

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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Carbon/Emery Telcom, Inc.'s Application for Recovery of UUSF Application Costs	<u>DOCKET NO. 18-2302-01</u> <u>ORDER VACATING REPLY COMMENT DEADLINE AND AWARDED COSTS</u>
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ISSUED: March 26, 2018

**BACKGROUND**

On January 23, 2018, Carbon/Emery Telcom, Inc. (“Carbon/Emery”) filed a request for agency action (“Request”) seeking recovery from the Utah Universal Service Fund (“UUSF”) of the costs associated with Carbon/Emery’s Application for an Increase in UUSF Support (“Application”) that Carbon/Emery filed with the Public Service Commission of Utah (“PSC”) on March 27, 2015.<sup>1</sup> Pursuant to a notice of amended comment period that the PSC issued on February 16, 2018, the Division of Public Utilities (“DPU”) filed comments on March 8, 2018 (“Comments”) recommending that the PSC deny Carbon/Emery’s Request. No other person filed comments by the comment deadline of March 23, 2018 to oppose Carbon/Emery’s Request. For the reasons outlined in this order, we vacate the April 12, 2018 deadline for reply comments and award to Carbon/Emery a lump-sum payment from the UUSF of \$158,914.98.<sup>2</sup>

Carbon/Emery argues that Utah law in effect at the time of its Application allows recovery of reasonable costs of providing telephone service. Carbon/Emery asserts that while in the past the costs associated with an application for a UUSF disbursement were embedded costs

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<sup>1</sup> *In the Matter of the Application of Carbon/Emery Telcom, Inc. for an Increase in Utah Universal Service Fund Support*, PSC Docket No. 15-2302-01.

<sup>2</sup> While Carbon/Emery’s original request was slightly higher than this amount, it was subsequently amended. *See Amended Affidavit of Attorneys’ Fees*, PSC Docket No. 18-2302-01, filed February 21, 2018. Other than that amendment, no party has challenged Carbon/Emery’s specific calculation of costs.

and amortized over a period of two or three years, in more recent cases, expenses associated with an application for a UUSF disbursement have resulted in a one-time lump sum payment to better reflect costs and avoid ongoing recovery after the amortization period.<sup>3</sup>

The DPU asks the PSC to deny Carbon/Emery's Request for two reasons. First, the DPU argues that Carbon/Emery failed to exhaust its appeal of the PSC order on Carbon/Emery's Application. The DPU claims Carbon/Emery did not raise the issue of Application costs in its appeal to the Utah Supreme Court, and later withdrew that appeal. Second, the DPU argues that awarding Carbon/Emery its Application costs is not in the public interest, alleging Carbon/Emery brought "a losing case with dubious support" that resulted in a PSC order decreasing Carbon/Emery's UUSF distribution. The DPU concedes that "success in a rate case or [U]USF case" should not be the "sole measure by which prudent expenses are judged" while noting that costs might be warranted if the PSC had ordered the filing of the case, and argues the awarding of the Application costs in this instance would provide "an incentive for companies to make dubious requests."<sup>4</sup>

### **FINDINGS AND CONCLUSIONS**

We conclude that Carbon/Emery did not fail to exhaust its appeal obligations with respect to the Application costs. In our Report and Order issued in connection with the Application, we stated "Carbon/Emery has not yet submitted to the [DPU] its costs for this case. That matter will be adjudicated separately."<sup>5</sup> There is no ambiguity in that statement regarding our intentions, and

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<sup>3</sup> Request at 2-3.

<sup>4</sup> Comments at 2.

<sup>5</sup> *Report and Order* at 25, footnote 14, PSC Docket No. 15-2302-01, issued March 31, 2016.

we decline to require Carbon/Emery to have appealed an issue we affirmatively stated would be adjudicated separately.

We previously concluded that at least one statute applicable to a general rate case did not apply to Carbon/Emery's Application.<sup>6</sup> Nevertheless, some statutory guidelines relevant to general rate cases still apply in the context of a UUSF distribution request. We conclude that one such statute is Utah Code Ann. § 54-4-4(4), which establishes standards we must consider when making a prudence determination. Those standards direct us to evaluate whether Carbon/Emery's decision to file the Application was reasonable when Carbon/Emery filed the Application, considering what Carbon/Emery "knew or reasonably should have known" when it filed the Application.

The DPU maintains the Application was imprudent, but it offers insufficient analysis in support of this assertion. The DPU offers one primary observation about the underlying docket: the result was a decrease in UUSF support as opposed to the increase the Application requested. The DPU concludes the Application had "dubious support." We cannot discern whether the DPU is inferring the support was dubious from the fact of an adverse outcome, or whether the DPU is independently asserting the Application lacked merit but declining to further explain or identify specific alleged deficiencies.<sup>7</sup> If the DPU intended the former, we conclude the DPU's inference

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<sup>6</sup> See Order on Motion to Vacate Hearing Dates at 2-3, PSC Docket No. 15-2302-01, issued September 25, 2015.

