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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION OF ALL AMERICAN TELEPHONE CO., INC. FOR A *NUNC PRO TUNC* AMENDMENT OF ITS CERTIFICATE OF AUTHORITY TO OPERATE AS A COMPETITIVE LOCAL EXCHANGE CARRIER WITHIN THE STATE OF UTAH.	)	**ALL AMERICAN'S APPLICATION FOR REVIEW AND REHEARING OF THE COMMISSION'S ORDER DATED APRIL 26, 2010** Docket No. 08-2469-01

Petitioner, All American Telephone Company, Inc. ("All American"), by and through undersigned counsel, and pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, hereby submits the following Application for Review and Rehearing of the Order issued by the Public Service Commission of Utah (the "Commission") in this matter on April 26, 2010.

BACKGROUND

I. Prior Proceedings

On March 7, 2007, the Commission granted All American a Certificate of Public 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.

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. 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).

II. The Current Proceeding.

Soon after the interconnection agreement was approved by the Commission, All American realized that the agreement was 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 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.

After filing its petition to amend its CPCN, All American did not receive any formal response to its request from the Division or any other third party. In fact, neither the Division nor the Commission did anything to advance the matter during the next 180 days. Then, on

October 23, 2008, the Division moved the Commission to dismiss All American's Petition on several grounds. First, the Division argued that All American's Petition should not be decided on an informal basis because it allegedly sought to by-pass the so-called "rural exemption" found in Utah Code § 54-8b-2.1(3)(c). Rather, the Division argued that the Petition could only be addressed via a formal proceeding because it presented such an important policy issue. Second, the Division argued that All American's Petition was deficient because it failed to comply with Utah Admin. Code R746-349-3. Finally, in the event that the Commission did not dismiss All American's petition, the Division sought an order compelling All American to participate in discovery. All American opposed such discovery because it believed the matter should be designated as an informal proceeding.

After receiving the aforementioned motion, All American attempted to address the Division's concerns informally. Specifically, it urged the Division to speak informally with representatives from the companies so that the Division could have a better understanding of All American's operations. All American believed this would help alleviate the Division's concerns as to whether All American's entry in Beehive's territory would be in the public interest. When All American offered to do this, the Division became concerned that the 240-day deadline contained in Utah Code Ann. § 54-8b-2.1(3)(d) would expire while its investigation was ongoing. In response, counsel for All American stated in a letter that "[i]t is my position that this time limit has no application to the subject matter of this proceeding. Therefore, I am willing to sign a waiver which states that a decision on the Petition need not

be made within this time frame." However, no such waiver was ever signed.

At the request of the parties, Administrative Law Judge Ruben H. Arredondo conducted a scheduling conference on December 2, 2008 for the purpose of establishing a briefing schedule for arguments as to whether the proceeding should be designated as formal or informal. Later, on December 23, 2008, five additional parties, Qwest Communications Corp, Qwest Corporation, AT&T, TCG Utah, and the Utah Rural Telecom Association ("URTA"), filed motions seeking to intervene and participate in the proceeding. All American opposed such intervention on numerous grounds.

On January 7, 2009, the Utah Office of Consumer Services ("OCS") filed a paper which it characterized as a "Response" to All American's petition to amend its CPCN, along with a memorandum in support of the Division's Motion to Dismiss.

On January 20, 2009, the Commission ruled that All American's Petition was to be designated as a formal proceeding, thus opening the door for discovery and third party intervention. In turn, the Commission issued another order on February 18, 2009, which granted Qwest, AT&T and URTA permission to intervene and participate in the proceeding.

Soon after this ruling, All American and Beehive filed dispositive motions seeking a summary decision from the Commission granting All American's petition to amend as a matter of law. First, the parties argued that the Commission had already made the factual findings necessary to amend All American's CPCN when it approved All American and Beehive's interconnection agreement in September 2007. Therefore, they believed All

American's petition to amend had to be approved under equitable estoppel principles. In the alternative, All American and Beehive asserted that All American's Petition must be deemed approved by virtue of Utah Code Ann. §54-8b-2.1(3)(d), which states that if the Commission has not acted on an application for competitive entry within 240 days, the application is deemed to be granted as a matter of law. Since All American's petition to amend was filed on April 23, 2008, All American and Beehive argued that the Petition had been granted as a matter of law on December 24, 2008.

