- 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 to Operate as a Competitive Local Exchange Carrier within the State of Utah	)	DOCKET NO. 08-2469-01 REPORT AND ORDER

ISSUED: August 24, 2009

By The Commission:

This matter is before us on All American's Application for Review and Rehearing and Beehive's Request for Reconsideration. For the reasons below, and for the reasons stated in our June 16, 2009 Order (June Order), we affirm our June Order denying the motions for summary judgment and motions to strike filed by Beehive and All American. We also deny the Motion for Stay.

Interconnection and Utah Code § 54-8b-2.1

All American and Beehive argue that by allowing an interconnection agreement (between All American and Beehive) to be deemed approved under provisions of federal law, we implicitly determined that All American meets state law requirements for competitive entry into Beehive's territory. They argue that by so doing, we granted All American, in effect, an expanded certificated territory to serve in areas beyond those to which it was restricted in its original, March 7, 2007 certificate (certificate of public convenience and necessity, or CPCN). They are wrong. They use two different public interest standards—one from a state statutory framework and one from a federal statutory framework to attempt to piece together a certificated territory which not only did we not grant, but which was specifically rejected in the original certification proceeding. All American points to Utah Code §54-8b-2.1 in identifying two tests it

believes govern the issuance of a certificate to serve in a particular area, namely 1) "sufficient technical, financial, and managerial resources and abilities to provide the services it seeks to provide (what All American terms as the "feasibility issue"), and; 2) that the issuance of such a certificate "is in the public interest" (a public interest test or issue). *See* Utah Code § 54-8b-2.1(2). All American and Beehive claim principles of res judicata now bar us from investigation or litigation on these two tests or issues relative to All American's service in Beehive's territory.

Upon submission of an interconnection agreement, federal law requires a state commission to issue written findings of any deficiencies. Federal law permits rejection for only two reasons: 1) that the agreement discriminates against a non-party telecommunications carrier, or 2) that implementation of the agreement is not consistent with the public interest, convenience, and necessity. If a state commission does not act to approve or reject the agreement within a requisite time period after submission, the agreement is deemed approved. *See 47 U.S.C. 252(e).* All American and Beehive extrapolate from the federal law procedural process anticipated in 47 USC 252(e) to argue that All American has met, and that we have concluded it has met, the two tests or issues contained in Utah Code § 54-8b-2.1. As to the "feasibility issue", they claim that because we did not issue written findings rejecting the interconnection agreement, we "implicitly determined that the interconnection agreement was 'consistent with the public interest, convenience and necessity'" and "determined that All American meets the legal requirements for competitive entry into Beehive territory." *All American Application for Review and Rehearing*, p.9. However, there is nothing in 47 USC 252(e)(4) or any existing case law which states that the regulatory review and public interest test for *interconnection agreements* approved under the *federal statutory framework*, are the same

regulatory review and public interest test we use under UCA § 54-8b-2.1(2) to determine if an entity should be granted a certificate in the state. There is nothing in UCA § 54-8b-2.1(2) which mandates we use the same public interest consideration contained in 47 USC 252(e)(4). In fact, as we stated in our June Order, neither party has provided us with any authority that states these public interests tests are interchangeable. Nor have All American and Beehive given any authority or rationale that private parties' negotiation of an interconnection agreement and its submission to a state commission, under federal law, substitute for state law and process to expand a certificated service area granted under state law.

Our state laws and rules outline the way a certificate may be granted or amended and the manner by which a telecommunications carrier may gain entry into another's territory. That process is substantively different from the process telecommunications corporations use to obtain approval of an interconnection agreement. All American's March 7, 2007 certificate only granted it authority to operate in Qwest's service territory. All American was specifically excluded from those areas of any local exchange with less than 5,000 access lines of incumbent telephone corporations with fewer than 30,000 access lines in the state. This exclusion covers Beehive's territory. All American was also required to provide the Commission with maps, at least annually, identifying all areas of the state in which it would offer any service and was required to update the maps as it undertook to offer service in any additional areas. Irrespective of the specific exclusion contained in its certificate and the direction on how to identify new service areas for its certificated area, All American continues to argue it did not need to comply with these to modify its certificate and expand its certificated service area. All American and

Beehive's arguments that All American obtained an expanded certificated area by filing an interconnection agreement is not consistent with Utah law.

