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Before the Public Service Commission of Utah

<p>In the Matter of Carbon/Emery Telcom, Inc.'s Application for an Increase in Utah Universal Service Fund Support</p>	<p>Docket No. 15-2302-01 Office of Consumer Services Memorandum in Opposition of Carbon/Emery Telcom, Inc.'s Motion for Partial Summary Judgment</p>
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Pursuant to Utah Administrative Code, r746-100-1C, r746-100-3.J and Utah Rules of Civil Procedure, Rule 56, the Utah Office of Consumer Services (“Office”) submits this Memorandum in Opposition to Carbon/Emery Telcom Inc.’s (“Carbon/Emery”) Motion for Partial Summary Judgment, which seeks an Order prohibiting the use of a single asset straight-line depreciation method in Utah Universal Service Fund (“UUSF”) cases and perhaps, though it is unclear, seeks an Order adopting Carbon/Emery’s depreciation calculations. While the Motion is not directed at the Office’s position on depreciation, the Office writes separately to challenge factual allegations contrary to the Office’s stance and to offer support to the Utah Division of Public Utilities’ (“Division”) opposition to the Motion.

STATEMENT OF CONTESTED MATERIAL 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 1, Subchapter B, Part 32. FCC part 32.2000. (Testimony of Woolsey, lines 799-802; and Rebuttal Testimony of D. Meredith, lines 645-653.)

The Office contests this statement of facts. The Office produced evidence that the manner in which Carbon/Emery calculates depreciation expense is not in conformity with the accounting prescribed by FCC part 32.2000 (47 CFR § 32.2) because Carbon/Emery fails to adequately account for depreciation on assets that are either fully depreciated or will be fully depreciated in approximately two years. (Corrected Confidential Testimony of Bion C. Ostrander, lines 1216-1281; Confidential Surrebuttal Testimony of Bion C. Ostrander, lines 541-543.)

ARGUMENT

Summary Judgment can only be granted when “the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Utah R. Civ. P. 56(c). In determining whether a genuine issue of fact exists, all evidence and the reasonable inferences that can be drawn from the evidence must be viewed “in the light most favorable to the nonmoving party.” *Suarez v. Grand County*, 2012 UT 72, ¶ 18, 296 P.3d 688.

To the extent that the instant motion seeks a judgment that the depreciation calculations employed by Carbon/Emery are in compliance with 47 CFR § 32 and therefore are binding on

this Commission, the Motion must be denied because the record contains disputed issues of genuine fact regarding this contention. To the extent that the instant Motion only seeks a judgment that the Division's proposed single asset straight-line depreciation method cannot be used in any UUSF case, the Motion must be denied because a central contention of Carbon/Emery's argument, that Utah Admin. Code, r746-340-2.D and 47 CFR § 32.2000(g)(1)(i) apply to UUSF cases, is legally erroneous.

A. A Genuine Issue of Material Fact Exists Regarding Whether Emery/Carbon's Depreciation Calculations are Binding on This Commission.

There is no doubt that the record contains abundant evidence demonstrating that the manner in which Carbon/Emery calculates depreciation is not in conformity with the accounting prescribed by 47 CFR § 32. *See infra*, Statement of Contested Material Fact, at pg. 2. Therefore, even if the Commission accepts the contention that it is legally prohibited from ever applying a single asset depreciation method in UUSF cases, Carbon/Emery is nevertheless not entitled to a judgment that the depreciation calculations themselves, as opposed to its overall method of depreciation, must be accepted as a matter of law. This much is clear.

What is less clear is whether Carbon/Emery ever makes the argument that its depreciation calculations must be accepted as a matter of law. Several aspects of the Memorandum suggest that Carbon/Emery is making this argument. Approximately half its Memorandum and three of its four statements of undisputed facts are directed to the proposition that the manner in which Carbon/Emery calculates depreciation is compliant with 47 CFR § 32. *See* Carbon/Emery's Memo. at pg. 2, 5-7, 9. Moreover, as a central pillar of its argument, Carbon/Emery repeatedly points to the fact that adopting a single asset method of depreciation would require it to change its mode of accounting. *See* Carbon/Emery's Memo. at pg. 2, 7-9. These assertions are unique to Carbon/Emery and unnecessary to support the contention that, as a matter of law, this

Commission can never employ a single asset method of depreciation in any UUSF case – a contention that simply presents an issue of statutory construction. This suggests that Carbon/Emery is arguing that its computation of depreciation expense is binding on this Commission.

