- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah	DOCKET NO. 08-2469-01 ORDER ON APPLICATION FOR REVIEW AND REHEARING AND REQUEST FOR RECONSIDERATION

ISSUED: July 6, 2010

By The Commission:

All-American Telephone Co. Inc. (AATCO) applied for Review and Rehearing and Beehive Telephone Company, Inc. (Beehive) requested reconsideration of our April 26, 2010 Order (Order of Rescission). The Order of Rescission denied AATCO's petition to amend its certificate of public convenience and necessity (CPCN) to operate in Beehive territory and revoked AATCO's CPCN. It also ordered AATCO's withdrawal from providing telecommunications service in Utah. Many of the arguments currently raised by AATCO and Beehive we addressed in previous orders. *See e.g. June 16, 2009 Report and Order (June 2009 Order) and August 24, 2009 Report and Order on Review and Rehearing, and Request for Reconsideration (August 2009 Order)*. Additionally, Beehive and AATCO have filed an interlocutory appeal to the Utah Supreme Court. We also responded to their arguments on appeal. For purposes of this Order, we do not repeat in detail the reasoning in our prior orders and appellate brief. We do, however, address some of the recent arguments raised by AATCO and Beehive, and add further rationale to orders previously entered.

For reasons stated in previous orders, stated in our briefs in the interlocutory appeal, and explained below, we affirm our Order of Rescission. We reaffirm our order

mandating the withdrawal of AATCO from the state and further reemphasize to AATCO that it is subject to monetary penalties and other remedies as may be allowed for violation of Commission orders and applicable laws.

AATCO's APPLICATION FOR REVIEW AND REHEARING

AATCO contends the requirements of the Utah Administrative Procedures Act (UAPA) and due process require us to vacate our order. It argues we were required to serve it with notice of agency action pursuant to Utah Code Ann. § 63G-4-102(1)-(3), and to open a separate docket when deciding whether to consider revocation of its CPCN. *See AATCO's Application for Review and Rehearing (Application), p. 10-13.* AATCO complains we never provided it notice of our bases for considering revocation of its CPCN and the opportunity to file a formal response. It claims that we committed error by unilaterally interjecting revocation into the proceedings. We disagree.

We are not sure why AATCO only now raises these issues—almost a year after we issued our June 2009 Order where we stated we would consider rescission. This however, seems to be a pattern with AATCO, i.e. remaining silent in the face of what it later will argue is Commission error.

Regardless, Section 63G-4-201 deals with how adjudicative proceedings are commenced.[1] At the time we decided to also investigate whether AATCO's CPCN should be revoked, the matter of the scope of AATCO's CPCN was already before us in this docket, commenced in response to AATCO's original Petition filed April 2008. In the course of

[1] Section 63G-4-201 deals with the commencement of adjudicative proceedings either by the agency or another party.

examining that petition, various facts and allegations came to light leading us to believe rescission should be considered, and we so notified the parties. Therefore, 63G-4-201 is not applicable in this docket.

Utah Code Section 54-7-14.5, however, is applicable here. It states, in pertinent part, that the Commission "may, at *any time* after providing an affected utility notice and an opportunity to be heard, rescind, alter or amend any order or decision made by the commission" (emphasis added). Although AATCO initially commenced the Petition seeking *nunc pro tunc* relief, Utah Code § 54-7-14.5 allows us to expand the scope of the inquiry. The evidence for deciding whether to expand the CPCN and the evidence used to determine if the CPCN should be rescinded is effectively the same. We see no need to add additional proceedings, adding to the administrative burden. This position is buttressed by Utah Code § 54-4-2, which allows us to investigate a public utility when we believe such action is necessary in order to ensure compliance with our orders "upon [our] own motion" so long as a "time and place for a hearing thereof with notice to the public utility" is given. *See Utah Code Ann. 54-4-2.* The specific statutes governing the Commission allow us to examine the actions of a public utility to ensure its compliance so long as notice of this hearing is given. We did this and gave AATCO ample opportunity to defend the merits of its petition and address our concerns.

We gave AATCO early and clear notice that in addition to the questions of whether it's CPCN should be amended, we would evaluate if it still maintained the requisite technical, financial, and managerial resources and abilities to maintain its CPCN, and that it was still in the public interest. Rescission was a possibility we raised before any meaningful

discovery was conducted and before we heard any evidence. Paragraph 3 of the June 2009 Order stated that we

> give[] notice to All American that this docket shall consider to what extent 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 [in rural areas].