III. Commission's Rulings on All American and Beehive's Motions

On June 16, 2009, Administrative Law Judge Ruben Arredondo issued an Order denying All American's Motion for Summary Decision and its Motion to Strike OCS's arguments (the "June Order"). With respect to the Motion for Summary Decision, Judge Arredondo first determined that the Commission lacks authority to grant *nunc pro tunc* relief because such relief is equitable in nature and therefore beyond the Commission's scope of authority. Second, the Judge stated that 240-day deadline set forth in Utah Code Ann. §54-8b-2.1(3)(d) may be waived and that All American in fact waived the deadline. Third, the Order stated that the even if the 240-day deadline cannot be waived, it does not apply to this proceeding because All American's Petition only seeks an amendment to its CPCN, as opposed to the issuance of a new one.

In addition to denying All American and Beehive's Motions, the June Order also contained an affirmative ruling that significantly altered the proceeding's future scope. It

stated:

> "[T]he Commission gives notice to All American that this docket shall consider the extent to which its certificate should be rescinded, altered or amended, and whether its certificate should permit it to operate in Beehive's territory or to what extent it should be excluded from serving local exchanges with less than 5,000 access lines controlled by incumbent telephone corporations with fewer than 30,000 access lines. The caption in this docket shall be changed to be as follows: "In the Matter of the Consideration of the Rescission, Alteration, or Amendment to the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah."

In other words, the June Order clearly indicated that the proceeding no longer pertained to whether All American was entitled to a *nunc pro tunc* amendment to its CPCN. Rather, the pertinent issue was now the overall scope and possible revocation of All American's CPCN in the future. In fact, Judge Arredondo ordered All American to file an amended petition that conformed to the June Order because the Order essentially denied all of the relief sought in the original petition. Moreover, the Commission believed that the filing of this amended petition triggered a new 240-day time period within which it was required to issue a ruling.

On July 16, 2009, both All American and Beehive filed requests for reconsideration of the June Order with the Commission. The Commission granted these requests on August 5, 2009 and stated that it would review its June Order and issue a revised decision. On August 24, 2009, the Commission entered a revised Order (the "August Order") that affirmed the rulings contained in the June Order. However, the Commission did not consider the August Order to be a "final agency" action for purposes of judicial review. Rather, the Commission described its Order as being "preliminary, preparatory, or intermediate."

Therefore, the Commission denied All American's request to stay this proceeding pending judicial review of the August Order by the Utah Supreme Court.

IV. The Formal Hearing

On March 3, 2010, the Commission conducted a formal hearing on All American's Petition. In doing so, the Commission received evidence from the parties and interveners as to whether it would be in the public interest for All American to provide telecommunications services in Beehive's territory. After considering the evidence, the Commission subsequently issued a Report and Order dated April 26, 2010, in which it made the following rulings:

> 1. AATCO's Petition to amend its CPCN is denied;
> 2. AATCO's [existing] CPCN is hereby revoked;
> 3. AATCO shall cease operating in Utah within 30 calendar days of the entry of this order. Pursuant to Utah Code Ann. § 54-7-25, should AATCO continue to operate beyond that time, it shall be assessed a penalty for each day that it operates beyond that time.

This is the Order that All American is now requesting the Commission to review and rehear pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15.

ARGUMENT

Utah's Administrative Procedures Act states that "if a statute ... permit[s] parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order...." Utah Code Ann. § 63G-4-301(1). In turn, the Public Utilities Act states that "[a]fter any order or decision has been made by the commission, any party to the action or proceeding ... may apply for rehearing of any matters determined in the action or

proceeding." Utah Code Ann. § 54-7-15(2)(a). Based on this statutory authority, All American respectfully requests the Commission to rehear and review its Order dated April 26, 2010, for the following reasons.

I. THE PROCESS BY WHICH THE COMMISSION REVOKED ALL AMERICAN'S EXISTING CPCN FAILED TO COMPORT WITH THE UTAH ADMINISTRATIVE PROCEDURES ACT AND/OR DUE PROCESS REQUIREMENTS.

