

GARY R. GUELKER (Bar No. 8474)
JANET I. JENSON (Bar No. 4226)
JENSON & GUELKER, LLC
747 East South Temple, Suite 130
Salt Lake City, Utah 84102
Telephone: (801) 579-0800
Facsimile: (801) 579-0801
Attorneys for Petitioners

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION OF)	ALL AMERICAN TELEPHONE
ALL AMERICAN TELEPHONE CO.,)	COMPANY'S POST-HEARING BRIEF
INC. FOR A <i>NUNC PRO TUNC</i>)	
AMENDMENT OF ITS CERTIFICATE)	Docket No. 08-2469-01
OF AUTHORITY TO OPERATE AS A)	
COMPETITIVE LOCAL EXCHANGE)	
CARRIER WITHIN THE STATE OF)	
UTAH.)	

Pursuant to the briefing schedule established by the Presiding Officer at the close of the hearing on March 3, 2010, All American Telephone Company, (“All American”) respectfully submits the following Post-Hearing Brief to discuss the reasons why the Utah Public Service Commission (“Commission”) should grant All American’s Petition in this matter.

BACKGROUND

All American commenced this proceeding on April 23, 2008, when it petitioned the Commission for a *nunc pro tunc* amendment to its existing Certificate of Public Convenience and Necessity (“CPCN”). Specifically, All American wanted to expand the scope of its CPCN so that it would be authorized to provide public telecommunications services in those areas of the State currently being served by Beehive Telephone Company (“Beehive”), the incumbent local exchange

carrier. Furthermore, All American requested that the amendment be applied retroactively to September 10, 2007, which is the date on which the Commission approved All American's interconnection agreement with Beehive.

On June 16, 2009, the Commission made a number of legal rulings regarding the proposed amendment to All American's CPCN. For example, the Commission determined that it did not have the legal authority to grant relief on a *nunc pro tunc* basis, and that any amendment to All American's CPCN would only be granted on a prospective basis. The Commission also decided that it could not summarily grant the proposed amendment and that a full evidentiary hearing needed to be conducted before it could rule on the petition. Finally, the Commission outlined the legal standard it would follow in determining whether the proposed amendment to All American's CPCN should be granted. It stated that the Commission uses "the factors listed in UCA 54-8b-2.1, e.g. sufficient technical, financial, and managerial resources, considerations of the public interest, etc. in determining whether a certificate should be amended."¹ These rulings were also affirmed in the Commission's subsequent Report and Order dated August 24, 2009.

The Commission's prior rulings have now limited the relevant issue in this case to whether All American's proposed entry into Beehive's territory meets the legal standards set forth in Utah Code Ann. § 54-8b-2.1(2), which sets out a two part test:

- (2) The commission shall issue a certificate to the applying telecommunications corporation if the commission determines that:
 - (a) the applicant has sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for; and

¹ See Report and Order dated June 16, 2009, at p.13.

(b) the issuance of the certificate to the applicant is in the public interest.

Based on the evidence presented at the hearing in this matter on March 3, 2010, and for the reasons stated more fully below, the Commission should find that All American has satisfied the requisite legal standard for entry into Beehive's territory. This is especially true in light of All American's willingness to limit the scope of its services in Beehive's territory to those which it is currently providing: switched access services to conference call companies such as Joy Enterprises. The evidence shows that All American certainly has the necessary resources to provide this type of service, as evidenced by its demonstrated ability to provide switched access service to Joy Enterprises successfully for several years.

More importantly, there has been no evidence which shows that the proposed amendment would be adverse to the public interest. There is not even a scintilla of evidence to show that any of the consumers who reside in Beehive's territory will be adversely affected by All American's entry, through either higher rates or a decrease in the quality of services. Nor is there any evidence which shows that All American's activities will harm the ILEC or have an anti-competitive effect. In fact, Beehive has consented to the proposed amendment. There is also no evidence which shows All American's activities will adversely affect on the Universal Service Fund. Rather, the evidence affirmatively shows that All American's entry into Beehive's territory will have a positive effect on the local economy and provide Beehive with increased revenue, which in turn can be used to improve Beehive's infrastructure and its quality of service. In other words, there is nothing which shows that All American's activities in Beehive's territory have had, or will have, any negative impact on any interested party. Therefore, All American respectfully requests that the Commission

grant the proposed amendment to All American's existing CPCN so as to authorize All American to service conference call companies in Beehive's territory.