That was not the only explanation we gave for our determination to consider rescission as well as amendment in one docket. Besides the many reasons listed in the body of the Order's Analysis section, we summarized our reasoning as follows:

> The Commission clearly has authority to "rescind, alter, or amend any order or decision made by it" in circumstances when inadvertences or errors have been made, when a utility has violated terms of orders—including but not limited to the terms of its certificate, and when it is "otherwise appropriate[] to modify its judgment, decree, or order."
>
> Arguably, the petitioner may be found to have violated the terms of its certificate. The order of the Commission, as clearly reflected in the petitioner's CPCN, was that the petitioner was excluded from serving local exchanges with less than 5,000 access lines controlled by incumbent telephone corporations with fewer than 30,000 access lines. About three months after the date of certificate's issuance, the petitioner and Beehive submitted an interconnection agreement whereby petitioner sought to operate as a CLEC[2] in Beehive's certificated territory. In its petition in this docket, All American admitted it "and Beehive have been operating under the terms of this interconnection agreement on the *assumption* that [All American] had authority to operate as a CLEC in the area certificated to Beehive" but that All American "technically may be deemed to lack authority to operate as a CLEC in the area certificated to Beehive." Just given these admissions, the Commission may, even now, investigate any alleged violation of the petitioner's certificate and determine whether the granting or maintenance of the CPCN is still in the public interest (including what effect alleged traffic pumping may have, if any, on the public interest). Even if the interconnection agreement somehow expanded the petitioner's certificated territory, the Commission still maintains continuing jurisdiction to determine whether that should again be amended to restrict the petitioner to its original certificated area—which excluded Beehive's territory.

[2] Competitive local exchange carrier

June 2009 Order, p.18. The June 2009 Order stated that because of the violations by AATCO in operating outside its boundaries, we would not only determine if those violations would prevent AATCO from having its CPCN amended, but also if those violations affected the "maintenance of the CPCN" and whether maintaining that CPCN was "still in the public interest." AATCO's petition to amend explicitly raised the issues of the public interest purportedly being served by its CPCN and its managerial and technical expertise to serve that interest. Our June 2009 Order provided AATCO clear notice its petition included assertions that caused us to question whether it was serving that interest or contravening it. Moreover, as of that Order, if not before, AATCO was also on notice rescission of the existing CPCN was a potential outcome of the proceeding.

Following issuance of the June 2009 Order, and action on Requests for Review and Reconsideration, a lengthy period of discovery ensued, in accordance with our Scheduling Order of October 28, 2009. AATCO participated in the development of the schedule as well as in the discovery process itself. It presented prefiled direct testimony, as scheduled, on January 19, 2010. Intervenors filed their direct testimony on February 12, also in accordance with the schedule. This testimony provided detailed allegations of facts and circumstances on which certain parties based their recommendations that AATCO's CPCN be rescinded. AATCO filed rebuttal testimony an March 1. In fact, the Commission even gave AATCO's counsel a few days to consider whether to delay the hearing, offering AATCO more time to prepare, but AATCO declined to delay the hearing. A hearing was held on March 3rd at which all parties were subject to cross examination. After due consideration of the extensive record before us, we issued the Order of Rescission.

We find the forgoing process provided AATCO ample notice of the allegations against it and full opportunity to contest them. Even if Section 63G-4-201 applied to this proceeding, which it does not, we find the substance of its provisions are amply met in the process we followed.

AATCO disclosed, in its original petition (as it reaffirmed in various motions and pleadings made thereafter) that it had been operating illegally in the Garrison exchange, *even after* we specifically prohibited it from operating there, and even after *affirmative representations* from AATCO that it would not serve there. During the hearing, through information gathered and presented by the Division of Public Utilities (Division), the Office of Consumer Services and other intervenors, the Commission learned AATCO had also operated illegally in the Garrison exchange *even before* we granted it the CPCN, and that it had made several misrepresentations in the Original Certificate Proceeding[3]. *See e.g. Transcript, p.120,ll.21-24, p.99, ll.1-10, p.123, ll.5-8,p.124, ll.5-9, p.136, ll.14-25, p.137, ll.1-7, p.158, ll.7-19, etc*. For example, we learned AATCO had not provided any telecommunications services whatsoever in its authorized service territory (in Qwest certificated territory) and that it never intended to do so. We also learned AATCO had always intended to serve only one customer, its parent company, Joy Enterprises in Beehive territory, despite its assertions to us that it would serve other residential and business customers in Qwest territory. AATCO asserts our Order in June 2009, should have informed it that we would possibly revoke its CPCN because it had operated illegally. We did inform it of this possibility, however. We did not, however, inform it that part of our basis for revoking the CPCN and denying amendment, was that it had operated

illegally previous to obtaining its CPCN and other violations of the Law or our orders. That was not possible, however, because those facts came to light only during the hearings. We could not give notice of facts we did not know. AATCO had full access to discovery and full awareness of the information it was providing in response to other parties' inquiries and, presumably, the implications of that information. It had adequate time to prepare for hearings after the testimony of adverse parties was filed and declined additional preparation time. It did participate fully in discovery and the hearing. AATCO's mistaken notion of what constitutes notice would shield it from any adverse evidence produced during the discovery and hearing process and render the hearings virtually meaningless. Moreover, the facts about which AATCO claims to be surprised are facts it and Beehive knew before any other party. AATCO's only "surprise", if any, is that they came to our attention, not that they existed.