This proceeding was not initiated by a notice of agency action from the Commission stating its intent to revoke All American's existing CPCN. Nor does it stem from a request for agency action filed by any of the interveners asking the Commission to rescind All American's existing CPCN. Rather, the proceeding was commenced by All American pursuant to a Petition that sought limited and discrete relief from the Commission, namely an order that authorized All American to provide local exchange services in the Beehive's existing territory.

Despite the limited scope of All American's Petition, this proceeding eventually morphed into an expansive and open-ended inquiry into whether All American was entitled to keep its existing CPCN. This expansion was authorized by the Commission when it unilaterally issued an Order that stated its desire to consider whether All American's existing CPCN should be rescinded. However, this issue was not interjected into the proceeding until fourteen (14) months after the proceeding's commencement. Furthermore, the Commission did not identify the specific bases upon which its decision to consider the revocation of All American's CPCN was based. Rather, the Commission simply stated its intent to consider

the issue. This essentially provided the interveners with free reign to conduct an open-ended "fishing expedition" in the hope of uncovering any facts that could be used a basis to revoke All American's CPCN. It also placed All American in the unenviable position of having to defend itself against the revocation of its CPCN without knowing the specific bases therefor.

All American made several attempts to resolve the uncertainty surrounding the grounds upon which the Commission and interveners would seek to revoke All American's CPCN. For example, during the various scheduling and status conferences, All American and Beehive requested an outline or statement from each intervener stating why they believed All American was not entitled to a CPCN, amended or otherwise. The interveners refused on the grounds that the docket was "evolving" and that more discovery was necessary. All American also served the Office of Consumer Services and the Division with formal interrogatories in September, 2009, that asked the two entities to identify the factual bases for their respective positions. Unfortunately, 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, wherein they requested the outright rescission of All American's CPCN. In other words, All American did not know that grounds upon which the parties were going to seek the revocation of its CPCN until less than three weeks before the hearing. This obviously did not provide All American with adequate notice. Nevertheless, the Commission relied on this pre-filed testimony as a basis upon which to revoke All American's CPCN.

For the reasons stated below, the Commission should reconsider its decision to revoke All American's existing CPCN. The Commission's decision to consider the revocation of All American's CPCN in the context of this proceeding did not comport with the requirements of the Utah Administrative Procedures Act ("UAPA"). If the Commission unilaterally wanted to consider this issue, it was required create a separate docket and serve All American with a formal Notice of Agency Action that provided All American with fair notice of the grounds upon the Commission based its decision to consider revocation. Alternatively, the Commission should have required the interveners to file a Request for Agency Action that outlined the specific reasons why the interveners believed that revocation was appropriate. By failing to do so, the Commission denied All American of its fundamental right to procedural due process in the form of adequate notice. Therefore, the Commission should reverse its prior ruling and reinstate All American's existing CPCN.

A. The Commission Failed to Follow the Utah Administrative Procedure Act's Requirements.

The requirements of UAPA apply to every state agency and govern any agency action "that determines the legal rights, duties, privileges, immunities, or other legal interests of an identifiable person, including agency action to ... revoke, ... annul, [or] withdraw, ... an authority, right, or license." Utah Code Ann. § 63G-4-102(1)(a). Agency action may only be taken against a person or entity in the context of an adjudicative proceeding. UAPA states that there are only two ways in which an adjudicative proceeding can be commenced. It states that "all adjudicative proceedings ***shall*** be commenced by either: (a) a notice of agency

action, if proceedings are commenced by the agency; or (b) a request for agency action, if proceedings are commenced by persons other than the agency." Utah Code Ann. § 63G-4-201(1) (emphasis added).

When an agency initiates a proceeding for the purpose of revoking an authority or license, its notice of agency action must meet certain requirements. *See* Utah Code Ann. § 63G-4-201(2)(a). For example, it must state "the purpose of the adjudicative proceeding" and "the questions to be decided." *Id.*. The notice must also contain a "statement of the legal authority and jurisdiction under which the adjudicative proceeding is to be maintained." *Id.*. Finally, the notice must state that the affected party has the right to file a responsive pleading with 30 days of the notice's mailing date. *Id.*.