ARGUMENT

I. The Services All American is Seeking to Provide in Beehive's Territory Are Limited.

Before the Commission can examine whether All American's entry into Beehive's territory satisfies the requisite legal standard, it must first have a clear understanding of the scope of services All American is seeking to provide. In its Amended Petition, All American did not seek a broad amendment to its CPCN that would authorize it to provide a full array of public telecommunications services within Beehive's territory. Rather, All American only sought authority to operate in Beehive's territory "to the extent of the terms and conditions of that interconnection agreement" between All American and Beehive.² Then, as this proceeding progressed and the parties' concerns were more clearly articulated, All American again limited and clarified the scope of services it was seeking to provide in Beehive's territory. It stated that it was willing to accept an amendment to its CPCN that limited the scope of its services in Beehive's territory to switched access service for conference call companies such as Joy Enterprises.³ Therefore, these are the only types of services that the Commission should analyze pursuant to section 54-8b-2.1(2).

It is important to understand that Utah law does not require CLECs to be capable of providing every type of service to every customer in the territory who seeks a particular service. Rather, either

² Amended Petition at ¶ 4.

³ See Exhibit P-2 at lines 93-108 and Hearing Transcript ("Tr.") at 52:24 – 53:5.

an applicant or the Commission may seek to limit the scope of services that will be provided pursuant to a CPCN by limiting either the geographic area of the services to be provided or the type of services to be provided. For example, section 54-8b-2.1(1) states:

[T]he commission may issue a certificate to a telecommunications corporation authorizing it to compete in providing local exchange services or other public telecommunications services in all *or part of the service territory* of an incumbent telephone corporation....

(emphasis added). This same statute goes on to state:

The commission shall issue a certificate to the applying telecommunications corporation if the commission determines that:

(a) the applicant has sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services *applied for*;

Utah Code Ann. § 54-8b-2.1(2) (emphasis added). In other words, the certification process for CLECs clearly contemplates potential limitations on the geographical area within which a CLEC may operate and on the types of services the CLEC can provide.

The foregoing statutes are also consistent with the Commission's own administrative rules. These rules recognize that CLECs are not obligated to provide the full array of telecommunications services to every customer within a service area. Rather, a CLEC's obligations in this regard are limited to those services which it has the technical and financial capability to provide. As stated in Rule 746:

R746-349-8. CLEC's Obligations with Respect to Provision of Services.

A. The CLEC agrees to provide service within specified geographic areas upon reasonable request and subject to the following conditions:

1. the CLEC's obligation to furnish service to customers *is dependent on the availability of suitable facilities* on its network at company-designated locations as

identified in its annual network route map filing;

2. the CLEC will *only* be responsible for the installation, operation, and maintenance *of services that it provides*;

3. the CLEC will furnish service *if it is able to* obtain, retain and maintain suitable access rights and facilities, without unreasonable expense, and to provide for the installation of those facilities required incident to the furnishing and maintenance of that service;

* * *

6. all construction of facilities will be undertaken *at the discretion* of the CLEC, consistent with budgetary responsibilities and consideration for the impact on the CLEC's other customers and contractual responsibilities.

(emphasis added).

Based on the foregoing, there is nothing which prevents the Commission from amending All American's CPCN so as to allow it to operate in Beehive's territory on a limited basis. Therefore, since All American does not object to a CPCN which would limit its activities in Beehive's territory to the servicing of conference call companies, the Commission should consider All American petition with such limits in mind.

II. All American Has The Necessary Resources to Serve Conference Call Companies Such As Joy Enterprises.

In order to grant the proposed amendment to All American's CPCN, the Commission must first determine that All American "has sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for...." Utah Code Ann. § 54-8b-2.1. In this case, All American has presented sufficient evidence to support such a finding.

As an initial matter, the Commission has previously determined that All American possesses the resources necessary to provide public telecommunications services in the state of Utah. This

finding was made in March, 2007, when the Commission granted All American's existing CPCN for the Qwest territory. In order to obtain this CPCN, All American was first required to file an application that contained all of the information necessary for the Commission to analyze a telecommunications company's resources,⁴ as outlined under the Commission's rules.⁵ All American is not seeking to provide any services that are inconsistent with those outlined in its original application for a CPCN.⁶ Therefore, the Commission should adhere to its previous finding that All American has the requisite resources to provide switched access services to conference call companies in Beehive's territory.