However, the Motion is only addressed to the Division and not the Office, which employs a group method of depreciation compliant with 47 CFR § 32 in computing its proposed depreciation adjustments. *See infra*, Statement of Contested Material Facts, at pg. 2. This suggests that Carbon/Emery is only making the argument that as a purely legal issue of statutory construction a single asset depreciation method cannot be used in any UUSF case, thus attacking the Division’s depreciation adjustments but not the Office’s.

However, whatever Carbon/Emery is arguing, the testimony of Bion Ostrander undoubtedly creates a genuine issue of material fact regarding whether Carbon/Emery depreciation calculations comply with 47 CFR § 32 and thus whether Carbon/Emery’s depreciation calculations themselves are binding on this Commission. Again, this is true regardless of how this Commission decides the statutory construction argument concerning whether a single assets depreciation method can ever be employed in any UUSF case.

B. This Commission is Not Legally Required To Adopt A Group Asset Depreciation Method.

Carbon/Emery’s argues that this Commission is bound by federal law to employ a group asset method of depreciation because Utah Admin. Code § r746-340-2.D adopts the federal Uniform System of Accounts outlined in 47 CFR § 32, which in turn requires a group method of depreciation, pursuant to 47 CFR § 32.2000(g)(1)(i). *See* Carbon/Emery’s Memo. at pg. 5-6. A necessary link in this argument is the assertion that Utah Admin. Code r746-340-2.D, and by extension 47 CFR § 32.2000(g)(1)(i), are controlling in UUSF cases. However, such a reading

of Rule 746-340-2.D places the rule in conflict with relevant statutes and rules and therefore must be rejected. Without the contention that Rules 746-340-2.D and 47 CFR § 32.2000(g)(1)(i) are controlling in UUSF cases, Carbon/Emery's statutory construction argument, and with it the Motion for Summary Judgment, collapse in upon themselves. Accordingly, the instant Motion must be denied in full.

As a settled rule of statutory construction a statute or an administrative rule must be interpreted as a whole and harmonized with "other statutes [or rules] in the same chapter and related chapters." *Miller v. Weavre*, 2003 UT 12, ¶ 17, 66 P.3d 592. Similarly, administrative rules are subordinate to statutes so if there is an irreconcilable conflict the statute governs. *Morgan County v. Holnam Inc.*, 2001 UT 57, ¶ 7, 29 P.3d 629. Indeed, interpreting "an administrative rule out of harmony or in conflict with the express provisions of a statute would effectively [and impermissibly] amend that statute." *Crossroads Plaza Ass'n v. Pratt*, 912 P.2d 961, 965 (Utah 1996)(quotations and citations omitted.) Here, Carbon/Emery's proposed interpretation of Rule 746-340-2.D cannot be reasonably harmonized with Utah Code Ann. § 54-7-12.1 and § 54-8b-2(16) and therefore must be rejected.

Rule 746-340-2.D is contained in section r746-340, which regulates service quality for telecommunications corporations. "The purpose of these rules 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). The Rule 746-340-2.D provides: "The Uniform System of Accounts for . . . telephone utilities, as prescribed by the Federal Communications Commission at 47 CFR § 32 is the prescribed system of accounts to record the results of interstate operations." 47 CFR § 32 can be viewed in two parts. One identifies the type of accounts that are required to be recorded. The second provides instructions for certain accounts. 47 CFR §

32.2000(g)(1)(i) is in the second part and provides instruction for depreciation and amortization. Read in isolation, Rule 746-340-2.D is arguably ambiguous regarding whether the term “system of accounts” is meant to incorporate only to the portion of 47 CFR § 32 that identifies the accounts to be recorded or also incorporates the portions of the rule that provides instructions. However, as noted above, any interpretation reading Rule 746-340-2.D as incorporating the instructions portions of 47 CFR § 32 collides with any reasonable interpretation of other telecommunication statutes and rules.

First, no coherent argument can be made that r746-340-2.D and thus 47 CFR § 32.2000(g)(1)(i) apply globally to all telecommunication cases. Utah Code Ann. § 54-7-12.1 expressly deals with depreciation in telecommunication rate setting cases and provides: “In determining the depreciation expense of a telephone corporation . . . the commission shall consider all relevant factors . . . [and] retain the authority to determine the depreciation expense of telecommunication corporations.” The plain language of this section is irreconcilable with the assertion that this Commission is bound by federal law to apply one method of calculating depreciation expense in ratemaking cases. Accordingly, Rules 746-340-2.D and 47 CFR § 32.2000(g)(1)(i) cannot apply globally to all telecommunication cases. *Morgan County*, 2001 UT at ¶ 7; *Crossroads Plaza*, 912 P.2d at 965.

