Docket No. 08-2469-01

Office of Consumer Services

Witness OCS – 1D Michele Beck

Attachment 3

McCown Declaration Opposing Motion of Sprint for Restraining Order

Civil No. 2:08cv00380

DAVID R. IRVINE (Utah Bar No. 1621)
Attorney and Counselor at Law
747 East South Temple Street, Suite 130
Salt Lake City, Utah 84102
Telephone: (801) 579-0800

ALAN L. SMITH (Utah Bar No. 2988)
Attorney and Counselor at Law
1492 East Kensington Avenue
Salt Lake City, Utah 84105
Telephone: (801) 521-3321

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

BEEHIVE TELEPHONE CO., INC., a Utah corporation, and BEEHIVE TELEPHONE CO. INC. NEVADA, a Nevada corporation, Plaintiffs, vs. SPRINT COMMUNICATIONS COMPANY, LP, a Kansas limited partnership, Defendant.	)	**McCOWN DECLARATION OPPOSING MOTION OF SPRINT FOR RESTRAINING ORDER** Civil No. 2:08cv00380 Judge: Dee Benson

DECLARATION OF CHUCK MCCOWN

I, Chuck McCown, do hereby testify and declare as follows:

1. I am the Chief Executive Officer of Beehive Telephone Company Inc., and Beehive Telephone Co. Inc. Nevada (collectively "Beehive"), the plaintiffs in this civil action. I have served in those capacities at all times relevant to this civil action. Because of my job duties and service as an officer of Beehive, I have personal knowledge respecting the testimony given in this declaration.

2. Beehive provides what is called local exchange service to rural areas in Utah and Nevada. This is telephone service for and among communities in relatively small geographical areas within these states. As such, Beehive is called a local exchange carrier or "LEC." Its local, instrastate service is regulated by agencies of state government, the Utah Public Service Commission and the Nevada Public Utilities Commission. That regulation includes the granting of certificates of public convenience and necessity in relation to designated service areas and the setting of rates which Beehive is permitted to charge in rendering that local exchange service.

3. In order to connect these local customers with the wider world and vice versa, all LECs including Beehive provide what is called interexchange service, that is, service which allows the customers of other, local and long distance carriers, to have access to and communicate with persons and businesses in the local exchanges which have been certificated to Beehive. Hence, when a person in Newark, New Jersey, wants to call another person in Park Valley, Utah, the Newark resident places a call which originates

in his local exchange; that call is handed off to a long distance company (called an interexchange carrier or "IXC") , that has been preselected, such as Sprint, AT&T, or Verizon. In our Newark to Park Valley example, the call travels over the lines owned by the IXC until it reaches Utah. In Utah the IXC hands the call off to a regional toll tandem company which has an interconnection with Beehive. Beehive then transports the call to the local customer. Some of these calls, when made, are destined to terminate with a conference calling company, and in those instances, they leave the local exchange in Newark, are handed to Sprint, are handed again to Qwest as a transiting carrier, handed still again to Beehive as another intermediate transiting carrier, and then given to All American Telephone Co., Inc. ("All American"), pursuant to an interconnection agreement, and then terminated to the conference calling company as an end-user. These calls, in telecommunications jargon are called "traffic;" they bring to mind trucks and cars going over a series of toll roads. Each segment of the road is owned by a different carrier which charges, in the form of a toll charge or access charge, its portion of the costs which it has incurred in building and maintaining that portion of the highway. Since this "traffic" is interstate in character, these "toll charges" or "access charges" are regulated by the Federal Communications Commission. The rates and other conditions of service, in this regard, are governed by tariffs and other forms of agreement which, in order to be valid, effective, and enforceable, must be approved in the manner specified by the FCC.

4. Speaking in terms of customers and operational size, Beehive is a small rural telephone company. But speaking geographically, Beehive's service areas are not only vast, but also distant, remote, and isolated. Beehive serves nine of the most rural counties in the state of Utah and parts of three counties in Nevada.. The area served by Beehive is larger than the areas of Washington, D.C., Rhode Island, Delaware, and Connecticut combined. Beehive's area is larger than the entire state of Vermont or New Hampshire. To further put the network in perspective, the airline distance between Beehive's Park Valley, Utah, end office in the north and its Dangling Rope end office in the south is 343 miles. By the end of 2006, Beehive had constructed more than 814 route miles of long distance facilities just to reach the remote villages it serves.
5. These are the areas which other telephone companies, because of cost and other difficulties, did not want to serve. We have to obtain rights-of-way from governmental entities and private persons to lay our fiber and to establish our switches and other facilities. We have to plow through some of the most formidable terrain in the country. Once the network is established and installed, it has to be maintained and the costs of maintenance, personnel, parts, upgrades, and the like also are substantial. To drive overland in order to repair system outages, for example, can require a 300-mile trip. Even by air, the most remote parts of Beehive's network are two hours from its headquarters in Lake Point, Utah.
6. At the end of the line, we may reach and serve only a handful of customers. Indeed, throughout this entire area, Beehive has fewer than 1,000 cutomers, and averages less

