- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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| In the Matter of the Application of Carbon/Emery Telcom, Inc. for an Increase in Utah Universal Service Fund Support | DOCKET NO. 15-2302-01<br><br>ORDER ON PETITION FOR REVIEW, REHEARING, OR RECONSIDERATION OF THE COMMISSION'S MARCH 31, 2016 ORDER |

ISSUED: May 19, 2016

The hearing in this docket was conducted on January 26-27, 2016. On March 31, 2016, the Public Service Commission of Utah (Commission) issued its final order (Order). In the Order, the Commission reduced the subsidy Carbon/Emery Telcom, Inc. (Carbon/Emery) has been receiving from the Utah Universal Service Fund (UUSF), with a further reduction scheduled to go into effect on January 1, 2020. On April 29, 2016, Carbon/Emery and the Utah Rural Telecom Association (URTA)[1] filed nearly identical petitions for review, rehearing, or reconsideration of the Order (Petition).[2] Carbon/Emery and URTA articulate eight issues as being subject to review.

The Commission denies the Petition and addresses each issue articulated by Carbon/Emery as follows.

[1] URTA was granted intervenor status in this docket on September 18, 2015.

[2] URTA avoided using confidential data in its petition for review. Otherwise, the petitions are identical. In these circumstances, we treat the two petitions as a single filing, citing to Carbon/Emery's petition and referring solely to Carbon/Emery in our discussion. This order applies to URTA's petition for review as if issued separately.

**1. Adequacy of Carbon/Emery's existing network; Purpose of Carbon/Emery's network upgrade.**

In the Order, the Commission characterized the following two findings of fact as "undisputed":

> Historically, Carbon/Emery's telecommunications network has been comprised of aerial and buried copper cable, which at all relevant times has been adequate to provide basic telephone service….[3]
>
> To deliver internet and cable television services, Carbon/Emery has undertaken a fiber-to-the-home (FTTH) network upgrade….[4]

Carbon/Emery considers the adequacy of the copper network and the purpose of the FTTH upgrade to be disputed issues. Specifically, Carbon/Emery cites to hearing testimony offered by Brock Johansen as evidence that the buried copper in outlying areas is vulnerable to moisture, requiring ongoing maintenance.

Although Carbon/Emery has accurately cited a portion of Mr. Johansen's testimony, it has failed to marshal the testimony in full. When asked at hearing whether all of Carbon/Emery's customers currently have telephone service, Mr. Johansen replied, "They do."[5] Therefore, the Commission found—and we continue to find—no dispute that the bandwidth provided by Carbon/Emery's copper network is adequate for basic telephone service.

As to the purpose of the FTTH upgrade, Mr. Johansen testified as follows:

> A lot of buried copper, and because it's buried you're out in fields where moisture gets in, the lines get old, more moisture gets in. Those are our hardest to maintain, but we're trying to do the

[3] Order, finding of fact number 6, p. 7.

[4] Order, finding of fact number 10, p. 8.

[5] Hearing transcript, p. 56, lns. 2-3.

> biggest bang for the buck. We're cutting the towns first and then we'll go into those areas….[6]

From this testimony, the Commission understands that the most degraded sections of the copper network, which are located in the most rural sections of Carbon/Emery's service area, will remain adequate for basic telephone service though at least 2019, which is the effective period contemplated in this docket. There is no record testimony that the copper network serving the towns is degraded or difficult to maintain. Yet it is in these same towns that Carbon/Emery has chosen to lay fiber now and in the near future. Therefore, the record demonstrates that the primary reason for the upgrade—at least during the effective period of this case—is to increase bandwidth. Increased bandwidth is not necessary for basic telephone service. Therefore, it must be found that Carbon/Emery's reason for increasing bandwidth is to provide unregulated services. Any dispute that Carbon/Emery might wish to create on this issue is contradicted by Mr. Johansen's testimony regarding the company's chosen timeline for implementing the FTTH upgrade.