A request for agency action filed by a non-agency must likewise meet certain statutory requirements. *See* Utah Code Ann. § 63G-4-201(3)(a). For example, it must contain (i) a statement of the legal authority and jurisdiction under which agency action is requested; (ii) a statement of the relief or action sought from the agency; and (iii) a statement of the facts and reasons forming the basis for relief or agency action. *Id.*. Upon receiving a request for agency action, an agency must respond in either one of three ways. The agency may notify the requesting party that (i) the request is granted and that the adjudicative proceeding is completed; (ii) the request is denied and that the party may request a hearing before the agency to challenge the denial; or (iii) further proceedings are required to determine the agency's response to the request. Utah Code Ann. § 63G-4-201(3)(d).

In this case, the Commission did not follow any of the foregoing procedures when it decided to expand the scope of this proceeding to include the revocation of All American's CPCN. It did not serve All American with a notice of agency action that outlined the potential grounds for revocation. Nor did it receive a request for agency action from any of the interveners that specifically requested revocation of All American's CPCN and outlined the alleged grounds therefor.[1]

The only notice that All American received was a one paragraph statement by the Commission in its June Order that it would "consider" the revocation of All American's CPCN at the formal hearing on All American's Petition. This is obviously not the type of notice contemplated by UAPA, as evidenced by its failure to include all of the representations required by Utah Code Ann. § 63G-4-201(2)(a). By expanding the scope of this proceeding in the context of an Order, the Commission also denied All American an opportunity to file a formal response. *Id.*. Most importantly though, the Commission's statement did not provide All American with fair notice of the reasons why the Commission wanted to consider the revocation of All American's CPCN.

Based on the foregoing, the Commission committed legal error when it unilaterally interjected the revocation of All American's existing CPCN into this proceeding. All

[1] Even if the interveners' motions and memoranda could be construed as formal requests to revoke All American's CPCN, the appropriate response would have been for the Commission to either grant the requests outright or deny the requests. Utah Code Ann. § 63G-4-201(3)(d)(i). If the requests were denied, the interveners would have been required to request a hearing for the purpose of obtaining revocation. Neither of these procedures were followed in this case.

American initiated the proceeding and therefore the scope of the proceeding should have been limited to the issue raised in All American's petition, namely its request to operate in Beehive's territory. If the Commission wanted to examine whether there were grounds to revoke All American's authority to operate in the Qwest territory, it should have initiated a separate proceeding in accordance with the Administrative Procedures Act. Instead, the Commission simply re-captioned the proceeding and required All American to defend itself against the revocation of CPCN for reasons that All American was unaware. Therefore, the Commission should review its April 26, 2010, Order and reinstate All American's CPCN.

B. The Commission Violated All American's Right to Procedural Due Process When It Revoked All American's CPCN Without Prior Notice.

As stated more fully above, the Commission's failure to serve All American with a notice of agency action prior to revoking All American's CPCN constituted a violation of UAPA's procedural requirements. However, this failure to provide All American with adequate notice also resulted in a more serious violation of All American's constitutional right to procedural due process under the Fourteenth Amendment. The only way to vindicate All American's rights is for the Commission to rescind its revocation of All American's CPCN.

To invoke the protections of procedural due process, a party must establish the existence of a recognized property or liberty interest. *See Setliff v. Mem'l Hosp.*, 850 F.2d 1384, 1394 (10th Cir. 1988). The United States Supreme Court has held that a license to practice one's profession is a protected property right. *See Bell v. Burson*, 402 U.S. 535, 539

(1971). Once a license or certificate is issued, as in All American's case, its continued possession becomes essential in the pursuit of a livelihood. "Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees." *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1150 (10th Cir. 2001) In such cases "the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment." *Id.*. *See also In re Worthen*, 926 P.2d 853, 877 (Utah 1996) (Utah's appellate courts have never hesitated to consider claims alleging due process violations when licencees risk losing their professional license or means of employment through the action of a public disciplinary body.).

