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Before the Public Service Commission of Utah

In the matter of the Complaint of: Beaver County, et al., Complainants, -vs- Qwest Corporation fka U.S. West Communications, Inc., fka Mountain States Telephone & Telegraph Services, Inc., Respondent.	Docket No. 01-049-75 **Complainant's Memorandum In Opposition to Respondent's Motion for Summary Judgment**

Complainants submit the following memorandum in opposition to Respondent's Motion for Summary Judgment.

Complainants' Responses to Statement of Undisputed Facts

1. During the years 1988 through 1996, Qwest's customers in Utah purchased telephone services from Qwest at rates found just and reasonable in Commission orders issued prior to or following appeals in

Docket Nos. 87-049-T35, 88-049-07, 90-049-06, 92-049-05 and 95-049-05. In instances where rates set in these cases were adjusted following appeals, Qwest has made a refund to customers of amounts paid in excess of rates ultimately found just and reasonable in a manner ordered by the Commission.

Response: The Counties dispute that any rate refunds were made consistent with its theory of this case regarding Qwest's windfall received from the property tax appeal. In any event, (any) rate cases during 1988 through 1996 would not have taken into account the $16.9 million refund to Qwest in 1998, 1999.

2. In Docket No. 88-049-18, allegations of misconduct were made against Qwest. Direct Testimony of Eckhardt Arthur Prawitt ("Prawitt") at 9. The allegations related to representations made by Qwest to the Commission and Division in response to questions regarding the effect of the Tax Reform Act of 1986 ("TRA") on Qwest's earnings and filings and responses to data requests which may have disclosed current or anticipated earnings by Qwest in excess of the rate of return found reasonable and used by the Commission in setting Qwest's rates in Docket No. 85-049-02. The allegations had nothing to do with property taxes paid, the amount of property taxes included in financial reports to the Commission, the amount considered in setting rates, or any appeal of Qwest's property tax valuation in 1988 or in any other year.

Response: The Counties are unable to respond to the compound nature of this factual allegation and therefore request clarification of the actually facts alleged.

3. No evidentiary hearing was ever held on the allegations of misconduct in Docket No. 88-049-18, and the Commission never made a finding regarding them. Following extensive discovery, the parties to the docket entered into a release and settlement agreement and a conditional amendment to the release and settlement agreement in which Qwest agreed, without acknowledging any misconduct, to make a substantial refund to customers to resolve the matter. Following public notices and hearings, the Commission entered an order in Docket No. 88-049-18 on April 19, 1999, approving the release and settlement agreement as amended and releasing Qwest from all claims arising out of any alleged misconduct or earnings in excess of the rate of return found reasonable by the Commission and used in setting rates in connection with rates paid

from January 1, 1986 through November 14, 1989. Paragraph 3 of the ordering paragraph in the order provided:

> In consideration of the refund referenced in the foregoing paragraph and the other terms and conditions of the Release and Settlement Agreement as amended by the Conditional Amendment to Release and Settlement Agreement, U.S. WEST, its officers, directors, agents, authorized representatives, parent and affiliate corporations and entities and their respective officers, directors, agents, and authorized representatives, and attorneys are hereby released and discharged from any and all claims, causes of action, liabilities, obligations, suits, losses, expenses, and costs, of whatever kind or nature, which now exist or which may hereafter accrue, whether known or unknown, because of, for, arising out of, or in any way connected with Docket No. 88-049-18 before the Commission and Case Nos. 890251 and 890252 before the Utah Supreme Court or the subject matter of any of them, including, without limitation, all claims arising out of or related to any alleged over earnings on the part of Mountain Bell for the period January 1, 1986, through November 15, 1989, including any over earnings resulting from the TRA or any alleged misconduct on the part of Mountain Bell, including any penalties, interest, late charges, or attorney fees or costs with respect thereto [footnote omitted].

Response: The Counties were not a party to the above action and therefore disputes that the facts alleged have any bearing on the Counties theory of this case.

4. In setting the rates in each of the foregoing dockets, the Commission considered Utah property taxes accrued by Qwest during the test year used. in setting rates. In each case, the amount of property taxes considered in setting rates was the intrastate portion of Qwest' s accrual for property taxes Qwest owed to county treasurers for the test year. [Footnote omitted.] Because the intrastate portion of property taxes considered in setting rates in each case was less than the full amount of property taxes accrued by Qwest, rates were lower than they would have been by the difference between the full amount of property taxes accrued and the intrastate portion of the property taxes accrued.

Response: Qwest has failed to provide the best evidence to support any indication of this fact. The distinction between the accrual for Utah property tax and accrual for interstate property taxes is not relevant to the Counties claim and is therefore disputed. The fact that only a portion of Qwest's Utah property tax was attributed to Utah, does not obviate the fact that the balance of the tax paid by Qwest was recognized as a recoverable expense in other jurisdictions.

5. In financial reports filed by Qwest with the Commission during the period from 1988 through 1996, Qwest reported the intrastate portion of accrued property taxes for the year. In reports filed prior to assessment by the Property Tax Division, the amount Qwest reported was based on an accrued liability for property taxes. The property tax amounts shown in reports Qwest filed after the assessment reflected the true up of the accrual to reflect the amount assessed, which was also the amount paid. In each case, the intrastate portion of the property taxes included in the reports was less than the total amount of property taxes paid in each year. A schedule of accrued property taxes and the intrastate portion of such amounts for each year from 1988 through 1996 is set forth in Attachment 1 to Grate. The schedule was prepared jointly by Qwest and the Division. It was reviewed by the Committee and adjusted based on input from the Committee, Adjustments based on Committee input are highlighted in Attachment 1.

Response: See answer to 4.

6. Qwest appealed the valuation of its property tax assessed by the Property Tax Division of the Utah State Tax Commission in each year from 1988 through 1996.

Response: The Counties to not dispute this fact.