than 50 customers per wire center. Nevertheless, but for Beehive, the citizens of these areas (which include Grouse Greek, Garrison, Ibapah, Kolob, Park Valley, Partoun, Vernon, Cedar Highlands, Cainville, Rush Valley, Ticaboo, and Wendover) would not have telephone service and would be isolated communication-wise as well as physically from the rest of the world.

7. Service to remote, rural areas such as these, in the telecommunications business, is called high-cost service. In other words, the cost of getting service to these customers, given the challenges of geography and landscape, is extremely expensive. If customers had to pay for that service, it would be too exorbitant to afford. Rural telephone companies make this service affordable to customers by tapping into high cost funds or universal service funds which are a form of revenue pooling and redistribution.

8. In short, the cost of service – whether it is local exchange service or interexchange service -- to rural customers or customers like Sprint in relation to these outlying exchanges is neither cheap nor free. Beehive has had to borrow money to finance its operations. These loans and other extensions of credit are fixed obligations which have to be paid – whether or not Beehive gets revenues from its customers to service the debt.

9. Prior to July of 2007, Beehive filed its own federal tariff with the FCC for access charges to IXCs. This tariff was filed pursuant to what is known as section 61.39 of the FCC Rules. Because of this filing, Beehive was called or designated as a "Rule 61.39 carrier." During that pre-July, 2007 period of time, Beehive had direct relationships with so-called conference calling companies to which Beehive terminated long-distance calls.

These relationships, and the access charges associated with terminating traffic to conference calling companies, according to my layman's understanding, had been declared lawful by the FCC in a series of decisionsWhat is more, as a business person, seeking to grow Beehive's business during these years, I did not believe that there could be anything more natural than good, old-fashioned boosterism, trying to bring as many customers to Beehive's territory as possible, thereby increasing traffic and enhancing revenues. The IXCs, in effect, were doing the same thing – to increase customers, enlarge traffic, and enhance revenues -- through advertising and other marketing efforts.

10. Nevertheless, in approximately 2006, there were multiple proposals for altering the regulatory landscape controlling how "access charges" would be assessed. The tension between IXCs who paid access charges to LECs was growing. The IXCs were competing more and more fiercely among themselves. By this time they had already gone away from the older "time and distance" based charges that made sure they were receiving more money to calls to rural areas in favor of geographic rate averaging where all their customers were charged a flat rate per minute irrespective of the destination. But that was not enough for the IXCs to remain competitive -- it seems. Accordingly, they even started to offer unlimited calling for one flat fee, eliminating even the duration of the call as a metered service. They were depending on the law of large numbers to make them whole on the minor amount of traffic to the rural high cost areas. It stands to reason that, as competition drove prices down among IXCs and as access charges in rural areas stayed relatively higher, this alone would drive all the IXCs to pressure the

FCC to reform access charges. What is more, the IXCs were becoming increasingly aggressive in contesting the higher access rates in rural local exchanges, and they were fighting this fight on the policy level at the FCC as well as lawsuits in courts. I knew that it was only a matter of time that Beehive would have to seek the safe harbor presented by the National Exchange Carriers Association or NECA, by becoming a joint issuer under the NECA sponsored tariff, NECA 5.