<sup>7</sup> We are unaware of any recent instance where the DPU has argued, against any electricity, natural gas, telecommunications, or water utility, that an adverse administrative outcome is sufficient to deem the pursuit of such relief imprudent. Electricity and natural gas utilities, in particular, regularly file requests with the PSC that are often unsuccessful. These instances virtually never involve a docket where the PSC ordered the filing of the case. We know of no recent history of the DPU or any other party asking us to declare litigation costs to be imprudent because an application was not ultimately successful.

is unjustified. If the DPU intended the latter, it has given us an insufficient basis upon which to concur.

We disagree with the characterization of Carbon/Emery's Application as a losing case. That characterization only looks at two numbers: the total dollars of UUSF support Carbon/Emery requested, and the total dollars of UUSF support we granted. If that were all that mattered, our Report and Order could have been one page instead of twenty-six. We adjudicated multiple complex issues connected to that Application, some in favor of a specific party's position and others involving compromises.

We decline at this time to articulate a specific standard interpreting the language of Utah Code Ann. § 54-4-4(4) in the specific context of application costs.<sup>8</sup> We affirmatively conclude, though, that an adverse administrative outcome alone is insufficient to render imprudent an applicant's decision, in the first instance, to seek administrative action.

While we ultimately did not agree with every assertion contained in Carbon/Emery's Application, we have no basis to conclude that the Application was not reasonable at the time it was filed. While Carbon/Emery should have known some aspects of its Application would be controversial and not completely certain to be successful, that knowledge does not make the Application unreasonable or imprudent. To conclude otherwise would create bad public policy. While the DPU expresses concerns about creating improper incentives to file dubious requests with the PSC, we are also concerned about the improper chilling effect of a denial of the

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<sup>8</sup> Possible standards could include denial of costs for an application made in bad faith, or to an application made in clear contravention of unambiguous precedent. No party has presented any basis on which a standard similar to one of those guidelines would have been satisfied by Carbon/Emery's Application.

Application costs. Good public policy encourages vigorous advocacy of reasonable issues. Certainty of success cannot be the standard for reasonableness or prudence. We must encourage meaningful and vigorous evaluation of issues, and we conclude it would be both inconsistent with Utah Code Ann. § 54-4-4(4), and bad public policy, to establish a standard that threatens to penalize anyone who brings an unsuccessful argument in a PSC proceeding.<sup>9</sup>

Here, Carbon/Emery filed its Application, numerous issues were contested at length, and the result was a meaningful adjustment in the UUSF support awarded to Carbon/Emery. No party has offered, in this docket, sufficient argument or evidence suggesting Carbon/Emery did not act prudently and in good faith in seeking the PSC's evaluation of its UUSF support. Carbon/Emery has offered sworn, unrefuted affidavits in support of its Request, and no party has asserted the affidavits overstate costs or reflect unnecessary expenses. Accordingly, we find the expenses Carbon/Emery incurred in filing and prosecuting its Application were prudently incurred; we have no basis to find otherwise.

We recognize that we previously provided Carbon/Emery an opportunity to respond to the DPU's comments.<sup>10</sup> Because we are deciding the issue in Carbon/Emery's favor, we see no prejudice to Carbon/Emery in vacating their opportunity to provide reply comments. In fact, doing so should prevent Carbon/Emery from incurring additional unnecessary legal costs.

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<sup>9</sup> We recognize that recovery of litigation costs in other arenas not related to public utilities regulation involves much higher standards for cost recovery, but we conclude that those standards are unrelated to the issue before us, which focuses on the statutory guidelines for reasonableness and prudence.

<sup>10</sup> The proper time for any party other than the DPU to have objected to Carbon/Emery's Request would have been the comment deadline.

**ORDER**

1. We vacate the April 12, 2018 reply deadline in this docket.
2. We approve Carbon/Emery's Application as amended by Carbon/Emery, and award Carbon/Emery a lump-sum payment from the UUSF of \$158,914.98.

DATED at Salt Lake City, Utah, March 26, 2018.

/s/ Michael J. Hammer  
Presiding Officer

Approved and Confirmed March 26, 2018, as the Order of the Public Service  
Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg  
PSC Secretary  
DW#300921

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the PSC within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the PSC fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the PSC's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on March 26, 2018, a true and correct copy of the foregoing was served upon the following as indicated below:

By Electronic-Mail:

Kira M. Slawson ([kiram@blackburn-stoll.com](mailto:kiram@blackburn-stoll.com))  
Blackburn & Stoll, L.C.  
Attorney for Carbon/Emery Telcom, Inc.

