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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE APPLICATION OF CARBON/EMERY TELCOM FOR AN INCREASE IN UTAH UNIVERSAL SERVICE FUND SUPPORT	DOCKET NO. 15-2302-01 **DIVISION RESPONSE TO CARBON/EMERY'S PETITION FOR REVIEW, REHEARING OR RECONSIDERATION**

Pursuant to Utah Code Ann. § 54-4a-1 and Utah Admin. Code r746-100 the Utah Division of Public Utilities ("Division"), hereby submits this Response to Carbon Emery Telecom, Inc. (Carbon/Emery) Petition for Review, Rehearing or Reconsideration of the Commission's March 31, 2016 Order ("Petition"). The Commission should deny review, rehearing or reconsideration of its March 31, 2016 Order.

INTRODUCTION

Carbon/Emery's Petition is predominantly a re-argument of the same issues and facts that have been thoroughly presented and argued by the parties. In this docket the parties submitted five rounds of prefiled testimony, prehearing briefing, participated in live testimony, and submitted post hearing briefs. There is nothing novel in Carbon/Emery's Petition that warrants

reconsideration of the Commission's Order. Carbon/Emery has had every opportunity to present its position and arguments. The Commission should deny the petition in its entirety.

DISCUSSION

The Commission's Undisputed Facts Challenged by Carbon/Emery are Reasonable Conclusions from the Evidence and Whether or Not they are Disputed is Immaterial to the Order.

Carbon/Emery disputes the Commission's characterization of the condition of Carbon/Emery's existing copper plant. Carbon/Emery claims that copper network is reaching the end of its useful life and needs to be replaced. While the Division recognizes that Carbon/Emery witnesses did assert that the copper system is aging there is no evidence on the record that the service being provided to customers on the copper network is inadequate or unreliable. However, the Division is unsure of the relevancy of the condition of the copper plant as no party objected to its replacement.

Carbon/Emery also challenges the Commission's characterization of its fiber to the home ("FTTH") project. Carbon/Emery's build out of FTTH network in replacing its copper is a dual purpose system that significantly benefits its unregulated affiliates. The Commission stated that "To deliver internet and cable television services, Carbon/Emery has undertaken a fiber to the home (FTTH) network upgrade…" Carbon/Emery takes issue with this fact and asserts that it is disputed. Carbon/Emery recognizes that expert witnesses from the Office opined on the matter, but argue that those opinions should be given limited value because they were made without foundational support.

Carbon/Emery argues that the FTTH upgrade is necessary for basic telephone service because the copper is outdated and its equipment is obsolete. Carbon/Emery further

states that "[f]iber is cheaper to install…"[1] Carbon/Emery witnesses have however recognized that "out of the two products, the internet definitely would be the most desirable or the most popular thing to have versus the traditional phone line."[2] Carbon/Emery witness Woolsey also testified that "The [copper supporting electronic] equipment could be updated, but it would be a cost similar to the fiber to the home equipment…"[3] It is reasonable to infer from these statements alone that the FTTH upgrade primarily benefits the affiliate services as recognized by the Commission. The Division does not quarrel with the decision to replace aging copper plant with fiber, but has argued that the costs of such replacement should be shared with the entities that benefit most from the upgrade including its affiliate internet and television companies.

The Commission's Chosen Cost of Equity is Supported by the Evidence on the Record.

The parties presented voluminous evidence and live testimony on the issue of cost of equity. The parties presented their experts and testimony with a full opportunity to cross examine. Each cost of capital witness supported their respective positions. Carbon/Emery is merely re-arguing the same facts. The Commission weighed the evidence presented by the parties' experts and reached a reasonable conclusion based on that evidence. Nothing new is presented in Carbon/Emery's Petition that supports reconsideration of the cost of equity determination made by the Commission. The Commission should deny reconsideration of this issue.

Carbon/Emery challenges the Commission's use of the Division's calculation claiming in effect that its expert's testimony was more persuasive than the Division's or Office's. Carbon/Emery reiterates its position that a small company premium should be added and that the

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[1] Petition for Review, Rehearing or Reconsideration at p.7 (citing to Transcript, P. 57, Lns. 13-17).
[2] Transcript P.100, Lns. 22-25.
[3] Transcript at P.37 Lns. 21-22.

comparable companies have various differences from Carbon/Emery. Carbon/Emery further reasserts its position on the choice of interest free rate. All of these issues were presented by the parties in detail through multiple rounds of prefiled and live testimony. The Commission has reviewed the positions and addressed the issues directly explaining its decisions. Specifically the Commission's Order stated that the small company premium is "inapplicable to Carbon/Emery, which benefits from the UUSF." The Commission further cites to the obvious ability of Carbon/Emery to raise capital as demonstrated by its retirement of all of its debt and ability to fund an aggressive FTTH buildout.