11. In 2007, Sprint was among the IXCs that complained to the FCC, and filed federal court actions, alleging that LECs, through established affiliations with conference calling companies, were engaged in traffic pumping or "access stimulation," a practice which, notwithstanding the earlier rulings of the FCC noted above, Sprint claimed were unlawful under the federal telecommunications act. According to the complaining IXCs, such as Sprint, LECs engage in access stimulation by entering into contractual arrangements for the purpose of substantially increasing their terminating access minutes. These complaints led the FCC to take several actions.
12. First, the FCC's Wireline Competition Bureau ("WCB") issued a declaratory ruling that IXCs cannot engage in self-help against l LECs allegedly involved in access stimulation.
13. At the same time, the WCB granted Sprint's petition to suspend and investigate the tariff of carriers who were not participants in NECA. That meant that all carriers who filed tariffs on their own pursuant to section 61.39 of the FCC's Rules would be the subject of suspension and investigation. As noted in my testimony above, prior to this time, Beehive had been outside NECA, filing tariffs under section 61.39. And, in fact, to my

understanding, the WCB designated the 2007 annual access tariff filings of those LECs who were leaving NECA or remaining outside the NECA regime for investigation specifically to address Sprint's allegations that certain access stimulation practices may cause the switched access rates to become unjust and unreasonable under federal law. This, of course, would have included Beehive – had Beehive stayed outside the NECA regime.

14. However, the WCB announced that it would not require any LEC under investigation to respond to any issue in the proceeding if that LEC required a rule waiver to permit joinder under NECA 5. Thus, the WCB recognized, to my layman's understanding, that rejoining or becoming a member of NECA 5 would constitute a "safe harbor procedure" with respect to allegations of access stimulation.
15. As noted in my previous testimony, Beehive had anticipated these developments, and, indeed, even before they occurred, had taken steps to become a participant in the NECA pool and a joint issuer of NECA 5. Beehive believed that, as a result of taking these steps, it would be getting out of and away from the entire access stimulation debate.
16. The FCC subsequently found that the access rates of the LECs, like Beehive, that re-entered NECA 5 were lawful, because those rates had gone into effect on June 30, 2007, in accordance with the FCC's streamlined tariff filing rules and without suspension. Ever since that time, because Beehive has been a participating member of the NECA tariff, to my layman's understanding, Beehive has remained within the FCC's "safe harbor" and its rates are deemed lawful in this respect.

17. At the same time that Beehive re-entered the NECA pool, Beehive re-structured its relationship with so-called conference calling companies which had been customers within Beehive's territory. No longer did Beehive have a direct relationship with these companies, terminating calls to them as end-users. Like Qwest (in the example above of the caller from Newark), Beehive began to carry this traffic as an intermediate, transiting carrier, hauling the freight, so to speak, on its segment of the telecommunications highway, and handing that traffic to LEC, All American, which in turn terminates the call to an end-user customer. All American is a competitive LEC or "CLEC." Insofar as interstate, federally regulated calls are concerned, Beehive's relationship with All American is governed by an interconnection agreement. This agreement, consistent with the requirements of Section 252 of the 1996 Telecommunications Act, has been approved by the Utah Public Service Commission.

18. Beehive's participation in the NECA pool means that Beehive does not benefit from any traffic stimulation (whether lawful or not) which may occur as a result of any relationship (whether lawful or not) with a conference calling company. The declaration filed by Beehive's Chief Financial Officer, Wayne McCulley, explains the reasons for this result, and I will not repeat those reasons here.Ever since joining the NECA pool in July, 2007, Beehive has been billing Sprint for access charges under the NECA tariff on a monthly basis. Starting with Beehive's August, 2007, bill for access charges to Sprint, and for each monthly bill thereafter, Sprint has not paid and has refused to pay these bills. Sprint stands alone among IXCs in this regard. All of the other IXCs which are customers of

Beehive have paid their bills regularly and in full pursuant to NECA 5. As of December 1, 2009, after two years and three months worth of bills which have not been paid, Sprint owes Beehive approximately three million dollars. Put differently, Sprint has used and benefited from the use of Beehive's network, for lo these many months, to the tune of about three million dollars. Sprint, meanwhile, is collecting the revenues from its customers which are associated with these calls – without paying the costs associated with the use of Beehive's network. Sprint is reaping, in other words, where it has not sown.

19. Throughout this time, I have considered Sprint's "self-help remedy" of refusing to pay these bills, not only as an anomaly among IXCs, but also as a violation of the FCC's anti-self-help rules, as described, in my layman's terms, above. Those rules, as I understand them, require IXCs, like Sprint, which may question the legitimacy of access charges in a given instance, to follow established procedures at the FCC to resolve those questions and that, pending such resolution, they should not exercise self-help in any way, including the withholding of payment, call blocking, or the like. The telecommunications industry now is well-aware, of course, that Sprint has ignored this FCC directive on several fronts. It is refusing to pay, not only Beehive's bills, but also the tariffed charges of numerous carriers. And Sprint recently was sanctioned by the Iowa Utilities Board for engaging in call-blocking.