In addition to the approval of its existing CPCN, All American has provided additional evidence to show that it has the managerial resources necessary to provide the services for which it is applying. For example, All American's President, David Goodale, testified that he has worked in the telecommunications industry for over twenty years and that such experience has provided him with the capability to effectively manage All American's operations.⁷ The company also employs an experienced CPA to assist Mr. Goodale in preparing and generating the company's financial statements, quarterly reports, tax returns and other financial documents.⁸

All American has also provided additional evidence which shows that it has the financial

⁴ Exhibit P-1 at lines 39-58.

⁵ See Utah Admin. Code R746-349-3.

⁶ *Id.* at lines 75-77.

⁷ Tr. at 38:21 – 39:7.

⁸ *Id.* at 45:24 – 46:14.

resources to provide the services for which it is applying. It has produced annual reports for 2007 and 2008 which show its annual revenue and expenses.⁹ Furthermore, Mr. Goodale testified that All American has met all of its financial obligations since beginning its operations:

A. [Mr. Goodale] I'll tell you this, though.

Q. [Mr. Proctor] Please.

A. Nobody's given any bill to All American Telephone that hasn't been paid. We are responsible for taking care of our obligations.

And our accounting that you see there [in the annual reports], those -- that accounting has been prepared for our internal use. And my CPA is very diligent about making sure that everything is taken care of properly.

Q. I have no doubt about that.¹⁰

In other words, the evidence shows that All American has certainly been able to meet its financial obligations so as to maintain its ability to provide conference call servicing in Beehive's territory.

Finally, All American has certainly proven that it has the technical resources to provide the service for which it is applying. For example, the evidence shows that All American uses its switch located in Garrison, Utah, to terminate calls made to the phone numbers All American has assigned to Joy Enterprises, a provider of free conference calling.¹¹ The switch All American currently uses to provide this service is a Taqua 7000 switch.¹² This switch was purchased less than two years ago and is considered to be "state of the art" in the industry.¹³ This new switch is more reliable than All

⁹ See Exhibit DPU-3.

¹⁰ Tr. at 142:13-22.

¹¹ Exhibit P-1 at lines 228-235.

¹² *Id.* at 238-40.

¹³ Tr. at 68:9 – 69:23.

American's previous equipment and it is capable of handling several thousand calls simultaneously.¹⁴ As a result, All American has not received any complaints from Joy Enterprises or any of Joy's customers regarding the quality of All American's switching services.¹⁵ In other words, All American has proven that it will invest its resources in the best equipment available so that it may continue to provide top-quality, uninterrupted switching services to Joy Enterprises and its customers.

In response, none of the interveners has challenged the quality of All American's equipment or its services. Nor has anyone challenged its ability to meet its financial obligations. Rather, the Division and the Office of Consumer Services' responses have been to challenge All American's managerial abilities by shifting the focus from All American's exceptional services to decisions that were made three and four years ago in connection with All American's application for its existing CPCN. In its application, All American represented that it only intended to provide services in the Qwest service territory when it actually intended to provide services in Beehive's territory. The Division and the OCS are now using this four-year old mistake to argue that All American is currently undeserving of an amended certificate.

In determining whether the mistakes surrounding All American's initial application for a CPCN justify the denial of All American's current petition, even in light of the high quality of its current services, the Commission must also take into consideration the significant efforts All

¹⁴ *Id.* at 69:21 – 70-15.

¹⁵ *Id.* at 44:18-24.

American's management has taken to try to rectify the company's mistakes and voluntarily bring itself into compliance. For example, All American has admitted that the application for its existing certificate was too narrow in scope because it did not include Beehive's territory.¹⁶ However, All American and Beehive later approached the Commission and made a public and open application for an interconnection agreement.¹⁷ By filing this agreement with the Commission, All American openly and publically stated its intent to operate in Beehive's territory. The Commission eventually approved the agreement, despite the scope of All American's existing certificate.¹⁸

After receiving approval of its interconnection agreement, All American again decided to take additional steps to bring itself into compliance. It filed its petition in this docket in an effort to resolve any discrepancies that existed between its original certificate, its interconnection agreement with Beehive, and the operations it was providing. By doing so, All American's management was exhibiting its desire to comply with the law now and in the future. Such conduct is not indicative of a company intent on violating the law, but rather of a company that is taking all the steps necessary to bring itself voluntarily into compliance. As Mr. Goodale explained in his testimony at the hearing:

It's quite obvious I've gotten -- I've received some bad counsel. I am aware of that. And I, I'm not very proud of the fact that I've done some things that have not been to the best interest of our own company. By far more troublesome than I'd ever imagined.