All American and Beehive's arguments are rejected by the Utah Supreme Court in *Salt Lake Citizens Congress v. Mountain States Tel. and Tel., Co.*, 846 P.2d 1245 (Utah 1992) (*Charitable Contributions case).* There, a prior order of the Commission had determined that a specific type of expense, charitable contributions, was to be excluded as a recoverable expense in determining the public utility's rates charged to ratepayers. Subsequent to that ruling, the utility began to include charitable contributions as a component in its general rate case applications and supporting material for new rates to be approved by the Commission in subsequent applications. However, the utility did not request the Commission alter or otherwise change the prior order excluding this type of expense. After rates had been set in this manner in a number of rate cases, the utility was later called to task for its inclusion of charitable contributions expenses in the rates charged to customers without seeking a change in the Commission's original order which excluded them. On appeal, the utility argued its inclusion of charitable contribution expenses as a recoverable expense in the subsequent general rate cases constituted petitions to change the Commission's prior ruling. The utility argued the Commission's conduct, in approving rates whose calculation followed the utility's inclusion of charitable contribution expenses and the Commission's failure to specifically exclude them, constituted a Commission decision to alter the prior ruling and condone the inclusion of charitable contributions in rates to be charged utility customers. The Court's opinion states "this argument is without merit." *Id.* at 1254. The Court noted the utility never filed a petition, never directed the Commission's attention to the issue, and the Commission never addressed it. The Commission's silence and inactivity in

subsequent cases does not constitute a Commission decision to alter or amend its prior decision. *Id.* Here, as well, All American failed to petition to change the March 7, 2007 Order and Certificate for expansion of its certificated area to serve in Beehive's territory, and we have never addressed the issue. In fact, if we were to accept Beehive and All American's position that the interconnection agreement enlarged All American's certificated area, it would discriminate against other telecommunications corporations that sought amendments to their certificated territory through the expected process of specific application to alter prior orders and certificate for Commission approval of the altered service territory, rather than having followed All American's and Beehive's interconnection agreement argument We do not agree with All American and Beehive that the interconnection agreement submission enlarged All American's territory, particularly to include any area previously and expressly excluded in the March 7, 2007 Order and CPCN.

Effect of Collateral Estoppel

Beehive complains that the doctrine of collateral estoppel bars us from determining now, issues of financial and technical ability, managerial competency, and public interest in the "generic sense" because we "already made findings and conclusions that [All American] satisfied these statutory tests when it granted *that initial certificate.*" We disagree with Beehive.

> A party seeking to invoke collateral estoppel must establish that: (1) the issue decided in the prior adjudication is identical to the one presented in the instant action; (2) the party against whom issue preclusion is asserted was a party, or in privity with a party, to the prior adjudication; (3) the issue in the first action was completely, fully, and fairly litigated; and (4) the first suit resulted in a final judgment on the merits.

Buckner v. Kennard, 2004 UT 78, ¶ 13. Even assuming collateral estoppel applies here, and assuming that the first and second prongs of the test listed above are met, the third and fourth prongs of the test are not satisfied. The issues of financial and technical ability, managerial competency, and public interest—at least as related to All American's potential provision of service in Beehive territory, were not "completely, fully, and fairly litigated." Our June Order chronicles the actions, including All American's petition amendments leading to the ultimate granting of a CPCN to All American. A review of the docket, however, shows that the Division of Public Utilities (Division) filed a recommendation on January 16, 2007 recommending we issue a CPCN to All American to compete in Qwest territory but "identified several potential issues with All American's request to enter Beehive Telephone's ILEC territory" namely, the following concerns:

> **Statewide Issue**
> The All American petition is the first request in Utah by a CLEC to enter a rural ILEC territory. As a result, determinations made in this proceeding will set precedents for future requests. The Division recommends that the associated issues be heard by the Commission.
> **Universal Service Fund**
> In general, allowing CLEC entry into the territory of any rural ILEC that receives Universal Service ("USF") support can impact the USF. The probability of USF support increases when any rural ILEC loses customers and revenues to a CLEC.
> **Telecommunications Rates**
> Generally, allowing CLEC entry into the territory of any rural ILEC can result in an increase of telecommunication rates. In this instance, it is possible that existing ILEC customers will subscribe to the CLEC, which will result in a loss in revenue to the ILEC. To meet its rate of return, an ILEC could increase service rates to offset revenue loss.

In the Matter of the Application of All American Telephone Co., Inc., for a Certificate of Public Convenience and Necessity to Provide Local Exchange Services within the State of Utah, Docket No. 06-2469-01, DPU Recommendation, January 16, 2007, p.2. The

Division further stated: "The Division recommends that 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." *Id.* at 3. A hearing previously scheduled in Docket No. 06-2469-01 and in Docket 06-051-01 (*In the Matter of the Application of Beehive Telephone Co., Inc., for a Certificate of Public Convenience and Necessity to Provide Local Exchange Services within the State of Utah*) was set, but later cancelled. The Commission gave the reason for the cancellation: "Given the number and nature of the issues raised in the above-entitled matters and the *desire to ensure parties have adequate opportunity to address these issues prior to hearing*, notice is hereby given that the hearings noted above are cancelled." *Docket No. 06-2469-01, Notice Canceling Hearing and Setting Technical and Scheduling Conference,* p.1. About a month after the hearing was stricken and after an additional technical conference was held, All American then submitted its amended application wherein it stated it no longer sought to provide services in any area of small or rural local exchange carriers", including Beehive's territory, and requested *expedited* consideration of its amended application. Based on All American's representation in this amended application, the Division recommend approval of the CPCN "to All American in only Qwest's territory" and recommended that the Commission "specifically disallow entry into local exchanges with fewer than 5,000 access lines that are owned or controlled by ILEC's with fewer than 30,000 access lines until the associated issues and concerns are resolved formally in a hearing." *Docket No. 06-2469-01, DPU Recommendation, February 27, 2007*, p. 2. No hearing was ever held.

We then issued All American a CPCN to serve in Qwest's territory only. A review of the docket where the initial March 7, 2007 certificate was issued reveals that the issue of All American serving in Beehive's territory was not "completely, fully, and fairly, litigated." In fact, at least one party—the Division, never had its concerns heard, and opted to forego having its "issues and concerns [] resolved formally in a hearing" because All American specifically stated it would not serve Beehive territory. The Division recommended approval of the CPCN, based in part on All American's representations. There was no judgment on the merits concerning All American's entry into Beehive's territory. Therefore, collateral estoppel does not make our "findings in that original docket [] binding and [of] preclusive effect."

Exclusion where ILEC consents to CLEC Entry

We also disagree with All American's and Beehive's arguments regarding the implications of UCA § 54-8b-2.1(3)(c) on our ability to determine whether a CLEC should be excluded from an ILEC's territory. All American claims that when an applicant petitions for permission to enter the territory of an incumbent LEC with a local exchange with fewer than 5,000 access lines, under UCA 54-8b-2.1(3)(c), that LEC may petition for an exclusion of the applicant. The exclusion may be granted upon a "finding that [exclusion] is consistent with the public interest." *UCA 54-8b-2.1(3)(c).* It claims that since Beehive chose not to move for exclusion, but instead consented to All American's entry, exclusion is not an issue here. Beehive's arguments are similar. It claims that the subpart (3)(c) "exception" to the rule in subpart (2) "comes into play or becomes applicable only in the event that the ILEC involved specifically petitions for an

