrounding a CLEC operating in an exchange of less than 5,000-access lines have yet to be heard by the Commission concerning All American. The Division opposes putting off that inquiry. All American provides two main reasons to stay the proceedings. First, it argues that it should not have to participate in discovery and formal hearings because it is entitled to relief as a matter of law. It argues that courts should have an opportunity to review its legal issues before the Commission proceeds since the court's decision could affect All American's legal rights. Second, it argues that a stay should be granted for reasons of efficiency and economy. All American claims that if it were ultimately successful then all of the effort of discovery and hearings would have been wasted. It is important to remember in considering the stay, that All American is continuing to operate in the Beehive territory without a Certificate. It is not stating that it will stop operating until the legal issues are resolved.
3. On June 16, 2009 the Commission issued its Report and Order in this Docket. The Order has yet to affect any legal rights of All American. It allows All American to continue to operate until some further order of the Commission. It does not rule on whether All American should be able to operate in the Beehive territory. The only thing the Order did was deny the Motion for Summary Disposition and Motion to Strike and state that further proceedings will address if All American's Certificate should be amended, rescinded or

altered in any way. In the scheduling conference held June 14, 2009 All American was provided a deadline to file an Amended Application for a Certificate to operate in the Beehive area of August 5, 2009. The opportunity to file an Amended Petition should not be eliminated. Nor should the further proceedings to address whether All American's Certificate should be rescinded or altered in any way be stayed. Until actions on the Amended Certificate occur, or the Certificate is amended or altered, All American's legal rights have not been affected. Until that happens, this proceeding is not final and judicial review is premature. If at the end of this proceeding, All American's Certificate to operate in the Beehive area is not allowed, its legal rights to raise the 240 day issue still exist and can be raised at that time in an appropriate manner. If All Americans request concerning their Certificate is granted prospectively only, All American can raise the issues surrounding their Nun Pro Tunc Motion at that time. It is the DPU's view that all the Commission did was issue a non-final order that allows further proceedings to continue. It is those further proceedings that the DPU, the Office, AT&T and Qwest have requested occur during this entire process. At least from the DPU perspective those further proceedings will address, among other things, the public interest considerations of a CLEC like All American serving in an exchange of less than 5,000 access lines. Those issues have never been heard by the Commission relating to All American's service or any other CLEC in a rural ILEC exchange of less than 5,000 access lines.

4. The Utah Administrative Procedures Act states " (a) party aggrieved may obtain judicial review of final agency action..." (Utah Code Ann. §§ 63G-4-401(1)) and 63G-4-401(3)(a) also states that a party shall file a Petition for judicial review of final agency

action within 30 days of the final agency action. Final agency action has not yet occurred in this proceeding and judicial review and a stay are inappropriate at this time. Final agency action will not occur until the Certificate is denied, granted, altered, amended or otherwise affected in any way. The only things All American wants to stay is the continued proceeding itself that may lead to some final Agency action against it. It seems to the DPU that it is inappropriate to stay the further proceedings that will finally provide the opportunity to address the public interest issues in this case. Under Utah Code Ann. § 54-7-17, when a court determines if a stay is appropriate for a Commission proceeding, the party petitioning for a stay must show with evidence submitted to the court that (1) great or irreparable damage will result to the petitioner absent suspension or stay of the Order; and (2) specify the nature of the damage. No great or irreparable harm has occurred to All American. In fact the only harm it can claim is that it may be forced to go through discovery and an administrative proceeding for something that it believes is ultimately unnecessary because of its legal position taken in the request for summary disposition. All American's position is unsupported by relevant Utah statutes and case law.

5. In Union Pacific Railroad v. Utah State Tax Commission, 99 P.2d 17 (Utah 2000), the Utah Supreme Court defined a three-part test to determine if agency action is final. That test includes: (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? In this All American case the criteria listed have not been met. First, at this point, no rights or obligations have been determined. No legal consequences will flow at this point from the Commission's Order. Second, the Commission's Order appears preliminary and preparatory with regard to possible subsequent Orders of the Commission. It only establishes the need for further proceedings. Finally, judicial review and a stay will clearly disrupt further administrative proceedings by not permitting them to go forward.

In conclusion the Division opposes the issuance of a stay avoiding further proceedings in the docket. All American should be required to show why the services it is offering in an exchange of less than 5,000 access lines are in the public interest. Further, the Commission's Order stating that this proceeding will consider to what extent All American's Certificate should be altered, amended, or rescinded should not be stayed while any Rehearing is pending or during any judicial review.

RESPECTFULLY SUBMITTED, this _____ day of July, 2009.

MICHAEL L. GINSBERG
PATRICIA E. SCHMID
Attorneys for the
Division of Public Utilities

CERTIFICATE OF SERVICE

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

Paul Proctor
Assistant Attorney General
160 East 300 South 5th Floor
Heber Wells Building
Salt Lake City, UT 84111
pproctor@utah.gov

Stephen F. Mecham
Callister Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, UT 84133
sfmecham@cnmlaw.com

Paul Proctor
Assistant Attorney General
160 East 300 South 5th Floor
Heber Wells Building
Salt Lake City, UT 84111
pproctor@utah.gov

Stephen F. Mecham
Callister Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, UT 84133
sfmecham@cnmlaw.com

Judith Hooper
Beehive Telephone Company
Beehive Telecom
2000 E. Sunset Road
Lake Point, UT 84074
Hooper@Beehive.net

All American Telephone
Attn: Legal Regulatory Dept.
8635 W. Sahara Avenue, Suite 498
Las Vegas, NV 89117
Facsimile: 702-920-4488

Alan L. Smith
Attorney for Beehive Telephone
1492 East Kensington Avenue
Salt Lake City, UT 84105
Alanakaed@aol.com

Roger Moffitt
Attorney at Law
645 East Plumb Lane, B132
P. O. Box 11010
Reno, NV 89502
Roger.moffitt@att.com

Davis R. Irvine
Attorney for Beehive Telephone Co
747 East South Temple Street, Suite 130
Salt Lake City, UT 84102
Drirvine@aol.com

George Baker Thomson, Jr.
Qwest Services Corporation
1801 California Street, 10th Floor
Denver, CO 80202
George.Thomson@qwest.com

Janet I. Jenson
Gary R. Guelker

Jenson & Guelker LLC
747 East South Temple, Suite 130Salt
Lake City, UT 84102
janet@jandglegal.com