Courts have held that a party to an administrative proceeding regarding the revocation of the party's professional license must be given "a fair opportunity to mount a meaningful defense to the proposed deprivation of its property." *Energy West Mining Co v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009). However, in some cases, it is unnecessary for a party to show actual prejudice in order to establish that it was prevented from mounting a meaningful defense. For example, "when the government entirely fails to give notice of a claim, or delays so excessively in providing notice that the party's ability to mount a defense is impaired, due process is offended regardless of whether the party can show prejudice; the unfairness of such a procedure impugns its results." *Id.*.

In order to provide adequate notice in the context of a license revocation, government agencies are required to provide the licensee with "fair notice as to the reach of the grievance

procedure and ***the precise nature of the charges***." *In re Ruffalo*, 390 U.S. 544, 550 (1968) (emphasis added). As the United States Supreme Court has explained:

> The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

Id. (In attorney licensing proceeding, respondent was denied due process where he was not provided notice that his solicitation of clients could be considered a disbarment offense until after proceeding commenced.).

In this case, the Commission never outlined any specific charges against All American prior to its decision to consider the revocation of All American's CPCN. Rather, it simply opened the door to the issue without any stated factual basis. This, in turn, allowed the interveners to conduct discovery into any aspect of All American's business on the justification that such discovery could theoretically provide a basis upon which to revoke All American's CPCN. However, without knowing which aspects of its business practices were going to be raised until less than a month before the hearing, All American was obviously disadvantaged at the hearing. In fact, the Commission's Order alluded to the fact that All American's President was unprepared to respond to some of the inquiries made to him at the hearing. This was due primarily to the fact that All American had not been provided with notice regarding all of the potential topics that could be used as a basis for the revocation of its CPCN. This "shifting sand" approach obviously does not comport with the requirements of due process.

Based on the foregoing, All American respectfully requests the Commission to review its Order dated April 26, 2010 and recognize that the approach it followed in the course of revoking All American's CPCN did not comport with either UAPA or the Fourteenth Amendment's due process requirements. In turn, All American requests the Commission to rescind its revocation of All American's CPCN.

II. ALL AMERICAN'S PETITION MUST BE GRANTED BECAUSE THE 240-DAY DEADLINE FOR THE COMMISSION TO ACT ON THE PETITION PASSED PRIOR TO THE HEARING.

All American contends that the petition it filed with the Commission on April 23, 2008 should have been granted as a matter of law on December 24, 2008, because the Commission did not explicitly approve or deny the petition within 240 days, as required by Utah Code Ann. § 54-8b-2.1(3)(d). In its Order, the Commission does not dispute that this 240-day deadline applies to All American's petition; nor does the Commission deny that the deadline passed prior to it taking any action on the petition. Rather, the Commission alleges that All American waived the deadline, thus providing the Commission with an unlimited amount of time within which to rule on the petition. In response, All American denies that the deadline was ever effectively waived. However, this is immaterial because the 240-deadline contained in Section 54-8b-2.1(3)(d) is mandatory and therefore cannot be waived by the Commission or the parties.

A. The Statutory Deadline is Mandatory and Non-Waivable.

The first step in determining whether the statutory deadline contained in Section 54-

8b-2.1(3)(d) can be waived by an applicant is to look at the statute's plain language. *See, e.g., J. Pochynok Co., Inc. v. Smedsrud*, 2005 UT 39, ¶ 15, 116 P.3d 335 ("We look first to the plain language of a statute to determine its meaning."). The only justification for looking beyond the plain language is where the language is ambiguous. *Id.* at ¶ 15. In addition, "'statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and ... interpretations are to be avoided which render some part of a provision nonsensical or absurd.'" *Id.* (quoting *Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980)).

In this case, the language of Section 54-8b-2.1(3)(d) is clear and unambiguous. Once a party files an application for competitive entry, the Commission "shall" act on the application within 240 days. *Id.*. The type of action the Commission must take on the application prior to the deadline is also limited. It has two choices – to either "approve or deny" the application. *Id.*. If neither of these alternatives is adopted before the applicable deadline, the statute commands that the application "is considered granted." *Id.*. In other words, the statute sets forth a mandatory deadline followed by a mandatory result if the deadline is not met. It does not give the Commission any discretion to waive or circumvent the required deadline. Nor does it allow applicants to waive the deadline for their own benefit. It states in no uncertain terms that an application "shall" be "approved or denied" by the Commission within 240 days.