exclusion." If there is no petition for exclusion from the ILEC, then "the question of [whether] the exclusion [is in the public interest] cannot be raised or reached" procedurally or substantively. Both parties are wrong. First, agreeing with their arguments would mean that the legislature meant to deprive the Commission of any authority to consider whether an exclusion would benefit the public interest under subpart (3)(c) so long as an ILEC consented to the entry of a CLEC. Regardless of the fact that the Commission is charged with general jurisdiction to "supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state" , *UCA § 54-4-1*, and must consider not "only the interests of the litigating parties [but also those] of the utility's customers and the interests of the public" All American and Beehive would have us find that, at least under subpart (3)(c), the legislature intended that an ILEC and a CLEC may alone determine whether the CLEC's exclusion is in the public interest. In fact, All American and Beehive's arguments would mean that since we would not be able to raise or reach the question of [whether] the exclusion [is in the public interest]", an ILEC and CLEC could in fact completely ignore any consideration of whether the CLEC's exclusion is in the public interest, and we would not be able to question their determination, even if the exclusion is in fact in the public interest. All American's and Beehive's arguments regarding the implications of UCA § 54-8b-2.1(3)(c) on our ability to determine whether a CLEC should be excluded from an ILEC's territory do not lead us to conclude they are entitled to summary judgment. They are contrary to Utah law. *See e.g. Stewart v. Public Serv. Comm'n.*, 885 P.2d 759, 775 (Utah 1994) (criticizing the unconstitutional delegation of power where

private parties' actions, in pursuit of their interest, control governmental agency's pursuit of public interest).

Waiver of the 240-day Deadline

We find that UCA § 54-8b-2.1's 240-day deadline is waivable by the applicant. Section 54-4-1 of the Utah Code provides the basis under which we may allow an applicant to waive the deadline. It states:

> The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such 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; . . .

Our current practice is to allow an applicant to waive similar 240-day deadlines, e.g. those contained in UCA 54-7-12 (3), etc. which govern petitions for rate increases by water, electrical, and gas utilities. We have not found that the deadline can be waived by us, or by any other party— only by the applicant.

Allowing an applicant to waive the deadline has been a procedure which has been both a necessary and convenient mechanism that has not only benefitted utilities/applicants but also their ratepayers. Public utilities in our state range from multi-billion-dollar corporations with numerous personnel who have extensive and specific technical knowledge, and the financial wherewithal to hire legal counsel and other technical and accounting experts when needed, to small utilities with operating budgets of only a few thousand dollars, part-time personnel or lay persons, and little knowledge of the subject matter and regulatory framework governing their utility. Applicants may waive the deadline for various reasons. In some dockets, the applicant is represented by

lay-persons with little or no technical knowledge of the subject matter or knowledge of the regulatory process, and need to be "walked-through" the process of establishing just and reasonable rates. Some utilities have needed greater time to identify and correct previously made mistakes in utility operations, e.g. accounting mistakes, before identifying a just a reasonable rate. Some utilities have no specialized personnel whose task is to respond to data requests, and need greater time to compile information requested by parties like the Division or the Office of Consumer Services (OCS). Utilities may waive the deadline to allow more time for settlement negotiations or resolution of discovery disputes. Many of the applicants ultimately waive the deadline as an alternative to having us dismiss a docket before a 240-day deadline because we lack the information to make a complete determination as to the appropriateness of a rate increase or the issuance or amendment of a certificate. If an applicant did not have this option, it would be necessary for us to dismiss the case, forcing an applicant to begin the often costly and time-consuming process over again—eventually resulting in higher costs to ratepayers. Ultimately, however, allowing the waiver pursuant to 54-4-1 benefits both utilities and the ratepayers.