We gave AATCO sufficient notice of the possibility of rescission in June 2009, based on the information before us that AATCO had been operating illegally in Beehive's territory. AATCO's contentions that it was inadequately informed of the possibility of rescission and the reasons for rescission are without merit.

AATCO contends we violated its rights to procedural due process under the Fourteenth Amendment. *See AATCO's Application for Review and Rehearing (Application), p. 13-15.* We again disagree. A party before the Commission is "entitled to 'the essential elements of due process of law . . . . notice, and an opportunity to be heard and defend in an orderly[4] proceeding adapted to the nature of the case, before a tribunal having jurisdiction of the cause.'"

[3] Docket No. 06-2460-01.

R.W. Jones Trucking, Inc. v. Public Service Comm'n, 649 P.2d 628, 629 (Utah 1982) (internal citations omitted). AATCO cites *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009), for the proposition that

> a party must be given "a fair opportunity to mount a meaningful defense to the proposed deprivation of its property." *Id at 1219*, and 2) "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"*

AATCO Request for Review and Rehearing, p.14. However, as pointed out by the Division in its Response to the Petitions for Rehearing, due process is concerned with the proceedings as a whole, and whether the proceedings were sufficiently fair. *See Energy West Mining*, 555 F.3d at 1219. The Division further quoted: "As long as a party to an administrative proceeding is reasonably apprised of the issues in controversy, and is not misled, the notice is sufficient." *Savina Home Indus., Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979). As discussed in detail above, we gave AATCO unequivocal notice that revocation would be a possible outcome and ample opportunity to present its case and cross-examine opponents. We gave AATCO notice that revocation would be a possibility, even before we knew of its most significant violations of our Order and the Law.

AATCO claims it lacked notice that we would examine whether it had sufficient technical, financial, managerial resources and abilities, or whether it's CPCN remained in the public interest. These arguments also are baseless. AATCO's Amended Petition (filed August

[4] If there was any "disorderliness" or a "docket run riot" as Beehive and AATCO assert, this was in large part due to

31, 2009) requested *nunc pro tunc* relief—which *nunc pro tunc* relief we had unequivocally denied previously—and also petitioned for alternative relief in the form of an amendment to its certificate. In the Amended Petition AATCO itself raises the issue of its competence and asserts it has "sufficient technical, financial, and managerial resources and abilities to operate as a CLEC in Beehive's territory" and" that the "the proposed amendment is in the public interest." *AATCO Amended Petition, ¶ 10.* Indeed, these are the statutory criteria for qualifying for a certificate. Similarly, the Pre-filed Direct Testimony of David Goodale (*Hearing Exhibit P-1*) directly addressed the public benefit the proposed expansion of CPCN authority purportedly would provide to the State of Utah. *See Id at p.17-18.* It also references AATCO's technical, financial, and managerial resources and abilities to provide the services it proposed. *Id at p.4.* AATCO was content to rest mostly on the information provided initially to the Commission in the Original Certificate Proceeding, claiming those findings were *res judicata*. But AATCO knew, or should have known, we would examine whether it had or continued to have sufficient technical, financial, and managerial resources and abilities, whether its maintenance of the CPCN was still in the public interest, and if it had adhered to the requirements of its existing CPCN and the representations it made to receive it.

Additionally, we question what merit AATCO has to even claim it has a right to maintain its CPCN. Now that we are aware of the misrepresentations made in obtaining its CPCN and later in trying to amend it, AATCO likely had no right to the CPCN from the start. AATCO's claims of a violation of its due process rights are baseless on at least two levels. First, its contention we revoked its CPCN without notice ignores the last full year of events in this

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their own dilatory tactics. Their tactics and delay are described, in part, in our order on AATCO's Motion in Limine.

docket, summarized above. Additionally, as summarized at length in our Order of Rescission, the evidence before us shows overwhelmingly AATCO does not serve any public interest in its authorized territory, nor would it do so in the Garrison exchange if its existing unlawful operations there were authorized. Because it has no lawful claim to CPCN authority, it cannot be improperly deprived of rights to which it is not legitimately entitled:

> The *Fourteenth Amendment of the United States Constitution* provides that no state shall deprive any person of property without due process of law. While the Constitution guarantees due process before the deprivation of property interests, such interests are not created by the Constitution. Rather, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972).* "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He [or she] must have more than a unilateral expectation of it. He [or she] must, instead, have a *legitimate claim of entitlement to it*." *Id.*

Lucas v. Murray City Civil Serv. Comm'n, 949 P.2d 746, 752 (Utah Ct. App. 1997) *(emphasis added).* The "existing rules" in our "state law" that govern the manner in which AATCO could have a "legitimate claim of entitlement" to its CPCN, require it to provide a local exchange service or public telecommunications service, to have the requisite technical, financial and managerial resources and abilities to provide such services, and that such services be in the public interest. We specifically found, in our Order of Rescission, that the CPCN should be rescinded because:

1) Despite representations in the Original Certificate Proceeding that it would provide local exchange service, *see Order of Rescission, p.2,* AATCO has not provided a local exchange service or public telecommunications service in its certificated territory as defined in the Utah Public Telecommunications Law

(Law), Utah Code Ann. §§ 54-8b-1 *et seq*. *See Order of Rescission, p.16 and apparently it never intended to.* Therefore AATCO does not merit a CPCN that would permit it the concomitant privileges, e.g. the right to levy access charges, order number blocks, etc. *See id;*

2) Even assuming, *arguendo,* AATCO does provide a local exchange service or public telecommunications service, and despite original representations that it did have the requisite technical, financial and managerial resources and abilities to provide such services, *see Order of Rescission, p.3-4,* it lacked those requisite resources and abilities to operate under a CPCN, *much less have it amended* to operate in Beehive's territory. In fact we found that it made multiple misrepresentations in the Original Certificate Proceedings. *See Order of Rescission, specifically p.29, and generally pp.17-28.* The representations AATCO initially made about its intent and capabilities to serve are not accurate. Therefore, since AATCO improperly gained its CPCN, it cannot now claim its rights are being violated because it should not be permitted to maintain that which it obtained initially through multiple misrepresentations.

AATCO also claims its Petition must be granted because the 240-day deadline for us to act on the petition is mandatory, non-waivable, and expired before the hearing. We find AATCO is estopped from raising this argument. Our brief in the interlocutory appeal before the Supreme Court states our analysis on judicial estoppel and we do not repeat that here. *See e.g. Brief of Respondent Utah Public Service Commission, Appeal No. 2009 0774, Argument IV, p.34, etc*. AATCO's claims that Beehive did not waive the 240-day time period, and that Beehive

was somehow prejudiced by the "waiver", are addressed below in the context of Beehive's arguments.

But AATCO's argument raises another serious concern with its forthrightness before us. AATCO, on or about November 10, 2008, filed a request for the Commission to extend the time to respond to a Division Motion to Dismiss their petition (which the Division made before the end of the 240-day time period) and requested a scheduling conference. That request was a follow-up from an offer AATCO's counsel made to the attorney general's office, which was representing the Division. *See Brief of Respondent Utah Public Service Commission, Appeal No. 2009 0774, pp. 17-19.* In that request filed with us, and signed by counsel, AATCO unambiguously stated that it could waive the 240-day time period and that it did waive it, and that the petition would not be deemed granted if we did not act upon it within 240 days. It said:

> Finally, Petitioners hereby stipulate and agree that the 240-day deadline set forth in Utah Code Ann. § 54-8b-21.(3)(d) *does not apply to this proceeding*. As such, Petitioners stipulate and agree that the *Commission is not required to approve or deny the Petition in this matter within 240 days of its filing* and that the Petition *will not be considered granted* if it is not acted upon within 240 days of its filing.

Petitioner's Request for Extension of Time to Respond to the Division's Request for Dismissal and Request for Scheduling Conference, p.2 (emphasis added). Because our practice was, and continues to be, that we allow only the petitioner/applicant to waive the 240-day time period, and relying on AATCO's counsel's representations in its written motion, that it did in fact waive the deadline, we granted the Request and took administrative notice of its waiver. In fact, AATCO stated that part of the purpose of the extension was to allow for "negotiations between the parties." *Id at 1.* At the next scheduling conference requested by AATCO, it appeared it had made no efforts to

conduct any such negotiation. AATCO's arguments in claiming it cannot waive the 240-day time period, after affirming to us earlier that it could waive the time period in asking for an extension, are potentially violative Rule 11(b)(1) of the Utah Rules of Civil Procedure.