¹⁶ Exhibit P-2 at lines 24-43.

¹⁷ Exhibit P-1 at lines 111-142.

¹⁸ *Id.*

And I'm here today trying to rectify that. And I have competent counsel that's trying to help me get through this. And I believe to be excellent counsel. I have never been perfect. I don't profess to be perfect today. But I do profess to try and do what is right to meet the letter of the law, if not exceed the minimum of the letter of the law. And get through this and get on with the process of being productive.

You know, we keep rehashing what I did wrong and what wasn't done just right. I want to know what I can do right now to make things right and move forward.¹⁹

It is also important to note that while All American's prior operations in Beehive's territory may have exceeded the territorial scope of its CPCN, there has been no evidence that such operations resulted in any actual harm to local consumers or the public at large. Rather, as will be discussed more fully below, All American's operations in Beehive's territory have had a positive effect on the local economy and telecommunications infrastructure.

Any decision by the Commission to deny All American's petition based solely on its past mistakes would be inconsistent with State policy regarding flexible regulation, especially where All American is taking affirmative steps to correct those past mistakes. In the Public Utilities Code, the Legislature stated that it is the policy of this State to "allow *flexible and reduced regulation* for telecommunications corporations and public telecommunications services as competition develops."²⁰ In this case, neither the Division nor the OCS has asked the Commission to be flexible in its regulation of All American. Rather, these two entities have gone so far as to seek the revocation of All American's existing CPCN. This is despite the fact that All American itself is the party which initiated this proceeding. It affirmatively sought to bring itself into compliance.

¹⁹ Tr. at 136:14 – 137:7.

²⁰ Utah Code Ann. § 54-8b-1.1(4).

Unfortunately, the response has been vigorous and zealous opposition from the very state agencies whose duty should be to abide by and enforce the State's espoused policy of "reduced and flexible regulation." To the contrary, their opposition to All American's CPCN and their subsequent push to revoke it border on the punitive and fly directly in the face of the Legislature's stated policy of flexibility.

In determining whether All American's petition should be granted, the Commission's goal should not be to punish All American for past mistakes. This is especially true where All American's petition was motivated by its desire to correct these past mistakes. Rather, the proper focus is whether All American *currently* has the managerial, financial and technical resources to provide switched access service to conference call companies in Beehive's territory. Based on the evidence presented at the hearing, the Commission should find that All American has met its burden in this regard.

III. The Services All American Seeks to Provide in Beehive's Territory Are In the Public Interest.

Once the Commission determines that All American has the resources needed to provide switched access service in Beehive's territory, the next step is to determine whether allowing All American to provide such services is in the public interest.²¹ In this case, All American has met this standard. For example, its switched access services help to facilitate a valuable commodity to the public, namely free conference call servicing. All American's services have also allowed the ILEC to significantly improve the quality of its own services without having to utilize the Universal

²¹ Utah Code Ann. § 54-8b-2.1(2)(b).

Service Fund. Finally, there has been absolutely no evidence that All American's services will result in increased telecommunications costs for local consumers or adversely affect the quality of services these consumers receive. Therefore, All American has satisfied the requisite legal test for the proposed amendment to its CPCN.

A. The Free Conference Call Services That All American Facilitates Are Valuable to the Public and Are in the Public Interest.

As stated more fully above, All American is seeking an amendment to its CPCN that allows it to provide switched access service to conference call companies in Beehive's territory. All American has been providing such services to a company, Joy Enterprises, for several years. In his pre-filed testimony, Mr. Goodale explained that Joy Enterprises provides both business and social networking conference calling services to customers across the country. These services allow multiple people to join and participate in a single telephone call and communicate with one another simultaneously. Each individual participating in the conference call connects to the call by dialing a number that has been assigned to Joy Enterprises by All American. These calls are then connected to Joy Enterprises' conference bridges, which in turn connect the conference call participants to one another.²²

While Joy Enterprises provides conference communications services for consumers, the evidence shows that the company does not actually promote any particular kind of speech. Mr. Goodale testified that anyone calling these services is free to talk about any topic of choice just as

²² Exhibit P-1 at 186-92.

