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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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| <p>IN THE MATTER OF UBTA-UBET COMMUNICATIONS, INC.'S (DBA STRATA NETWORKS) APPLICATION FOR UTAH UNIVERSAL SERVICE FUND SUPPORT</p> | <p>DOCKET NO. 15-053-01</p> <p>DIVISION MEMORANDUM IN OPPOSITION TO STRATA NETWORKS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEPRECIATION METHOD</p> |
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Pursuant to Utah Code Ann. § 54-4a-1 and Utah Admin. Code r746-100 the Utah Division of Public Utilities (“Division”), hereby submits this Memorandum in Opposition to STRATA Networks’ Motion for Partial Summary Judgment. Summary judgment is not appropriate because the same issues have been decided recently in another docket. Genuine issues of material fact exist. Additionally the Public Service Commission of Utah (“Commission”) is not bound as a matter of law to accept group plan depreciation, particularly as used by STRATA, as the only method of determining depreciation expense for Utah Universal Service Fund (“UUSF”) distributions. The Commission should deny the Motion.

RESPONSE TO STRATA'S STATEMENT OF MATERIAL UNDISPUTED FACTS

2. STRATA calculates depreciation expense using a straight-line calculation in conformity with a group plan of accounting required by the FCC in the Code of Federal Regulations, Title 47, Chapter I, Subchapter B, Part 32. FCC part 32.2000 (g)(i) states:

Depreciation accounting—(1) Computation of depreciation rates. (i) Unless otherwise provided by the Commission, either through prior approval or upon prescription by the Commission, **depreciation percentage rates shall be computed in conformity with a group plan of accounting for depreciation** and shall be such that the loss in service value of the property, except for losses excluded under the definition of depreciation, may be distributed under the straight-line method during the service life of the property. (*Emphasis added.*)

The Division disputes that STRATA calculates its depreciation “in conformity” with the group plan of accounting as prescribed by the FCC. First, STRATA’s filing is based on two different depreciation methods by using group plan depreciation for some assets and single asset depreciation for others. (Direct Testimony of Hicken, lines 84-88). Specifically the FCC requires for interstate depreciation calculation “a group plan of accounting such that the loss in service value of the property, except for losses excluded under the definition of depreciation, may be distributed under the straight-line method during the service life of the property.” FCC Part 32.2000(g)(1)(i) (emphasis added). STRATA’s calculation of depreciation is not in conformity with 47 CFR 32 because fully depreciated assets remain in the groups skewing average service lives. The resulting calculated depreciation does not depreciate the loss in service value of the property in a straight line method during service life of the property. (Direct Testimony of Hicken, lines 113-76).

3. In Utah Admin. Code R746-320-2 D, the Commission adopted 47 CFR Part 32 as “...the prescribed systems of accounts to record the results of Utah intrastate operations” for

telephone utilities, which includes mandatory group asset depreciation.

This is a legal conclusion, not a fact. The Division disputes that Utah Admin. Code r.746-320(2)(D) adopts Part 32 as universally applying to all matters involving telephone utilities. Specifically the Division further disputes that group asset depreciation is mandatory as a result.

INTRODUCTION

On April 6, 2015 STRATA filed an application for an increase in Utah Universal Service Fund (“UUSF”) Support. This filing was made shortly after Carbon/Emery Telcom, Inc. filed a similar application for UUSF on March 27, 2015. *See* Docket No. 15-2302-01. The applications share many similarities, and in particular both use similar methods of group plan depreciation. Carbon/Emery filed a substantially similar motion for summary judgment in that docket. STRATA “adopt[ed] the legal arguments of Carbon/Emery” in its Memorandum in Support of Motion for Summary Judgment. Similarly the Division will adopt its legal arguments in response. The Division’s Response is attached as Attachment A.

The Commission’s October 15, 2015 Order in that docket denied summary judgment on the same issues presented in this docket. It held that “The Commission rule R746-340-2(D) adopts the FCC’s Part 32 expressly for the purpose of evaluating service standards. It does not necessarily follow that the federal rule also applies in calculating a utility’s UUSF requirement.” *Id.* at p.4. The Commission further held that it “retains the same ability as the FCC to require straight-line depreciation on an asset-by-asset basis in circumstances where it appears that a utility has improperly configured its asset groups.” *Id.* at 6. The Commission should similarly deny summary judgment.

