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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint of: BEAVER COUNTY, et al, and all other Persons or Entities Similarly Situated, Complainants, vs. QWEST CORPORATION, fka U S WEST COMMUNICATIONS, INC., fka THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, Respondent.	:	Docket No. 01-049-75 **QWEST'S REPLY TO COUNTIES' REPLY MEMORANDUM ON MOTION TO CONSOLIDATE**

Qwest Corporation ("Qwest") hereby responds to the Counties' Reply Memorandum in Further Support of Motion to Consolidate and Motion to Amend ("Counties Reply"), filed August 23, 2002.[1]

[1] Qwest acknowledges that it is not typical procedure for the non-moving party to file a reply to the moving party's reply. However, the Commission has not scheduled a hearing on the Counties' motion to consolidate and the Counties' reply relies on authorities not previously addressed by Qwest.

The Counties state that Qwest "would have the Commission believe that . . . Petitioners' claim for declaratory relief in Docket No. 98-049-48 is not pending before the Commission." (Counties Reply at 4.) That is precisely Qwest's position, and nothing in the erroneous reasoning or irrelevant authority cited in the Counties Reply undercuts that position.

The Counties rely on *Harper Investments v. Utah State Tax Comm'n*, 868 P.2d 813 (Utah 1994), for the claim that as the "Tax Commission chose to rule on the request for reconsideration after it was 'deemed denied' under § 63-46b-14(3)(a), so, too, can this Commission, rule on Petitioners' request for declaratory ruling." (Counties Reply at 5.) This argument is flawed and is not supported by *Harper Investments*. The Counties' argument, if successful, would result in the Commission nullifying the legislature's 60-day automatic denial provision in Utah Code Ann. § 63-46b-21(7). It would also result in the Commission retaining never-ending jurisdiction (it is now three and one-half years since the Counties requested a declaratory order in Docket No. 98-049-48) to keep a docket open and issue a declaratory order. Neither section 63-46b-21(7) nor *Harper Investments* supports such a result.

First, *Harper Investments* had nothing to do with declaratory orders under section 63-46b-21, but rather dealt with the interpretation of Utah Code Ann. §§ 63-46b-13 and 63-46b-14, specifically the "deemed denial" of requests for reconsideration and the timing for appeals. In Docket No. 98-049-48, no petition for rehearing under section 54-7-15 was ever filed, so there was never any "deemed denial" of a request for rehearing affecting the 30-day period for appeal; rather, the only "denial" was the automatic and mandatory denial of the request for a declaratory order under the clear language of section 63-46b-21.

In the context of a request for reconsideration, the statutory "deemed denial" serves the obvious function of automatically triggering the 30-day period in which a party may appeal a

final agency action, unless the agency issues an order on reconsideration thereafter. Because a request for reconsideration tolls the 30-day appeal period,[2] if there were no statutory "deemed denial" an agency would be forced to respond to every request for reconsideration, otherwise the requesting party's time in which to appeal would never begin to run.

It makes perfect sense, then, for the courts to allow, as the Supreme Court did in *Harper Investments,* an agency to override the 20-day "deemed denial" with a late agency decision on the request for reconsideration. Indeed, the statute supports agency authority to override the "deemed denial" under section 63-46b-13, because under section 63-46b-14 the 30-day appeal period runs from "the date that the order constituting the final agency action is issued *or* is considered to have been issued under Subsection 63-46b-13(3)(b)." (Emphasis added.) As the Utah Court of Appeals held, in *49th Street Galleria v. Tax Comm'n,* 860 P.2d 996, 998-99 (Utah Ct. App. 1993):

> A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued *or* is considered to have been issued under Subsection 63-46b-13(3)(b).

Id. (emphasis added)[quoting Utah Code Ann. § 63-46b-14(3)(a)]. The Tax Commission simply ignores the disjunctive term "or" found in section 63-46b-14(3)(a) and interprets the statute to mean that if an order is not issued within the twenty day "deemed denied" period, the thirty-day jurisdictional clock for judicial review begins irretrievably to run.

We disagree. A plain reading of the statute indicates that a party may file a petition for judicial review within thirty days after the order constituting the final agency action, in this case the order denying reconsideration issued on March 10, 1992, "*or*" within thirty days after the "deemed denied" date established by section 63-46b-13(3)(b).

[2] *See Harper Investments,* 868 P.2d at 815.

As *Harper Investments* makes clear, a party that has sought reconsideration in a timely manner may, at its peril, ignore the 20-day deemed denial if it believes the agency will issue a decision on reconsideration thereafter. Of course, if the agency never issues a decision and no appeal is filed within 30 days after the 20-day deemed denial, the right of appeal will be lost. 868 P.2d at 816.

Unlike the "deemed denial" of a petition for reconsideration issue addressed in the foregoing cases, the 60-day automatic denial of a petition for a declaratory ruling in section 63-46b-21(7) is mandatory. There is no "or" language to provide the agency a unilateral opportunity to issue a declaratory order after the 60-day period has run. The language of section 63-46b-21(7) could hardly be clearer or more imperative:

> Unless the petitioner and the agency agree in writing to an extension, if an agency has not issued a declaratory order within 60 days after receipt of the petition for a declaratory order, *the petition is denied.*

(Emphasis added.) Thus, the only way the 60-day time period can be extended is if the petitioner and the agency "agree in writing to an extension." *Unless* they do so, an order must be issued within the 60-day period—otherwise, "the petition is denied." There was no such written agreement in Docket No. 98-049-48, and there was no declaratory order within the 60-day statutory period. Therefore, the petition was denied by operation of the statute. The Counties petition for review with the Supreme Court indicates their agreement with this fact. However, because the Counties failed to file a petition for reconsideration of the denial within 20 days thereafter, the matter could not be revived by their appeal.

The Counties have provided no support for the argument that the automatic denial of their request for a declaratory order in Docket No. 98-049-48 was somehow ineffective and that the Commission retains authority to undo that denial. The denial was final and the docket is dead—

thus, there is nothing left of Docket No. 98-049-48 to consolidate with any other docket and the motion to consolidate must be denied.

DATED: June 18, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of QWEST'S REPLY TO COUNTIES' REPLY MEMORANDUM ON MOTION TO CONSOLIDATE was served upon the following by U.S. Mail, first class postage prepaid, on June 18, 2018:

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