

William J. Evans (5276)
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Tel: (801) 532-1234
Fax: (801) 536-6111
bevans@parsonsbehle.com
Counsel for Joint Applicants

**BEFORE THE
PUBLIC SERVICE COMMISSION OF UTAH**

In the Matter of the Joint Application of
**Broadview Networks Holdings, Inc., and
Broadview Networks, Inc.**

and

Windstream Holdings, Inc.

for Approval to Transfer Indirect Control
of Broadview Networks, Inc.

MOTION FOR EXEMPTION FROM
REQUIREMENT OF HEARING

Docket No. 17-2514-01

Applicants Broadview Networks Holdings, Inc. (“Broadview Holdings”), Broadview Networks, Inc. (“Broadview Networks”), and Windstream Holdings, Inc. (“Windstream”) (collectively, “Applicants”) through the undersigned counsel, and pursuant to the provisions at Utah Code Ann. § 54-8b-3, and Utah Administrative Code R746-100-3 and R746-110-1, hereby move the Public Service Commission (“Commission”) for an order granting an exemption from the requirement of a hearing on the Application in this matter, and for an order approving the relief requested in the Application (“Motion”). In support of this Motion, Applicants provide the following information:

1. Applicants filed their Joint Application for Approval to Transfer Indirect Control of Broadview Networks, Inc. (“Application”) along with accompanying exhibits on April 27, 2017, seeking approval from the Commission of the transaction described in the Application. The Commission sent an Action Request to the Division on the same day, requesting review and recommendation on the Application. On April 28, 2017, the Commission issued a Notice of Filing, Comment Period and Hearing, setting the hearing of this matter for June 6, 2017. On May 16, 2017, the Division submitted a Memo responding to the Commission’s Action Request (“Division Memo”), and stating “that the public interest will be promoted by recommending that the [Commission] allow the Transfer of Control” as described in the Application. Division Memo at 1.

2. The Application was filed pursuant to the requirement at Utah Code Ann §§ 54-4-28 and -29, which provide, in relevant part, that “No public utility shall combine, merge nor consolidate with ...” and “[n]o public utility shall purchase or acquire any of the voting securities or the secured obligations of” another public utility “engaged in the same general line of business” without the “consent and approval of the Public Service Commission, which shall be granted only after investigation and hearing and finding” that such proposed transaction “is in the public interest.” Utah Code Ann. §§ 54-4-28, -29.

3. The Commission’s rules specify procedures for public telecommunications service providers¹ to obtain approval of transactions subject to Sections 54-4-28 to -30. Utah Admin. Code R746-349-7. The rule provides that “such adjudicative proceedings are designated as

¹ The text of R746-349-7 provides the “CLECs” may obtain approval of such transactions pursuant to the rule. Under the rule, a “CLEC means a public telecommunications service provider that did not hold a certificate of convenience and necessity to provide public telecommunications service as of May 1, 1995.” R746-349-2.

informal adjudicative proceedings pursuant to 63G-4-203 unless converted to formal adjudicative proceedings.” *Id.* In addition, when a matter is uncontested (or the Commission reasonably expects it to be uncontested), the Commission’s rules allow the Commission to adjudicate the matter informally and to issue a report and order without a hearing. Utah Admin. Code R746-110-1; R746-110-2.

4. Neither the designation of proceedings as “informal” under R746-349-7, nor rule R746-110-2 allowing the issuance of an order without a hearing in an uncontested matter, however, overrides the requirement of a hearing when the requirement is prescribed by statute. Thus, until now, uncontested applications of telecommunications service providers for approval of transactions subject to Sections 54-4-28 to -30 have been subject to the requirement of a hearing.

5. During the 2017 legislative session, the Utah Legislature enacted House Bill 59 (“HB 59”), which amended Section 54-8b-3 to add a new subsection, 54-8b-3(1)(b) (“Subsection 1(b)”). The first two subsections of the statute, as amended by HB 59, provide as follows:

(1) (a) The commission, on its own initiative or in response to an application by a telecommunications corporation, a public agency, or a user of a public telecommunications service, may, after public notice and a hearing, issue an order exempting any telecommunications corporation or public telecommunications service from any requirement of this title, including any requirement or limitation relating to a telecommunication corporation's earnings, rate base, or pricing of public telecommunications services.

(b) The commission may issue an order described in Subsection

(1)(a), after an informal adjudication, without a hearing if:

(i) the matter is not a proceeding described in Subsection 54-1-3(2)(a);

(ii) a party to an application submitted under Subsection (1)(a) requests an informal adjudication; and

(iii) no person opposes the request for informal adjudication before 10 business days after the day on which the party files the request.

