

Convenience and Necessity (“CPCN”) authorizing it to operate as a competitive local exchange carrier (“CLEC”) within the state of Utah, excluding those local exchanges with less than 5,000 access lines controlled by incumbent telephone corporations with fewer than 30,000 access lines in the state. *See* Docket No. 06-2469-01. As part of the application for its CPCN, All American submitted all of the documentation and factual information required by Utah Admin. R746-349-3 to the Utah Public Service Commission (the “Commission”) . *See id.*

Three months later, on June 11, 2007, All American and Beehive Telephone Co., Inc. (“Beehive”) submitted an interconnection agreement to the Commission for its approval pursuant to 47 U.S.C. § 252(e)(1). *See* Docket No. 07-051-03. This agreement set forth the nature of the parties’ proposed relationship. For example, it states:

... All American terminates local telecommunications traffic that originates from Beehive subscribers, and Beehive terminates local telecommunications traffic that originates from All American subscribers.

... All American provides a point of interconnection in the Beehive service areas, or interconnects with Beehive network via a Beehive tandem switch; and

... the Parties wish to establish a reciprocal compensation interconnection arrangement that compensates each other for terminating local telecommunications traffic that originates on the other Party’s network.

See id.

Based on the foregoing, it was clear that All American intended to operate as a CLEC in the area certificated to Beehive if and when the interconnection agreement was approved by the Commission. Furthermore, the proposed agreement was given its own docket and placed in the public record so that any interested party could view it. In fact, the Division of Public Utilities (“Division”) was a party to this proceeding and participated by serving Beehive with a set of data

requests.¹ The Division did not oppose the interconnection agreement, which was eventually approved by the Commission on September 10, 2007 pursuant to 47 U.S.C. § 252(e)(4).

In order to approve the interconnection agreement, the Commission was required to make certain findings regarding the nature of Beehive and All American's relationship. For example, the Commission was required to reject the agreement if it determined that it "discriminates against a telecommunications carrier not a party to the agreement." 47 U.S.C. § 252(e)(2)(A)(i). Likewise, the agreement could not be approved if "the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity." *Id.* at § 252(e)(2)(A)(ii). Again, the Division did not raise any concerns that Beehive and All American's proposed relationship fell short of these standards. Therefore, by approving the interconnection agreement, the Committee necessarily determined that agreement was consistent with the public interest, convenience and necessity.

II. The Current Dispute

Soon after the interconnection agreement was approved by the Commission, All American realized that its interconnection agreement was somewhat incongruous with its CPCN, as the CPCN did not technically authorize All American to operate as a CLEC in Beehive's territory. However, since Beehive had no objection to All American's entry into its territory, and since the Commission had already determined that such entry was consistent with the public interest, All American viewed the omission of Beehive's territory from its CPCN as a mere technicality. Therefore, in order to

¹ In addition, the Qwest Corporation and Qwest Communications Corporation were given permission to intervene in the matter on August 1, 2007. *See* Docket No. 07-051-03.

conform All American's CPCN to the Commission's approval of the interconnection agreement, All American filed a Petition requesting that the Commission amend the March 7, 2007 CPCN *nunc pro tunc*, so as to formalize All American's authority to operate as a CLEC in the area certificated to Beehive.

Based on the Commission's prior approval of the interconnection agreement between All American and Beehive, All American contends that it is entitled to a summary decision granting its Petition as a matter of law. In order for the Commission to deny a CLEC's entry into a rural exchange, two conditions must be met. *See* Utah Code Ann. § 58-8b-2.1(3)(c). First, the affected ILEC must intervene and protest the certification, and, second, the Commission must find that the CLEC's entry would not be "consistent with the public interest." *Id.* In this case, neither of these conditions can be satisfied because (1) Beehive has consented to All American's certification in Beehive territory, and (2) the Commission determined that All American's certification is consistent with the public interest when it approved All American's interconnection agreement on September 10, 2007.