ARGUMENT

The Motion for Partial Summary Judgment filed by STRATA should be denied. There are genuine issues of material fact with respect to whether STRATA calculates depreciation correctly in accordance with 47 CFR 32 (“Part 32”) and whether STRATA properly uses the depreciation rates set in Docket Nos. 94-053-01 and 03-053-01. Additionally even if all the facts were undisputed the Commission is not bound by law to follow the FCC prescribed group plan depreciation method, and is in fact prohibited by statute from doing so if other more reliable or reasonable methods are available.

I. SUMMARY JUDGMENT MAY NOT BE GRANTED BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT

Summary Judgment may only be granted “if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” Utah R. RCP Rule 56. The Commission “should grant summary judgment only when, viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party.” *Morra v. Grand County*, 1026, 2010 UT 21, ¶ 12, 230 P.3d 1022. “It only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact for purposes of summary judgment.” *Zundel v. Magana*, 2015 UT App 69, 347 P.3d 444.

STRATA’s Motion for Summary Judgment seeks summary judgment on the issue of whether the Commission has discretion to calculate depreciation by a method other than group plan without rulemaking. In support of its assertion that the Commission cannot do so STRATA asserts that the Commission has established group plan accounting as the only accounting

method for depreciation by rule. This reliance on the rule is unsupported by the language of the administrative rule when taken in context, does not comport with Utah law, and is inconsistent with Commission precedent of making regulatory adjustments to Part 32. Moreover STRATA's premise of universal application is inconsistent with STRATA's own depreciation in its Application.

II. THE COMMISSION IS NOT REQUIRED AS A MATTER OF LAW TO USE GROUP PLAN DEPRECIATION FOR THE DISBURSMENT OF STATE UNIVERSAL SERVICE FUND SUPPORT.

The Commission has broad statutory discretion in choosing the depreciation method it deems appropriate when determining the UUSF distribution. STRATA's reliance on a subsection of the administrative rule on telephone service quality regarding the reports and records on service quality is misplaced. The cited rule, referencing a federal system of uniform accounts to be used for reporting purposes, is not and has not historically been, applied globally to telecommunications companies' depreciation. In fact, Utah law specifically provides for the Commission to retain authority to determine the depreciation expense.

STRATA asserts that a subsection of Administrative Rule 746-340 on "Service Quality for Telecommunications Corporations" requiring the records and reports that telecommunication corporations must make available pursuant to Utah Admin. Code r746-340-2 use the "system of accounts to record the results of Utah intrastate operations" means that group asset depreciation is the only legal depreciation method. For STRATA's argument to be persuasive it must be first found that the accounting methods in Part 32 are universally applicable to all telecommunications depreciation calculations. This broad application cannot be supported.

This expansive view of the application of the service quality rule requiring a specific depreciation method is inconsistent with canons of interpretation. The language of an

administrative rule or statute must “be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and ‘with other statutes under the same and related chapters.” *State v. Schofield*, 2002 UT 132, ¶ 8, 63 P.3d 667. When read as a whole in harmony with surrounding provisions, the limited application of Rule 746-340-2 becomes clear.

The plain language of the rule states that “[t]he purpose of [Rule 746-340] is to establish reasonable service standards to the end that adequate and satisfactory service will be rendered to the public.” Utah Admin Code r746-340-1(A)(1). Rule 746-340-2 governs records and reports. “Each telecommunications corporation shall maintain records of operations in sufficient detail to permit review of its service performance.” Rule 746-340-2(C)(1). The rule then goes on to prescribe how those reports should be recorded stating in subpart (D) that the Uniform System of Accounts “is the prescribed system of accounts to record the results of Utah intrastate operations.”

Interpreting the rule as creating a legally binding limit on how depreciation may be calculated impermissibly conflicts with Utah statutes. Administrative rules must be interpreted in such a way that they are harmonious with statutes. If the rule conflicts with statute, the rule must yield. See *Crossroads Plaza Ass'n v. Pratt*, 912 P.2d 961, 965 (Utah 1996). Section 54-7-12.1 is consistent with the broader language in §54-4-24, but adds more specific requirements for consideration of depreciation expenses for telephone corporations. It provides broad authority to the Commission to determine depreciation expense, including method of calculation, and requires the Commission to consider all relevant factors.

