REX W. OLSEN (#4895)
Assistant Utah Attorney General
ROBERT J. MOORE (#5764)
Special Assistant Utah Attorney
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0353
rolsen@utah.gov
rmoore@utah.gov
Attorneys for Utah Office of Consumer Services

Before the Public Service Commission of Utah

In the Matter of Carbon/Emery Telecom, Inc.'s Application for an Increase in Utah Universal Service Fund Support	Docket No. 15-2302-01 Office of Consumer Services' Response Response to Petitions for Review, Rehearing or Reconsideration.

Pursuant to Utah Code Ann. §§ 54-7-14.5, 54-7-15, 63G-4-301 and Utah Admin. Code r746-100-11.F, the Utah Office of Consumer Services ("Office") submits this Response to Carbon/Emery Telecom, Inc. ("Carbon/Emery") and the Utah Rural Telecom Association's ("URTA") Petitions for Review, Rehearing or Reconsideration of the Commission's March 31, 2016 Order. ("Report and Order.") Because the arguments raised in the Petitions are identical, the Office refers to both Petitions collectively as "Carbon/Emery's Petition for Review." This Response only addresses issues on which the Office was at least partially successful and leaves it to the Utah Division of Public Utilities ("Division") to address issues, such as depreciation, where the Division prevailed. Accordingly, this Response addresses the issues of the state return on equity, hypothetical capital structure, interest synchronization and the global argument that the Report and Order constitutes improperly enacted Rule.

A. STATE RETURN ON EQUITY

Carbon/Emery argues that this Commission erred in its factual finding that its proposed 12.13% return on state equity does not have empirical support, challenging the portion of this Commission's Report and Order where this Commission ruled:

> Carbon/Emery argues in its amended application that its cost of equity should be set at 12.13%, which is a stipulation value in a case involving a different utility. 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.

(Report and Order, at pg. 10.) The heart of Carbon/Emery's argument is that "the Commission has overlooked [the] testimony offered by Mr. Meredith in reaching its conclusion that Carbon/Emery has not offered any empirical support for its proposed cost of equity of 12.13%." (Carbon/Emery's Petition at pg. 12) However, even a cursory review of this Commission's Report and Order reveals that this Commission did not overlook Mr. Meredith's testimony but rather rejected it in favor of its own analysis and the evidence and arguments presented by the Office and the Division. (Report and Order at pg. 11; Brevitz Confidential Surrebuttal pg. 20-22, ln. 367-390; Coleman Surrebuttal pg. 18-19, ln. 359-370.)

As this Commission notes, Mr. Meredith did not provide any empirical evidence supporting 12.13% ROE but relies on the fact that the 12.13% ROE was used in a prior case that resulted in a settlement and argues that various premiums would justify a ROE in excess of 12.13%. (Meredith Hearing pg. 127-28, ln. 24-25.) However, this Commission properly rejected Carbon/Emery's premium argument ruling "the theory and analysis proffered by Carbon/Emery . . . [are] inapplicable to Carbon/Emery, which benefits from the UUSF." (Report and Order at pg. 11.) In addition, this Commission notes "Carbon/Emery has retired all of its debt in the last six years and funded an aggressive FTTH program provides compelling

evidence that it has ample access to capital." (*Id.)* There is abundant evidence in the record to support these findings. (*See e.g.,* Brevitz Confidential Surrebuttal pg. 20-22, ln. 367-390; Coleman Surrebuttal pg. 18-19, ln. 359-370.)

As pointed out in the Office's Post Hearing Brief, without the premium argument, "Carbon's state ROE analysis dissolves into nothingness because of the absolute lack of any analysis leading to the claim of a state ROE of 12.13%." (Office of Consumer Services Post Hearing Brief at pg. 13.) The Commission concurred in this argument on both factual and legal grounds. First, this Commission relied on the fact that each "rural telecommunications company in Utah has unique capital circumstances and risks, which vary over time. The cost of equity approved for one utility does not constitute precedent in a subsequent docket involving a different company." (Report and Order at pg. 10, & fn 5.) Indeed, Utah Admin. Code r746-100-10.F.a provides issues resolved by a stipulated settlement "are not binding precedent in future cases involving similar issues." As noted above, there is ample evidence to support the Commission's factual argument and the Commission's legal argument regarding Rule 746-100-10.F.5.a is unassailable.