**2. Cost of equity.**

In its application and direct testimony, Carbon/Emery chose a cost of equity that it took from a 2014 stipulated case involving Hanksville Telcom, Inc. (Hanksville). Therefore, the Commission made the following statements:

> Carbon/Emery has offered no cost of equity data pertaining to its operations or other empirical support for 12.13% as a reasonable cost of equity.[7]

[6] Hearing transcript, p. 56, lns. 6-11.
[7] Order, p. 10.

> Carbon/Emery has not adequately demonstrated relevant empirical support for its request for a 12.13% cost of equity.[8]

In addition, we cited Utah Administrative Code R746-100-10(F)(5)(a): "Cases may be resolved by a settlement of the parties if approved by the Commission. Issues so resolved are not binding precedent in future cases involving similar issues."

In its Petition, Carbon/Emery presents two arguments. First, despite the administrative rule, Carbon/Emery argues that a 2014 stipulation negotiated by a separate utility does constitute empirical support for adopting in this docket the cost of equity used in that stipulation. Second, Carbon/Emery argues that evidence provided in rebuttal in this docket has gone uncontested and should therefore constitute adequate support for the requested return on equity.

As to the first argument, we emphasize that the Hanksville stipulation does not set forth all of the negotiations and considerations that led to the final agreement. Carbon/Emery has not identified the methodology that was used to generate the Hanksville return on equity, nor has it demonstrated that the financial markets have remained unchanged since the Hanksville stipulation was finalized. Carbon/Emery has also failed to argue or demonstrate that its circumstances and operations are so similar to Hanksville's as to obviate any other considerations. The Hanksville stipulation is evidence that a 12.13% return on equity was part of an overall package of adjustments and rates that were judged to be reasonable for a specific company at a given point in time. It does not show the rate to be reasonable in isolation. Nor does it constitute binding precedent or provide empirical data as to current financial markets and Carbon/Emery's unique circumstances and operations.

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[8] *Id*.

As to the second argument, Carbon/Emery reiterates the following points, all of which were brought forward in Douglas Meredith's rebuttal testimony:

a. If Carbon/Emery's return on equity is calculated using the capital asset pricing model (CAPM), then a small company premium should apply.

b. Several of the companies used by the Division of Public Utilities (Division) in calculating the CAPM are not comparable to Carbon/Emery and should be excluded from the CAPM calculation.

c. If rates of publicly-traded companies are trended from 1990 to the present, the return on the 20-year T-Bond is 5.0009%. If that value is used rather than a spot rate, the CAPM would generate a 16.83% return on equity.

d. The Rural Broadband Association has developed a free cash flow method, which the National Exchange Carriers Association (NECA) has used to establish an 11.75% median overall rate of return for rural carriers.

We address these arguments in turn, discussing the last three arguments as one.

**A. Small company premium.**

We set forth in the Order our reasons for rejecting Carbon/Emery's rebuttal testimony regarding a small company premium.[9] We decline to reconsider our decision for the reasons expressed in the Order.

[9] *See* Order, p. 11.

**B. The Division's CAPM calculation vs. alternate methodologies.**

The Division has testified that applying data from publicly-traded telecommunications companies to subsidized utilities such as Carbon/Emery is an inexact undertaking. Reasons can be found to deem any publicly-traded telecommunications company as being too dissimilar from a subsidized utility to yield representative data. In fact, as the Office of Consumer Services (Office) aptly notes in its response to Carbon/Emery's Petition, Carbon/Emery finds reasons to disqualify nearly every company from consideration. In pre-hearing testimony, the Office challenged some of the companies the Division chose to use in gathering data. After eliminating those companies from consideration, the Office calculated a lower return on equity. This evidence demonstrates that CAPM results are sensitive to changes in the mix of companies that are used as comparables. In this case, we were required to exercise our discretion in choosing the calculation that we considered to return the most reasonable result. Of the two unadjusted CAPM calculations presented, the Division used the larger pool of comparable companies, thereby reducing the effect that any single company would have on the overall calculation. Based on the record before us, we concluded that the Division's unadjusted CAPM calculation is more representative than is the Office's. We decline to modify that conclusion.

As we noted in our Order,[10] there might be other ways of calculating the CAPM (for example, using a trended rate rather than current market data), as well as methodologies other than the CAPM that might be used to generate hypothetical data for a utility that, in fact, receives

[10] *See* Order, p. 15, fn. 7.

at least part of its invested capital through a subsidy funded by other utility customers. However, we are limited in this docket by the record evidence presented.

