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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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IN THE MATTER OF THE PETITION OF )	<b>MEMORANDUM IN SUPPORT OF</b>
ALL AMERICAN TELEPHONE CO., )	<b>MOTION IN LIMINE TO PROHIBIT</b>
INC. FOR A <i>NUNC PRO TUNC</i> )	<b>THE DIVISION AND THE OCS FROM</b>
AMENDMENT OF ITS CERTIFICATE )	<b>OPPOSING ALL AMERICAN’S</b>
OF AUTHORITY TO OPERATE AS A )	<b>PROPOSED AMENDMENT TO ITS</b>
COMPETITIVE LOCAL EXCHANGE )	<b>CERTIFICATE AND/OR SEEKING</b>
CARRIER WITHIN THE STATE OF )	<b>THE RECISION OF ALL</b>
UTAH. )	<b>AMERICAN’S CERTIFICATE</b>
)	
)	Docket No. 08-2469-01
)	
)	

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Petitioner, All American Telephone Company, Inc. (“All American”), by and through undersigned counsel, hereby submits the following Memorandum in Support of Motion in Limine to Prohibit the Division and the OCS from Opposing All American’s Proposed Amendment to its Certificate and/or Seeking the Recision of All American’s Certificate.

**BACKGROUND**

One of the issues All American has faced throughout these proceedings has been the refusal of the Division of Public Utilities (“Division”) and Office of Consumer Services (“OCS”) to outline their positions regarding the ultimate relief All American seeks. This is because none of the parties

has ever filed a formal pleading in response to All American's petition. Both All American and Beehive Telephone Co. ("Beehive") repeatedly raised this issue at the scheduling conferences that were held early in the proceeding and asked that each of the intervenors be required to file some sort of position statement. Each time, All American and Beehive received nebulous responses regarding the "evolving" nature of this docket and the need for further "investigation." As a result, All American was left in the dark as to whether the Division and OCS even opposed the proposed amendment to All American's Certificate of Public Convenience and Necessity, much less the bases for any such opposition. This left All American in a highly uncertain position with respect to the evidence it would ultimately need to present at the hearing.

In an effort to resolve the ongoing uncertainty regarding the OCS and Division's positions, All American served each of these parties with interrogatories on September 29, 2009, that asked them to disclose the following information:

**INTERROGATORY NO. 2:** State whether you believe it would be in the public interest for AATCO to operate as a CLEC in the area currently certificated to Beehive Telephone Co., Inc. ("Beehive"). If not, identify each and every reason why you believe it would not be in the public interest. Include in your answer the following information:

- (a) the factual basis for your position;
  - (b) any legal basis for your position;
  - (c) the manner in which you obtained the facts supporting your position;
- and
- (d) the identity of any individuals who have information that may support your position, including their addresses and telephone numbers.

**INTERROGATORY NO. 3:** State whether you believe AATCO's current Certificate of Public Convenience and Necessity, dated March 7, 2007, should be rescinded. If so, identify each and every reason why you believe it should be rescinded. Include in your answer the following information:

- (a) the factual basis for your position;

- (b) any legal basis for your position;
  - (c) the manner in which you obtained the facts supporting your position;
- and
- (d) the identity of any individuals who have information that may support your position, including their addresses and telephone numbers.

*See* Interrogatory Answers from Division and OCS, attached hereto as Ex. "A".

In response, the Division and OCS once again sent non-committal answers to All American.

For example, the Division's response to each of these interrogatories was as follows:

The Division has not yet developed a position on this issue. The Division will be conducting its investigation to develop its position. It will provide that position when developed and pursuant to the schedule in this proceeding. Answer by William Duncan.

*See id.* The OCS's response to each interrogatory, while certainly more verbose, was likewise non-committal:

The Office has made assertions pertaining to All American's request for agency action that are contained in the pleadings the Office has thus far filed with the Commission. In summary, the assertions include: All American's petition in this docket must be the subject of a formal administrative proceeding and that an informal proceeding is improper; to amend the CPCN, All American must establish in a properly filed petition that expanding the CPCN meets all statutory and administrative rule requirements and is in the public interest, including but not limited to a consideration of the regulatory policies, public policies, and public interests pertaining to a CLEC entry into rural exchanges; *nunc pro tunc* relief is not available to All American; All American's original application and amendments and the Commission's order granting a CPCN are relevant to the Commission's consideration of this request for agency action; the facts and circumstances of the drafting and execution of the All American/Beehive interconnection agreement are relevant to the Commission's consideration of the request for agency action; an examination and analysis of the telecommunications services All American represented it would provide and the telecommunications services actually provided are relevant to the Commission's consideration of the request for agency action; the facts and circumstances of All American's unauthorized entry into a rural exchange are relevant to the Commission's consideration of the request for agency action; a

utility may not unilaterally expand its authority by violating the terms of the authority originally granted; an interconnection agreement does not alter or amend the terms and conditions of a telecommunications company's certificate of public convenience and necessity; All American must operate within the bounds of its CPCN; and, the Commission's resolution of these issues necessarily impacts ratepayers and the public interest.

*Id.* A close reading of the foregoing answer reveals that while the OCS believes a number of issues may be relevant to its ultimate position on All American's Petition, it failed to provide a "yes" or "no" answer to the ultimate issues it is being asked to take a position on.