Carbon/Emery also attacks this Commission's reliance on the Division's CAPM analysis on the grounds that the companies employed in the analysis are not sufficiently comparable. (Carbon/Emery's Petition at pg. 9-12.) On close reading, however, this argument is actually a challenge to the appropriateness of the CAPM model in UUSF in general. As this Commission observes:

> no single publicly-traded company will be a particularly good match to Carbon/Emery. The Division has chosen an acceptable pool of comparable companies – some of which drive the calculation downward and some of which push it upward. Where no pool of public-traded companies will perfectly

> reflect the circumstance of a utility with UUSF access, we see little value in attempting to weight the dissimilarities that appear within the pool.

(Report and Order at pg. 11.) The fact that publicly traded companies inherently have dissimilarities to rural telecoms always affects a CAPM analysis in UUSF cases. The fact that Carbon/Emery's argument attempts to disqualify all but two companies in the Division's pool demonstrates the unfeasibility of structuring a CAPM with publicly traded companies that closely resemble rural telecom qualifying for UUSF funding. (*See* Carbon/Emery Petition at 10.) However, Carbon/Emery does not attack the use of the CAPM model generally nor, given its witness' testimony, could it. Mr. Meredith's testimony is based on the use of a CAPM model with the adjustment of premiums for small companies. (*Id.* at 9.) Thus, a rejection of the CAPM model generally would undercut Carbon/Emery's own argument.

Given that all parties rely, at least in part, on the appropriateness of the CAPM model and that the CAPM model inherently relies on comparable companies with some dissimilarities, this Commission's ruling adopting the Division's CAPM methodology as "just and reasonable" is within this Commission's discretion and should not be disturbed. Moreover, to the extent that Carbon/Emery's argument raise concern, this Commission should review the Office's testimony and reconsider Mr. Brevitz' testimony concluding that the appropriate state ROE is 10.00%.

B. **CAPITAL STRUCTURE**

Carbon/Emery argues that this Commission should reconsider its capital structure ruling because it is a departure from the prior practice of employing a hypothetical capital structure of 35% debt and 65% equity to telecoms that employ an unreasonable high amount of equity, without providing distinguishing facts and/or a rational to justify the departure from prior practice. (Carbon/Emery's Petition at pg. 12-15.) In support of this contention, Carbon/Emery

cites to *Mountain Fuel Supply Co. v. Public Serv. Com'n of Utah*, 861 P.2d 414, 421 (Utah 1993) and Utah Code Ann. § 63G-4-403. However, in making this argument, Carbon/Emery conflates the Division with this Commission and settlements with fully litigated UUSF cases. In fact, this Commission has never developed a practice of imputing 35% debt 65% equity capital structure in cases where a telecoms employs an unreasonably high percentage of equity. Rather, this Commission has explicitly rejected such an approach. Therefore, *Mountain Fuel* and section 63G-4-403 are inapplicable. Moreover, this Commission provides a sound rational for its rejection of a 35% debt 65% equity hypothetical capital structure in this case.

Carbon/Emery bases its arguments on testimony of the Division concerning a 2008 taskforce proposal to promulgate a rule requiring that in all cases where a telecom's capital structure consists of 65% or more equity, a hypothetical capital structure of 35% debt 65% equity would be imputed. As Carbon/Emery concedes this Commission rejected the proposed rule in favor of making "its determination based upon the evidence presented in the adjudicative proceedings, based upon the circumstances facing each company and the relevant time in which rates will be effective." (October 27, 2008 Julie Orchard letter on file as Office Exhibit 2R-2; Duncan Hearing pg. 165, ln. 4-10.) Nevertheless, the Division has adopted an internal "policy" of applying the parameters of the rejected rule in dealings with telecoms in several subsequent cases, all resulting in stipulated settlements. (Carbon/Emery Petition at pg. 13-14.) It is these settled cases that Carbon/Emery relies on to attempt to establish this Commission's prior practice. (*Id.* at pg. 13-14 & fn. 3.)