Rule 11(b) states, in pertinent part:

> (b) Representations to court. By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

AATCO made a representation to us of a legal conclusion it believed was correct: that it could waive the 240-day time period, and that if we did waive it, the petition would not be deemed granted. But its efforts then, viewed in light of its current arguments, appear to be nothing more than an effort to cause unnecessary delay in these proceedings[5]. They are made for the improper purpose of now claiming error which—if it is error, it invited. This needlessly increased the cost of litigation to private parties, state agencies, and consumed valuable regulatory resources which could have been used more efficiently elsewhere. AATCO's actions could serve as a basis for a variety of sanctions under Rule 11.

BEEHIVE'S REQUEST FOR RECONSIDERATION

Beehive moved for reconsideration and also requests we vacate our Order of Rescission. Its arguments primarily restate positions made previously, while ignoring the weight of evidence used as a basis for the Order of Rescission.

For reasons discussed in previous orders and in our brief in the interlocutory appeal, the Petition was not deemed granted by the passing of the 240-day time period found in Utah Code § 54-8b-2.1(3)(d). If the deadline applies in the case of a requested CPCN modification, it is waivable and AATCO waived it.

Additionally, Beehive's claims that the 240-day requirement is intended to benefit solely it as an ILEC[6] is simply wrong. Beehive contends

> it is the party which, in the main, is protected by the statute, including and especially the 240 day time limit . . .and that protection, if it is waivable, should not be waived in the absence of Beehive's permission.

Beehive's Request for Reconsideration, p.15. It relies on the provision in Utah Code § 54-8b-2.1(3)(c) for the proposition that the

> statutory standards are there to protect Beehive, the local exchange carrier. When a CLEC petitions to invade Beehive's territory, Beehive is protected not only by the substantive standards which must be applied in determining whether *competitive entry* is appropriate, but also by the temporal limits which are imposed on the duration of the litigation involved. Litigation is expensive. Protracted litigation is more expensive. The uncertainty of outcome in certification proceedings (will there be *competition* or not – if *competition is allowed*, what will be the terms and conditions and qualifications upon which it is permitted) may interfere with the local exchange carrier's business plans and planning process – for the short or long haul. This uncertainty becomes an opportunity cost. Prolonged uncertainty increases that cost.

Beehive's Request for Reconsideration, pp.13-14 (emphasis added). First, aside from its own interpretations of the law, Beehive has never cited any statute or other law that supports its contention that the Commission—or even AATCO, even needed its "permission" to waive the 240-day limit.

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[5] Or even possibly to mislead the Commission to obtain its desired relief.
[6] Incumbent local exchange carrier

Expeditious proceedings are generally favored and benefit all parties in producing the swift certainty of outcome to which Beehive refers. This attribute benefits all parties and does not support Beehive's claim the 240-day deadline exists for its benefit alone. On the contrary, the driver of Section 54-8b-2.1(3)(c) and the driver of Utah's telecommunications Law is to create competition and *competitive market entry* for telecommunications services. The benefits of this policy include "wider customer choices for public telecommunications services throughout the state" and "growth of the economy of the state through increased competition in the telecommunications industry." *Utah Code Ann.* § 54-8b-1.1. The provision in question exists to assure qualified CLEC's gain prompt approval to begin operations in competition with ILEC's like Beehive.

Another statutory provision, however, Section 54-8b-2.1(3)(c) does operate to protect ILEC's from competition that could harm their ongoing ability to serve:

> An intervening incumbent telephone corporation serving fewer than 30,000 access lines in the state may petition the commission to exclude from an application filed pursuant to Subsection (1) any local exchange with fewer than 5,000 access lines that is owned or controlled by the intervening incumbent telephone corporation. Upon finding that the action is consistent with the public interest, the commission shall order that the application exclude such local exchange.

Notwithstanding this provision, Subsection (1) in turn states, in part:

> the 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 . . . .

This provision permits us to grant a CPCN to a CLEC to *compete* in a rural ILEC's territory. Beehive contends that only if it petitions to exclude the CLEC from *competing* in its area, do public interest considerations come into play. It claims that since it never petitioned to exclude AATCO, but instead consented to its entry, we cannot reach the public interest considerations and must grant AATCO's petition.

Beehive's arguments, however, fail to consider that ultimately, pursuant to Subsection (1), we grant the CPCN to facilitate *competition* in providing local exchange services or other public telecommunications services." *Utah Code §54-8b-2.1(1).* AATCO, however, is not competing in the provision of any local exchange services or other public telecommunications service anywhere in Utah, nor does it intend to do so. The record also demonstrates there never has been and likely never will be any competition or competitive entry from AATCO anywhere in the state. Despite the representations in the Original Certificate Proceeding that it would compete in the Qwest service territory, Mr. Goodale admitted that AATCO has never provided any customer in Qwest territory any service and has never otherwise competed there. *See Transcript,p.154, ll.5-25, p.155, ll.1-5.* Our Order of Rescission further relates our findings as to AATCO's supposed competitive entry into Beehive territory:

> Mr. Goodale admitted it only allows Joy to provide the conference calling service and provides nothing else. *Transcript, P. 172, ll.22-25, p. 173, ll.1.* AATCO is not serving the business and residential customers it represented it would be, but is only serving one customer. *Transcript, p.53, ll.21-24.* Mr. Goodale further represented AATCO did not "have any plans of doing anything else" besides serving only Joy, and only in Garrison, Utah and not entering anyone else's territory. *See AATCO Exhibit P-1, ll.179-182, Transcript, p,123, ll.9-18.* He stated that even if AATCO is permitted to enter Beehive territory as a *competitive* LEC, AATCO has "no intent of ever taking customers away from Beehive." *Id.*

> *at p.123, ll.19-20.* Mr. Goodale even stated that despite the *verified* representations in the Original Application that they would compete in Utah by providing all forms of local exchange service to residential and business customers, he later stated in his testimony that "from the time [AATCO] first considered operating in Utah, the company's *intent* was to operate in Beehive's territory in the manner in which it is currently operating." *AATCO Exhibit P-2, ll.25-27.* AATCO never had any intent to provide the services and serve the customers it stated in its Original Application and has no intent to do so. Since it provides service to only one customer, and has no intent to serve any other customer, it cannot provide wider customer choices and does not do anything to promote the competition encouraged by the Law.

Order of Rescission, p.28. Section 54-8b-2.1(3)(c)'s purpose is to encourage competition for promotion of wider customer choice and enhance the general welfare and encourage the growth of the economy. It is not meant to encourage collusion between an illegally operating CLEC purporting to offer local exchange service and ILEC's like Beehive, which resultantly increases costs for Utah's consumers, without any overriding benefits. Because AATCO does not provide local exchange service, and because it will not promote any competition, Beehive's reliance on Section 54-8b-2.1(3)(c) to argue it has some protections is inapplicable.

Also, the relationship between AATCO and Beehive raises more public interest questions than it settles. For example, the impact Beehive's relationship with AATCO has on other residential and business customers, the likelihood for Beehive's dependence on USF funding given its lack of income, and the impact on Beehive's service quality without income from AATCO and USF distributions. These are questions that we have a duty to determine. Beehive ignores the fact that we are a regulatory agency charged with ensuring public utilities serve the public convenience and necessity. We have "plenary power to determine public convenience and necessity",

Union Pacific RR Co. v. Public Service Comm'n, 300 P.2d 600, 603 (Utah 1956). Our enabling statutes state we are "vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction" and this includes, determining if a purported "interconnection agreement" between an illegally operating CLEC and an ILEC enabling its illegal operation is in the public interest.

Beehive contends Section 54-8b-2.1[7] conflicts with federal law, either explicitly or implicitly, and is therefore preempted. It fails to give any reasoning for this argument. In any case, we disagree. When enacting the Telecommunications Act (Act), Congress expressly preserved existing state laws that furthered Congress's goals under the Act, and authorized states to implement additional requirements that would foster local competition. 47 U.S.C. §261 (b)-(c). Further, 47 U.S.C. §253(b) says that the state may impose requirements necessary "to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers" so long as not inconsistent with federal law. Additionally, many courts have affirmed the validity of state law and state commissions' jurisdiction in this regard. For example, courts, including the United States Tenth Circuit Court of Appeals, have adopted a bifurcated standard of review of state commission decisions relating to interconnection where the first step is to review the state

[7] Beehive refers repeatedly to 54-8b-*1.2*. There is no such section. The Commission will assume it refers to 54-8b-*2.1*, as its arguments cite to its provisions.

commission decisions *de novo* to determine compliance with the Act and implementing regulations. *See e.g. U.S. West Communications, Inc. v. Sprint Communications Co., L.P.*, 275 F.3d 1241, 1248 (10th Cir. 2002). The second step in the bifurcated review is, if compliance with federal law is demonstrated: "all other issues, including *state law* determinations made by the [state commission], are reviewed under an arbitrary and capricious standard" that accords *substantial deference* to a state commission's application and interpretation of relevant law. *Id. (emphasis added).* Therefore, state laws relating to competition and other aspects of the Act, e.g. interconnection, etc., are not preempted by associated federal law to the extent that state law, and state commission procedure and decisions that are influenced by such law, do not contravene relevant federal law. Again, this standard of review affirms the breadth of jurisdiction afforded states with respect to the regulation of telecommunications providers. Our interpretations help to promote competition, which Beehive and AATCO do not want, and help prevent anti-competitive behavior, which Beehive and AATCO do want. Beehive's assertion that the provisions of §54-8b-2.1 are preempted by federal law is wrong under both the plain language of the Telecommunications Act and controlling case law.

