

13-553 & 13-1462

TAX TYPE: INCOME TAX

TAX YEAR: 2006, 2009, 2010 and 2011

DATE SIGNED: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL

GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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TAXPAYER,

Petitioner,

v.

AUDITING DIVISION OF THE UTAH  
STATE TAX COMMISSION,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL DECISION**

Appeal Nos. 13-553 & 13-1462

Account No. #####

Tax Type: Income Tax

Tax Years: 2006, 2009, 2010 and 2011

Judge: Phan

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**Presiding:**

Rebecca Rockwell, Commissioner

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: NAME-1, Attorney at law  
TAXPAYER

For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General  
RESPONDENT, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on September 6, 2016, in accordance with Utah Code §59-1-501 and §63G-4-201 et seq., based on appeals filed by Petitioner (“Taxpayer”) of Utah Individual Income Tax audit deficiencies for tax years 2006, 2009, 2010 and 2011. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Respondent (“Division”) issued a Notice of Deficiency and Estimated Income Tax Audit against Petitioner on January 14, 2013, for tax year 2006.<sup>1</sup> This was a non-filing audit that indicated an amount due of \$\$\$\$ in tax, \$\$\$\$ in penalties and \$\$\$\$ in interest. The Taxpayer then filed a 2006 Utah Individual Income Tax Return. The Division audited the 2006 return and issued a Revised Notice of

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<sup>1</sup> Respondent’s Exhibit 1.

Deficiency on August 15, 2014, reducing the tax. The Taxpayer had filed Utah returns for the years 2009 through 2011 as a part-year resident for each year and on the returns had excluded retirement income received in those years, which income was included in her federal adjusted gross income. The Division audited the returns and for tax year 2009 the Division issued a Notice of Deficiency and Audit Change on April 16, 2013. For tax years 2010 and 2011 the Division issued Notices of Deficiency and Audit Change on May 23, 2013.<sup>2</sup>

2. The amount of the audit deficiencies from the Revised Notice for 2006 and the Notices for the other years at issue are as follows:

	Tax	Penalties	Interest <sup>3</sup>	Total as of Date of Notice
2006	\$\$\$\$\$	\$0	\$\$\$\$\$	\$\$\$\$\$
2009	\$\$\$\$\$	\$0	\$\$\$\$\$	\$\$\$\$\$
2010	\$\$\$\$\$	\$0	\$\$\$\$\$	\$\$\$\$\$
2011	\$\$\$\$\$	\$0	\$\$\$\$\$	\$\$\$\$\$

3. No penalties were issued with the audits that are at issue in this appeal.

4. Upon auditing the returns filed by the Taxpayer for all years at issue, it was the Division's position that the Taxpayer was a full-year resident of Utah and not a part-year Utah resident. It was the Taxpayer's position that she was a part-year Utah resident each year and part-year resident of STATE-1 each year.

5. For tax year 2006 the Taxpayer had originally not filed a Utah return. After being contacted by the Auditing Division, she filed a Utah return. On the Utah TC-40C she stated that she was a Utah resident from January 1, 2006 to December 18, 2006.<sup>4</sup> She had filed Utah returns as a part-year resident as they became due for tax years 2009 through 2011. On the Form TC-40B that was submitted with her 2009 Utah return, she claimed she was a Utah resident for the period from January 15, 2009 through December 31, 2009.<sup>5</sup> On Form TC-40B with her 2010 Utah return, she claimed she was a Utah resident from January 16, 2010 to December 31, 2010.<sup>6</sup> On her 2011 return, she also claimed to be a part-year Utah resident, but did not provide the dates she was a Utah resident on Form TC-40B.<sup>7</sup>

6. Although the Taxpayer had claimed on the Utah forms that she was a Utah resident for all but a few weeks of each year, even if that had been correct, she filled out the Forms TC-40B in a manner

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2 Respondent's Exhibit 1.

3 These amounts represent the interest and the total as of the date the Notices were issued. Interest continues to accrue on the unpaid balance.

4 Respondent's Exhibit 3. For tax year 2006, the form for Nonresident and Part-year Resident was called TC-40C. For subsequent tax years it was renamed TC-40B. In this decision this form will be referred to TC-40B.