However, Utah Admin. Code r.746-100-10.F.5.a, provides: "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." (Emphasis added.) Moreover, these

settlements were "black box" settlements, where only the ultimate result was agreed upon by the parties and approved by the Commission. In no case was there any mention of the capital structure in either the stipulated settlements or the Order approving the settlements. [1] In fact, all the stipulated settlements included language to the effect of: "While the Parties may not agree that each specific component of this Stipulation is just and reasonable in isolation, all of the parties agree that this Stipulation as a whole is just and reasonable in result and in the pubic interests."[2]

[1] *In the Matter of the Application of UBTA-UBET Communications, Inc., dba STRATA Networks for an Increase in Utah Universal Service Fund Support,* Docket No. 15-053-01, Report and Order, pg. 1-3 (January 5, 2016); *In the Matter of the Application of UBTA-UBET Communications, Inc., dba STRATA Networks for an Increase in Utah Universal Service Fund Support,* Docket No. 15-053-01, Amended Joint Settlement Stipulation, pg. 1-7 (December 30, 2015); *In the Matter of the Application of Emery Telephone for an Increase in Utah Universal Service Fund Support,* Docket No. 15-042-01, Report and Order, pg. 1-4 (September 30, 2015); *In the Matter of the Application of Emery Telephone for an Increase in Utah Universal Service Fund Support,* Docket No. 15-042-01, Settlement Stipulation, pg. 1-6 (September 10, 2015); *In the Matter of Application for Rate Increase and Increase in State USF Distribution for Gunnison Telephone Company*, Docket No. 14-043-01, Report and Order, pg. 4-5 (August 27, 2014); *In the Matter of Emery Telephone's Application for Utah Universal Service Fund Support,* Docket No. 14-042-01, Report and Order, pg. 3-4 (February 12, 2015); *In the Matter of Emery Telephone's Application for Utah Universal Service Fund Support,* Docket No. 14-042-01, Settlement Stipulation, pg. 2-9 (January 21, 2015); *In the Matter of Application for Rate Increase and Increase in State USF Distribution for Gunnison Telephone Company*, Docket No. 14-043-01, Settlement Stipulation, pg. 4-6 (August 27, 2014); *In the Matter of the Utah Division of Public Utilities' Petition for USF Distribution to Hanksville Telecom, Inc.*, Docket No. 14-2303-01, Report and Order Approving Increased State USF, pg. 1-9 (August 27, 2014); *In the Matter of Manti Telephone Company's Application for Increase USF Eligibility*, Docket No. 13-046-01, Report and Order Approving Settlement Stipulation, pg. 3-11 (February 19, 2014); *In the Matter of Manti Telephone Company's Application for Increase USF Eligibility*, Docket No. 13-046-01, Settlement Stipulation, pg. 1-9 (January 28, 2014); *In the Matter of the Application for the Increase of Rates and Charges by Manti Telephone Company,* Docket No. 08-046-01, Order Approving Settlement Stipulation, pg. 1-4 (June 17, 2013); *In the Matter of the Application for the Increase of Rates and Charges by Manti Telephone Company,* Docket No. 08-046-01, Stipulation, pg. 1-6 (June 3, 2013); *In the Matter of the Application of All West Communications, Inc. for UFS Eligibility,* Docket No. 11-2180-01, Order Approving Stipulation, pg, 2-5 (November 30, 2011); *In the Matter of the Application of All West Communications, Inc. for UFS Eligibility*, Docket No. 11-2180-01, Stipulation, pg, 2-5 (November 17, 2011); *In the Matter of the Increase in USF Eligibility for Carbon/Emery Telcom, Inc.*, Docket No. 09-2302-01, Report and Order, pg. 2-4 (June 24, 2010); *In the Matter of the Increase in USF Eligibility for Carbon/Emery Telcom, Inc.*, Docket No. 09-2302-01, Stipulation, pg. 1-4 (May 24, 2010.)

[2] *In the Matter of the Application of UBTA-UBET Communications, Inc., dba STRATA Networks for an Increase in Utah Universal Service Fund Support,* Docket No. 15-053-01, Amended Joint Settlement Stipulation, ¶

Therefore, regardless of any action of the Division leading up to these settlements, these settlements in no way establish a "prior practice" of the **Commission**. In fact, the only specific action of this Commission in regards to the issue of hypothetical capital structure in UUSF cases since the 2008 is this Commission's action of rejecting the proposed rule in favor of a case by case adjudication.