they would on a private two party call. All American simply provides groups of individuals with the freedom to discuss any particular topic they want without having to be in the physical presence of one another. It is similar to the way in which Qwest, AT&T or any other IXC does not have any concern over the topics that are discussed by their customers while using their service. The IXCs simply provide the technology which allows its customers to communicate. Joy Enterprises is no different than these IXCs, other than the fact that their customers communicate with one another on a group basis.²³

There are many different ways the public can benefit from Joy Enterprises' services. For example, consumers use the services for business purposes such as client meetings or sales presentations. Conference calls can also be used for entertainment and social purposes. These include phone numbers that are used as community chat rooms. In fact, the types of groups and individuals who can benefit from these services are virtually endless. For example, members of a church congregation can call one another and participate in a prayer group. Individuals living in remote areas can participate in twelve-step or other types of recovery programs on a frequent basis without having to travel long distances. Students can call one another from their homes and participate in study groups. Family members who live in different parts of the country can join a call to plan for a family reunion. Single individuals can use the service for dating purposes.²⁴ In other words, the benefits that can be derived from these services span across the public spectrum.

²³ Exhibit P-1 at lines 212-224.

²⁴ *Id.* at lines 193-209.

The most important reason why Joy Enterprises' services are so valuable to the public is that Joy Enterprises does not charge a service fee for the conference call. Rather, the consumer simply pays the normal cost he or she would pay to make a long-distance call.²⁵ Mr. Goodale further explained the public benefit of these services in his testimony at the hearing:

These [conference call] services we're referring to have originated back in 1994 with Joy Enterprises having been a customer of Beehive Telephone for quite some time before they L&P'd their numbers over to our services at All American Telephone. And we've continued to provide the service through All American.

The services themselves are of great value to the community at large. There's business conference calling services that are made available to nonprofit organizations who prefer to use them because they can't afford to pay \$0.50 a minute for conference calling services with AT&T, or MCI, or companies – other companies that provide them.

This is a financial benefit to everybody that's -- uses the service within the State of Utah, as well as throughout the United States.²⁶

At the hearing, there was a spurious attempt by Qwest Corp. and its witness to portray Joy Enterprises as an operator of so-called "adult" chat lines. However, once the rhetoric and innuendo were set aside, it became apparent that there was very little evidence to support this allegation. The only evidence presented to support Qwest's position was testimony from a Qwest employee who stated that she placed Joy Enterprises' phone number block into the Google internet search engine and found a single internet posting from an unknown source who stated that one of Joy Enterprises' number could be used for adult chat.²⁷

²⁵ *Id.* at lines 252-54.

²⁶ Tr. at 47:3-18.

²⁷ Exhibit Qwest-1 at lines 249-260.

As an initial matter, the fact that the foregoing internet search was performed by a Qwest employee necessarily brings its neutrality into question. As a provider of conference call services, Qwest and its employees have an obvious interest in damaging Joy Enterprises' business relationships. The fact that Qwest's employee did not print out or recreate the entire internet page showing the results of her search also brings the accuracy of the search result into question. The employee instead provided a partial quote filled with ellipses.²⁸ As such, it is impossible to place this alleged quote in its full context or verify its accuracy.

In any event, there is certainly no reason to believe that this internet posting was created or prompted by Joy Enterprises or All American. The fact that this Qwest employee did an internet search of All American's entire phone number clock and could only find a single reference to one number allegedly being used to engage in "adult chat" is hardly indicative of a concerted effort by Joy Enterprises to promote a so-called porn service. To the contrary, it supports the fact that Joy's conferencing communication services are topic neutral and are not promoted by Joy as porn or adult sex services.

Finally, Qwest suggests that there is no way to prevent minors from accessing Joy Enterprises' conference call services and that the numbers could potentially be used for inappropriate discussions with children. However, this is patently untrue. In fact, Mr. Goodale testified at the hearing that Joy Enterprises has taken affirmative steps to protect minors from such activity:

Q. [Mr. Guelker] Another issue that was raised by Qwest was you testified about your ability to block calls that were, that were coming in to All American and then

²⁸ *Id.* at lines 262-65.

being terminated with Joy. And I believe you indicated that you [All American] don't have any specific procedures set up to block those types of calls.

Let me ask you, though, are you aware, does Joy Enterprises have any protocols in place to monitor or block calls made to -- that are terminated with -- in its conference services?