The Legislature's use of the word "shall" indicates that the 240 day deadline is

mandatory and cannot be waived by the Commission or the parties. For example, Utah courts have stated that the word "shall" is usually "presumed mandatory and has been interpreted as such in this and other jurisdictions." *Board of Ed. of Granite School Dist. v. Salt Lake County*, 652 P.2d 1030, 1035 (Utah 1983) (citing *Herr v. Salt Lake County*, 525 P.2d 728 (Utah 1974); *State v. Zeimer*, 347 P.2d 1111 (Utah 1960); *Swift v. Smith*, 201 P.2d 609 (Colo. 1948)). "This Court assumes that the terms of a statute are used advisedly and should be given an interpretation and application which is in accord with their usually accepted meanings." 652 P.2d at 1035.

The Legislature's decision to preclude the Commission from denying an application for competitive entry once the 240 day deadline has passed is further evidence of the statute's mandatory effect. For example, in *Kennecott Copper Corp. v. Salt Lake Cty.*, 575 P.2d 705 (Utah 1978), the Utah Supreme Court analyzed a statute, which prescribed the time within which a public officer was required to perform an official act, to determine whether its use of the terms "shall" and "must" should be interpreted as having mandatory effect. *Id.* at 705-06. It stated that a statute's use of such terms in those circumstances is considered to be mandatory if it also "contains negative words denying the exercise of power after the time specified ..., or the language used by the Legislature shows that the designation of time was intended as a limitation...." *Id.* at 706 (citation omitted). In this case, the deadline set forth in § 54-8b-2.1(3)(d) is clearly mandatory because it is followed by negative words which prohibit the Commission from denying an application for competitive entry after the 240-

deadline has passed.

Another reason the Commission must interpret the 240 day deadline as having a mandatory effect is because the deadline is clearly intended to protect the rights of those who submit applications for competitive entry into another company's service area. *See Board of Ed.*, 659 P.2d at 1035 (strict compliance with a statutory deadline is required where "prejudice occurs as a result of failure to follow direction of the statute...."); *see also Cache County v. Prop. Tax Div*., 922 P.2d 758, 763 (Utah 1996) (A designation is mandatory if it is "of the essence of the thing to be done."). One of the policy goals underlying the Legislature's regulation of the telecommunications industry is to "encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state...." Utah Code Ann. § 54-8b-1.1(3). By providing a deadline within which applications for competitive entry must be approved, the Legislature sought to enhance this goal by limiting the amount of time applicants would have to spend gaining regulatory approval before being able to operate. If this deadline could be waived, or if the Commission and/or the Division could "encourage" applicants to waive the deadline in the hopes of gaining approval, then this Legislative goal would be severely diminished. In fact, the Commission need not look past the present case for proof of this result. After All American's petition was filed, it took over 700 days – nearly two full years – before All American obtained a ruling on the merits.

Finally, All American's reading of Section 54-8b-2.1(3)(d) is consistent with prior

judicial decisions regarding the Commission's lack of inherent powers. Utah courts have repeatedly held that the Commission, as a creature of the Legislature, "has no inherent regulatory powers other than those expressly granted or clearly implied by statute." *Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n*, 754 P.2d 928, 930 (Utah 1998). Accordingly, "[t]o ensure that the administrative powers of the PSC are not overextended, any reasonable doubt of the existence of any power must be resolved against the exercise thereof." *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 50 (Utah 1988) (citation and internal quotations omitted). In this case, there is no statutory authority which allows the Commission to circumvent the requirements of Section 54-8b-2.1(3), regardless of whether it is done with the consent of the parties. Therefore, All American's petition must be deemed granted pursuant to this statute.

In conclusion, the language of Section 54-8b-2.1(3)(d) is very clear. When an application for competitive entry is filed with the Commission, the Commission shall act on the application within 240 days. Such action is limited to two alternatives, the approval or denial of the request for certification. If neither of these alternatives is adopted before the stipulated deadline, the application is considered granted. More importantly, this statutory deadline is mandatory and cannot be waived by the Commission or the parties. The parties and the Commission are not the legislature and they do not have the legislative authority to amend a mandatory statutory deadline. The Legislature, by statute, has required the Commission to exercise power and adhere to standards, and that power may not be

relinquished or those standards varied through a stipulation of the parties. Therefore, once 240 days passed from the time All American filed its petition to amend, that petition was considered granted.