Furthermore, this Commission gave a sound and well reasoned rationale in rejecting Carbon/Emery and the Division's proposal of establishing a blanket approach to the issue of hypothetical capital structure, i.e., the rationale that Title 54 directs this Commission to decide cases on an individual basis considering the relevant time and circumstances and the rationale that Carbon/Emery and the Division's position is based solely on a near decade old policy recommendation that this Commission reject and lacks any evidentiary support. (Report and Order, at pg.12-13.) Moreover, this Commission's ultimate conclusion is based on substantial record evidence. Specifically, the Commission relied on evidence of a comparison of the debt ratios of similar companies in the relevant time period and Carbon/Emery's own historical debt ratios to arrive at its own conclusion of the appropriate hypothetical capital structure. (*Id.;*

11 (December 30, 2015); *In the Matter of the Application of Emery Telephone for an Increase in Utah Universal Service Fund Support*, Docket No. 15-042-01, Settlement Stipulation, ¶ 9 (September 10, 2015); *In the Matter of Emery Telephone's Application for Utah Universal Service Fund Support*, Docket No. 14-042-01, Settlement Stipulation, ¶ 8 (January 21, 2015); *In the Matter of Application for Rate Increase and Increase in State USF Distribution for Gunnison Telephone Company*, Docket No. 14-043-01, Settlement Stipulation, ¶ 11 (August 27, 2014); *In the Matter of Manti Telephone Company's Application for Increase USF Eligibility*, Docket No. 13-046-01, Settlement Stipulation, ¶ 14 (January 28, 2014); *In the Matter of the Application for the Increase of Rates and Charges by Manti Telephone Company*, Docket No. 08-046-01, Stipulation, ¶ 3 (June 3, 2013); *In the Matter of the Application of All West Communications, Inc. for UFS Eligibility*, Docket No. 11-2180-01, Stipulation, ¶ 9 (November9, 2011); *In the Matter of the Increase in USF Eligibility for Carbon/Emery Telcom, Inc.*, Docket No. 09-2302-01, Stipulation, ¶14 (May20, 2010.)

Brevitz Revised Confidential Direct at pg. 9, ln. 159-164.) Accordingly, Carbon/Emery's argument that this Commission departed from its prior practice is misplaced and the record contains substantial evidence in support of this Commission's ultimate conclusion.

C. Interest Synchronization

In two alternative arguments, Carbon/Emery seeks reconsideration of this Commission's adoption of the Office's interest synchronization adjustment, whereby interest expense on the company's imputed debt under a hypothetical capital structure is deducted from taxable income before calculating taxes. (Carbon/Emery's Petition at pg. 25-26.) First, Carbon/Emery argues that, as a matter of law, interest synchronization cannot be applied when a company has no actual debt and the rate of return is calculated using a hypothetical capital structure. *Id.* Second, Carbon/Emery argues that if interest synchronization is to be applied, it should only impact the intrastate assets to "avoid Federal subsidization." (*Id.* at 26.) Neither argument has merit. Moreover, the second argument must be disregarded because it is improperly raised for the first time in a Petition for Reconsideration.

As this Commission correctly observed "utilities have an obligation to provide service at a reasonable cost and with appropriate efficiency. That a utility chooses to meet its capital requirements with 100% equity does not entitle it to pass the associated higher capital cost on to ratepayers or to receive higher than necessary UUSF subsidies." (Report and Order at pg. 24.) The purpose of employing a hypothetical capital structure, therefore, is to treat the telecom for UUSF purposes as if it carried a reasonable amount of debt. As this Commission ruled, in order to do so, and protect ratepayer from increased costs associated with an unreasonable equity structure, it is necessary to employ interest synchronization to the imputed debt. (*Id.*)

Otherwise, a telecom using a hypothetical capital structure of, for example, 50% debt would receive higher UUSF payments than a telecom with an actual capital structure of 50% debt, partially defeating the purpose of the hypothetical capital structure.

Nevertheless, Carbon/Emery argues that as a matter of law interest synchronization is prohibited when a hypothetical capital structure is employed and the company actually carries no debt. (Carbon/Emery's Petition at pg. 25.) Though Carbon/Emery asserts that this is a legal principal, it cites to no statute, rule or decision in support of this contention.[3] Moreover, since Carbon/Emery carries no debt, all parties agree that hypothetical capital structure should be employed. The dispute has been over the composition of the structure. Given this agreement over the necessity of a hypothetical capital structure, the fact that without employing interest synchronization the purpose of a hypothetical capital structure would be partially defeated, and the complete lack of any authority supporting Carbon/Emery's legal argument, this Commission must reject the request to reconsider its decision on this matter.