7. Qwest understands that the Commission and the Division were aware that Qwest was appealing its property tax valuations. For example, Carl Mower, Chief Auditor of the Division, testified before the Utah State Tax Commission in the hearing on Qwest's appeal of the 1988 property tax valuation.

Response: Qwest has failed to provide the best evidence to prove undisputedly that "the Commission and the Division were aware that Qwest was appealing its property tax valuation," and even so if this would have any bearing on the facts alleged in this case concerning Qwest's system and pattern of overearning. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

8. In March 1998, Qwest, the Property Tax Division and the Counties entered into a stipulation that reduced the property tax valuations that were the subject of appeals for each year from 1988 through 1996.

On April 13, 1998, the Utah State Tax Commission entered its Order of Approval, approving the stipulation. In September of 1998, Qwest, the Property Tax Division and the Counties agreed upon the principal amount of property taxes paid in each year, and the interest on such principal amount, to be refunded by the Counties to Qwest pursuant to the earlier stipulation. On October 2, 1998, the Utah State Tax Commission entered its Supplemental Order, finding that the total amount of the refund of property taxes for tax years 1988 through 1996 was the sum of $16,900,000, including principal and interest up to and including December 3 1, 1998. Grate ¶ 15; see also Prawitt at 5. The amounts of the principal and interest components of the refund attributable to each year and the estimated intrastate portion of the components of the refund agreed upon and approved by the Utah State Tax Commission are set forth in Attachment to Grate.

Response: The Counties do not dispute this fact, however, the Counties have not been provided with the underlying best evidence to support a finding which amounts were attributable to intrastate versus interstate “portions of the components of the refund” and therefore disputes this fact as having any bearing on the Counties claims int his case. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

9. In Qwest’s 1988 general rate case, the Commission, in considering proposed adjustments to 1988 salaries and wages, referred to the Report to the Public Service Commission of the State of Utah by the Task Force on Annualization of Test Year Data, dated May 14, 1986, submitted by the Division, Utah Power and Light Company, Qwest and Mountain Fuel Supply Company. See Report and Order, In the Matter of the Investigation into the Reasonableness of the Rates and Charges of the Mountain States Telephone and Telegraph Company, Docket No. 88-049-07 (Utah PSC, Oct. 18, 1989) (“1988 Order”) at 20-24. With regard to the application of the known and measurable standard to proposed test year adjustments, the “Recommended Annualization Policy” of May 14, 1986 included the following points that the Commission quoted with approval in the 1988 Order:

3.The changes must be specific in that it occurs at a known moment or moments in time.

4.The effects of the change must be measurable.

> 6.The change must have already occurred or will occur before any increase in rates occurs.

Id. at 21-22.

Response: The Counties do not dispute this fact, however, the Counties maintain this fact does not have any bearing on the Counties theory of this case contained in its Complaint(s) as amended. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

10. The Commission has discussed the known and measurable standard in other decisions. See, e.g., Re Pac Docket No. 97-035-01, 1999 WL 218118 (Utah P.S.C. Mar. 4, 1999)) (denying utility's attempt to include an income tax contingency, stating in part: "The record shows that possible future tax assessments [audit] for the 1997 tax year are unknown at this time."); see also id. (refusing to approve expenses for a dam removal "since . . . the outcome of negotiations is unknown, removal of the dam is an uncertain event. We conclude that this is a post-test-year event. The costs of removal are merely estimates, presented by the Company, grounded in this uncertain future event. . . . We find that the estimates do not satisfy the known and measurable standard."); see also In re Little Plains Water Co., Docket No. 96-2178-0 1, 1996 WL 769262, *2 (Utah P.S.C. August 7, 1996)).

Response: The Counties do not dispute the fact that the Commission has discussed the known and measurable standard in other decisions.

11. Until the stipulation was reached, Qwest did not know whether it would prevail in its valuation appeals and the amount of excess property tax paid for each year was not known and measurable. Because the outcome of Qwest's valuation appeals and the refund of property taxes resulting from such appeals were not known until September 1998, no test year adjustments for them would have been made in any test year from 1988 through 1996; the fact that a refund would be received was not known and the amount of any such refund was not measurable.

Response: The Counties are not in a position to opine as to whether Qwest knew it would prevail on its

property tax valuation appeals. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

12. When Qwest accrued the property tax refund in September 1998, it made the following accounting entries:

a.Debited $11,479,398 to Account No. 4080.11, Other Taxes Accrued — Property Tax - Operating. Grate ¶ 19.

b. Credited $11,479,398 to Account No. 7240.19, Operating Other Taxes — Property Taxes — Real and Personal Property. Prawitt at 6; Grate ¶ 19.

c. Debited $5,420,422 to Account No. 1210.99, Interest and Dividend Receivable — Other. Grate ¶ 19.

d. Credited $5,420,422 to Account No. 7320.90, Non-operating Income. Prawitt at 7; Grate ¶ 19.

Response: The Counties do not dispute the debited amounts from the specific accounts of Qwest, however, the amount of overearning is a matter of material dispute in the Counties theory of this case. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

13. When Qwest received the property tax refund in 1999, it made the following accounting entries:

a. In January it debited $7,101,502.60 to Account No. 1130.1, Cash.

b. In January it credited $ 7,101,502.60 To Account No. 4080.11, Other Taxes Accrued — Property Tax — Operating.

c. In February it debited $9,572,269.38 to Account No. 1130.1, Cash.

d. In February it credited $9,572,269.38 to Account No. 4080.11, Other Taxes Accrued — Property Tax — Operating.

e. In March it debited $5, 420,422 to Account No. 4080.11, Other Taxes Accrued — Property Tax — Operating.

f. In March it credited $ 5,420,422 to Account No. 1210.99, Interest and Dividend Receivable — Other.

Response: The Counties do not dispute that Qwest made the above debits. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

14. The foregoing accounting entries were entered in accordance with Utah Administrative Code R746-3 40-2.D, "Uniform System of Accounts," the rule promulgated by the Commission regarding the system of accounts to be used by telephone companies in Utah. The rule provides:

> Uniform System of Accounts - The Uniform System of Accounts for Class A and Class B telephone utilities, as prescribed by the Federal Communications Commission at 47 CFR 32 is the prescribed system of accounts to record the results of Utah intrastate operations.