5 Respondent's Exhibit 5.

6 Respondent's Exhibit 6.

7 Respondent's Exhibit 9.

that is inconsistent with her position. If the Taxpayer was, in fact, a resident of Utah for all but a few weeks of each year as she claimed on the Utah forms, she should have included on Line 10 Column A, all the pension income she received during the period of time she was a Utah resident. The Taxpayer is retired and most of the taxable income she received during the years at issue was from the STATE-2 Teacher's Retirement System.<sup>8</sup> Line 10 of TC-40B asks for Pensions and Annuities received while a resident of Utah, whether or not they are from Utah sources. The Instructions for TC-40B are included in the Individual Income Tax TC-40 Forms & Instructions. For the 2009<sup>9</sup> tax year, at page 11, the Instructions provide:

**Column A –Utah Income and Adjustments:**

Enter on lines 1 through 16 all income (loss) earned or received from Utah sources while not a Utah resident, plus all income (loss) earned or received from all sources while a Utah resident (even if not from a Utah source).

7. Had Petitioner followed the instructions for Column A- Utah Income on the TC-40B and included the portion of the pension income she had received during the period of time she claimed she was a Utah resident, most of this income would have been allocated to Utah and would have been subject to Utah income tax. Taxpayer in error excluded all the pension income from Column A- Utah Income. This is the reason for the large difference in tax that she had claimed on the returns she filed and what the Auditing Division had calculated as being correct. As Taxpayer had claimed to be a Utah resident all but approximately three weeks per year on the form TC-40B, about 49/52 of the pension income should have been taxable in Utah based on her own claims on that form to be consistent with the instructions for that form.

8. In addition to the exclusion of the pension income, which the Division found to be taxable to Utah, the Division disagreed with the Taxpayer's position that she was a part-year Utah resident each year. It was the Division's contention that the Taxpayer's tax domicile did not change every time she left Utah and went to STATE-1 to stay with her daughter.

9. The Taxpayer and the Taxpayer's daughter NAME-2 testified at the hearing that when the Taxpayer was in Utah, which was for most of the year, she resided with her daughter NAME-2 who lives in this state. They testified that the Taxpayer spent at the most 10 months per year in Utah and at the least 9 months per year in Utah. During the other months, which were generally during the winter, the

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<sup>8</sup> Based on Taxpayer's testimony and Exhibits 5,7,9.

<sup>9</sup> There were some revisions in this instruction in 2010 and 2011 that are not substantially material. In 2006 the instruction appeared on the Form TC-40C itself. This 2006 instruction stated (emphasis in the original):

**Column A-UTAH INCOME AND ADJUSTMENTS**

**INCOME:** Include all income/loss 1) earned or received from Utah sources while not a Utah resident; and 2) received while a Utah resident. This includes pension, annuity, dividend and interest income received while a Utah resident, even if it is not from a Utah source.

Taxpayer went to STATE-1 where she stayed with another daughter who resided in that state. The Taxpayer did not own a home or lease her own place in any state.

10. For all the years at issue the Taxpayer had a Utah Driver License, was registered to vote in Utah, registered her vehicle in Utah and received her financial mail in Utah. The Taxpayer filed her Utah returns and federal returns using the Utah address where she resided with her daughter. She did not get a STATE-1 Driver License, register to vote or register vehicles in STATE-1 every time she went to that state to stay with her daughter there. There was no testimony that every time she left Utah for STATE-1 she had the intent to abandon her Utah domicile and remain in STATE-1 permanently.

11. In the years 2009, 2010 and 2011 the Taxpayer worked some in Utah as a substitute teacher for SCHOOL DISTRICT. Although this employment was in Utah, the Taxpayer also excluded the wage income she earned from SCHOOL DISTRICT from Colum A-Utah income on her 2009 Utah Form TC-40B.<sup>10</sup> Even if the Taxpayer was a part-year resident as she had claimed, these wages were Utah source income and should have been listed on Line 1, Column A and taxed to Utah. The Taxpayer did not pay Utah income tax on this income because of this error for 2009. For 2010 and 2011, the Taxpayer did correct this error in her Utah filing as she had included this wage income in Column A-Utah Income on the Forms TC-40B<sup>11</sup>.

12. The Taxpayer's daughter, DAUGHTER, testified at the hearing that prior to 2006 the Taxpayer had an accountant prepare her tax forms. The accountant had become ill by 2006, so in 2006 NAME-2 began to try to help her mother file returns. NAME-2 said she used TAX PREPARATION SOFTWARE for her own returns and so that is what she had used for her mother. NAME-2 testified that she used the forms and instructions on TAX PREPARATION SOFTWARE and she testified that she did not remember if she had ever looked at the Individual Income Tax TC-40 Forms & Instructions published by the Tax Commission. The Taxpayer also testified that she did not remember if they had looked at the Individual Income Tax Forms & Instructions published by the Tax Commission.

#### APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104(1) (2009)<sup>12</sup> as follows:

...a tax is imposed on the state taxable income of every resident individual...

Resident individual is defined in Utah Code Sec. 59-10-103(1)(q) (2009) as follows:

(q)(i) "Resident individual" means:

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10 Respondent's Exhibit 5.

11 Respondent's Exhibits 7 & 9.

12 The Commission applies the substantive statutes that were in effect during the years at issue 2006 and 2009 through 2011. The Utah Individual Income Tax Act has been revised and provisions renumbered. However, the revisions do not affect the outcome of this decision. For convenience the Commission cites to the 2009 provisions.

- (A) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of the period during which the individual is domiciled in this state; or
  - (B) an individual who is not domiciled in this state but: (I) maintains a permanent place of abode in this state; and (II) spends in the aggregate 183 or more days of the taxable year in this state.
- (ii) For purposes of this Subsection (1)(v)(i)(B), a fraction of a calendar day shall be counted as a whole day.

During the audit years, “domicile” was defined at Utah Administrative Rule R865-9I-2<sup>13</sup> as follows:

(A) Domicile

1. Domicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home.
2. For purposes of establishing domicile, an individual’s intent will not be determined by the individual’s statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation.
  - (a) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.
  - (b) Domicile applies equally to a permanent home within and without the United States.
3. A domicile, once established, is not lost until there is a concurrence of the following three elements:
  - (a) a specific intent to abandon the former domicile;
  - (b) the actual physical presence in a new domicile; and
  - (c) the intent to remain in the new domicile permanently.
4. An individual who has not severed all ties with the previous place of residence may nonetheless satisfy the requirement of abandoning the previous domicile if the facts and circumstances surrounding the situation, including the actions of the individual, demonstrate that the individual no longer intends the previous domicile to be the individual’s permanent home, and place to which he intends to return after being absent.

. . .

Administrative Rule R884-24P-52(5) sets forth the factors that are determinative of domicile, as follows:

Factors or objective evidence determinative of domicile include:

- (a) whether or not the individual voted in the place he claims to be domiciled;
- (b) the length of any continuous residency in the location claimed as domicile;
- (c) the nature and quality of living accommodations that an individual has in the location claimed as domicile as opposed to any other location;

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<sup>13</sup> Effective beginning with tax year 2012, the Utah Legislature substantially revised the provisions of the Utah Code regarding domicile, adopting Utah Code 59-10-136 which replaced Utah Administrative Rule R865-9I-2. These revisions are significant and this decision, therefore, should not be considered to provide guidance for tax year 2012 and later years.

- (d) the presence of family members in a given location;
- (e) the place of residency of the individual's spouse or the state of any divorce of the individual and his spouse;
- (f) the physical location of the individual's place of business or sources of income;
- (g) the use of local bank facilities or foreign bank institutions;
- (h) the location of registration of vehicles, boats, and RVs;
- (i) membership in clubs, churches, and other social organizations;
- (j) the addresses used by the individual on such things as:
  - (i) telephone listings;
  - (ii) mail;
  - (iii) state and federal tax returns;
  - (iv) listings in official government publications or other correspondence;
  - (v) driver's license;
  - (vi) voter registration; and
  - (vii) tax rolls;
- (k) location of public schools attended by the individual or the individual's dependents;
- (l) the nature and payment of taxes in other states;
- (m) declarations of the individual:
  - (i) communicated to third parties;
  - (ii) contained in deeds;
  - (iii) contained in insurance policies;
  - (iv) contained in wills;
  - (v) contained in letters;
  - (vi) contained in registers;
  - (vii) contained in mortgages; and
  - (viii) contained in leases.
- (n) the exercise of civil or political rights in a given location;
- (o) any failure to obtain permits and licenses normally required of a resident;
- (p) the purchase of a burial plot in a particular location;
- (q) the acquisition of a new residence in a different location.

The applicable statutes generally provide that the taxpayer bears the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-1-1417 provides:

In a proceeding before the commission, the burden of proof is on the petitioner . . .

The Tax Commission may waive, reduce or compromise penalties or interest under Utah Code Sec. 59-1-401(14) as follows:

Upon making a record of its actions, and upon reasonable cause shown the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part.

What constitutes reasonable cause for waiver of interest is set out at Utah Admin. Rule R861-1A-42(2):

Reasonable Cause for Waiver of Interest. Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, the taxpayer must prove that the

commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.