In the last fully-litigated UUSF docket, the Division used current market data and an unadjusted CAPM calculation to generate a return on equity value, and the Commission approved that methodology.[11] As the Office notes in its response to Carbon/Emery's Petition,[12] Carbon/Emery recognized our precedent when it calculated the CAPM in rebuttal testimony. If, in fact, Carbon/Emery wished to advocate for an altogether different methodology (i.e., the free cash flow methodology), it could have made that request and set forth supporting arguments and evidence in its application and direct testimony. Had it done so, the Division and the Office would have been obligated to investigate the alternatives presented and subject them to the adversarial process. Because Carbon/Emery did not present its testimony regarding the trended rate and the free cash flow methodology until rebuttal testimony, other parties did not have a full opportunity to rebut it. We therefore decline to consider Mr. Meredith's testimony as "unrebutted."

As this docket amply demonstrates, every calculation used to establish the UUSF subsidy can be manipulated through the choice of data and methodology. Where a calculation is in dispute, it is vital that the underlying data and methodology be subjected to the adversarial process. It is incumbent upon the applicant to set forth the data and methodologies on which it asks the Commission to rely at a point in the proceeding where adverse parties may offer rebuttal

[11] Report and Order issued December 28, 2012, In the Matter of the Application for the Increase of Rates and Charges by Manti Telephone Company, Docket No. 08-046-01, pp. 20-21.

[12] *See* Office response to Petition, p. 4: "Mr. Meredith's testimony is based on the use of a CAPM model with the adjustment of premiums for small companies."

testimony from their experts. Carbon/Emery failed to do so on the issue of return on equity, waiting until rebuttal to introduce testimony regarding data and methodologies that it considered persuasive. Therefore, we decline to rely on Carbon/Emery's representations regarding what the return on equity would be if it were calculated in a different way from that recommended by the Division and the Office.

**3. Capital structure.**

Since the last fully-litigated UUSF case, the Commission has approved a number of stipulations. Carbon/Emery argues that those stipulations utilized a hypothetical capital structure, which consistently imputed 35% debt to any highly-capitalized utility. Carbon/Emery therefore argues that the Commission may not depart from its "practice" of imputing no more than 35% debt in circumstances where a utility's actual debt ratio is less than 35%.

As the Office articulates in its response to this Petition, Carbon/Emery inaccurately construes the Commission's prior practice, conflating settlements with fully-litigated UUSF cases.[13] Carbon/Emery has not pointed to any Commission precedent establishing a standard hypothetical capital structure. We also are aware of none.[14] However, the Office presented data in this docket regarding capital structures under which non-subsidized rural telecoms operated during Carbon/Emery's test year. We noted that the lowest debt ratio present in the Office's data was very similar to that of Carbon/Emery in 2005, at which time Carbon/Emery used a more customary amount of debt to fund its operations. In sum, the data provided by the Office and

[13] *See* Office response to Petition, p. 5.

[14] *See* Order, p. 13, where we emphasize that we have declined to adopt a rule that would establish a hypothetical capital structure for telecommunications companies with high levels of equity.

Carbon/Emery's operational history were stronger evidence of a reasonable capital structure than was a prior stipulated case involving a different utility.

**4. Depreciation.**

In its pre-hearing rebuttal testimony regarding depreciation, Carbon/Emery focused primarily on whether it is permissible to make an adjustment through a single-asset straight-line calculation. In our Order, we did not use a single-asset straight-line calculation in adjusting Carbon/Emery's depreciation; therefore, that specific issue is moot.

In this Petition, Carbon/Emery objects to the Commission's depreciation expense adjustment on two bases:

a. Carbon/Emery considers that the Commission was improperly motivated to adjust the depreciation calculation because the Commission stated that Carbon/Emery's FTTH network upgrade primarily benefits and supports unregulated operations.

b. Carbon/Emery considers that the Commission's vintage-based calculation of test-year depreciation does not accurately reflect the depreciation expense that Carbon/Emery will experience in subsequent years, and that the weight of the evidence in this docket supports a finding that the FCC methodology would more accurately reflect Carbon/Emery's actual depreciation expense going forward.