Response: The Counties do not dispute this fact, however, this fact has no bearing upon the Counties theory of this case. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

15. According to 47 C.F.R. § 32,1, the Uniform System of Accounts ("USOA") is a historical financial accounting system which reports the results of operational and financial events in a manner which enables both management and regulators to assess these results within a specified accounting period. USOA Account No. 7240, Operating Other Taxes, USOA Account No. 7320, Non-operating Income, and USOA Account 7600, Extraordinary Items, are Other Income Accounts under Subpart F of 47 C.F.R. Part 32. See 47 C.F.R. § 32.6999(b), Other Income Account Listing, a copy of which is provided as Attachment 2 to Grate. 47 C.F.R. § 32.6999, Structure of Other Income Accounts, provides in subsection (a) as follows:

> The Other Income Accounts are designed to reflect both operating and nonoperating income items including taxes, extraordinary items and other income and expense items not properly included elsewhere.

Response: The Counties theory of this case raises a matter of factual dispute inconsistent with the above. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

16. 47 C.F.R. § 32.7240, Operating Other Taxes, subsection (a), provides:

This account shall be charged and Account 4080, Other Taxes - Accrued, shall be credited for all taxes, other

than Federal, state and local income taxes and payroll related taxes, related to regulated operations applicable to current periods. Among the items includable in this account are property, gross receipts, franchise and capital stock taxes; **this account shall also reflect subsequent adjustments to amounts previously charged.** Grate ¶ 23 (emphasis added). Qwest's credit to operating tax expense results in a proportional increase in net income which is available for distribution to shareholders.

Response: : The Counties theory of this case raises a matter of factual dispute inconsistent with the above. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

17. USOA Account 7320.90, Non-operating Income, is a subaccount of USOA Account 7300. In pertinent part, USOA Account 7300, Nonoperating Income and Expense, provides:

> (a) This account shall be used to record the results of transactions, events and circumstances affecting the company during a period and which are not operational in nature. **This account shall include** such items as nonoperating taxes, dividend income and **interest income**.

(Emphasis added.) Grate ¶ 24. Qwest' s credit to non-operating income results in a proportional increase in net income which is available for distribution to shareholders. In addition, a credit to non-operating income appears, in accounting parlance, "below the line," meaning that it is not an operational item that would be considered in setting rates.

Response: : The Counties theory of this case raises a matter of factual dispute inconsistent with the above. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

18. In MCI, the Utah Supreme Court said that for the extraordinary component of the unforeseen and extraordinary exception to the rule against retroactive ratemaking to apply the event "must have an extraordinary effect on the utility's earnings." 840 P.2d at 771. In Beaver County v. Utah State Tax Comm 'n, 916 P.2d 344 (Utah 1996), the Utah Supreme Court said that the "Counties must expect, as is obvious from this case, that initial property tax assessments, especially those of large utility systems, are subject to challenges. . . ." 916 P.2d at 352.

Response: The Counties do not dispute the quotations from the Utah Supreme Court case. However, this is not a fact that has any bearing on the Counties theory of this case. he Counties theory of this case raises a matter of factual dispute inconsistent with the above. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

19. USOA Accounts 7240 and 7320 were the proper USOA accounts in which to credit the Utah property tax refund. The Utah property tax refund would not have been properly recorded as an extraordinary item. In pertinent part, USOA Account 7600, Extraordinary Items, provides:

> (a) This account is intended to segregate the effects of events or transactions that are extraordinary. Extraordinary events and transactions are distinguished by both their unusual nature and by the infrequency of their occurrence, taking into account the environment in which the company operates. This account shall also include the related income tax effect of the extraordinary items.
>
> (b) This account shall be credited and/or charged with nontypical, noncustomary and infrequently recurring gains and/or losses which would significantly distort the current year's income computed before such extraordinary items, if reported other than as extraordinary items.

Response: : The Counties theory of this case raises a matter of factual dispute inconsistent with the above. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

20. Taking into account the environment in which Qwest operates, a property tax refund is neither unusual nor infrequent. Qwest actively monitors its property tax assessments in all states and routinely litigates what it believes to be excessive assessments. For example, during the past four years, Qwest has engaged in property tax valuation litigation in Arizona, Idaho, Iowa, Montana, Oregon, Utah, and Washington. Qwest received a refund/credit of $5.6 million for tax years 2001 through 2004 in Idaho. Qwest received a refund/credit of $3.3 million in Montana for tax years 2003 and 2004. Qwest received a refund/credit of $11.1 million in Oregon for tax years 2003 and 2004. Qwest received a refund of $1.0 million in Utah for tax year 2000. Qwest has property tax valuation litigation currently pending in four states. The amount of property tax in dispute in each state is as follows: Arizona, $55.6 million; Iowa, $6.6 million; Utah, $26.3 million; and Washington, $24.6 million. These numbers represents disputed property tax amounts and are not necessarily the amounts Qwest would receive as a result of settlements or court rulings.

Response: The Counties do not dispute the fact that Qwest has appealed its taxes in other jurisdictions. However, the Counties contend that Qwest has engaged in a system or motis operandi (common plan or scheme) in which it has appealed its property taxes in other jurisdictions as well as Utah in an effort to shift the windfall to shareholders and directors. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

21. When accrued in 1998, the Utah property tax refund was not a nontypical, noncustomary and infrequently recurring gain and did not significantly distort the current year's income computed before extraordinary items. Specifically, the refund of $11.5 million (which does not reflect the effect of income taxes) was 0.11% of the Company's operating revenues, 0.14% of the Company's pre-tax operating expenses and 0.48% of

the Company's 1998 pretax operating income of $2,391 million (a figure that included the $1 1.5 million property tax refund).