20. Sprint's non-payment of Beehive's access charge billings has been deeply troubling for two other reasons. Insofar as anybody could tell, Sprint was disputing only the charges

for traffic which, after it transited Qwest's and Beehive's networks, was handed to All American which then terminated that traffic to an All-American end-user, probably a conference calling company. Sprint claimed that, since All American wasn't legally certificated and otherwise a "sham," Sprint didn't have to pay Beehive as a transiting carrier which merely carried the traffic to All American's door and left it there – as though Beehive should be punished for the transgressions – whatever they may or may not be – of All American, a situation over which, as a transiting carrier, Beehive has absolutely no control. But Beehive's access charge billings included traffic in addition to the calls terminated by All American to its customers, traffic which Sprint did not dispute, and Sprint wasn't paying for this traffic either. Hence, I drew the conclusion that Sprint was not paying even undisputed charges, because it wanted to hold those charges hostage, as it were, until it forced Beehive to resolve, on Sprint's terms, the dispute over the other charges. What's more, if All American's allegedly illegal and "sham" existence, on some theory, excused Sprint from paying Beehive as a transiting carrier, why then did Sprint continue to pay Qwest, the other transiting carrier along the highway which carried the traffic to its ultimate destination at All American? I drew the conclusion in this regard that, like any "bully," Sprint would only pick on somebody smaller in the telecommunications playground.

21. Disturbed by these aspects of "self-help," bad faith, and bullying, I directed Beehive's FCC counsel, Mr. Russ Lukas, to contact Sprint and determine why these bills weren't being paid. My understanding is that this contact was made and that the "billing dispute"

procedures set forth in the NECA tariff were followed and that process ended with Sprint still refusing to pay its bills for access charges to Beehive – that is, again, all the bills, whether they entailed disputed or undisputed charges.

22. I personally had many conversations with Mr. Joe Cowin, Sprint's general counsel, about this matter. I learned later – after these conversations concluded -- that, since Mr. Cowin knew that Beehive had counsel in Mr. Lukas, it was highly improper, even a breach of professional ethics, for Mr. Cowin, as an attorney for Sprint, to engage in conversation with me as an officer of Beehive. Nevertheless, Mr. Cowin had extensive conversations with me on a frequent basis before I was warned about the impropriety of his conduct. During this time, Mr. Cowin never said anything to me about the fact that this was a violation of his rules of professional conduct and that he should not be having these conversations without the permission of Beehive's counsel, a permission which Mr. Cowin definitely did not have at any time.

23. During the course of these conversations, however, Mr. Cowin, on behalf of Sprint, offered to "settle" the access charge differences then existing between Beehive and Sprint if Beehive would make a so-called "off-tariff" deal, a deal which lowered the rate which Beehive would charge to Sprint under the NECA tariff. From my years of experience in the telecommunications industry, I knew that this proposal, not only was highly irregular, but also egregiously illicit. Under the filed rate doctrine, a telephone company, like Beehive, cannot give this kind of rebate or discount or "settlement" to a customer like Sprint; it offends, among other principles, the anti-discrimination policies of tariffed

service under the telecommunications laws. I told Mr Cowin that this would not be legal and would set up a situation of discriminatory pricing. His response was that this is the only way Sprint was going to pay.

24. As noted above, I theretofore had viewed Sprint's refusal to pay its bills as a form of economic extortion, exercising self-help and withholding payment (of both "disputed" and undisputed charges) in order to "squeeze" a little company like Beehive into compliance with Sprint's wishes. After receiving and rejecting this proposal from Sprint (through Mr. Cowin), I was more convinced than ever that Sprint's goal was extortion through non-payment.

25. I directed our attorneys to prepare and file a lawsuit, seeking to collect these charges from Sprint. That litigation has been protracted. In the meantime, because of the rules of operation of the NECA pool, Beehive has been suffering a terrible loss to cash flow and struggling financially. We have had to defer the payment of some bills, extending and compromisinghers. One of these was a tax liability and, because of this particular delay in payment, Beehive incurred additional charges in penalties and interest. We have had to shelf projects for improved service and service expansions in some of our certificated areas. Matters have not improved; they have gotten worse as the months have passed.