A. [Mr. Goodale] Yes.

Q. Thank you. Could you describe those, please?

A. If a minor calls and a monitor detects a minor on the, the services that we've mentioned earlier, being open-forum conversation, they would block that minor from calling so that you can't call back, and then have them disconnected.

If somebody calls that is disruptive or promoting some activity that would be undesirable, they have the ability to mute that caller so nobody else can hear 'em. If somebody's making racial comments and slanderous comments they can block the call so nobody can hear it.

That's the kind of thing that they protect, and we -- the quality of the service that they're providing.²⁹

Qwest's mischaracterization of Joy Enterprises as an operator of adult chat lines is nothing more than conjecture. It has failed to produce a shred of evidence that Joy Enterprises' efforts to limit access to minors has been unsuccessful. For example, it has not produced any complaints from the public made to Qwest, Joy Enterprises or any government agencies regarding children accessing these chat rooms. Rather, it appears Qwest is motivated by a desire to disparage one of its competitors in the business of conference calling.

The actual evidence presented in this case shows that the conference call services All American is facilitating via its switched access services are providing a valuable benefit to the public. They allow people from around the country to engage in open discussions at an affordable cost. As such the Commission should use its regulatory powers to promote this type of activity and allow All American to provide such services in Beehive's territory.

²⁹ Tr. at 183:10 – 184:10.

B. All American's Services In Beehive's Territory Will Benefit Local Consumers, Rural Telephone Companies and the Universal Service Fund.

In addition to facilitating a valuable service to the public, All American's services in Beehive's territory will result in additional benefits to Beehive and its customers, as well as the Universal Service Fund ("USF"). As a transiting carrier of calls made to Joy Enterprises, Beehive is entitled to charge IXCs for the switched access service it provides in carrying calls to All American's switch. Accordingly, the increased traffic to Beehive's network that results from calls made to All American's switch will lead to increased income to Beehive. This increased income will allow Beehive to make increased investments towards the improvement of its network infrastructure and to improve the quality of its coverage, service and capacity without having to access the USF. In fact, Joy Enterprises' ongoing presence in Beehive's territory has already produced such results. As Mr. Goodale explained in his testimony at the hearing:

Q. [Mr. Guelker] [D]o you believe that Beehive Telephone Company and its customers derive any benefits from the services you're providing in their territory?

A. [Mr. Goodale] Absolutely. These services were the foundation for the growth that Beehive Telephone had experienced since 1994. At that time they had 17 employees. And subsequently they've increased their staffing to 85 employees. And in that period of time they've been able to take out of earnings and reinvest in their inner structure. And have subsequently increased their fiberoptic cabling, including 350 miles of new fiber that they've laid.

They've upgraded all of their switches. And they've brought DSL service to virtually all of their residential and business customers. They've been able to upgrade their 7 -- 13 different local offices. And they've had high-capacity microwaves installed in Southern Utah.

They have done all of this without any state Universal Service Funds assistance. And by not drawing from it and still paying into it, that in turn has made more money available to the other small telephone companies that you're -- throughout the state of Utah.

At least it makes sense to me that it would have.³⁰

It is important for the Commission to understand that All American's services in Beehive's territory will not only result in benefits to consumers in Beehive's territory, but also to consumers throughout rural Utah. This is because a number of rural providers also derive income from traffic routed to All American's switch, which is then used by these companies to improve their own infrastructure. For example, Mr. Goodale explained how All American's traffic allowed several rural companies to improve the quality of their services through the purchase of their own tandem switch:

[T]here's about nine small telephone companies that are also involved with the Utah Fiber Network that was established to be the tandem switching services for all of these small phone companies.

They were able to do that because of the high volume of service that was being serviced through their switch. And subsequently added to, what at that time was about 50 percent of their revenue, came from the traffic that Joy Enterprises had serviced.

That made it a financially-viable option to increase the quality of their service to all of their customers. And the reason they took this action originally was because they were getting inadequate service from Qwest and weren't getting the kind of backup they needed from the tandem.

This has definitely benefited the customers that they serve throughout the state. And that has also benefited us, because we've had better service. And I look forward to remaining in the State of Utah and contributing to the increased service of -- that we're doing now. And being a supporting member of their organization by using their service.³¹

Unfortunately, if the Commission determines that All American is not entitled to an amendment to its CPCN, Beehive and other rural providers in the this State will no longer benefit

³⁰ Tr. at 47:19 – 48:21.