We address each argument in turn.

**A. Commission motivation.**

We did not adjust Carbon/Emery's depreciation calculation because we question the purpose of the FTTH upgrade. In fact, the manner in which Carbon/Emery allocates costs and

resources between regulated and unregulated operations has not driven any of the adjustments we made in our Order. We adjusted Carbon/Emery's depreciation expense because Carbon/Emery has failed to respect and comply with the asset depreciation schedules it was ordered to use in a previous docket. [15]

While we noted in our Order that the FTTH upgrade primarily benefits unregulated operations,[16] we did not disallow or decrease UUSF support on that basis. We simply are not persuaded that we should allow Carbon/Emery to circumvent the Commission's previously-ordered depreciation schedules to recoup the costs of the upgrade on an accelerated schedule, and well before the FTTH network might be expected to lose service utility.

**B. FCC methodology.**

In discussing this aspect of Carbon/Emery's request for review, we must first summarize the relevant procedural history surrounding the issue of depreciation in this docket, as follows:

- In the Division's direct testimony, it did more than recommend and calculate a depreciation adjustment using a single-asset straight-line methodology. It also suggested that Carbon/Emery's accelerated depreciation could be remedied under other methodologies, which would include: (a) correctly applying what the parties refer to as the FCC methodology; or (b) configuring Carbon/Emery's asset groups according to vintage, and then applying straight-line depreciation to each asset group.[17] However, the Division did not calculate either adjustment in its direct testimony.

- In sur-surrebuttal testimony, Carbon/Emery applied the FCC methodology to calculate another option for the Commission to consider alongside the Division's

[15] *See* Report and Order issued January 3, 2006 in Docket No. 05-2302-01.

[16] Order, p. 19. *See also* Division response to Petition, p. 5, where the Division cites to hearing testimony establishing that "Internet is the most profitable product, it is the most desirable product, and it drives the system usage."

[17] Hellewell direct testimony, lns. 205-211 and 223-234.

single-asset straight-line adjustment.[18] The Division did not test that calculation,[19] but noted in its own sur-surrebuttal testimony that, "Mr. Woolsey's calculations omit several groups of assets currently on Carbon-Emery's books."[20]

- In its own sur-surrebuttal testimony, the Division also calculated Carbon/Emery's test-year depreciation expense using a vintage methodology.[21] Carbon/Emery did not request an opportunity to test or rebut the Division's vintage-based calculation.

In sum, after rejecting Carbon/Emery's accelerated depreciation calculation for failure to comply with a prior Commission order, we were left with two options: (a) we could accept the Division's single-asset straight-line methodology, as set forth in direct testimony; or (b) we could choose between Carbon/Emery's FCC methodology and the Division's vintage methodology, each of which was set forth for the first time in sur-surrebuttal testimony, and neither of which was fully subjected to the adversarial process.

This procedural context must be borne in mind as we address Carbon/Emery's bases for arguing that the weight of the evidence in this docket demonstrates the FCC methodology to be objectively superior to the Division's vintage methodology.

First, we note that none of the evidence on which Carbon/Emery asks us to rely was set forth in direct testimony so as to be fully litigated. We cannot disregard that deficiency in the record.

Second, Carbon/Emery claims that its actual depreciation in years subsequent to the test year will be higher than that recognized under the vintage methodology. Carbon/Emery

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[18] Woolsey sur-surrebuttal testimony, lns. 379-380.

[19] Hearing transcript, p. 233, lns. 14-19.

[20] Hellewell sur-surrebuttal testimony, lns. 161-162.