Despite its previous decision not to challenge the interconnection agreement in Docket No. 07-051-03, the Division has now reversed course and decided to seek the dismissal of All American's Petition on purely technical grounds. Specifically, it argues that All American should be required to re-file its Petition as a separate request for competitive entry into Beehive's territory pursuant to Utah Code Ann. § 54-8b-2.1 and Utah Admin. R746-349-3. The Division believes that this is the only way it can ascertain the nature of All American and Beehive's relationship and determine whether the proposed amendment to the CPCN is in the public interest. However, all of

the information the Division seeks has already been disclosed in connection with All American's original CPCN and/or the approval of its interconnection agreement with Beehive. Therefore, there is no need to require All American to re-file its request, especially since the Division waited six months after the filing of All American's Petition before moving for its dismissal.²

Finally, the Utah Committee of Consumer Services (the "Committee") has also filed a motion seeking to dismiss All American's Petition.³ However, this motion must be stricken because (1) it is not authorized by statute, and (2) it exceeds the sphere of interests that the Committee has been directed to protect. First, only the members of the Committee may direct the Attorney General to advocate in matters on the Committee's behalf. In this case, a review of the minutes from the Committee's meetings reveal that the Committee never addressed nor adopted a position on All American's Petition prior to the Attorney General's motion. Second, even if the Committee had adopted a position in this matter, it could not be considered because the subject matter raised in this proceeding does not involve issues or concerns that fall within the Committee's responsibility.

² All American filed its Petition on April 23, 2008. The Division did not file its motion to dismiss until October 23, 2008. In the interim, the Division served All American with several data requests seeking information about the relationship between Beehive and All American. In other words, it appears that the Division initially agreed that All American's proposed amendment to its CPCN could be resolved in this particular proceeding. It was only after All American sought to designate this matter as informal that the Division changed course and argued that a separate application needed to be filed. However, now that this matter has been designated as a formal proceeding, there is no substantive reason why All American's request should not be resolved as quickly as possible within this docket.

³ A review of the docket shows that the Committee has not filed an actual motion to dismiss, but rather only a "Memorandum in Support of Motion to Dismiss." Therefore, it is unclear whether the Committee has filed its own motion or simply filed a memorandum which supports the Division's Motion to Dismiss. In any event, for purposes of this Memorandum and the accompanying Motion to Strike, All American will assume that the Committee has filed its own separate motion.

Therefore, the Committee's motion and memorandum must be stricken from the record.

Based on the foregoing, and as explained more fully below, All American respectfully requests the Committee to (1) deny the Division's Motion to Dismiss, (2) strike the Committee's Motion to Dismiss and supportive memorandum from the record, and (3) grant All American's Motion for Summary Decision.

ARGUMENT

I. All American is Entitled to a Summary Decision Granting Its Petition.

All American has petitioned the Commission to amend All American's March 7, 2007 CPCN *nunc pro tunc*, so as to formalize All American's authority to operate as a CLEC in the area certificated to Beehive. All American contends that it is entitled to such relief as a matter of law under principles of res judicata. This is because the Commission already made the factual determinations necessary for the granting of All American's Petition when it approved the All American's interconnection agreement with Beehive on September 10, 2007.

"Res judicata, often referred to as claim and issue preclusion, prevents the readjudication of issues previously decided." *Salt Lake Citizens Congress v. Mountain States Telephone & Telegraph Co.*, 846 P.2d 1245, 1251 (Utah 1992). "Res judicata applies when there has been a prior adjudication of a factual issue and an application of a rule of law to those facts." *Id.* at 1251-52. In other words, the principle "bars a second adjudication of the same facts under the same rule of law." *Id.* at 1252. Finally, the Utah Supreme Court has held that the "basic policies" of res judicata apply to administrative decisions, including the "need for finality." *Id.* at 1251.

In order to apply the foregoing principle to All American's Petition, it is necessary to first

examine Utah Code Ann. § 54-8b-2.1, which provides the standards for approving an applicant's competitive entry into an existing service territory. The statute states that the Commission shall issue a certificate upon a determination that (a) the applicant has "sufficient technical, financial, and managerial resources and abilities" to provide the services in question and (b) "the issuance of the certificate to the applicant is in the public interest." *Id.* at § 54-8b-2.1(2). The statute further provides that if the applicant is seeking to enter the territory of an ILEC which serves fewer than 30,000 access lines in the state, that ILEC "may petition" the Commission "to exclude from [the] application . . . any local exchange with fewer than 5,000 access lines that is owned or controlled" by such ILEC. *Id.* at § 54-8b-2.1(3)(c). If the Commission finds that the proposed exclusion is consistent with the public interest, then it "shall order that the application exclude such local exchange." *Id.*

In this case, Beehive has chosen not to petition for the exclusion of All American from its territory under § 54-8b-2.1(3)(c). To the contrary, Beehive consented to All American's Petition in writing. Therefore, the only two remaining issues for the Commission to decide are the feasibility issue and the public interest issue, as required by § 54-8b-2.1(2). However, pursuant to the basic principles of *res judicata*, there is no need for further proceedings to resolve these issues. This is because the Commission already made factual determination regarding these two issues when it approved All American's interconnection agreement with Beehive.