³¹ Tr. at 49:1-23.

from the income derived from All American's switching service. This is because Joy Enterprises will direct all of the traffic to its conference call services to All American's second switch located in Nevada. As Mr. Goodale testified:

Q. [Mr. Guelker] If the Commission is inclined to deny All American's petition for an amendment, what will be its business response, if any? Will you be required to move your traffic to a different location?

A. [Mr. Goodale] Well, we would be forced to do something different. And we would have to take our traffic out of that [Utah Fiber] network and bring it to another network. We have other states we're certified to bring service in, and we can move that traffic if necessary.

Q. Okay. What state is that located in?

A. Nevada.

Q. Okay. But that wouldn't result in the Beehive or any other -- that wouldn't result in Beehive receiving these continued access fees for these, these types of calls, would it?

A. They, they would lose any revenue that they're receiving in the State of Utah that benefited from our service.³²

In sum, the Commission's decision in this matter will have one of two results. If the Commission decides to amend All American's CPCN and allow it to service conference call companies in Beehive's territory, Beehive and other rural telecom companies will continue to realize income from the traffic delivered to All American's switch, which in turn can be used to improve telecommunications services for rural consumers. If the Commission chooses not to grant the amendment, the rural telecom companies will no longer receive such income, as All American will be forced to move its operations to Nevada. A potential ripple effect of this lost income will be an increased need for rural telecom companies to access the Universal Service Fund in order to maintain their current level of services. Based on its desire to remain in Utah, All American respectfully

³² Tr. at 49:24 – 50:17.

requests the Commission to follow the former route and amend All American's existing CPCN.

C. There Is No Evidence That All American's Activities in Beehive's Territory Will Adversely Affect the Public.

Since All American has agreed to accept an amendment to its CPCN that limits the scope of its services in Beehive's territory, there is no evidence that such activities will have a negative impact on the public interest. For example, Mr. Goodale has testified that All American is not seeking to serve any other customers in Beehive's territory other than Joy Enterprises.³³ As such, All American is not competing against Beehive and its presence will not result in a loss of customers to Beehive. Accordingly, there is no reason to believe that Beehive will need to increase its rates or request funds from the USF in order to maintain its current level of service. To the contrary, All American's presence has resulted in increased income to Beehive which has been used to improve its infrastructure, hire more employees and increase the quality of services it renders to its customers.

In its pre-filed testimony, the Division wrongly contends that All American must meet an even higher standard than what has been presented above in order to satisfy the public interest standard. Specifically, it relies on the Commission's decision in *In re Bresnan Broadband, LLC*, Docket No. 07-2476-01, to argue that a CLEC can only obtain a CPCN for a rural area if it can show that its operations will result in increased "competitive choice."³⁴ In turn, the Division argues that All American's petition should be denied because it has not shown how its services will result in a

³³ Exhibit P-2 at lines 112-17.

³⁴ Exhibit DPU-8 at lines 266-276.

wider range of choices or increased competition in Beehive's territory.³⁵

The Division's reliance on the *Bresnan* decision for the appropriate "public interest" standard in this case is misplaced. This is because the facts in *Bresnan* are so divergent from those presented at the hearing in this matter. Unlike All American, *Bresnan* was seeking to enter a rural ILEC's territory and compete directly for the ILEC's existing customers. Specifically, *Bresnan* wanted to offer the ILEC's existing customers an alternative source for their residential and business telephone service, namely cable telephony. Furthermore, the rural ILEC opposed *Bresnan*'s entry because it felt *Bresnan* would simply "cherry-pick" customers from the ILEC's low cost exchanges, thus resulting in lost income to the ILEC and a negative impact on the USF.

Under the scenario presented in *Bresnan*, it made sense for the Commission to examine whether or not the CLEC's entry would result in increased competitive choice. This is because the Commission had an interest in ensuring that any duplication in services would be offset by better choices and services for the consumers. However, in this case All American is not seeking to compete directly with Beehive and it will not be offering duplicative services to Beehive's existing customers. In fact, Beehive has consented to All American's operations in Beehive's territory. As such, there is no need to examine the issue of "competitive choice." Rather, it only makes sense to apply this factor to a CLEC when there is opposition from the ILEC or where a duplication of services will result in one of the companies being unable to operate efficiently. Neither of these factors is present in this case.

³⁵ *Id.* at lines 281-294.