[21] Hellewell sur-surrebuttal testimony, lns. 252-257.

calculates that the FCC methodology would allow more depreciation expense, and it considers that the FCC methodology is therefore more accurate. As the Division notes in its response to this Petition, it was incumbent upon Carbon/Emery to choose a test year that would be representative of the anticipated effective period.[22] We see no error in accepting Carbon/Emery's choice. Further, given the length of time and the degree to which Carbon/Emery has accelerated its depreciation, we cannot rely on Carbon/Emery's estimate of future depreciation.[23] Finally, we note Carbon/Emery's acknowledgment that "there may be evidence supporting the calculation of the [Division's vintage] depreciation expense" for the test year,[24] as well as Mr. Woolsey's testimony at hearing, as follows:

> Q: Ultimately, what you're saying is that the capital expenditures you have planned with the current depreciation estimate you've used have a slightly growing rate base through the end of 2019. And then that would begin to trail off fairly significantly at that point, would it not?
>
> A: That is correct.[25]

[22] Division response to Petition, p. 7: "There is no 'fatal flaw' in relying on Carbon/Emery's own representation in its application that the 2014 test year is a reasonable basis for calculating the revenue requirement for the rate effective period. Had Carbon/Emery concluded that an adjusted 2014 test year was not representative of the rate effective period it should have chosen to use another test period."

[23] *See* Hellewell surrebuttal testimony at lns. 215-223: "Carbon-Emery's depreciation expense has been accelerated for so long now, when asked to return to a normalized depreciation expense, Carbon-Emery baulks at the idea stating it will cause a 'cash-flow squeeze' and to minimize this so Carbon-Emery can 'continue to invest in infrastructure as identified in its planned capital budget.' Carbon-Emery's capital budget is based around accelerated depreciation expense and the anticipated UUSF dollars it will bring in." (citing Duncan Meredith rebuttal testimony at ln. 757.)

[24] Petition, p. 22.

[25] Hearing transcript, p. 45, lns. 16-22.

We see no error in applying our test-year adjustment, which Carbon/Emery acknowledges to be supported by record evidence, to the effective period of the subsidy in circumstances where, according to Carbon/Emery's own forecasts, only slight growth in rate base is anticipated.

Third, in characterizing the FCC methodology as more accurate than the vintage methodology, Carbon/Emery states that the FCC methodology requires an approximation of the actual diminution of value of assets, while the vintage methodology does not.[26] Assuming that such approximation is required in this docket, Carbon/Emery criticizes the Division for not inspecting Carbon/Emery's plant to establish the actual remaining life of its depreciable assets.[27] We decline to adopt this reasoning.

At the outset, we do not see in the record where Carbon/Emery presented this specific advantage of the FCC methodology to the Commission in pre-hearing testimony or at hearing. Therefore, this argument is not subject to consideration on review. More importantly, though, it is not necessary in this docket to inspect the plant or approximate the remaining value of Carbon/Emery's assets, because the depreciable lives of those assets have been established by prior Commission order.

Carbon/Emery has not argued in this docket that the Commission-ordered depreciable lives need to be re-examined or re-set. [28] Therefore, we view Carbon/Emery's argument as opining that the Division's declining to question and potentially re-set the Commission-ordered

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[26] Petition, p. 23

[27] Petition, pp. 20-21.

[28] *See* hearing transcript, p. 40, ln. 19, where Mr. Woolsey testified, "I do feel that the lives established by the Commission are representative."

depreciable lives outweighs its own failure to comply with them. We do not accept that argument.

Fourth and finally, our choice of which methodology to use in adjusting Carbon/Emery's depreciation expense is discretionary. As explained above, after rejecting Carbon/Emery's accelerated depreciation calculation and the Division's straight-line single-asset adjustment, we were left to choose between two largely untested and unrebutted calculations. In our Order, we stated that the testimony at hearing established the Division's vintage methodology as being similar to the methodology that Carbon/Emery uses on the unregulated side of its operations. That testimony was part of the body of evidence that persuaded us to accept the adjustment arrived at through the vintage depreciation methodology.[29] Carbon/Emery has failed to acknowledge our reasoning and to explain why it would constitute an abuse of discretion to apply in this docket a methodology that Carbon/Emery employs for a large portion of its operations.

**5. Interstate revenue impact of depreciation adjustment.**

Carbon/Emery argues that adjusting its depreciation expense reduces its interstate revenues, which reduction must be acknowledged and potentially compensated in this docket. Carbon/Emery characterizes Mr. Woolsey's testimony on this issue as "unrebutted" without acknowledging that it was a new argument raised for the first time in sur-surrebuttal testimony.[30]

[29] Order, pp. 21-22. See also hearing transcript, p. 68, ln. 19 through p. 71, ln. 24.