We also disagree with Beehive that our conclusions in the Original Certificate Proceedings are "binding in this proceeding." *Beehive's Request for Reconsideration, p.23*. It further claimed that any deviation from that original finding that AATCO has the requisite technical, financial, and managerial resources and abilities to maintain its CPCN are an "about-face" which is "inconsisten[t]", "not adequately explained" and "arbitrary and capricious." *Id.* Beehive is wrong again. We fail to see how findings made in our Original Certificate Proceeding, which were based on misrepresentations and unfulfilled commitments, only

discovered after our most recent hearing, are now binding: they are not. Further, our Order of Rescission unambiguously stated the basis for our rescission and adequately detailed the many bases for not only denying amendment, but also revoking the CPCN. In addition, Beehive ignores the fact that we are a regulatory agency given continuing jurisdiction over public utilities. Our Order of Rescission was not arbitrary and capricious, but based on the substantial and most recent evidence before us.

Beehive addresses many of the same procedural and due process concerns AATCO makes. We refer to our rationales addressed above in rebutting AATCO's claims of due process violations in rebutting Beehive's claims. However, we also give further rationale to dispute Beehive's claims its due process protections were violated.

Beehive claims it was denied due process because it was not prepared for hearing and had insufficient time for preparation. As already noted, the issues to competence and public interest were raised by AATCO and addressed by many parties. The parties participated for months in discovery before the hearing during which these issues were investigated in detail. The record shows Beehive participated very little in discovery, if at all, during the *months* before the hearing. If Beehive did not know these issues were to be treated at the hearing, it is because of its own lack of participation.

Beehive also complains it had no notice rescission would be one of the remedies under consideration. Yet we advised it would be, in our June 2009 Order. The evidence of misrepresentations relating to the Original Certificate Proceeding, and evidence that AATCO had been operating illegally even before it obtained its CPCN, came to light only through the hearing. Without knowing this information before the hearing, it is not clear what information

Beehive would have desired we provide it, besides the notification we did give that rescission was a possibility. Moreover, the evidence supporting it was amply present in the direct testimony of several parties, testimony that was sufficiently distributed before the hearings began. The issues were defined sufficiently. Arguably, some of the most persuasive evidence in support of the rescission came through the admission of AATCO's president, Mr. Goodale, during the hearings. This, however, is not a failing of due process. It is the fruits of due process, as parties are afforded the chance to test the representations of other through examination.

Beehive and AATCO both suggest that because we denied the CPCN amendment, Beehive is denied the benefit of its interconnection agreement with AATCO, which interconnection it claims was granted pursuant to 47 U.S.C. § 252. Beehive claims to have a valid "interconnection agreement which has been approved by the Commission." *Beehive's Request for Reconsideration, p.24.* AATCO claims that because we denied the amendment, "Beehive could potentially lose the benefit derived from this [interconnection] agreement." *AATCO Request for Review and Rehearing, p.23.* AATCO further claimed that "Beehive's interest in having All American's petition granted was substantial." *Id.* But both ignore the weight of the evidence before us. Beehive entered into an agreement with a CLEC that had no authority to serve the Garrison exchange. The application for approval of the interconnection agreement said nothing about AATCO being precluded from operating in the Garrison exchange. Moreover, Beehive, having participated actively in AATCO's initial CPCN, knew or should have known, we had specifically prohibited AATCO from serving there.

The record shows Beehive helped AATCO obtain its CPCN improperly and helped it operate illegally. AATCO operated illegally at least two years prior to applying for its

CPCN. *Order of Rescission*, p.1. Mr. Goodale testified that when AATCO began operating illegally, it leased switches from Beehive to provide the service to Joy. *See Transcript, p.69, ll.1-6, p.124, ll.5-15, p.125, ll.20-24*. AATCO's petition in the Original Certificate Proceeding, and subsequent amended petitions, were all prepared and filed by Beehive's former counsel. *See Transcript, p.133, 11-20.* In those petitions—which were drafted by Beehive's counsel, AATCO represented to us that they would not serve in Beehive's territory. We granted the CPCN based on this representation. Despite that affirmation that it would not serve in Beehive territory, Beehive's counsel then drafted the interconnection agreement which it claimed would purportedly allow it to compete in Beehive territory. *See Transcript, p.133, ll.24-25, p.134, ll.1-2.*[8] Beehive *knew that AATCO* was not authorized to serve in its territory. *See Transcript, p.96, ll.20-25, p.97,ll.1-20*. First, Beehive was generally aware of the contents of AATCO's application. *See Transcript, p.97, ll.1-18.* Second, Beehive was also aware because its attorney represented AATCO before us. She drafted AATCO's petition and amended petitions submitted to us, and made representations to us in order to obtain its CPCN. All the while, Beehive continued to lease switches to AATCO, at the early point of their relationship received access charges paid by interexchange carriers to AATCO, and provided management services, consulting services, and serviced equipment belonging to AATCO. *See Order of Rescission, p.18.* Beehive's close working relationship and cooperation in AATCO's unauthorized activities is further evidenced by actions AATCO took to release fraud blocks. When AATCO first began operating illegally, it asked Qwest and later the Federal Communications Commission (FCC) to