Similarly with respect to the comparable companies used by the Division, the Commission had substantial evidence from each party including all of the arguments relied upon by Carbon/Emery's Petition. The Commission recognized that "no single publicly-traded company will be a particularly good match…" and that the "Division has chosen an acceptable pool of comparable companies – some of which drive the calculation downward and some of which push it upward." There is nothing novel in Carbon/Emery's arguments that would support reconsideration on this issue. The parties have presented many rounds of prefiled testimony on this issue, testified at hearing, and submitted post hearing briefing covering the same ground. The facts plainly support the Commission's decision and its Order explains the findings of fact relied upon by the Commission to reach its decision. The Commission should deny the Petition on the issue of cost of capital.

The Commission's Depreciation Expense Calculation is Supported by the Evidence on the Record.

The Commission's depreciation expense calculation is reasonable and supported by the evidence in the record. In support of its Petition Carbon/Emery relies on the following

arguments. First Carbon/Emery argues that the Commission's conclusion that the FTTH buildout is primarily benefitting unregulated affiliates is not supported by the facts. Second Carbon/Emery argues that the depreciation calculation is not representative of the UUSF period. Carbon/Emery largely reargues the same position it has taken throughout this docket. No new evidence or reasoning is provided that supports reconsideration of the depreciation expense. The Commission should deny reconsideration of this issue.

The Commission's conclusion that the FTTH project is primarily benefitting unregulated affiliates is a reasonable conclusion that may be drawn from the evidence presented. The FTTH network will provide the same basic telephone service already being provided on the copper network. In addition it will also provide internet and IPTV service on the same plant. Internet is the most profitable product[4], it is the most desirable product[5], and it drives the system usage.[6] It is certainly within the reasonable inferences that may be drawn from these facts that the FTTH network will primarily benefit the unregulated affiliates who will have the ability to offer significantly improved products as compared to the provision of basic telephone service.

Moreover, whether the FTTH primarily benefits affiliates or not, the Division's depreciation calculation relied upon by the Commission does not change. The Division's group depreciation method is calculated based on the test year as adjusted for known and measurable changes. It does not exclude depreciation for fiber plant or apportion the costs of the fiber plant to the affiliates and remove them from the calculations. Because of the inclusion of those plant assets the Commission's recognition of the nature of fiber and where the benefits flow is not material to the Division's depreciation calculation.

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[4] Transcript at P. 99 Lns. 17-20.
[5] Transcript at P. 100 Lns. 22-24.
[6] Transcript at P. 63 Ln. 13.

Carbon/Emery's second argument is that the depreciation calculation is incorrect because it will not adequately match the depreciation in the rate effective period. This line of argument is inconsistent with the general process of using a test year. In Carbon/Emery's own application it plainly states that "Calendar year 2014 constitutes a reasonable test year for purpose of determining the appropriate amount of additional support…. Carbon/Emery's revenue requirement calculation includes known and measurable test year adjustments." [7] If Carbon/Emery did not consider the 2014 test year a reasonable representation of the rate effective period it is quite the curious choice to rely on the 2014 test year adjusted for known and measureable changes in its own application and testimony.

Carbon/Emery relies on conclusory and entirely unsupported statements such as "Mr. Hellewell admits that the depreciation expense suggested by the Division, and adopted by the Commission is not reasonably representative of the future and past years."[8] That simply was not the testimony of Mr. Hellewell. His testimony is quite the opposite. The estimate of depreciation during the rate effective period is based upon a historic test year and adjusted for known and measureable changes. Mr. Hellewell testified that he did not believe Carbon/Emery's "depreciation will remain exactly the same for 2014 and 2015."[9] It was thoroughly demonstrated in the prefiled testimony of Mr. Hellewell that the method used by Carbon/Emery was not a reasonable representation of actual depreciation. The Division recommended a number of plausible methods for calculating depreciation.

Carbon/Emery's conclusion is that its witnesses provided the only testimony that projects future depreciation during the rate effective period and so it must be used. This would render the

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[7] Carbon/Emery Application for Increase in USF Support at ¶ 7.
[8] Petition for Review, Rehearing or Reconsideration atP.22.
[9] Transcript at P. 209 Ln. 20-24.

depreciation calculation reliant entirely on Carbon/Emery's own forecasts for spending and capitalization of assets. The reason an historical test period is often used is because the data is actual data, not speculative. In smaller companies such as Carbon/Emery it is more difficult to project actual spending that is often discretionary. Reliance on historical actual spending is often more representative of the rate effective period than optimistic company forecasts.

The Division's depreciation calculation is intended as a representation of the rate effective period. The entire purpose of adjusting test years is to normalize them for projection to the rate effective period. Carbon/Emery chose the historical test year and filed its application on the basis of 2014 as representative of the rate effective period. There is no "fatal flaw" in relying on Carbon/Emery's own representation in its application that the 2014 test year is a reasonable basis for calculating the revenue requirement for the rate effective period. Had Carbon/Emery concluded that an adjusted 2014 test year was not representative of the rate effective period it should have chosen to use another test period.

The Commission did not err in its conclusion that the Division's group method was reasonable. There is ample evidence on the record to support the finding that the depreciation expense calculated using the group method as proposed by the Division is sufficiently representative of the rate effective period. And the Commission did not error by relying upon Carbon/Emery's chosen test year as a representative year for the rate effective period. The Commission should not reconsider the depreciation calculation.

The Commission did not Commit Error of Law when it Calculated the UUSF Distribution Based on the Vintage Group Depreciation Method.