In determining the depreciation expense of a telephone corporation in any proceeding under Section 54-7-12, the commission shall consider all relevant factors, including the alteration of asset lives to better reflect changes in the economic life of plant and equipment used to provide telecommunications services. A relevant factor to consider shall be the asset lives of existing and emerging competitive telecommunications

providers. Nevertheless, the commission shall retain the authority to determine the depreciation expense of telecommunications corporations for ratemaking purposes.

Utah Code Ann. § 54-7-12.1 (emphasis added).

While Section 54-7-12.1 is expressly limited to rate proceedings it demonstrates that group plan accounting for depreciation is not universally applied to telecommunications matters as suggested by STRATA. If this were the case it would be inconsistent with the plain language of Utah law. Moreover the same discretion must apply both to rate cases and UUSF requests for rate of return carriers. This is inherent in the relationship between ratemaking and UUSF requests. Section 54-8b-15(7)(b) states that the funds shall defray the costs “where the basic telephone service rate considered affordable... is less than the costs, as determined by the Commission for that geographic area.” This is reflected in Rule 746-360-8(A)(1). UUSF distributions are calculated as the “difference between the Incumbent telephone corporation’s total embedded costs (revenue requirement)” and the revenue generated from the support area. *Id.* The revenue requirement for cost of service Telephone Corporation must equal the sum of the revenue received from rates and UUSF distributions.

Depreciation expense is one of the largest contributors to the revenue requirement for telephone companies. If the revenue requirement were inconsistent between the UUSF and ratemaking proceedings the formula would not function properly. It would be impossible to reconcile the two different revenue requirement values in such a way that does result in over or under earning. Using two different depreciation methods will not result accurate UUSF distributions and accurate rates. The correct interpretation of the rule that requires service quality reporting to use the Uniform System of Accounts without universal adoption of a specific depreciation method both serves the objective of the rule and comports with statute.

There is also Commission precedent for rejecting the FCC's accounting methods in Part 32 when the results under the FCC's Part 32 rules differ from those the Commission has found just and reasonable. In its January 19, 1996 Order in *In Re U S West Communications, Inc.*, the Commission made multiple regulatory adjustments to conform the calculations under the FCC's methods to "Utah regulatory policies and ratemaking principles." Docket No. 95-049-05 at p.2. For example the Commission rejected outright a method of accounting in Part 32 on the capitalization of leases. *Id* at 4. With respect to depreciation the Commission in that Docket adjusted depreciation expense from "the FCC level to the PSC level for intrastate ratemaking purposes." *Id* at 5.

If the rule on service quality reports were applied universally the Commission could not have made regulatory adjustments. For example the Commission would have been prohibited from changing the method of accounting for leases without a rule making and prospective application only. The same discretion to adjust depreciation methods for specific asset types that the Commission has retained for 20 years in ratemaking must also apply to UUSF cases to retain consistency between ratemaking and UUSF earnings. The Commission is not bound as a matter of law to accept the group plan depreciation method or Stratra's use of that method.

Finally STRATA does not use the group plan depreciation method universally for its own depreciation calculations. STRATA's Application relies on single asset straight line depreciation method for some assets. (Direct Testimony of Hicken, lines 84-88.) This further demonstrates that group plan depreciation is not viewed at least by STRATA as being universally applicable to all telecommunications matters.

CONCLUSION

STRATA's Motion for Summary Judgment should be denied. There are genuine issues of material fact in filed testimony. The rule relied upon by STRATA is a subsection of the rule

on service quality standards and is not universally applicable to all matters involving telecommunications companies in Utah. If it were, it would be in conflict with other administrative rules and statutes. The Commission has previously recognized that Part 32 is not universally followed where it is inconsistent with Utah regulatory policy. The logical conclusion is that the Commission retains authority to determine the method and result of depreciation expense calculation in UUSF matters. The Commission has very recently held that it retains discretion to adjust depreciation calculations when necessary in Docket No. 15-2302-01.

For these reasons the Commission is not bound to the group plan method for calculating depreciation, nor is it bound to the manner in which STRATA calculates its depreciation expense using the group plan method. The Commission should deny STRATA's Motion for Partial Summary Judgment.

Submitted this 26th day of October, 2015.

/s/ Justin C. Jetter

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