#### CONCLUSIONS OF LAW

1. One issue in this appeal is whether the Taxpayer was a full year “resident individual” in the State of Utah for the purposes of Utah Code Sec. 59-10-104 for the audit years, or whether she was a part-year Utah resident and a part-year STATE-1 resident every year. It is clear under Utah law that the Taxpayer was a full-year Utah resident. A “resident individual” is defined at Utah Code Subsection 59-10-103(1)(q) to be one who is domiciled in this state. Even if a person is not domiciled in this state, the person may still be a “resident individual” if he or she maintains a place of abode in the state and meets the 183 day test. In this matter it is clear that the Taxpayer was domiciled in Utah throughout all years at issue. Even though she spent some portion of each year in STATE-1, she never established “domicile” in STATE-1. One may be domiciled for the entire year in the state regardless of the number of days spent in the state. For the tax years at issue, domicile is the place where an individual has a permanent home and to which he or she intends to return after being absent under Utah Administrative Rule R865-9I-2.

2. The question of whether one establishes or maintains domicile in Utah is a question of fact. The Commission has considered this issue in numerous appeals and whether someone is a “resident individual” for state tax purposes has been addressed by the courts in Utah.<sup>14</sup> As discussed by the courts in considering this issue, the fact finder may determine intent “based on the ‘totality of the facts and circumstances surrounding the situation,’ and the taxpayer’s statement of intent is only one factor of many to be considered. ‘In determining whether a party has established a Utah domicile, the fact finder may accord the party’s activities greater weight than his or her declaration of intent.’” *Benjamin v. Utah State Tax Comm’n*, 250 P.3d 39, 2011 UT 14, 22 (Utah 2011) citing *Clements*, 893 P.2d at 1081 (citing *Allen v. Greyhound Lines, Inc.*, 583 P.2d 613 (Utah 1978)).

3. In this case there is no dispute that the Taxpayer established domicile in Utah. She had obtained a Utah Driver License, registered to vote in Utah, registered her vehicle in Utah, had her financial mail sent to her Utah address and used her Utah address on her state and federal tax returns. She spends nine or ten months per year in Utah. The Taxpayer had apparently assumed that her residence for tax purposes was dependent only on the one factor, that of being physically present in Utah at that

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<sup>14</sup> For Tax years prior to 2012 the issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Court of Appeals in the following cases: *Benjamin v. Utah State Tax Comm’n*, 250 P.3d 39, 2011 UT 14 (Utah 2011); *Lassche v. State Tax Comm’n*, 866 P.2d 618 (Utah Ct. App. 1993); *Clements v. State Tax Comm’n*, 839 P.2d 1078 (Utah Ct. App. 1995); *O’Rourke v. State Tax Comm’n*, 830 P.2d 230 (Utah 1992); and *Orton v. State Tax Comm’n*, 864 P.2d 904 (Utah Ct. App. 1993). The applicable law on domicile was substantially revised beginning in 2012.

particular time. The Taxpayer is incorrect and domicile does not change from state to state depending on where you are staying. Once domicile has been established in Utah, three things must be shown to establish that one is no longer domiciled in Utah and is domiciled for individual income tax purposes in a new state. The three factors are: 1) a specific intent to abandon the Utah domicile; 2) the actual physical presence in a new domicile; and 3) the intent to remain in the new domicile permanently. See Utah Admin. Rule R865-9I-2. The Taxpayer has the burden of proof in this proceeding under Utah Code Sec. 59-1-1417. The Taxpayer did travel to STATE-1, but did not demonstrate that each time she went to STATE-1 she intended to remain there permanently. It is apparent that each time she went to STATE-1 she intended to return to Utah. She also did not demonstrate a specific intent to abandon the Utah domicile as she had always maintained her Utah Driver License, voter registration and Utah was her permanent address for mail. The Division's position in the audit is correct. The Taxpayer was a full year Utah resident for all of the years at issue in this appeal.

4. Although the Taxpayer's representative spent considerable time arguing the Taxpayer was misled by instructions provided by the Tax Commission in its Individual Income Tax Forms & Instructions booklet as to what constituted a part-year resident, even if the Taxpayer had been a part-year resident each year, which is wrong based on the law noted above, the Taxpayer had incorrectly calculated her Utah taxable income because she excluded from her Utah return all portions of her retirement income. The Taxpayer excluded all of her retirement income even though she acknowledged being a Utah resident most of each year at issue.