[8] The preamble drafted by Beehive's counsel, began with the words "Whereas, All American is authorized by the Utah Public Service Commission . . . to provide CLEC service"—even though it was not authorized to serve in

release fraud blocks on 72 numbers which it claimed as its own. *Transcript, pp.195-196.* However, the numbers actually belonged to Beehive—not AATCO and were used to operate the adult chat lines. The evidence clearly shows Beehive was party to AATCO's scheme and materially aided it in operating illegally. Beehive cannot now claim that it has a legitimate claim to preserve an interconnection agreement which was entered into illegally, with a company it helped to operate illegally, all under a CPCN that was obtained through misrepresentations.

We find no basis in law or in fact to grant AATCO's or Beehive's Requests.

ORDER

For the foregoing reasons:

1. We affirm the April 26, 2010 Order denying AATCO's petition to amend its CPCN, revoking its CPCN, and ordering AATCO's withdrawal from Utah;
2. We order that for each day beyond the date of issuance of this Order that AATCO is operating, it shall be assessed a penalty of $2,000.00 per day, pursuant to Utah Code Ann. §54-7-25[9];
3. We may take any other and further measure as permitted by law to ensure compliance with our orders and governing laws, including but not limited to those found in Utah Code §54-7-21;[10]

Beehive's territory. *Transcript, p.134, ll.21-25, p.135, ll.1-25.*

[9] (1) Any public utility that violates or fails to comply with this title or any rule or order issued under this title, in a case in which a penalty is not otherwise provided for that public utility, is subject to a penalty of not less than $500 nor more than $2,000 for each offense.
(2) Any violation of this title or any rule or order of the commission by any corporation or person is a separate and distinct offense. In the case of a continuing violation, each day's continuance of the violation shall be a separate and distinct offense.
(3) In construing and enforcing the provisions of this title relating to penalties, the act, omission, or failure of any

4. We may also take any other and further measure to ensure imposition of any other and further penalties permitted by law, including but not limited to those found in Utah Code §§ 54-7-26[11], -27[12], -28[13];

Judicial review of our final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirements of Sections 63G-4-401 and 63G-4-403 of the Utah Code and the Utah Rules of Appellate Procedure.

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officer, agent, or employee of any public utility acting within the scope of his official duties or employment shall in each case be deemed to be the act, omission, or failure of that public utility.

[10] The commission shall see that the provisions of the Constitution and statutes of this state affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the state therefore recovered and collected; and to this end it may sue in the name of the state of Utah. Upon request of the commission, it shall be the duty of the attorney general to aid in any investigation, hearing or trial under the provisions of this title and to institute and prosecute actions or proceedings for the enforcement of the provisions of the Constitution and statutes of this state affecting public utilities and for the punishment of all violations thereof.

[11] Every officer, agent, or employee of any public utility who violates or fails to comply with, or who procures, aids, or abets any violation by any public utility of any provision of the Constitution of this state or of this title, or who fails to obey, observe, or comply with any order, decision, direction, demand, or requirement, or any part or provision thereof, of the commission, or who procures, aids, or abets any public utility in its failure to obey, observe, and comply with any order, decision, direction, demand, or requirement, or any part or provision thereof, in a case in which a penalty has not been provided for, the officer, agent, or employee is guilty of a class A misdemeanor.

[12] Every corporation, other than a public utility, which violates any provision of this title, or which fails to obey, observe or comply with any order, decision, rule, direction, demand or requirement, or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such corporation, is subject to a penalty of not less than $500 nor more than $2,000 for each and every offense.

[13] Every person who, either individually, or acting as an officer, agent, or employee of a corporation other than a public utility, violates any provision of this title or fails to observe, obey, or comply with any order, decision, direction, demand, or requirement, or any part or provision thereof, of the commission, or who procures, aids, or abets any public utility in its violation of this title or in its failure to obey, observe, or comply with any order, decision, direction, demand, or requirement, or any part or portion thereof, in a case in which a penalty has not been provided for the person, is guilty of a class A misdemeanor.

DATED at Salt Lake City, Utah, this 6th day of July, 2010.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#67468