Brett N. Anderson ([bretta@blackburn-stoll.com](mailto:bretta@blackburn-stoll.com))

Vicki Baldwin ([vbaldwin@parsonsbehle.com](mailto:vbaldwin@parsonsbehle.com))

Sharon Bertelsen ([bertelsens@ballardspahr.com](mailto:bertelsens@ballardspahr.com))

Larry Bowman ([larry.bowman@charter.com](mailto:larry.bowman@charter.com))

Brian W. Burnett ([bburnett@kmclaw.com](mailto:bburnett@kmclaw.com))

([cflregulatory@chartercom.com](mailto:cflregulatory@chartercom.com))

Eddie L. Cox ([ecox@cut.net](mailto:ecox@cut.net))

Carl Erhart ([carl.erhart@ftr.com](mailto:carl.erhart@ftr.com))

James Farr ([james.farr@centurylink.com](mailto:james.farr@centurylink.com))

Amy Gross ([agross@tminc.com](mailto:agross@tminc.com))

Alan Haslem ([ahaslem@mleainc.com](mailto:ahaslem@mleainc.com))

Ray Hendershot ([ray.hendershot@beehive.net](mailto:ray.hendershot@beehive.net))

William Huber ([william.huber@questar.com](mailto:william.huber@questar.com))

Bill Hunt ([williamp.hunt@dish.com](mailto:williamp.hunt@dish.com))

David R. Irvine ([drirvine@aol.com](mailto:drirvine@aol.com))

Kristin L. Jacobson ([Kristin.l.jacobson@sprint.com](mailto:Kristin.l.jacobson@sprint.com))



Brock Johansen ([bjohansen@emerytel.com](mailto:bjohansen@emerytel.com))

Dawn Kubota ([kubotad@ballardspahr.com](mailto:kubotad@ballardspahr.com))

Jasen Lee ([jlee@desnews.com](mailto:jlee@desnews.com))

Shirley Malouf ([srmalouf@stoel.com](mailto:srmalouf@stoel.com))

Jennifer H. Martin ([jhmartin@stoel.com](mailto:jhmartin@stoel.com))

Steve Mecham ([sfmecham@gmail.com](mailto:sfmecham@gmail.com))

Roger Moffitt ([roger.moffitt@att.com](mailto:roger.moffitt@att.com))

Gregory Monson ([gbmonson@stoel.com](mailto:gbmonson@stoel.com))

Sharon Mullin ([slmullin@att.com](mailto:slmullin@att.com))

Thorvald Nelson ([tnelson@hollandhart.com](mailto:tnelson@hollandhart.com))

Janice Ono ([Janice.ono@att.com](mailto:Janice.ono@att.com))

Sheila Page ([spage@utah.gov](mailto:spage@utah.gov))

Mike Peterson ([mpeterson@utahcooperatives.org](mailto:mpeterson@utahcooperatives.org))

Pam Pittenger ([pam.pittenger@ftr.com](mailto:pam.pittenger@ftr.com))

Jenny Prescott ([jenny.prescott@allwest.com](mailto:jenny.prescott@allwest.com))

Bruce Rigby ([bruce@ucmc-usa.com](mailto:bruce@ucmc-usa.com))

Gary Sackett ([gsackett@joneswaldo.com](mailto:gsackett@joneswaldo.com))

Alan L. Smith ([alanakaed@aol.com](mailto:alanakaed@aol.com))

Ted D. Smith ([tsmithlaw@earthlink.net](mailto:tsmithlaw@earthlink.net))

Kendra Thomas ([kthomas@kfrservices.com](mailto:kthomas@kfrservices.com))

Bruce H. Todd ([btodd@stratanetworks.com](mailto:btodd@stratanetworks.com))

Jake Warner ([jakew@beehive.net](mailto:jakew@beehive.net))

James H. Woody ([jwoody@union-tel.com](mailto:jwoody@union-tel.com))

John Woody ([jwoody@union-tel.com](mailto:jwoody@union-tel.com))

Union Telephone Company

Patricia Schmid ([pschmid@agutah.gov](mailto:pschmid@agutah.gov))

Justin Jetter ([jjetter@agutah.gov](mailto:jjetter@agutah.gov))

Robert Moore ([rmoore@agutah.gov](mailto:rmoore@agutah.gov))

Steven Snarr ([stevensnarr@agutah.gov](mailto:stevensnarr@agutah.gov))

Assistant Utah Attorneys General

Erika Tedder ([etedder@utah.gov](mailto:etedder@utah.gov))

Division of Public Utilities

By Hand-Delivery:

Office of Consumer Services  
160 East 300 South, 2<sup>nd</sup> Floor  
Salt Lake City, Utah 84111

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Administrative Assistant