[30] Woolsey sur-surrebuttal testimony, lns. 281-288.

Given this procedural context, we decline to categorize Mr. Woolsey's calculations as "unrebutted."

Additionally, we note that the hearing testimony on this issue was extremely limited, consisting of Carbon/Emery's cross-examination of a Division witness, as follows:

> Q: I just have a couple more issues here. I want to talk a little bit about the interstate effect that's been identified in the testimony. You haven't performed the depreciation calculation using the FCC method, but you have provided a calculation of the depreciation expense using what you call the single asset straight line method, correct?
>
> A: Yes.
>
> Q: And I believe you provided a calculation using what you call the vintage method of depreciation, correct?
>
> A: Yes.
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> Q: Upon calculating the depreciation expense adjustments using either of those methods, did you make any adjustment for the interstate revenue associated with that adjustment?
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> A: No.
>
> Q: Would you agree that if you change a general expense item on the books of Carbon/Emery there is an interstate impact where the jurisdiction separations of the company—I don't want to use confidential numbers here—are divided between interstate and intrastate jurisdictions?
>
> A: Yes.
>
> Q: If you don't consider the interstate revenue impact of the depreciation expense adjustment, then next year if Carbon/Emery takes the lower depreciation expense that you're suggesting and applies the jurisdictional percentage to that adjusted lower number, Carbon/Emery will recover less on the

federal interstate side for that adjusted depreciation expense; is that correct?

A: Sure.

Q: And if that happens, then under the total company approach adopted by the Commission Carbon/Emery would be entitled to seek recovery of the revenue shortfall on the interstate side from the state; is that correct?

A: Yes. [31]

This testimony shows that, in order for Carbon/Emery to claim a negative impact to its interstate revenue, at least three hypothetical conditions must be met. First, Carbon/Emery must change a general expense item on its books. Second, it must apply the vintage depreciation methodology to its interstate operations. Third, it must utilize the vintage depreciation methodology in working with the FCC to establish its Universal Service Fund subsidy.

The flaws in Carbon/Emery's argument are that we have not required it to change its accounting or modify its books; we have not required it to adopt a different depreciation methodology in accounting for its interstate operations; and we have not required it to change its depreciation calculation in its dealings with the FCC. Therefore, we consider Carbon/Emery's arguments regarding an interstate revenue impact too speculative to adopt.[32]

[31] Hearing transcript, p. 233, ln. 12 through p. 234, ln. 22.

[32] If Carbon/Emery chooses to change its bookkeeping going forward, and if that change results in reduced federal subsidization, it may make the Commission aware of those circumstances by filing a new application for review of its UUSF subsidy.

**6. Imputed interest.**

In imputing debt to Carbon/Emery, we also calculated the financial benefit that would result from Carbon/Emery's being able to claim the interest expense as a tax deduction. Carbon/Emery now argues that our doing so constitutes an error of law.

Carbon/Emery has not cited a law that prohibits a regulatory body from calculating and considering all effects of a hypothetical capital structure. Rather, Carbon/Emery argues in this request for review that, "[W]hen a company has no debt, there is no interest expense to synchronize, and it cannot realize any interest expense tax deduction. Thus it is not appropriate to utilize an interest expense deduction that cannot be realized by the company."[33] We decline to recognize a legal basis for Carbon/Emery's argument regarding the appropriateness of an interest synchronization.

A public utility must operate in an efficient, low-cost manner. We found in our Order that funding 100% of operations through equity is both inefficient and costly.[34] In imputing debt to Carbon/Emery, we imputed the prudence that a public utility is required to exercise, and we attributed to Carbon/Emery all calculable effects of that prudence. We do not see an error of law in that attribution.

Additionally, Carbon/Emery argues for the first time in this Petition that any interest synchronization should be applied only to the intrastate portion of the rate base. As the Office notes in responding to Carbon/Emery's Petition, this argument is not timely.[35] Further, we read

[33] Petition, p. 25.