Response: : The Counties theory of this case raises a matter of factual dispute inconsistent with the above. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

22. As shown in Attachment 3 to Grate, the property tax refund attributable to each year from 1988 through 1996 accounted for:

a.0.02% or less of the operating revenue of Qwest in any year and 0.0 1% of the operating revenue of Qwest for all nine years.

b. 0.03% or less of the operating expense of Qwest in any year and 0.02% of the operating expense of Qwest for all nine years.

c. 0.12% or less of the income from operations before taxes of Qwest in any year and 0.08% of the income from operations before taxes of Qwest for all nine years.

d. 0.42% or less of the operating revenue of Qwest in Utah in any year and 0.26% of the operating revenue of Qwest in Utah for all nine years.

e. 0.57% or less of the operating expense of Qwest in Utah in any year and 0.33% of the

operating expense of Qwest in Utah for all nine years.

f. 1.72% or less of the income from operations before taxes of Qwest in Utah in any year and 1.23% of the income from operations before taxes of Qwest in Utah for all nine years.

Had the refund attributable to each year been recorded in that year, it would not have significantly distorted income computed before extraordinary items. Grate ¶ 29.

Response: : The Counties theory of this case raises a matter of factual dispute inconsistent with the above. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

23. Qwest properly included the refund in its financial reports filed with the Commission in the applicable periods.

Response: : The Counties theory of this case raises a matter of factual dispute inconsistent with the above. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

24. The portion of the $11 .5 million property tax refund included in rates paid by Qwest's customers during 1988 through 1996 was $4,999,910. The portion of the property tax refund included in rates paid by Qwest's customers from November 16, 1989 through December 31, 1996 was $2,858,248. The derivation of these amounts is set forth in Attachment 1 to Grate. Grate ¶ 31.

Response: : The Counties theory of this case raises a matter of factual dispute inconsistent with the above. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

25. Qwest ceased being subject to cost-of-service, rate-of-return regulation upon issuance of the Commission's February 17, 1998 final order in Docket No. 97-049-08. The Property Tax Division, the Counties and Qwest stipulated to reduced property tax valuations in March 1998 and to the amount of the refund in September 1998. Qwest accrued the refund in September 1998 and received cash payment of portions of the refund in January, February and March 1999. Grate ¶ 32.

Response: : The Counties theory of this case raises a matter of factual dispute inconsistent with the above. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

26. Had Qwest been subject to cost-of-service, rate-of-return regulation following the property tax settlement and refund accrual in 1998, and had a rate case been commenced with a 1998 or later test year, the 1998 property tax refund would not have been considered in setting rates. The 1998 property tax refund pertained to the years 1988 through 1996. Accordingly, it would have been removed from a 1998 or later test year by a "prior period adjustment." Grate ¶ 33.

Response: : The Counties theory of this case raises a matter of factual dispute inconsistent with the above. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

27. The Counties obtained an exparte order of the Third District Court on December 31, 1998, allowing the deposit of the property tax refund in the court. Mr. Peters deposited most of the refund into the court on December 31, 1998. Direct Testimony of Bill Thomas Peters ("Peters") at 2.

Response: The Counties do not dispute this fact.

28. Within the first week of January 1999, Mr. Peters had a telephone conversation with either George Haley or Robert Stolebarger, who were attorneys for Qwest, who expressed Qwest's displeasure at the fact that the funds had been deposited in the court and asked whether the Counties would be willing to consider having Qwest post a bond for $16.9 million in lieu of having the funds deposited in court. The Qwest attorney told him that the year-end bonus for Qwest officers was largely dependent upon the $16.9 million they had anticipated being paid into the Company at year-end 1998, and that it would have a serious impact on those officers if the funds were not paid to Qwest.

Response: The Counties do not dispute this fact.

29. As mentioned previously, the property tax refund accounted for 0.48% of Qwest' s pre-tax

operating income in 1998. Had there been no accrual of an $11.5 million Utah property tax refund and no accrual of the related $5.4 million of interest income in 1998, the amount of annual bonus Qwest paid to its executives for 1998 operations would have been approximately $5,700 less. The Utah portion of this decreased bonus amount would have been an amount significantly less than $1,000. Grate ¶ 34.

Response: : The Counties theory of this case raises a matter of factual dispute inconsistent with the above. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

30. There are public records of governmental investigations of alleged financial reporting irregularities by former Qwest officers. Prawitt at 9.

Response: The Counties do not dispute this fact.

31. The only governmental investigations of alleged financial reporting irregularities by Qwest or its former officers from 1988 through the present relate to financial reports for calendar years after 1999. Grate ¶ 35.

Response: : The Counties theory of this case raises a matter of factual dispute inconsistent with the above. Prawitt Direct Testimony, Prawitt Aff. 1 & 2.

A R G U M E N T

I. Applicable Standard

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Jackson v. Mateus*, 2003 UT 18, ¶ 6, 70 P.3d 78, 80. *See also* Utah R. Civ. P. 56. The United States Supreme Court has elaborated on the standards to be applied

under Rule 56, observing that: “[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses and we think it should be interpreted in a way that allows it to accomplish this purpose.” *Celotex Corp. v. Catrett* 477 U.S. 317, 323-24 (1986) (emphasis added).

“[A]ll undisputed material facts [must be considered] in the light most favorable to the nonmoving party . . . .” (*IHC Health Services, Inc. v. D & K Management, Inc.*, 2003 UT 5, ¶ 6, 73 P.3d 320, 323), and“all reasonable inferences drawn therefrom [must be viewed] in the light most favorable to the nonmoving party[,]” (*Alder v. Bayer Corp.*, 2002 UT 115, ¶ 25, 61 P.3d 1068, 1076). Respondent must demonstrate, through admissible, probative evidence, that there are no material facts in dispute which preclude summary judgment. Respondent cannot meet this burden and, therefore, its motion for summary judgment must be denied.

II. The Respondent Has Failed to Meet the Standard for Summary Judgment Pursuant to Rule 56 of the Utah Rules of Civil Procedure.