Carbon/Emery's alternative argument that interest synchronization should only be applied to its intrastate assets also fails. First, nowhere in its prefilled testimony, hearing testimony or its two post hearing briefs does Carbon/Emery make this assertion. Rather, this is a new argument improperly raised for the first time in a Petition for Reconsideration. As such,

[3] On the other hand, the Office has identified a case from this Commission that employed interest synchronization to an imputed capital structure. *In the Matter of the Increase of Rates and Charges by Gunnison Telephone Company*, Docket No. 00-043-01, Report and Order, ¶ 5 (July 3, 2000.) (Ostrander Surrebuttal at pg. 37 & OCS Exhibit 1S-3 Ostrander.) This case is not directly applicable because it is expedited rate case rather than a UUSF case and Finding of Fact adopting interest synchronization relied on a stipulation between the Division and the company. *Id.* at pg. 5. Nevertheless, this case is distinguishable from the stipulated cases relied on Carbon/Emery, *supra* notes 1 & 2, because the Commission specifically addressed and adopted the use of interest synchronization with hypothetical capital structure in its findings, the Order does not contain the limiting language that exist in all cases contained *supra* notes 1 & 2, and the Order expressly provides that it may be used as precedent. *Id.* at ¶¶ 5 &8. While not binding controlling precedent in the instant case, this ruling at a minimum stands for the proposition that this Commission has a history of employing interest synchronization in cases using a hypothetical capital structure.

this Commission must refuse to address this new argument on procedural grounds. Otherwise, Petitions for Reconsideration would become vehicles for parties to interpose countless new issues post hearing to relitigate lost cases, insuring that there would be practically no end to protracted litigation.

Moreover, Carbon/Emery's alternative argument that as a matter of law if interest synchronization is to be allowed on imputed debt it must only apply to a telecom's intrastate assets is substantively defective. (Carbon//Emery's Petition at pg. 26.) Again, though Carbon/Emery asserts that this is a legal principal, it cites to no federal or state statute, rule or decision in support of this contention. This legal argument, therefore, is totally without legal support.

Finally, without citing to any authority, Carbon/Emery asserts that the Federal Communication Commission does not employ interest imputation in federal ratemaking or revenue requirement determinations and therefore Utah's USF disbursements must be increased to "avoid Federal subsidization." (*Id.*) Even if true, the fact that the FCC does not impute interest in federal proceedings it is irrelevant. This Commission is not tasked with interpreting and applying federal law or preventing federal subsidization. Rather, this Commission's authority is defined by Utah statutes that make no reference to federal subsidization. Moreover, as this Commission is aware, there is no federal law requiring the states to provide UUSF funding and several states have chosen not to do so. Logically, if federal law does not require a state to provide USF funding at all, federal law does not require a state to provide an increase in USF funding when imputing interest payments on a hypothetical capital structure.

In sum, Carbon/Emery's arguments regarding interest synchronization conflict with the principles underlying the established practice of imputing hypothetical capital structures in UUSF cases, are completely unsupported by cite to legal authority and procedurally defective. Accordingly, this Commission should not disturb its ruling on interest synchronization.

D. ORDER CONSTITUTES RULEMAKING

Carbon/Emery's final argument is that while "the Commission's ruling is called an `Order,' it amounts to a rule under the Utah Administrative Rulemaking Act." ("UARA") (*Id.* at 28.) Although the Petition is somewhat unclear, it appears to argue that this Commission should vacate its Order and begin this entire process over again under the procedures of the UARA. (*Id.* at 29)("Carbon/Emery asks the Commission to reconsider its Order and consider opening a rulemaking docket on these issues consistent with the requirements of the UARA.") However, Carbon/Emery overlooks controlling statutes and case law resulting in application of the wrong legal standard. This mistake is fatal to Carbon/Emery's argument.

Carbon/Emery argues a ruling by an agency in adjudicative proceeding constitutes a rule if it "(1) is explicitly or implicitly required by statute; (2) implements or interprets a state mandate; and (3) applies to a class of persons or another agency." (*Id*. at 28.) This is simply an incorrect statement of the law. Rather, Utah Code Ann. § 63G-3-102(17)(c)(vi) (2016) provides that a "`Rule' does not mean . . . rulings by an agency in adjudicative proceedings." Accordingly, in *WWC Holding Co. v. Public Service Com'n of Utah*, 2002 UT 23, ¶ 32, the Utah Supreme Court held that a decision from the Public Service Commission in an

adjudicative proceeding does not constitute a rule because such "rulings are excluded from the UARA's definition of "'rule' and are therefore not subject to the UARA."[4]

Section 63G-3-102(17)(c)(vi) comes with the proviso that rulings in adjudicative proceedings do not constitute a rule, "except as required by Subsection 63G-3-202(6)." In turn, Subsection 63G-3-201(6) provides: "Each agency shall enact rules incorporating the principles of law not already in its rules that are established by final adjudicative decisions within 120 days after the decision is announced in its case." In *WWC Holdings* the Supreme Court noted this provision but did not rule on its application because the provision was not raised in the briefing or oral argument. *WWC Holdings*, 2002 UT at ¶ 32.