[34] Order, p. 13.

[35] *See* Office response to Petition, p. 9.

Carbon/Emery's argument as asking us to separate assets and costs by jurisdiction before making any further calculations. Were we to do so, we would consider it necessary to take the same approach with every expense account, separating it not only according to how the expense is divided between intrastate and interstate operations, but also according to how it is divided between regulated and unregulated operations. The costs to perform such a separation analysis are prohibitive; therefore, we do not utilize or require it generally, and we decline to apply it selectively.

**7. "Change" in depreciation method.**

Citing to Utah Code § 54-4-4(4), Carbon/Emery argues that its decision to accelerate its depreciation cannot be overturned unless the Commission first reviews all of the circumstances in which Carbon/Emery made that decision, and thereafter determines that the utility acted imprudently at that time and in those circumstances. We reject this argument for the following reasons.

First, Carbon/Emery raised this argument for the first time in its post-hearing closing argument brief.[36] Therefore, it was not timely raised.

Second, Section 54-4-4(4) specifically applies to the fixing of rates, which is not at issue in this docket.

Third, Carbon/Emery has not provided to the Commission the facts and circumstances it now claims the Commission must consider. Rather, Carbon/Emery has stated generally that it

[36] Carbon/Emery Telcom, Inc.'s post-hearing brief and closing argument, p. 11.

"carefully selected the [accelerated] method of depreciation" it has been using.[37] Assuming arguendo that this were a rate-setting docket subject to Section 54-4-4(4), this very general statement does not provide to the Commission any evidence as to "what the utility knew or reasonably should have known at the time of the action." Utah Code § 54-4-4(4)(a)(iii).

Fourth, the question under Section 54-4-4(4)(a)(iii) would not be whether Carbon/Emery carefully considered whether to circumvent its Commission-ordered depreciation schedules. The question would be whether Carbon/Emery knew or should have known that the Commission had issued an order setting its depreciable lives. Carbon/Emery has not argued that it was unaware of the Commission's order.

Fifth, in looking to our Order for a finding that Carbon/Emery acted imprudently in choosing to disregard a Commission order, that finding is implicit in our decision to reject Carbon/Emery's accelerated depreciation methodology and adjust its test-year depreciation expense accordingly. *See* Utah Code § 63G-4-403(4)(g).

As to Carbon/Emery's argument that any "change" we require to its depreciation methodology must be accomplished through rulemaking, we have stated repeatedly in this docket, and we emphasize again, that we do not order Carbon/Emery to change its method for calculating depreciation expense. If it wishes to take the risk of regulatory action, including adjustment in a future docket, it may continue to ignore the Commission's prior order. We do not consider it necessary to promulgate a rule stating that a public utility is required to comply with an order setting its depreciation schedule.

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[37] Petition, p. 26.

**8. This order does not constitute rulemaking.**

In this Petition, Carbon/Emery states that our Order amounts to a rule because it issues in "one of the only fully litigated UUSF cases in recent Commission history" and, therefore, "could be interpreted as a statement of the Commission's position on UUSF proceedings that would be generally applicable to rural rate of return providers seeking UUSF disbursements."[38] Carbon/Emery appears to argue that, whenever a contested case requires the Commission to articulate a position, the Commission is barred from ruling unless it has foreseen the parties' dispute and promulgated a rule to foreclose it. We conclude that this argument is inconsistent with the Utah Administrative Rulemaking Act.

Any order that adjudicates contested issues may be considered to create precedent. When such precedent satisfies the conditions set forth in Utah Code § 63G-3-201, the issuing agency is required to promulgate a rule within 120 days of issuing the order. However, the agency is not prohibited in an adjudicative proceeding from ruling on contested issues simply because doing so establishes a position that might affect another utility's operational decisions or inform future adjudications.[39]

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[38] Petition, pp. 28-29.