All American's actions in this docket belie its arguments now. All American took advantage of our practice to allow an applicant to waive the 240-day deadline of 54-8b-2.1 "to avoid further legal disputes over the procedural aspects of the case." *See Petitioner's Request for Extension of Time to Respond to the Division's Request for Dismissal and Request for Scheduling Conference, Exhibit A: November 6, 2008 Letter from Gary Guelker, Esq. to Michael Ginsberg, Assistant Attorney General* (Guelker Letter). On October 27, 2008—before the 240-

day deadline[1], the Division moved to dismiss All American's petition because All American had not provided the Division with responses to data requests. Those responses would have assisted the Division in ascertaining "the nature of the services that AATCO [All American] provides to Beehive." *Division's Request for Dismissal*, p.4. All American further refused to provide responses to a second set of data requests. The Division moved for dismissal because All American failed "to provide the necessary information to determine if the requested Amendment should be granted." *Division's Request at id.* All American's counsel wrote to the Division's counsel, in part to "address [the Division's] pending Request for Dismissal . . . ." *Guelker Letter*, p.1. All American was aware that the Division's "underlying concern in this matter is that it may not be in the public interest to allow All American to provide its services within [Beehive's] service area." *Guelker Letter*, p.1. After conversations between All American representatives and Division staff, All American felt that the conversations "alleviated a lot of [the Division's] concerns regarding All American's pending Petition." *Id.* All American proposed staying briefing and hearing to try and resolve the Division's concerns informally, and stated that if the concerns were not resolved, then the parties could continue the formal resolution. All American's counsel then stated: "Finally, you previously raised concerns about delaying this matter in light of the 240 day time limit set forth in Utah Code Ann. § 54-8b-2.1(3)(d). *It is my position that this time limit has no application to the subject matter of this proceeding.* Therefore I am willing to sign a waiver which states that a decision on the Petition need not be made within this time frame." *Guelker Letter*, p.2. In our Report and Order of November 18, 2008, we granted its request for extension of time and took administrative notice of its waiver of

[1] Beehive argues the 240-day deadline ran on Janaury 4, 2009.

the 240-day deadline. The 240-day deadline may be waived by an applicant and UCA 54-4-1 provides the basis for allowing that.

The Office of Consumer Services

We find that the OCS' motions are properly before us. All American and Beehive's Motions essentially asked that we give no weight to the OCS's motions and arguments. They claim that the OCS did not authorize the attorney general's office to participate on its behalf in this docket. They also argue that the OCS has acted outside of the scope of its authority, even if it did authorize the attorney general to act on its behalf.

We find that Section 54-10-4 (1) and (3) provide the basis upon which the OCS may participate. Subpart (1) states that the OCS "shall assess the impact of utility rate changes and other regulatory actions on residential consumers and those engaged in small commercial enterprises in the state of Utah." Subpart (3) states that the OCS "shall be an advocate on its own behalf and in its own name, of positions most advantageous to a majority of residential consumers as determined by the committee and those engaged in small commercial enterprises, and may bring original actions in its own name before the [Commission]." Beehive claims that the OCS' Motion to Dismiss deals with the impact an amended CPCN would have on Qwest and AT&T access rates due to the effects of traffic pumping, and is designed to "protect the interests of the interexchange carriers, not small consumers." *Beehive Request for Reconsideration,* p.8. All American's arguments are similar. We disagree with both.

Although the OCS did raise concerns in part II of its Motion with traffic pumping and with the relation between a Joy Enterprise officer and All American, it specifically stated:

> The Committee has not concluded that the All American/Beehive interconnection agreement is intended to establish an access charge business that can be

> characterized as "traffic pumping." The Committee does conclude that the All American certificate and the interconnection agreement with Beehive must be scrutinized against both the obligations as public telephone utilities and tested by the public interest in a thorough and public process.