This Commission should follow the same approach. It is not incumbent on the Office or this Commission to correct Carbon/Emery's mistake in relying on the wrong statutory provision, propose positions that Carbon/Emery could have taken but for the mistake and then argue against these proposed positions.[5]

---

[4] *WWC Holdings* cited to Utah Code §§ 63-46a 21(17)(c)(vii) and 64-4a-3(6), which have since been renumbered as sections 63G-3-201(17)(c)(vi) and 63G-3-202(6) without making any changes to the language of the statutes. In 2016, sections 63G-3-102(17(c)(vi) and 63G-3-202(6) where amended. However, with the exception of renumbering, no changes were made in the relevant portions of the statutes. In this Response the Office cites to the current versions of the statute.

[5] While the Commission should not rule on the application the statute, the Office notes that the wording of section 63G-3-202(6) contemplates the enactment of rules established in adjudicative proceedings not the vacating of the adjudicative order. Moreover, while the term "incorporating principles of law not already in its rules" apparently has not been examined by the Utah appellate courts, general case law is helpful in its interpretation. *Gottling v.P.R. Incorporated*, 2002 UT 95, ¶ 29 ("absent and indication that the legislature intends a statute to supplant common law the courts should not give it that effect")(Durham dissenting). Utah prior case law provides that a decision in an adjudication constitutes rule if it is a "a policy or statement that is generally applicable, implements or interprets law, **and** results in a change in clear law." *Utah Chapter of Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 50 (emphasis added.) A ruling that is merely constitutes "a retroactive clarification of uncertain law may be brought about through adjudication." *Williams v. Public Service Com'n of Utah*, 720 P.2d 773, 776 (Utah 1986)(citing 2 K. Davis, *Administrative Law Treaties* § 7:25, at 122 (2d ed. 1978.)) Accordingly, the requirement that a ruling must result in change in clear law should be applicable in interpreting section 63G-3-202(6). Here, nothing in this Commission's Report and Order constitutes a change in clear law.

In fact, Carbon/Emery does not even identify what portions of this Commission's Report and Order constitute a rule. Rather, Carbon/Emery argues "[r]ules on issues **such as** capital structure, return of equity, and depreciation methods, would serve to greatly reduce the time and expenses the rural companies expend on these issues, thus saving rate payers in the State of Utah." (Emery/Carbon's Petition at pg. 29)(emphasis added.) This is a request for the enactment of rules not an argument in support of the contention that this Commission's Report and Order constitutes a rule. The argument does not address section 63G-3-102(17)(c)(vi)'s directive that a ruling for an adjudicative proceeding does not constitute rule and therefore must be disregarded by this Commission.

Moreover, even under Carbon/Emery's flawed approach, Carbon/Emery's arguments are inadequate. As noted above, in ruling on the proper hypothetical capital structure, this Commission rejected an approach grounded on a proposed rule in favor of an analysis of comparable companies in the relevant time period and Carbon/Emery's specific debt history. (Report and Order at pg. 12-13; Brevitz Revised Confidential Direct at pg. 9 ln. 159-164.) Clearly, this ruling is only applicable to Carbon/Emery. Carbon/Emery never attempts to explain how the rejection of an argument based upon a proposed rule in favor of a case by case approach constitutes the improper enactment of a rule. Similarly, this Commission rejected Carbon/Emery's return of equity argument because "the cost of equity must be evaluated in each case, with due consideration given to the to the business, financial, and regulatory risks the utility under consideration faces and to current financial market conditions." (Report and Order at pg. 10.) Carbon/Emery never attempts to explain how an approach focusing on the individual company constitutes the improper enactment of a rule, a rule supposedly applicable to Utah rural telecoms in general.

In sum, Carbon/Emery bases its argument on the wrong section of the UARA and therefore all its arguments are misplaced and must be rejected. It is not incumbent on the Office or this Commission to reconstruct Carbon/Emery's arguments under the proper standard and then argue against them. The failure to apply the correct standards is fatal to the request for reconsideration.

CONCLUSION

This Commission's March 31, 2016 Report and Order is well reasoned, supported by substantial evidence and, thus, should not be disturbed.

DATED, May 16, 2016.

Robert J. Moore
Attorney for the Office of Consumer Services