Rule 56(c) of the Utah Rules of Civil Procedure states in pertinent part that “[t]he judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” The Utah Supreme Court has enumerated many times that when a genuine issue of material fact is raised by the nonmoving party a motion for summary judgment should be denied. “Under this rule [Utah R. Civ. P. 56], it is clear that if there is any genuine issue as to any material fact, the motion should be denied.” *Young v Felornia,* 244 P.2d 862, 863 (Utah 1952).

The attached affidavit of Mr. Prawitt as well as all documents on file in this matter clearly raises not just one, but multiple genuine issues as to numerous material facts. The attached affidavit is compelling in not only raising genuine issues as to material facts, but also highlights that the Respondent’s “Undisputed Facts” are clearly baseless (relying on the evidence supporting the Prawitt affidavit, as well as affidavit). “On summary judgment the adversed party is entitled to have the court survey the evidence and all reasonable

inferences fairly to be drawn therefrom in the light most favorable to him." *Thompson v. Ford Motor Co.*, 395 P.2d 62, 63 (Utah 1964). " . . . it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact. This is analogous to the elemental rule that the fact trier may believe one witness as against many, or many against one." *Holbrook Co., v. Adams*, 542 P.2d 191, 193 (Utah 1975).

In surveying all of the evidence in the light most favorable to the Complainants, taking into account the attached affidavit of Mr. Prawitt along with all the exhibits attached (as well as on file), the Respondent's Motion for Summary Judgment must be denied by the Commission.

III. Mr. Prawitt's Experience and Education Qualify Him to Testify as a Forensic Financial Reporting and Accounting Expert.

Because Mr. Prawitt's affidavit provides that he has extensive experience and education interpreting and analyzing financial data for errors and improprieties, Mr. Prawitt is qualified to testify about the propriety of Qwest's financial reporting and to interpret the term "extraordinary item" from an accounting perspective. Rule 702 of the Utah Rules of Evidence provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The Utah Supreme Court has added that "'[t]he critical factor in determining the competency of an expert is whether that expert has knowledge that can assist the trier of fact in resolving the issues before it.'" *State v. Kelley*, 2000 UT 41 at ¶ 12, 1 P.3d 546.

Mr. Prawitt has specialized knowledge and experience qualifying him to interpret and analyze the financial records of large corporations (like Qwest) and to identify errors and improprieties in their financial reporting. Prawitt Aff. at ¶¶ 7-8. This specialized knowledge and experience is useful to the

trier of fact in this case to help it determine whether Qwest's property tax refund amounts to an "extraordinary item" for accounting purposes, and whether Qwest engages in utility misconduct when it uses property tax appeals as a mechanism to avoid regulatory review and to unjustly reward shareholders and executives at the expense of ratepayers.

Qwest claims that because Mr. Prawitt does not have a degree or professional certification as an accountant, and goes to great lengths to argue that he is not qualified to testify regarding Qwest's treatment of its property tax refunds and any improprieties related thereto. However, Qwest conveniently ignores Mr. Prawitt's experience, incident to appraising property, where he must "analyze taxpayer contentions and expert testimony concerning the valuation of their property," which involves "analyz[ing] and ... investigat[ing] the accuracy and veracity of such statements." Prawitt Aff. at ¶ 7. Qwest also ignores Prawitt's experience providing "forensic analysis" as a part of his current employment with the Utah Association of Counties and with his testimony to the Utah State Tax Commission, and to state and federal courts. *Id.* Qwest's objections to Mr. Prawitt's testimony are similar to the objections made in *Kelley*.

In *Kelley*, a criminal defendant claimed that his sexual advances towards a mentally retarded women did not amount to attempted rape because she consented to his advances. The prosecution presented an expert witness to testify as to the victim's mental capabilities and ability to appraise the nature of a sexual relationship. Like Qwest in this case, the defense argued that since the expert was not licensed, he was not qualified to testify to the victim's cognitive abilities. *Kelley* at ¶ 14. The Court found that the expert was qualified to testify to the victim's "overall ability to consent to a sexual relationship ... 'by virtue of experience and training.'" *Id.*, *citing Patey v. Lainhart*, 1999 UT at ¶ 15. Likewise, Prawitt is qualified to "analyze and interpret" Qwest's accounting practices and to give his opinion regarding the impact of the property tax refund by virtue of his experience and training as a

"forensic expert" in his current employment, which he has held for over 13 years. Prawitt Aff. at ¶ 7. Because the Utah Supreme Court has "routinely allowed persons to testify as experts based on the totality of their qualifications and experience, and not on licensing or formal standards alone," Prawitt is qualified to testify in this case. *Kelley* at ¶ 15. Any dispute by Qwest should go to the weight of Prawitt's evidence, and not to its admissibility.

Qwest also claims that "Mr. Prawitt's opinions are completely conclusory in nature. He fails to state any specific facts upon which he bases his conclusions, except the facts that Qwest accounted for the refund in a certain manner and has appealed its property tax valuation in Utah every year." (Qwest Summary Judgment at 34). Qwest ignores Mr. Prawitt's expert opinion that the "certain manner" in which Qwest accounted for the tax refund was purposely directed towards benefitting shareholders at the expense of ratepayers. Prawitt Aff. at ¶¶ 11-15. Prawitt also explains how this "certain manner" of accounting amounts to utility misconduct by directing funds "below the line" to avoid regulatory review at the expense of ratepayers and to the benefit of shareholders and corporate executives. *Id.* at ¶ 17. Mr. Prawitt relied upon financial reports, Prawitt Aff. at ¶ 9, information provided at discovery, *Id.*, federal regulations, Accounting Board opinions, and Qwest's public filings. *Id.* at ¶11. These documents provide a more than adequate foundation to support Mr. Prawitt's opinions and are "of a type reasonably relied upon by experts in the [forensic accounting] field...." Utah Rules of Evidence 703. If Qwest would have Mr. Prawitt base his opinions on different information, it failed to identify what that information should be.