The Commission approved All American's interconnection agreement pursuant to 47 U.S.C. § 252(e)(4). This portion of the Federal Telecommunication Act required the Commission to make the following findings before the agreement could be approved:

(e) Approval by State Commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted ***shall approve or reject the agreement, with written findings as to any deficiencies.***

(2) Grounds for rejection

The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(I) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) ***the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;***

47 U.S.C. § 252(e) (emphasis added).

In this case, the Commission approved the All American’s interconnection agreement via operation of law. This means that the Commission did not feel it was necessary to issue any written findings detailing deficiencies in the agreement. As such, the Commission implicitly determined that the interconnection agreement was “***consistent with the public interest, convenience and necessity.***” *Id.* at § 252(e)(2)(A)(ii) (emphasis added). If the Commission had determined otherwise, it would have been *required* to reject the interconnection agreement pursuant to federal law. The Commission’s determination is bolstered by the fact that the Division was a party to the proceeding and never raised any issues which suggested that All American’s entry into Beehive’s territory would be inconsistent with the public interest. By its silence, the Division implicitly consented to the Commission’s approval of the arrangement.

It now appears as if the Division would like to have a “second bite at the apple” and re-litigate the issue of whether All American’s entry into Beehive’s territory is consistent with the

public interest, convenience, and necessity. However, this is precisely the type of tactic that res judicata is designed to prevent. *See Salt Lake Citizens Congress*, 846 P.2d at 1251 (res judicata “prevents the readjudication of issues previously decided.”). By approving the interconnection agreement, the Commission has already determined that All American meets the legal requirements for competitive entry into Beehive territory. Therefore, any further litigation on this issue is proscribed and All American is entitled to a summary decision as a matter of law.

Finally, some intervenors have attempted to inject the issue of so-called “traffic pumping” into this proceeding. However, these tangential concerns have no bearing on whether All American is entitled to summary decision. In fact, the chat room and conference calling in which All American is alleged to have engaged has been deemed lawful in at least four separate FCC decisions. *See AT&T Corp. v. Jefferson Telephone Co.*, 16 FCC Rcd 161130 (2001); *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041 (2002); *AT&T v. Beehive Telephone Co.*, 17 FCC Rcd 11641 (2002); *Qwest Communications Corporation v. Farmers & Merchants Mutual Telephone Company*, 22 FCC Rcd 17973 (October 2, 2007). Furthermore, the intervenors could have raised their concerns as part of the docket related to the interconnection agreement. By failing to do so, they effectively waived their ability to raise this issue at this late juncture.

In any event, if the parties’ concerns over alleged traffic pumping are sincere, they are certainly entitled to open a new docket for the purpose of exploring this issue. However, these concerns should not be raised in this docket due to the limited scope of review set forth in § 54-8b-2.1(2). In other words, the question of whether All American is entitled to an amendment to its CPCN should not be delayed so that Qwest, AT&T and the Committee can engage in drawn-out

litigation regarding an unrelated issue. Therefore, All American respectfully requests the Commission to enter a summary decision that formalizes All American's authority to operate as a CLEC in the area certificated to Beehive through a *nunc pro tunc* amendment to its CPCN.

II. The Committee's Motion to Dismiss Must be Stricken From the Record.

Even if the Commission determines that All American is not entitled to a summary decision, it should not consider the motion to dismiss filed by the Committee. This is because the Committee never adopted a position regarding All American's Petition prior to the Attorney General's decision to file the motion. Second, even if the Committee had adopted a position in this matter, its motion cannot not be considered because All American's Petition does not involve issues or concerns that fall within the Committee's responsibility.

The Committee is a public entity created by the Utah Legislature, which in turn placed limitations on the Committee's duties and responsibilities. Such limitations are as follows:

The Committee of Consumer Services shall have the following duties and responsibilities:

(1) The committee 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.

(2) The committee shall assist residential consumers and those engaged in small commercial enterprises in appearing before the Public Service Commission of the state of Utah.

(3) The committee 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 Public Service Commission of this state or any court having appellate jurisdiction over orders or decisions of the Public Service Commission, as the committee in its discretion may direct.

Utah Code Ann. § 54-10-4. In addition, the Utah Legislature instructed the Attorney General to assign at least one attorney to represent the Committee. Utah Code Ann. § 54-10-7. This attorney is given 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.” *Id.* (emphasis added).