Moreover, while section 54-7-12.1 may not apply directly to UUSF cases, as a related statute any interpretation of Rule 746-304-2.D must be harmonized with section 54-7-12.1. *Miller*, 2003 UT at ¶ 17; *Crossroads Plaza*, 912 P.2d at 965 There is interplay between rate cases and UUSF cases and often a telecommunication corporation will brings one cases seeking both a change in rates and a change in the amount of distribution from the Universal Service Fund. Pursuant to Utah Admin. Code r746-360-8(A)(1), the amount of a UUSF distribution is

calculated as the “difference between the Incumbent telephone corporation’s total embedded cost,” its rate of return, and the proceeds generated through rates.

If as Carbon/Emery argues, Rule 746-304-2.D mandates that a group method of depreciation must be use in determining UUSF distributions, in a case seeking both a rate increase and a fund distribution in order to prevent a fatal inconsistency between the calculation for determining rates and the calculation for determining fund distributions—resulting in an unworkable computation—this Commission would be compelled to employ the same group method of depreciation in the rate making portion of the case as it applies in the UUSF portion of the case. Of course, this results in a de facto amendment of section 54-7-12.1 by stripping this Commission of its statutory discretion to determine depreciation expenses in ratemaking cases. Such a result is prohibited. *Morgan County*, 2001 UT at ¶ 7; *Crossroads Plaza*, 912 P.2d at 965. Accordingly, Rule 746-304-2.D must be interpreted in a manner in which is limited to issues of service quality or as not incorporating the second part of 47 CRF § 32, including 47 CFR § 32.2000(g)(1)(i).

In addition, Carbon/Emery’s argument also renders Rule 746-304-2.D inconsistent with Utah Admin. Code §§ r746-340-1(A); r746-349-4(F)(4) and Utah Code Ann. § 54-8b-2(16). Rule 746-340-1(A) provides that the service quality rules apply to all telephone companies, as defined by Utah Code Ann. § 54-8b-2(16), which includes CLECs whose financial statements must be “prepared in accordance with GAAP.”¹ Utah Admin. Code § r746-349-4(F)(4). However, GAAP standards are inconsistent with a group depreciation method and therefore Carbon/Emery’s interpretation of Rule 746-304-2.D is inconsistent with Rules 746-340-1(A),

¹ Utah Admin. Code § r746-349-2(A) and (C) defines a CLEC as a “public telecommunications service provider that did not hold a certificate to provide public telecommunications services as of May 1, 1995” and defines GAAP as “generally accepted accounting principles.”

746-349-4(F)(4) and section 54-8b-2(16). Again, this inconsistency requires this Commission to reject Carbon/Emery's interpretation of Rule 746-304-2.D and requires an interpretation of the Rule as not incorporating the instruction sections of 47 CFR § 32, including 47 CFR § 32.2000(g)(1)(i). *Morgan County*, 2001 UT at ¶ 7; *Crossroads Plaza*, 912 P.2d at 965.

This is not to say that this Commission is required to apply a single asset method of depreciation or is prohibited from applying a group asset method of depreciation. To the contrary, the Commission has broad discretion in deciding what depreciation method to employ. The statutes and rules cited above do not in any way lessen this discretion, if anything, they amplify it. *See e.g.*, Section 54-7-12.1 ("In determining the depreciation expense . . . the commission shall consider all relevant factors . . . the commission shall retain authority to determine the depreciation expense of telecommunications corporations.") Therefore, this Commission is free to adopt either the single assets straight-line depreciation method proposed by the Division or the group asset 47 CFR § 32 compliant method of depreciation, with appropriate adjustments, proposed by the Office. No federal law limits this discretion.

CONCLUSION

Carbon/Emery's Memorandum is unclear as to whether it is moving to only preclude the Division's proposed single asset straight-line method of depreciation or moving to have this Commission adopt its depreciation calculations. However, the record contains ample evidence demonstrating Carbon/Emery's depreciation calculations do not comply with the accounting requirements prescribed by 47 CFR § 32 creating a genuine issue of material fact regarding whether Carbon/Emery's depreciation calculations should be adopted as a matter of law and preventing a judgment on this issue, if this issue was actually raised. Moreover, Carbon/Emery's contention that as a matter of statutory construction federal law precludes this Commission from

ever applying a single asset depreciation method in an UUSF case is legally flawed. Therefore, this Commission is free to employ any method of calculating depreciation expense it deems proper, unshackled from the Code of Federal Regulations.

Dated this 5th day of October, 2015.

/s/ Robert J. Moore
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