Utah Code Ann. § 54-8b-3(1) (HB 59 amendment shown in emphasis). Thus, when a telecommunications service provider seeks approval of a transaction that is subject to Sections 54-4-28, -29 or -30, and when the specified conditions are met, the Commission may now grant an exemption from the requirement of a hearing.

6. The Application in the present case meets the conditions of Subsection 1(b). This matter is not one of the proceedings described in Section 54-1-3(2)(a);² the Applicants have requested that the Application be adjudicated informally; (see Application at 5, 9); and no party has opposed Applicant’s request for informal adjudication as of the date of this Motion.³

7. Although Subsection 1(b) did not become effective until May 9, 2017 (11 days after the Application was filed), the Commission may apply it to exempt the Applicants from the necessity of a hearing.

8. Utah law provides that “[a] provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive.” Utah Code Ann. § 68-3-3 (2016). Nevertheless, the Utah Supreme Court has held that “[u]nder our case law, ‘the parties’ substantive rights and

² Subsection 2(a) provides:

The following proceedings shall be heard by at least a majority of the commissioners:

- (i) general rate proceedings to establish rates for public utilities which have annual revenues generated from Utah utility service in excess of \$200,000,000; or
- (ii) any proceeding which the commission determines involves an issue of significant public interest.

Utah Code Ann. § 54-1-3(2)(a) (2016).

³ The Division’s Memo states:

The Division expects that based on history a filing of this type and with the information submitted by the company there will be no objections or opposition to this recommendation. Therefore, the Division requests that this docket be adjudicated informally in accordance with R746-110-1.

Division Memo at 1.

liabilities are determined by the law in place at the time when a cause of action arises,' while their procedural rights and responsibilities are governed by 'the law in effect at the time of the procedural act' at issue." *Gressman v. State*, 2013 UT 63, 323 P.3d 998, 1002 (citations omitted).

The Court further explained:

Consequently, we have said that the parties' "substantive rights and liabilities" are determined by the law in place at the time "when a cause of action arises, and not [by] a subsequently enacted statute." *Carlucci v. Utah State Indus. Comm'n*, 725 P.2d 1335, 1336 (Utah 1986). With respect to "procedural statutes enacted subsequent to the initiation of a suit," on the other hand, we have held that the new law applies "not only to future actions, but also to accrued and pending actions," and that "[f]urther proceedings in a pending case are governed by the new [procedural] law." *Higgs*, 656 P.2d at 1000-01.

State v. Clark, 2011 UT 23, 251 P.3d 829, 833.⁴

9. The requirement of a hearing may be a substantive right in contested cases when an issue of significant public interest is involved, or when due process requires the Commission to hold a hearing on the contested matter. Subsection 1(b), however, provides that the Commission may grant an exception only in matters where the public interest is *not* implicated, and only when a request for informal adjudication is uncontested. In those instances, the requirement of a hearing does not affect the substantive rights of any party, but becomes instead a procedural formality. Because Subsection 1(b) affects only the procedural aspects of the present case, and because Applicants have met the conditions stated in Subsection 1(b), the Commission may grant an

⁴ See also *Due S., Inc. v. Dep't of Alcoholic Beverage Control*, 2008 UT 71, ¶ 14, 197 P.3d 82 (determining that an amendment affecting a standard of review was retroactive because it was a clarification and because "the standard of review is a matter of procedural, rather than substantive, law" (internal quotation marks omitted)); *Kilpatrick v. Wiley, Rein & Fielding*, 2001 UT 107, ¶ 59, 37 P.3d 1130 (applying an amendment retroactively because the court considered the amendments to be both a clarification and procedural because they did not affect the plaintiffs' "vested or contractual right[s]").

exemption from the requirement of a hearing, even though the effective date of Subsection 1(b) was subsequent to the filing of the Application.

10. For the foregoing reasons, Applicants respectfully request that the Commission grant an exemption from the requirement of a hearing in this matter, vacate the hearing date, and issue a report and order approving the transaction that is the subject of the Application.

11. Counsel for the Division of Public Utilities has authorized the undersigned to represent to the Commission that the Division supports this Motion and joins with the Applicants in requesting an exemption from the requirement of a hearing.

Dated this 18th day of May, 2017

/s/ William J. Evans
William J. Evans (5276)
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Tel: (801) 532-1234
Fax: (801) 536-6111
bevans@parsonsbehle.com
Counsel for Applicants