Qwest also finds it "stunning" that Prawitt relies on the Accounting Review Board and not the Utah Supreme Court when he opines regarding the exceptions to the rule against retroactive ratemaking. Qwest ignores that Prawitt made his opinions "from an accounting standpoint" and not from a legal standpoint. Prawitt Aff. at ¶ 16. Under Qwest's interpretation, to qualify as an expert, a

person must not only be an expert in his own field, but a legal expert as well. Qwest does not support this bizarre assertion with any authority, be it legal or otherwise.

Qwest goes to great lengths to argue that because Mr. Prawitt's lacks a specific accounting degree acceptable to Qwest, that all his statements regarding accounting practices and methodologies should be disregarded. This argument is without merit, when "[t]he critical factor in determining the competency of an expert is whether that expert has knowledge that can assist the trier of fact in resolving the issues before it. A person may be qualified to testify as an expert by virtue of experience and training; formal education is not necessarily required (citations omitted)." *Patey v. Lainhart*, 1999 UT 31¶ 15, 977 P.2d 1193, 1196 (Utah 1999), See also, *Randle v. Allen*, 862 P.2d 1329, 1337 (Utah 1993). The fact that under Utah law a formal education degree is not required in order to be qualified as an expert to testify disposes of Qwest's argument requiring such a specific accounting degree. Besides actually having a formal education degree (B.S.) that includes various accounting courses (Prawitt Aff. ¶ 2.), Mr. Prawitt clearly has the requisite training, experience and knowledge of the pertinent subject matter to assist the trier of fact in this matter. Essentially Qwest is arguing for a new, more restrictive standard with barriers that an expert must first overcome in order to testify about the related subject matter. Qwest's argument for a more stringent standard is not supported by Utah case law and is inconsistent with the requirements under the Utah Rules of Evidence dealing with expert testimony.

Even assuming *arguendo* that Mr. Prawitt's business degree (with accounting courses) and his extensive history of performing financial accounting related analysis throughout the last 20 plus years does not rise to a level qualifying Mr. Prawitt to comment on regulatory accounting as an expert, Mr. Prawitt's testimony is still admissible as an expert in this matter. First, Qwest has never properly put forth the foundation required for someone to be allowed to testify as a regulatory accountant

(essentially arguing for the Commission to recognize such regulatory accounting as a separate accounting discipline). Second, if any such highly specific accounting discipline did exist it still would not bar Mr. Prawitt from testifying in this matter, given his training, experience and knowledge in the acceptable accounting practices of regulatory accounting. The Utah Supreme Court held that experts from one school of discipline may be allowed to testify against another school of discipline in the medical field as long as the proper foundation requirements regarding specific standards of care are established. In *Boice v. Marble*, 1999 UT 71 ¶ 14, 982 P.2d 565 (Utah 1999) the Utah Supreme Court stated that, "[a]n expert witness belonging to one school may testify against a member of another school once that expert provides sufficient foundation to show that the method of treatment at issue is common to both schools or that the expert is knowledgeable about the standard of care of the other school (citations omitted)." By analogy to the field of accounting, it is logical that Mr. Prawitt's training, experience and knowledge in the field of accounting (as well as his specific knowledge of Qwest's financial information) provide him with the proper foundation in order to testify about regulatory accounting (assuming the Commission were to accept Qwest's argument that such a discipline actually exists in the field of accounting).

Mr. Prawitt analyzes and interprets financial data on a regular basis. His employment (job) as an appraiser and forensic accountant requires him to critically examine the claims of utility taxpayers similar to Qwest and to examine their accounting methodologies. To do this job, Mr. Prawitt has familiarized himself with generally accepted accounting principles and accounting methods. His opinions that Qwest's books contain "red flags" and that a large tax refund amounts to an "extraordinary item" for accounting purposes are supported by information of a type reasonably relied upon by experts in the field of forensic accounting. Mr. Prawitt's opinions "will assist the trier of fact to understand the evidence or to determine a fact in issue...." For these reasons, Mr. Prawitt's testimony

is admissible.

IV. Mr. Prawitt's Opinion that Qwest has Engaged in Misconduct and that a Large Property Tax Refund Amounts to an "Extraordinary Item" for Accounting Purposes is Not Objectionable Merely Because it Embraces an Ultimate Factual Issue.

Qwest asserts that Mr. Prawitt's testimony amounts to an improper attempt to usurp the Commission's role as decision maker. Qwest specifically claims that Mr. Prawitt merely alleged that "Qwest accounted for the [property tax] refund in a certain manner and has appealed its property tax valuation in Utah every year." (Qwest Summary Judgment at 35). Qwest alleges that these allegations are not helpful to assist the trier of fact or supported by any factual bases. However, Rule 704 of the Utah Rules of Evidence provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

This is especially the case "where the subject matter is not one of common observation or knowledge, or in other words, where witnesses because of particular knowledge are competent to reach an intelligent conclusion and inexperienced persons are likely to prove incapable of forming a correct judgment without skilled assistance." *Patey v. Lainhart*, 1999 UT 31 ¶22, 977 P.2d 1193 (finding that expert dentist could state cause of injury even though it amounted to an ultimate fact in issue by reason of his special skill beyond grasp of jury). An expert may make ultimate conclusions so long as there is "a logical nexus between his opinion and the facts adduced...." *Id.* at ¶ 23 quoting *Edwards v. Didericksen*, 597 P.2d 1328, 1329-30 (Utah 1979).