26. Then, in October of this year, this Court dismissed our complaint to collect access charges against Sprint. The Court's ruling, at best, delayed to a still greater extent the prospect of collection from Sprint. The ruling, at worst, means that Beehive may never find a forum for the collection of these charges from Sprint. The FCC will not take

jurisdiction over this kind of a collection suit. Even Sprint's lawyers agree with that proposition. Beehive thus came to a cross-roads where it had to make a choice. It could not tolerate any more bleeding as a result of the NECA pool and the way that pool affects Beehive in view of the non-payment by Sprint. It could not see any immediate relief on the collection front through either this Court or the FCC. Hence, Beehive made a determination, first, to re-allocate its finite and limited trunking resources so that they would give maximum benefit to IXCs which have been paying their billsand less benefit to Sprint which has not paid its bills for over two years (in effect, forcing Sprint to drive only on the shoulder of the toll road, reserving the other lanes for paying customers). Second, Beehive determined to exercise its prerogative under NECA 5 to terminate service to Sprint and sent a notice of termination accordingly.

27. Respecting the first determination, to re-allocate trunking resources, I arranged for this to be accomplished and I also programmed our system so that, whenever a call failed of delivery as the result of this marshalling of resources, the caller would get a message of explanation for the delay in connecting. The purposes to be served by this explanatory message were threefold. First, customers needed to know the cause of the delay in service and where they could go for recourse in solving the problem. Second, if customers were not informed that Sprint, rather than Beehive, had caused the problem, then Beehive might have been blamed. Thus, Beehive's good will, a valuable asset, was at stake, and I did not want to see an erosion of that asset's value when Sprint and not Beehive was to blame for the circumstance which brought this to pass. Third, if no

message had been left, directing customers to contact a person at Sprint for a solution to the problem, customers would have contacted Beehive and this would have meant that Beehive's personnel, time, and resources would have been unfairly taxed in solving a problem which (a) should have been solved by the wrongdoer, Sprint, and (b) essentially was unsolvable in any case by Beehive. The message did not contain a word of untruth. It is undeniable that Beehive's tariff which governs this situation has been approved by the FCC, and it is equally undeniable that Sprint has not been paying the bills which Beehive has submitted for payment to Sprint pursuant to that tariff. Businesses which don't pay their bills, in my opinion, are deadbeats. If I hadn't paid one of my creditors for over two years and the balance of my obligation was $3,000,000, that creditor rightly could call me a deadbeat. The Random House Dictionary of the English Language, Second Edition, Unabridged, defines deadbeat as, "[A] person who deliberately avoids paying debts." That, it seems, is what Sprint is doing in this case.

28. In the message on Beehive's system, I did not "encourage," as Sprint claims, customers to change long-distance carriers. I stated the obvious, namely, that one option available to a customer who wanted an immediate solution to the problem at hand was to change carriers. That was absolutely true. I did not, as Sprint claims, maliciously direct calls to Sprint's president. That was the number at my disposal, and, because I cared about customers getting real relief and an effective solution, rather than a non-response from a help desk which didn't understand the problem, I used that number, confident that

Sprint's president would assist customers as appropriate or that Sprint would route the calls, from its president's number, to a person who could render that assistance.

29. On November 30, 2009, I arranged for Beehive to re-trunk service so that all inter-exchange carriers, including Sprint, as of that date, were receiving equal service. I also arranged for the re-programming of Beehive's system so that the interception of calls and accompanying message was discontinued.

30. All of the actions, noted above, were taken by Beehive in self-defense, as a matter of self-preservation, and, indeed, as a matter of economic survival. Sprint has been pirating service from Beehive, without payment, for over two years. In my view, Beehive has to stop this theft of services and trespass on its network facilities. Beehive has to stop the harm to its cash flow which results monthly from the combined failure of Sprint to pay and the operation of the NECA pool in relation to that non-payment. As set forth in the McCulley Declaration, this amounts to about 90 thousand dollars per month.

31. I have read the Declaration of Ms. Roach which Sprint has submitted in connection with its applications for a restraining order in this matter and she is incorrect in stating that Sprint has adequate "equipment" on Beehive's network to service Sprint's traffic. Indeed, I have no idea what she is talking about as Sprint has absolutely no "equipment" anywhere on Beehive's network. Moreover, Sprint does not have a direct connection to the Beehive network —anywhere – at all.

Executed on December 7th, 2009.

/ s / ______________
Chuck McCown