The Division and OCS provided the foregoing answers to All American in October, 2009. Since that time, they have never provided any supplemental answers to these interrogatories, even though the Division expressly stated that it would provide its position "when developed." Rather, the first time the Division and OCS ever took a definitive position with respect to All American's petition and CPCN was when they submitted their pre-filed testimony on February 12, 2010. Such testimony indicates that both the Division and OCS are opposing All American's proposed amendment because they do not believe it is in the public interest. In addition, the Division is now seeking the outright rescission of All American's CPCN. Unfortunately, All American did not know that the Division and OCS were going to take these adversarial positions until less than three weeks before the hearing. This is despite the fact that All American's petition was filed almost two years ago in April, 2008.

The Utah Rules of Civil Procedure, as applied to this proceeding via regulations, are specifically designed to prevent the type of "sandbagging" that the Division and OCS are engaging in. They require parties to supplement their interrogatory answers in a timely manner. They also

require the preclusion of information and materials that are not so disclosed. In this case, since the Division and OCS never supplemented their discovery in order to disclose the positions they are now taking, they must be precluded from asserting these positions at the hearing and from introducing any evidence in support of these positions.

### ARGUMENT

According to the Commission's administrative rules, discovery in formal proceedings "shall be made in accordance with Rules 26 through 37, Utah Rules of Civil Procedure." Utah Admin. Code R746-100-8. These rules impose a duty on parties to supplement their discovery responses in a timely manner if new information regarding their responses is discovered:

A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Utah R.Civ. P. 26(e)(2).

The rules also impose sanctions on parties who fail to supplement their responses in a timely manner. For example, Rule 37 states as follows:

(f) Failure to disclose. If a party fails ... to amend a prior response to discovery as required by Rule 26(e)(2), that party ***shall not be permitted*** to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by Subdivision (b)(2).

Utah R.Civ. P. 37(f) (emphasis added). The additional list of sanctions authorized by Subdivision (b)(2) includes the following:

(b)(2)(A) deem the matter or any other designated facts to be established for the purposes of the action ...;

(b)(2)(B) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence;

Utah R.Civ. P. 37(b)(2).

In applying these rules, courts have stated that they are designed “to avoid surprise or trial by ambush.” *American Stock Exchange, LLC v. Mopex, Inc.*, 215 F.R.D. 87, 93 (S.D.N.Y. 2002) (internal quotations omitted). As such, it is black letter law that information not properly identified by a party in response to discovery requests may not be used at trial. *See, e.g. Work v. Commercial Underwriters Ins. Co.*, 61 F. App'x 120, 2003 WL 342314, at \*3 n.18 (5th Cir. Jan. 30, 2003) (trial exhibits excluded for failure to disclose documents during discovery); *Semper v. Santos*, 845 F.2d 1233, 1237-38 (3d Cir. 1988) (treating physician precluded from testifying at trial because plaintiff failed to supplement discovery responses and identify witness in timely manner); *Scipio v. City of Steubenville*, No. 2L05-CV-759, 2007 WL 1299202 (S.D. Ohio May 2, 2007) (“Plaintiff’s failure to comply with [Rule] 26(a) in connection with the [exhibit] is sufficient reason to exclude the use of this exhibit at trial.”).

This is consistent with Rule 37, which generally states that a party who fails to properly supplement their discovery responses “**shall not be permitted** to use the witness, document or other material at any hearing....” Fed. R Civ. P. 37(c)(1). This result is generally “automatic and mandatory.” *Salgado ex rel. Salgado v. GMC*, 150 F.3d 735, 742 (7th Cir. 1998); *accord Campbell v. Keystone*, 138 F.3d 996, 1000 (5th Cir. 1998) (excluding expert witnesses identified after pretrial order deadline in part because the party failed “to proffer any explanation for its failure to designate

[its expert] in a timely fashion").

In this case, there is no question that the Division and OCS concealed their positions with respect to All American's petition until the eleventh hour, when they were finally forced to submit their pre-filed testimony to the Commission. Such tactics are fundamentally unfair and have substantially prejudiced All American's ability to prepare for the upcoming hearing. In fact, All American was required to submit its own pre-filed testimony without knowing that the Division and OCS were even going to raise any opposition. This type of gamesmanship is inconsistent with Commission's presumed goal to conduct fair and open proceedings.

The Division and OCS had almost two years to conduct a full and complete investigation regarding All American's petition and to develop their positions as to whether it should be opposed. There is no justification for these parties' decision to conceal such positions until nineteen days before the hearing. As such, Rule 37 requires that the Commission prohibit the Division and OCS from asserting these last minute arguments at the hearing.

### **CONCLUSION**

Based on the foregoing, All American respectfully requests that the Commission grant All American's Motion in Limine and prohibit the Division and OCS from (1) opposing All American's proposed amendment to its Certificate of Public Convenience and Necessity ("CPCN"), (2) seeking the rescission of All American CPCN at the hearing in this matter scheduled for March 3-4, 2010, and/or (3) introducing any evidence in support of these positions.

Dated this 26th day of Feb 2010.

**JENSON & GUELKER, LLC**

By: \_\_\_\_\_

GARY R. GUELKER

Attorneys for Petitioner



## CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May 2010, the foregoing **MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO PROHIBIT THE DIVISION AND THE OCS FROM OPPOSING ALL AMERICAN'S PROPOSED AMENDMENT TO ITS CERTIFICATE AND/OR SEEKING THE RECISION OF ALL AMERICAN'S CERTIFICATE** was sent by electronic mail to the following:

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