Carbon/Emery asserts that the Commission committed legal error by calculating UUSF distribution based on a method other than that proposed by Carbon/Emery. Carbon/Emery argues

that in order to calculate depreciation expense based on test year data it must apparently conduct a prudence review on the choice of depreciation method. What Carbon/Emery fails to recognize is that, even if a prudence review were necessary to adjust depreciation expense for historical periods, the setting of UUSF distributions is inherently prospective in nature. The Commission has not denied recovery of prudent expenses. The Commission has not changed historic depreciation calculations.

Rather the Commission has set a UUSF subsidy level based on data from an historical test year. The prudence of Carbon/Emery's past accounting simply is not at issue. The Commission's Order is prospective in application. There is no error of law with respect to basing future UUSF distributions on a more reasonable depreciation method that will more accurately reflect actual depreciation expense during the rate effective period. The Commission should deny reconsideration on this basis.

The Commission's Order is Specific to this Adjudicative Proceeding and is not a Rule Making.

The Commission did not run afoul of the Administrative Rulemaking Act when it chose to calculate the depreciation expense for Carbon/Emery using a vintage group straight line depreciation method based on the facts presented. Carbon/Emery's analysis of the statutory definition of rulemaking is misplaced in this instance. Nearly all administrative decisions will have some scintilla of precedential value. That alone does not rise to the level of administrative rulemaking. The depreciation calculation in this instance is not a rulemaking because is the result of an adjudicative proceeding and based on the facts of that proceeding and it does not apply generally.

Utah Code Ann. § 63G-3-102 defines a "rule" as "an agency's written statement that: (i) is explicitly or implicitly required by state or federal statute or other applicable law; (ii) implements or interprets a state or federal legal mandate; and(iii) applies to a class of persons or another agency." The Code further states that a "rule" does not mean "(i)orders" or "(vi)rulings by an adjudicative proceeding, except as required by Subsection 63G-3-201(6)…" Subsection 63G-3-201(6) requires an agency to "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..."

A similar argument was raised in *WWC Holding Co., Inc. v. Public Service Com'n of Utah*, 2002 UT 23, ¶ 31 (2002). In *WWC Holding Co.* the Commission relied on affordable base rates from a prior order with another telephone company. WWC challenged the use of that affordable base rate claiming that it should have been committed to rule and could not be applied from another administrative order. In support of the Commission's decision, URTA, a party to this docket, argued in its appellate brief that

> The Rule Making Act is clear that orders and decisions arising out of adjudicative proceedings are not rules. See §64-46a-2(16)(c) Utah Code Ann. (2001). Rules of law developed in the context of agency adjudication are as binding as those promulgated by agency rule making. *Salt Lake Citizens Congress v. Mountain State Telephone & Telegraph*, 846 P.2d 1245, 1252-1253 (Utah 1992) (an agency must be able to resolve legal issues when they arise in the context of adjudication).[10]

The Supreme Court concurred stating that "The UARA dictates when rulemaking is required and exempts 'rulings by an agency in adjudicative proceedings.' Such rulings are excluded from the UARA's definition of "rule" and are therefore not subject to the UARA.

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[10] *WWC HOLDING CO., INC., Petitioner, v. PUBLIC SERVICE COMMISSION OF UTAH*, Brief of Respondent Utah Rural Telecom Association at p. 41.

While WWC has argued that this portion of the PSC's Order is similar to a rule, it has not addressed the statutory exemption which appears to be directly applicable here."[11] The court did not rule on whether it the affordable base rate should have been reduced to rule because it was not argued by the parties. It did however hold that "the PSC did not need to engage in a formal rulemaking proceeding to establish that rate."[12]

The choice of depreciation method is even further from the demarcation point between rule and administrative order than the facts presented in *WWC Holding Co.* Whereas the Commission permissibly applied an affordable base rate – a specific dollar value - set in another docket; here the Commission is merely applying what it found to be a reasonable method of depreciation to an individual company. Further distinguishing this instance from a rule that would require a specific method of depreciation is the fact that the Commission has approved another depreciation method recently that it found reasonable as well.[13]

The Commission has not impermissible created an administrative rule. Orders such as this that arise out of adjudicative proceedings are not rules. The Commission did not broadly apply the vintage group method to all utilities or even to all rural telephone companies. The Commission should deny reconsideration.

CONCLUSION

Carbon/Emery's Petition for Review, Rehearing, or Reconsideration is merely another round of the same arguments that have been presented to the Commission. The Commission's Order is supported by evidence in the record and consistent with the applicable

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[11] *WWC Holding Co., Inc. v. Public Service Com'n of Utah*, 44 P.3d 714, 723-24, UT 23, ¶ 32 (2002)(internal citations omitted).

[12] *Id*.

[13] *See In the Matter of: the Application for the Increase of Rates and Charges by Manti Telephone Company*, Docket No. 08-046-01.

laws and rules. There is no reason for the Commission to reconsider its Order. The Commission should deny Carbon/Emery's Petition in its entirety and let its March 31, 2016 Order stand.

Respectfully Submitted this 16th day of May, 2016

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