[39] *See also* Utah Code § 54-7-15(4): "An order of the commission, including a decision on rehearing: (a) has effect only with respect to a public utility that is an actual party to the proceeding in which the order is rendered; and (b) does not determine any right, privilege, obligation, duty, constraint, burden, or responsibility with respect to a public utility that is not a party to the proceeding in which the order is rendered unless, in accordance with Subsection 63G-3-201(6), the commission makes a rule that incorporates the one or more principles of law that: (i) are established by the order; (ii) are not in commission rules at the time of the order; and (iii) affect the right, privilege, obligation, duty, constraint, burden, or responsibility with respect to the public utility." *See also WWC Holding Co., Inc. v. Public Service Com'n of Utah*, 2002 UT 23, as addressed in the Office response to Petition, pp. 11-12 and the Division response to Petition, pp. 9-10.

ORDER

Having considered the arguments raised by Carbon/Emery in its Petition for review, rehearing, or reconsideration, the Commission finds no error of law or abuse of discretion that would necessitate issuance of an amended order. Therefore, the Petition is DENIED.

DATED at Salt Lake City, Utah, May 19, 2016.

/s/ Jennie T. Jonsson
Administrative Law Judge

Approved and confirmed May 19, 2016 as the Order of the Public Service Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#276841

CERTIFICATE OF SERVICE

I CERTIFY that on May 19, 2016, a true and correct copy of the foregoing was served upon the following as indicated below:

By E-Mail:

Kira Slawson (kiram@blackburn-stoll.com)
*Counsel for Carbon/Emery Telcom, Inc.*

Brett N. Anderson (bretta@blackburn-stoll.com)
Blackburn & Stoll, LC

Vicki Baldwin (vbaldwin@parsonsbehle.com)

Sharon Bertelsen (bertelsens@ballardspahr.com)

Larry Bowman (larry.bowman@charter.com)

Brian W. Burnett (brianburnett@cnmlaw.com)

(cflregulatory@chartercom.com)

Eddie L. Cox (ecox@cut.net)

William J. Evans (wevans@parsonsbehle.com)

James Farr (james.farr@centurylink.com)

Amy Gross (agross@tminc.com)

Alan Haslem (ahaslem@mleainc.com)

Ray Hendershot (ray.hendershot@beehive.net)

William Huber (William.huber@questar.com)

Bill Hunt (williamp.hunt@dish.com)

David R. Irvine (Drirvine@aol.com)

Kristin L. Jacobson (Kristin.l.jacobson@sprint.com)

Brock Johansen (bjohansen@emerytelcom.com)

Dawn Kubota (kubotad@ballardspahr.com)

Jasen Lee (jlee@desnews.com)

Kirk Lee (kirk.lee@ftr.com)

Shirley Malouf (srmalouf@stoel.com)

Jennifer H. Martin (jhmartin@stoel.com)

Stephen F. Mecham (sfmecham@gmail.com)

Gregory Monson (gbmonson@stoel.com)

Sharon Mullin (slmullin@att.com)

Thorvald Nelson (tnelson@hollandhart.com)

Janice Ono (Janice.ono@att.com)

Sheila Page (spage@utah.gov)

Mike Peterson (mpeterson@utahcooperatives.org)

Pam Pittenger (pam.pittenger@ftr.com)

Jenny Prescott (jenny.prescott@allwest.com)

Bruce Rigby (bruce@ucmc-usa.com)

Gary Sackett (gsackett@joneswaldo.com)

Alan L. Smith (alanakaed@aol.com)

Ted D. Smith (tsmithlaw@earthlink.net)

Joe Solana (compliancemanager@gsaudits.com)

Kendra Thomas (kthomas@kfrservices.com)

Bruce H. Todd (btodd@stratanetworks.com)

Jake Warner (jakew@beehive.net)

James H. Woody (jwoody@union-tel.com)
John Woody (jowoody@union-tel.com)
Union Telephone Company

Patricia Schmid (pschmid@utah.gov)
Justin Jetter (jjetter@utah.gov)
Rex Olsen (rolsen@utah.gov)
Robert Moore (rmoore@utah.gov)
Utah Assistant Attorneys General

By Hand-Delivery:

Division of Public Utilities
160 East 300 South, 4th Floor
Salt Lake City, Utah 84111

Office of Consumer Services
160 East 300 South, 2nd Floor
Salt Lake City, Utah 84111

_____
Administrative Assistant