In this case, the Attorney General’s Office has filed a motion on the Committee’s behalf seeking the dismissal of All American’s Petition. However, it appears that the attorney may have exceeded his authority because there is no public record which indicates that the Committee ever took a position as to whether All American’s Petition is in the interest of the Committee’s constituents. Attached hereto are copies of minutes from all Committee’s meetings held between the time All American filed its Petition and the time the Attorney General’s Office filed its motion. *See* Ex. “A”. According to these minutes, All American’s Petition was never brought to the Committee’s attention or otherwise discussed by its members. More importantly, the Committee never formally instructed its attorney to seek dismissal of the Petition. As such, since it appears that the Attorney General’s Motion to Dismiss was never formally authorized by its client, it should be stricken from the record as moot.

Nevertheless, assuming *arguendo* that the Committee did authorize 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. For example, 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). In fact, the

motion does not discuss the impact of the proposed amendment on consumers' utility rates whatsoever. Rather, the motion is limited to a discussion of the proper forum in which All American's proposed amendment should be handled.⁴ The statute outlining the Committee's duties and responsibilities do not identify these types of procedural matters among the topics with which the Committee should concern itself. This is not surprising because such matters simply do not have any substantive impact on consumers or their utility rates. Therefore, even if the Committee authorized the Motion to Dismiss, it must be stricken because it does not raise any issues that fall within the scope of Utah Code Ann. § 54-10-4.⁵

III. The Division's Motion to Dismiss Must Be Denied.

Even if the Commission denies All American's Motion for Summary Decision, it must still deny the Division's Motion to Dismiss and allow the All American's Petition to proceed to a formal hearing before the Commission under the present docket number. This is because there is no purpose to be served by requiring All American to re-file its request under a separate docket when all of the information the Division seeks can be ascertained during the course of this proceeding.

The Division's motion is based on its belief that All American's Petition does not "provide the necessary information to determine if the requested amendment should be granted." Supp. Memo at 4. Rather, it believes All American should re-file a new petition "in compliance with

⁴ More specifically, the Committee's motion argues that this docket must be dismissed because "an amendment to the certificate of convenience and necessity must be adjudicated formally within the original Docket No. 06-2469-01." Supp. Memo at 2.

⁵ In the event the Commission decides not to strike the Committee's motion, All American reserves the right to respond to the Committee's substantive arguments via a separate pleading, which it will file in an expeditious manner.

R746-349” and which addresses certain concerns previously raised by the Utah Rural Telecom Association (“URTA”) in Docket No. 06-2469-01.⁶ However, the motion to dismiss was raised prior to the Commission’s determination that this matter should be designated as a formal proceeding. Now that the Commission has designated this matter as formal, All American acknowledges that it will be obligated to participate in discovery if its Motion for Summary Decision is ultimately denied. As such, there is no purpose to be served by requiring another docket to be opened, other than the unnecessary delay of any action on All American’s Petition.

Furthermore, the Division’s position is inconsistent with the information that has already been filed by All American in previous dockets. For example, the Division contends that All American must be required to file all of the information that is normally required by Utah Admin. R746-349 for an application for competitive entry. However, by requesting a *nunc pro tunc* amendment to its existing CPCN, All American is necessarily relying on the information that was previously filed in connection with its original application for competitive entry in Docket No. 06-2469-01. If the Division believes that such information has some bearing on All American’s current Petition, it can be easily obtained from the previous docket.

It is also important to note that the Division did not raise its “docketing” concerns until six months after All American filed its Petition. During the interim period, it presented All American with data requests, which All American initially agreed to answer. By waiting such a significant amount of time and participating in discovery before raising its motion, the Division lulled All

⁶ This was the docket in which All American originally applied for its CPCN.

American into believing that the proposed amendment to its CPCN could be resolved in this particular proceeding. It was only after All American sought to designate this matter as informal that the Division changed course and argued that a separate application needed to be filed. Such gamesmanship does nothing to resolve the underlying issue, but rather attempts to impose additional procedural hurdles that no serve no real purpose.

Finally, it must be emphasized that the Division has failed to provide any legal authority whatsoever which suggests that All American's Petition must be re-filed under a new docket number. In the absence of an absolute legal rule that requires such action, there is no justifiable reason for delaying this action any further. If All American's Motion for Summary Decision is denied, it will answer the Division's remaining data requests and provide any additional information that is relevant to the underlying issues. As such, since there is no legal basis for the Division request for dismissal, its motion must be denied.

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 7th day of April 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May 2009, the foregoing **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 AND IN OPPOSITION TO THE DIVISION OF PUBLIC UTILITIES' REQUEST FOR DISMISSAL** was sent by electronic mail and mailed by U.S. Mail, postage prepaid:

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