B. The Statutory Deadline Was Not Effectively Waived.

Even if the Commission determines that the 240-day deadline contained in Section 54-8b-2.1(3)(d) is not mandatory and therefore waivable, it must still grant All American's petition pursuant to this statute. This is because the deadline was never effectively waived by all the parties and it expired prior to the denial of All American's petition by the Commission. Therefore, the Commission must still reverse its ruling and grant All American's petition as a matter of law.

The Commission contends that All American waived its ability to enforce the 240-day deadline in November, 2008, when its counsel was attempting to negotiate an informal resolution of All American's petition with counsel for the Division of Public Utilities. It had been over 180 days since All American filed its petition and All American still believed the proposed amendment should be handled as an informal proceeding. It therefore urged the Division to speak informally with representatives from All American and Beehive so that the Division could have a better understanding of All American's operations. All American believed this would help alleviate the Division's concerns as to whether All American's entry in Beehive's territory would be in the public interest. However, when All American offered to do this, the Division became concerned that the 240-day deadline contained in Section 54-

8b-2.1(3)(d) would expire while its investigation was ongoing. In response, counsel for All American stated in a letter that "[i]t is my position that this time limit has no application to the subject matter of this proceeding. Therefore, I am willing to sign a waiver which states that a decision on the Petition need not be made within this time frame." However, no such waiver was ever signed.

There were a number of reasons for All American's belief that the 240-day deadline did not apply at that time. First, the Commission had never formally designated the matter as a formal proceeding so that third parties could intervene and conduct discovery. Second, All American still believed that its proposed amendment had been summarily granted the previous year when the Commission approved its interconnection agreement with Beehive. Therefore, All American did not believe a formal hearing conducted pursuant to Section 54-8b-2.1 was appropriate or necessary. This is why counsel for All American expressly stated that "this time limit has no application to the subject matter of this proceeding."

Once Judge Arredondo issued his Order dated January 18, 2009, and rejected All American's attempt to have the matter designated as an informal proceeding, any alleged waiver of the 240-day deadline became ineffective. Only at this point did it become clear that All American's petition was to be handled formally and would be adjudicated pursuant to Section 54-8b-2.1. It was also soon thereafter that six additional parties successfully intervened in the matter and began filing dispositive motions and conducting extensive discovery. In fact, the Commission's decision to conduct the matter formally pursuant to

Section 54-8b-2.1 resulted in the proceeding lasting over 700 days. All American obviously would not have waived the 240 day deadline under Section 54-8b-2.1 if it knew that the statute was applicable and that its Petition would be adjudicated formally.

Finally, even if the Commission is inclined to believe that All American did waive the 240 deadline, it must still grant All American's Petition as a matter of law. This is because Beehive Telephone Company never agreed to any waiver of the deadline. This is important because Beehive's interest in having All American's petition granted was substantial. One of the primary purposes behind All American's proposed amendment to its CPCN was so that it could lawfully implement its interconnection agreement with Beehive. If the amendment was denied, Beehive could potentially lose the benefit it derived from this agreement. In fact, Beehive intervened in this matter upon the filing of All American's petition by submitting a notice of consent. It would be patently unfair and unlawful for Beehive to lose the benefit of a mandatory statute where it has consistently insisted that the statute applies to this case. Therefore, the Commission should determine that the deadline was never effectively waived by all necessary parties, that it applies to this case, and that it requires that All American's petition to amend be granted as a matter of law.

CONCLUSION

Based on the foregoing, All American respectfully requests the Commission to grant its Application for Review and Rehearing of the Order issued by the Commission on April 26, 2010.

Dated this 26th day of May 2010.

JENSON & GUELKER, LLC

By:_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November 2010, the foregoing **ALL AMERICAN'S APPLICATION FOR REVIEW AND REHEARING OF THE COMMISSION'S ORDERS DATED APRIL 26, 2010** was sent by electronic mail and mailed by U.S. Mail, postage prepaid:

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