5. The Tax Commission has authority to waive penalties or interest under Utah Code Subsection 59-1-401(14) if reasonable cause is shown. In this matter no penalties were assessed. Utah Administrative Rule R861-1A-42 provides that to be granted a waiver of interest, the taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error. The representative for the Taxpayer argued the Tax Commission provided misleading information. However, the representative did not show that this contributed to the Taxpayer's error because the Taxpayer and her daughter who had tried to help her with her returns did not testify that they read the instructions or were misled. They testified that they did not recall reading the Tax Commission's published Individual Income Tax Forms & Instructions, they recalled relying on TAX PREPARATION SOFTWARE. Regardless, the Tax Commission's instructions were not misleading when read in context with the definitions for key terms provided on the same page. The Taxpayer had provided copies of the Individual Income Tax TC-40 Forms & Instructions for each year. The 2009 Individual Income Tax TC-40 Forms & Instructions, pg. 3, provided:

#### Part-Year Resident Defined

A part-year resident is an individual who is a Utah resident for part of the year and a nonresident for part of the year. All income received during the period of Utah residency is taxable to Utah regardless of where that income is earned.<sup>15</sup> Income from Utah sources is taxable in Utah during the period of nonresidency.

Directly above the definition on the same page is the definition of “resident” and below is the definition of “nonresident” which are terms used in the definition of “part-year resident.” There is also a definition of “domicile” which is a key term in the definition of resident. These definitions provide:

#### Resident Defined:

A Utah resident is an individual who:

1. Is domiciled in Utah for the entire year, even if temporarily outside of Utah for an extended period of time (even years in certain situations);
2. Is domiciled in Utah for any period of time during the taxable year, but only for the duration of that period;
3. Even though domiciled outside Utah, maintains a permanent place of abode in Utah and spends 183 or more days of the taxable year in Utah. This does not apply to military personnel or their spouses who are in Utah on military assignment, unless they are Utah residents.

All income received during the period of Utah residence is taxable in Utah, regardless of where that income is earned.

#### Domicile Defined:

Domicile is the place where an individual has a permanent home and where he or she intends to return after being absent. It is the place where an individual has voluntarily fixed his habitation, not for a special or temporary purposes, but with the intent of making a permanent home. A domicile, once established, is not lost until all of the following three conditions are met: 1) a specific intent to abandon the former domicile; 2) the actual physical presence in a new domicile; and 3) the intent to remain in the new domicile permanently.

See Tax Commission rules R865-91-2 and R884-24P-52 at [tax.utah.gov/research/search.html](http://tax.utah.gov/research/search.html) for more information.

#### Nonresident Defined:

A nonresident individual is one who was not domiciled in Utah or was in Utah for temporary purposes for less than 183 days during the taxable year or does not maintain a permanent place of abode in Utah. Income received by a nonresident from Utah sources is taxable in Utah.

In this case, if the definition of “part-year resident” was read in context with the other information provided on the page, the Taxpayer should have been aware that she did not change from a Utah resident

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<sup>15</sup> The Taxpayer’s representative made a point that for 2010 and 2011 this sentence was revised to say “All income received during the period of Utah residency is taxable in Utah, regardless of where that income is earned, unless specifically exempted.” However, he points to no statute that would apply to specifically exempt any income at issue in this matter.

to a STATE-1 resident every time she went to STATE-1 to stay with her daughter. Regardless, there is no showing that the Taxpayer actually relied on these instructions. There is no basis for waiver of interest.

6. The Taxpayer's representative asks that the tax and interest be abated in this matter, pointing out that the Taxpayer is now 80 years old, this is a hardship, and that the Tax Commission's instructions were misleading. He does not provide a statutory basis, case law or prior Tax Commission decision under which the Tax Commission can abate for hardship reasons tax that is due under the law in this audit appeal process. The Taxpayer may have thought she was filing her returns correctly and the Division has not assessed penalties. Ignorance of the law is not basis to abate either taxes or interest. However, once the appeal is closed by this order, the Taxpayer may contact another Division of the Tax Commission, the Taxpayer Services Division, and that Division may take into account financial hardship issues in determining how the tax is collected or consider an offer in compromise based on financial hardship. The telephone number for the Taxpayer Services Division is 801 297-7703.

After review of the facts and the law, the audit deficiencies of additional Utah individual income tax and interest should be upheld for tax years 2006, 2009, 2010 and 2011.

Jane Phan  
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Utah audit deficiencies as to the tax and interest for the tax years 2006, 2009, 2010 and 2011. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

John L. Valentine  
Commission Chair

Michael J. Cragun  
Commissioner

Robert P. Pero  
Commissioner

Rebecca L. Rockwell  
Commissioner

**Notice of Appeal Rights and Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be assessed.** You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.