Mr. Prawitt adduced several facts regarding Qwest's behavior: Qwest made certain debits and credits, these credits and debits resulted in non-operating income outside the scope of regulation by regulatory agencies, and this action benefitted shareholders at the expense of ratepayers. Prawitt Aff.

at ¶¶ 12-15. Mr.Prawitt created a nexus between these adduced facts, which he derived from relevant sources, and the conclusion that this behavior amounted to utility misconduct. This subject is adequately complex that an inexperienced person could not deduce, from these facts alone, that Qwest acted inappropriately by using this "certain manner" of accounting. Therefore, Mr. Prawitt's testimony is not an inappropriate conclusion, but an expert opinion arising from information generally relied upon by experts in forensic accounting. For these reasons, the Commission should admit and carefully consider Mr. Prawitt's testimony. Furthermore, because there are issues of material fact still remaining in this case arising from Mr. Prawitt's testimony and affidavit, summary judgment is not an appropriate remedy in this case. Based upon the foregoing, Qwest's motion for summary judgment must be denied.

V. Qwest's Contentions with Mr. Prawitt's Testimony are Appropriate for Cross Examination and Not Summary Judgment.

The majority of case law dealing with objections similar to Qwest's contention with Mr. Prawitt's testimony dictate that Qwest's arguments should be left for cross examination of the witness and are not proper arguments for summary judgment. The reason being that testimony offered by an expert goes to the weight that the trier of fact gives such testimony and not to its admissibility. Qwest may not like the testimony offered by Mr. Prawitt or the conclusions that may be adduced by the trier of fact from the testimony, but this does not mean that Qwest may simply ignore the testimony for summary judgment argument purposes. All of Qwest's contentions outlined in its Memorandum in Support of Summary Judgment do not change the fact that under Utah state law Mr. Prawitt's testimony is clearly admissible. In *State v. Clayton*, 646 P.2d 723, 726 (Utah 1982) the Utah Supreme Court stated that:

> It is within the discretion of the trial court to determine the suitability of expert testimony in a case and the qualifications of the proposed expert. However, once the expert is qualified by the court, the witness may base his opinion on reports, writings or observations not in evidence which were made or compiled by others, so long as they are of the type reasonably relied upon by experts in that particular field. The opposing party may challenge the suitability or reliability

> of such materials on cross-examination, but **such challenge goes to the weight to be given the testimony, not to its admissibility**. It is established law in Utah that the jury determines the weight and credibility to be given evidence. (Emphasis added).

Id. at 726-727.

Furthermore, Qwest does not argue that this type of expert testimony is unnecessary for Mr. Prawitt's opinions, instead Qwest argues that Mr. Prawitt's extensive background that includes: accounting; financial auditing; performance and supervision of annual financial valuations of multi-state utility companies; performance of specific audits for financial improprieties; performance of financial appraisals; performance of forensic financial investigations; review of APB Opinions; review of documents concerning regulatory accounting definitions of "extraordinary items and events"; along with the specific property taxation historical affairs of Qwest, when viewed as a whole does not allow Mr. Prawitt to adduce the matters attested to in his affidavit. Prawitt Aff. at ¶¶ 2-16. Again, Qwest's argument goes to the weight that any such testimony shall be given by the trier of fact and not to its admissibility for summary judgment purposes. There is more than enough foundation background to allow Mr. Prawitt's testimony to be presented, any further background questions by Qwest should be reserved for cross-examination as the above clearly demonstrates that admissibility of such testimony is not in dispute.

As previously stated, Rule 704(a) of the Utah Rules of Evidence clearly indicates that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Qwest's contentions with Mr. Prawitt's testimony regarding "extraordinary item" or "extraordinary event" concerning retroactive rate-making are unfounded under the Utah Rules of Evidence. Furthermore, "extraordinary item" or "extraordinary event" is an accounting term requiring expert testimony to explain this accounting term of art. Therefore, Mr. Prawitt's testimony concerning this issue in the form of opinion is clearly admissible under Rule 704(a) and Mr. Prawitt should be allowed to testify concerning this issue in assisting the trier of fact.

VI. Qwest's Claim that the Statute of Limitations Contained in U.C.A. § 54-7-20 Bar any Recovery Based Upon a Claim that Rates were Unjust and Unreasonable is Waived.

Qwest has waived any statute of limitations argument in this matter by not properly raising such argument when it sough to have the Utah Supreme Court sustain a dismissal of this case with prejudice, therefore any such argument is now barred. Under Utah law a failure by one party to raise, plead and present their issues during a previous appeal shall preclude that party from attempting to now argue those issues. In the Utah Court of Appeals' Memorandum Decision, *Smith v. Osguthorpe*, 2005 UT App. 11, ¶ 5, (Ut. Ct. App. 2005), (attached hereto as Exhibit B) the court held that the "Osguthorpes' failure to raise their present issues during the previous appeal precludes them from arguing them now. *See Junt*, 677 N.W. 2d at 212-213 ('[T]he law of the case encompasses not only those issues decided on the first appeal, but also those issues decided by the trial court prior to the first appeal' (quoting *Tom Beuchler Constr., Inc., v. City of Willinston*, 413 N.W. 2d 336, 339 (N.D. 1987). Moreover, in failing to attack the trial court's findings following our remand order, the Osguthorpes have waived the opportunity." *Smith v. Osguthorpes (memorandum decision*) at ¶ 5.

Qwest has been a party to these proceedings from the beginning filing motions and memorandum in the Third District Court and arguing before the Utah Supreme Court. In the Brief of the Appellee US West Communications, Inc., (Qwest) filed June 10, 2000 in case numbers 990268-SC, 990771-SC, 200144-SC, (consolidated) (attached hereto as exhibit C) Qwest never argued or presented for review, when it argued that the dismissal should be "with prejudice" the issue regarding limitations of the Counties action before the Public Service Commission ("Commission"). Instead, Qwest went to great lengths to indicate that the proper forum for a just resolution would before the Commission, now that the matter is pending before the Commission, Qwest claims the statute of limitations for filing complaints before the Commission under Utah Code Ann. § 54-7-20 has run against the Counties. By never raising this argument at the trial court level or while the consolidated cases were before the Utah Supreme Court, Qwest has waived this issue and its argument should be summarily stricken from its memorandum.