In sum, the evidence in this case overwhelmingly shows the services All American seeks to provide in Beehive's territory are in the public interest. It seeks to facilitate conference call services to consumers across the country so that they receive the benefit of remote group conferencing at an affordable price. All American's entry into Beehive's territory will have a positive effect on the local economy and provide Beehive and other rural providers with increased revenue, which in turn can be used to improve these companies' infrastructure and quality of service. Finally, there is nothing which shows that All American's activities in Beehive's territory have had, or will have, any negative impact on the public interest. None of the consumers who reside in Beehive's territory will be adversely affected by All American's entry, through either higher rates or a decrease in the quality of service. Nor will All American's activities harm the ILEC or have an anti-competitive effect. There is also no evidence which shows All American's activities will have an adverse effect on the Universal Service Fund. Therefore, All American respectfully requests that the Commission grant the proposed amendment to All American's existing CPCN so that it may lawfully serve conference call companies in Beehive's territory.

III. The Issue of Traffic Stimulation Is Irrelevant to This Proceeding.

For the past several years, All American and other rural LECs have become involved in several billing disputes with various IXCs regarding the obligation of these IXCs to pay access service charges for calls terminated with conference call companies such as Joy Enterprises. The IXCs have argued that All American and other rural LECs are engaging in so-called "traffic pumping schemes" at the IXCs' expense by locating themselves in rural areas that have higher access rates. In turn, the IXCs have argued in various courts around the country that they have no obligation to

pay any access charges for calls terminated by these rural LECs.

Two of these IXC's, Qwest and AT&T, have now intervened in this matter to argue that All American should not be granted an amended CPCN because the access charges All American previously billed to these IXC's were somehow improper. However, it appears the IXC's underlying goal is to establish some sort of precedence on this issue that can be used against All American in current or future lawsuits.

As an initial matter, it is false and misleading for the IXC's to characterize All American's conferencing arrangement with Joy Enterprises as fraudulent, unlawful, or irregular. In fact, the term "traffic-pumping" is not even a generally recognized term of art. Rather, it is phrase invented by IXC's which they use to describe legitimate efforts by rural telecommunications companies to increase traffic in their local exchanges.

In any event, All American's ongoing billing dispute with these IXC's over the appropriate access charge rate for call terminated with Joy Enterprises should have no bearing on the Commission's ultimate decision because it is irrelevant to whether All American's activities are in the public interest. This dispute has no bearing on the quality of the services that All American is providing. It is nothing more than a civil dispute between private companies that falls outside the scope of this Commission's oversight.

Furthermore, none of the IXC's has provided any legal authority which shows that All American's business practices are illegal or fraudulent. It is true that conferencing systems may increase traffic which terminates at local exchanges which, in turn, could cause the IXC's to incur additional access charges. However, rural telcos, like the IXC's, are profit-seeking businesses that

are always striving to increase traffic over their networks. In fact, the IXCs engage in traffic stimulation all of the time through advertising and other artificial stimulants in order to garner customers who will use their services. The IXCs, while claiming the right to increase sales for themselves, apparently do not want to extend the same liberty to others.

Nevertheless, even if the Commission had concerns regarding All American's access charge rates, this proceeding is not the proper forum to address the issue. If the Commission or IXCs wanted to litigate the merits of these types of access charges, the party seeking an investigation should be required to open up a separate rule-making docket so that all voices can be heard. There is simply no legal authority which allows the IXCs to use All American's petition for an amendment to its CPCN as a means to litigate the legitimacy of access charges and then try to apply any findings to All American retroactively. The proper course of action would be for the Commission to first grant All American's petition and then address any potential concerns it may have over traffic stimulation in a separate proceeding.

CONCLUSION

Based on the foregoing, All American respectfully requests the Commission to grant All American's petition and amend All American's existing CPCN so as to authorize All American to provide switch access service to conference call companies in Beehive's territory as it is currently doing for Joy Enterprises.

DATED this 24th day of March, 2010.

JENSON & GUELKER, LLC

By: _____
GARY R. GUELKER
JANET I. JENSON
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November 2010, the foregoing **ALL AMERICAN TELEPHONE COMPANY'S POST-HEARING BRIEF** was sent by electronic mail to the following:

Michael L. Ginsberg
Assistant Attorney General
160 East 300 South 5th Floor
Heber Wells Building
Salt Lake City, UT 84111
mginsberg@utah.gov

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

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

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

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

George Baker Thomson, Jr.
Qwest Corporation
1801 California St., 10th Flr.
Denver, CO 80202
george.thomson@qwest.com