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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

<p>IN THE MATTER OF THE APPLICATION OF CARBON/EMERY TELCOM FOR AN INCREASE IN UTAH UNIVERSAL SERVICE FUND SUPPORT</p>	<p>DOCKET NO. 15-2302-01</p> <p>DIVISION MEMORANDUM IN OPPOSITION TO CARBON/EMERY'S MOTION FOR PARTIAL SUMMARY JUDGMENT</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 Response To
Motion For Partial Summary Judgment. Summary judgment is not appropriate because 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 Carbon/Emery, as the only method of determining depreciation expense for Utah

Universal Service Fund (“UUSF”) distributions. The Commission should deny the Motion.

RESPONSE TO CARBON/EMERY’S STATEMENT OF MATERIAL UNDISPUTED FACTS

2. Carbon/Emery calculates depreciation expense using a straight line calculation in conformity with a group plan of accounting as prescribed by Federal Communications Commission (FCC) in the Code of Federal Regulations, Title 47, Chapter I, Subchapter B, Part 32. FCC part 32.2000 (Testimony of Woolsey, lines 799-802; and Rebuttal Testimony of D Meredith, lines 645-653).

The Division disputes that Carbon/Emery calculates its depreciation “in conformity” with the group plan of accounting as prescribed by the FCC. 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). Carbon/Emery’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. (Rebuttal Testimony of Hellewell, Lines 35-38; and Surrebuttal Testimony of Hellewell, lines 135-145).

3. Carbon/Emery applies the depreciation rates as set by the Commission in Docket 05-2302-01 to its group accounts. (See Testimony of Hellewell, Lines 114-117; Rebuttal Testimony of D Meredith, Lines 776-781).

The Division disputes that Carbon/Emery properly uses the group plan of accounting in such a way that depreciation rates set by the Commission are properly applied. (Testimony of Hellewell, Lines 53-56, 112-186; Surrebuttal Testimony of Hellewell, Lines 136-138.)

ARGUMENT

The Motion for Partial Summary Judgment filed by Carbon/Emery should be denied. There are genuine issues of material fact with respect to whether Carbon/Emery calculates depreciation correctly in accordance with 47 CFR 32 (“Part 32”) and whether Carbon/Emery properly uses the depreciation rates set in Docket No. 15-23-2-01. 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.

Carbon/Emery's Motion seeks summary judgment on two issues. First, that "as a matter of law... the Division (and the Commission) are prohibited from now requiring this change in accounting method" and second, that "Carbon/Emery's use of the group asset depreciation is acceptable and required as a matter of law." (Carbon/Emery Memo in Support of Motion for Summary Judgment at 8). In support Carbon/Emery asserted 4 facts. Two of the facts asserted are plainly disputed by the Division witness Hellewell in prefiled testimony. The Division disputes that Carbon/Emery properly calculates depreciation under the Part 32 group plan method and that Carbon/Emery properly apply the approved depreciation rates. Carbon/Emery's asserted facts are necessary to support summary judgment so the motion must be denied.

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. Carbon/Emery'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. For this reason Carbon/Emery's Motion for Summary Judgment should be denied.

Carbon/Emery argues that the Commission is bound by law to accept the group plan depreciation method used by Carbon/Emery in its Application. Carbon/Emery properly recognizes that Utah Code Ann. § 54-4-24 provides broad authority to the Commission require

public utilities to track depreciation “in accordance with such rules, regulations, and forms of account as the commission may prescribe.” Carbon/Emery then 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.

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.

Simply because records and reports are compiled using the system of accounts set forth in the Uniform System of Accounts for purposes of service quality does not inherently mean that the distribution of UUSF funds must be based on a depreciation method prescribed by the FCC for interstate operations. The rule says no such thing and has not been interpreted that way historically. 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.”

The rule does not adopt an FCC depreciation method for telecommunications companies. To do so would be in conflict with statute, administrative rules, and Commission precedent. For example Rule 746-340-1(A) states that the service quality rules apply to all telephone corporations as defined in §54-8b-2(16). As such, the service quality rules apply to CLECs. CLECs must report financial statements “prepared in accordance with GAAP.” Rule 746-349-4(F)(4). The group plan method used by Carbon/Emery is inconsistent with GAAP depreciation. If the depreciation method used by Carbon/Emery is universally applicable as the only legal method, the rules for reporting for CLECs would directly conflict. When read in the broader context of its location within the Commission’s rules and the preceding language in Rule 746-340 defining its purpose and application, the argument that this subsection adopts a specific depreciation method for all telephone carriers universally as a matter of law is not supported.

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 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 corporations such as Carbon/Emery 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.

The Commission cannot therefore be legally bound by function of an administrative rule to use group plan depreciation as prescribed by the FCC, while at the same time required by statute to “consider all relevant factors” and “retain authority to determine depreciation expense for ratemaking purposes” as required by statutes. 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.

In this case interpreting the service quality reporting rule to require a particular method of depreciation cannot be reconciled with the Commission's other statutory obligations to consider all relevant factors in setting depreciation for ratemaking and determining UUSF distributions consistent with the ratemaking revenue requirements. 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.

Finally there is 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. The same discretion to adjust depreciation 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 Carbon/Emery's depreciation method or use of that method.

CONCLUSION

Carbon/Emery's Motion for Summary Judgment should be denied. There are genuine issues of material fact in filed testimony. The rule relied upon by Carbon/Emery 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. For these reasons the Commission is not bound to one FCC prescribed method for calculating depreciation, nor is it bound to the distorting manner in which Carbon/Emery calculates its depreciation expense using the group plan method. The Commission should deny Carbon/Emery's Motion for Partial Summary Judgment.

Submitted this 5th day of October, 2015.

/s/ Justin C. Jetter

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