Furthermore, the Commission filed a brief in the matters before the Utah Supreme Court highlighting that the proper forum for resolution would be before the Commission, ("[t]he Commission argues that the Counties' request has not been denied, statutorily or, obviously, by order of the Commission, and the action before the Commission should not be on appeal and may continue to resolution.") Commission Brief at pp.6-7, (attached hereto as exhibit D). The Commission further argued in its brief that "[r]ather than solely seek a declaratory order, the Counties may pursue alternative relief which may be available through the Commission. *See, e.g., MCI Telecommunications Corp. v. Public Service Comm'n*, 840 P.2d 765 (Utah 1992) (recognizing exceptions to the rule against retroactive ratemaking for unforeseen and extraordinary events)." Commission Brief at pp. 8-9. The issues briefed by the parties as well as the Commission and reviewed on appeal before the Utah Supreme Court never included argument by Qwest or the Commission that the Counties were barred by any applicable statute of limitations on actions from seeking relief or a resolution of its claims before the Commission. Qwest's argument under Utah Code Ann. § 54-7-20 has been waived having been raised untimely. The Counties also incorporate by reference Complainant's Memorandum in Opposition to Qwest's Motion to Dismiss previously filed in this matter. The Counties Memorandum clearly outlines the procedural posture of this case barring any argument by Qwest as to limitation of the Counties claims.

VII. Qwest has Engaged in a Common Plan or Scheme to Defraud Utah Ratepayers Constituting Utility Misconduct.

Qwest argues and presents evidence of its continuing appeals not only in Utah but in other states as an indication that it has not engaged in any utility misconduct. However, Mr. Prawitt's direct testimony in this matter suggest otherwise. Mr. Prawitt indicates that:

> I have considered the fact that Qwest has appealed each year in Utah and, as admitted by Qwest in its Motion For Protective Order on Notice of Rule 30(b)(6) Deposition, at 8, that 'while [Qwest} appeal in other states less often' it still does so 'on a regular basis.' Based upon my auditing experience, this concession, together with the apparent use of property tax appeals as

> a mechanism in this case to funnel millions of dollars to shareholder return, almost one third (1/3) of which is 'below the line,' serious red flags are raised concerning U.S. West Communications Inc., now Qwest's, financial accounting practice and its actual motivation to assert property tax appeal for the purpose of driving revenues outside of the regulatory context and to increase the bottom line to shareholders, at the expense of taxpayers. Such a motivation would generally lead to higher sock prices and support larger bonuses to Qwest's middle and upper management. I have also reviewed the proceedings in the Matter of the Investigation into the Reasonableness of the Rate and Charges of the Mountain States Telephone and Telegraph Company, Docket No. 88-049-18. I have also reviewed the matters of public record as to governmental investigations of financial fraud by former U.S. West Communications officers. I have also reviewed the proceedings in the Matter of Investigation into the Reasonableness of the Rates and Charges of the Mountain States Telephone and Telegraph Company, Docket No. 88-049-18. I have also reviewed the maters of public record as to governmental investigations of financial fraud by former U.S. West Communications officers. The types of financial reporting exposed in those investigations fits generally into a single form of modus operandi, designed to enhance revenue sources for the awarding and payment of compensation to corporate officers. It is therefore my opinion that the financial reporting issues that I identify as red flags in this property tax refund scenario are, to a reasonable certainty, the result of utility misconduct.

Eckhardt Arthur Prawitt, Direct Testimony, Docket No. 01-049-075, Before the Public Service Commission of Utah. December 1, 2004.

Qwest supports Mr. Prawitt's determination of utility misconduct in its affidavit of Mr. Phillip Grate attached to its Motion for Summary Judgment. In the Grate Affidavit, evidence is presented that "Qwest has engaged in property tax valuation litigation in Arizona, Idaho, Iowa, Montana, Oregon, Utah and Washington." Grate Aff. ¶ 27.

Mr. Grate further indicates the amounts credited to Qwest by their property tax disputes and where in the accounting financials of Qwest such credits are indicated. However, all this shows is that Mr. Prawitt's assessment is correct that Qwest engages in utility misconduct, essentially a common plan or scheme in an attempt to subvert the integrity of the ratemaking process. Utah Rules of Evidence 404(b). *See also, MCI Telecommunications Corp. v. Public Serv. Comm'n*., 840 P.2d 765, 775 (Utah 1992).

The above clearly raises issues of material fact and summary judgment must be denied by the Commission.

Additionally, the affidavit of Mr. Prawitt dated March 31, 2005 clearly shows that Qwest engaged in utility misconduct at the benefit to shareholders and directors, "the DPU Handout, based on a review of Qwest's earnings, "[i]n the aggregate for years [1988] through 1996, Qwest actual earnings exceeded its

authorized [earnings] by approximately 3.73% to 3.86% on rate base . . .” Prawitt Aff. ¶ 3, Dated March 31, 2005, (Exhibit E). Mr. Prawitt further indicates that in his opinion because Qwest exceeded its earnings by the above amounts, that his conclusion is the “$16.9 million refund to Qwest should be returned to the ratepayers, rather than inappropriately enuring to the benefit of Qwest’s shareholders.” Prawitt Aff. ¶, Dated March 31, 2005, (Exhibit E). The Counties and Qwest have different theories of this case that clearly results in disputed material facts precluding summary judgment.

VIII. Conclusion.

The Counties hereby incorporate by reference the arguments opposing summary judgment contained in the Utah Committee on Consumer Services’ Response to Qwest’s Motion for Summary Judgment, rather than overburden the Commission with additional arguments against the Respondent’s Motion for Summary Judgment. Based upon the Committee’s arguments and the arguments outlined above as well as the existence of multiple unresolved issues as to material facts in this matter, the Respondent’s Motion for Summary Judgment must be denied by the Commission allowing the parties to engage in additional discovery and proceed to trial with a hearing on the merits.

Dated this _____ day of April, 2005.

Peters Scofield Price
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_____
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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the above and foregoing Complainants’ Memorandum in Opposition to Respondent’s Motion for Summary Judgment was mailed, postage prepaid, this _____ day of April, 2005, to the following:

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