Committee of Consumer Services' (n.k.a. Office of Consumer Services) Response to Petition and Memorandum in Support of Motion to Dismiss, p.5. The OCS contended that All American's petition was an attempt to sidestep its representations in the original certificate proceedings, and thereby, our order issued on the CPCN in those proceedings. It also expressed concern that All American's proposed amendment, if granted, would permit a utility to "unilaterally expand its authority by violating the terms of the authority originally granted" and via an interconnection agreement. The OCS' Motion is not only concerned with specifically how an All American/Beehive interconnection agreement will impact rates for ratepayers, but also generally with the process by which public telephone companies may alter the terms of their certificates and abide by the Commission's orders.

Our resolution in this docket will impact how public telephone utilities obtain amended certificates and how those utilities—specifically Beehive and All American, operate within the bounds of their certificates. The ultimate outcome of these issues will necessarily impact ratepayers and likely the public interest. Additionally, the process by which we decide issues in this docket (e.g. finding that a utility may expand its certificate via the simple filing of an interconnection agreement as opposed to petitioning for amendment of the certificate through a public process, etc.) is also a regulatory action that will impact residential and small utility customers of public telephone utilities. Without any significant discovery conducted on the merits of All

American's petition, and given concerns raised about the process by which it seeks to amend its certificate, we believe that the OCS Motion has raised a sufficient basis for us to conclude that they are appearing to assess the impact of potential regulatory actions' impact on, and to advocate on positions most advantageous to, residential consumers and small commercial enterprises.

All American and Beehive argue that because the Committee may not have authorized the attorney general to appear on its behalf, we must strike the OCS' Motion. We, however, will presume that the attorney general is acting on behalf of the Committee and as directed by its client. Whether the Committee has minutes of where it actually directs the attorney general to appear in this docket, is an internal matter for the OCS. We will not police whether such a direction exists and do not find it is a basis for ignoring the OCS' Motion.

Motion for Stay

All American moved for a stay of further proceedings pending the issuance of this Order and pending any subsequent judicial review. The Administrative Procedures Act, Utah Code § 63G-4-401(1), allows an aggrieved party to "obtain judicial review of final agency action." "Final agency action" is not defined in the Act. However, the Utah Supreme Court in *Union Pacific Railroad Company v. Utah State Tax Commission*, 2004 UT 40, ¶ 16 gave "the appropriate test to determine whether an agency action is final under Utah law . . . :

> (1) Has administrative decisionmaking 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 our view, a stay would not be proper, because our denying All American and Beehive's motions for summary judgment and motions to strike are not final agency action. *See Cf. Logan v. Peterson*, 1978 Utah LEXIS 1173 (holding that "the denial of a motion for summary judgment is not a final judgment . . . ."). First, judicial review will disrupt the orderly process of adjudication in this matter. Despite All American's own admissions that it has been operating outside its certificated area, we have nonetheless allowed this process of adjudication to proceed to determine if in fact All American violated the terms of its certificate, the scope of any such violation, and the possible remedies. Additionally, no meaningful discovery has occurred on whether All American should be allowed to compete in Beehive's territory. Interrupting the process at this stage with a stay would disrupt these administrative proceedings by not permitting them to move forward.

Second, no rights or obligations have been determined. All American claims it has the right to serve Beehive territory, and continues to serve there. We have not yet enjoined them from serving there, and All American has not offered to stop serving Beehive areas. We have not yet determined to what extent All American's certificate should be altered or amended, or otherwise affected. The only legal consequences flowing from our denial of the motions for summary judgment is that All American and Beehive will have to continue in these administrative proceedings while appealing our orders.

Third, the denial of the motions for summary judgment and motions to strike are preliminary, preparatory, and intermediate. The denial of the motions has not stopped All American from continuing to operate in Beehive territory. In fact, the parties have yet to flesh out the underlying facts that will determine the final outcome in this docket, and discovery is ongoing to obtain those facts. The denial of the motions is preliminary, preparatory, or intermediate and a stay would not be proper.

Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirement of Sections 63G-4-401 and 63G-4-403 of the Utah Code and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 24th day of August 2009.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#63317