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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.	**Complainants' Memorandum in Opposition to Qwest's Motion for Protective Order** Docket No. 01-049-75

Complainants, by and through their undersigned counsel, and pursuant to Utah Admin R. 746-100-1.C, 8 and Utah R. Civ. P. 7(c), 81, submit the following memorandum in opposition to "Qwest's Motion For Protective Order On Notice of Rule 30(b)(6) Deposition" ("Qwest's Motion"):

Preliminary Statement Qwest Corporation ("Qwest") has filed a motion for protective order, seeking to prevent, entirely, the discovery by Complainants of sworn testimony from Qwest, that is binding upon it, by way of the taking of Qwest's deposition in accordance with Utah R. Civ. P. 30(b)(6). *See* Qwest Motion at 12-13. Qwest offers in support of its request the proposition that the Rule 30(b)(6) notice

served on it is "unreasonable." *See* Qwest Motion, Part III.A, at 4-10. As discussed fully, below, this proposition is, in its entirety, without merit as a basis to deny clearly proper discovery to the Complainants.

Most of the remainder of Qwest's Motion appears not to be directed to the merits of its objection that the notice is "unreasonable," but instead to the assertion that Complainants should have sent the notice sooner. As discussed below, this argument is a diversion from the merits, because the notice was timely and in accordance with the Commission's Scheduling Order.

Argument

I. The Timing of The Notice of Rule 30(b)(6) Deposition Should Not Preclude The Taking Of The Deposition, Because It Was Reasonable and There Is No Prejudice To Qwest.

Qwest argues that the ten days' notice provided to it of its Rule 30(b)(6) deposition is "unreasonable." But there has been no secret that Complainants intended to take Qwest's deposition in this matter prior to discovery cutoff. Such intent was expressed by Complainants' counsel in hearings before this Commission and informally to counsel. So there certainly is no surprise to Qwest that it received a notice for its deposition. Nor is any prejudice demonstrated by Qwest.

The applicable language governing the time required for notices of deposition is found in Utah R. Civ. P. 30(b)(1), which states: "A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action." That specific rule does not set forth what period of notice would be considered "reasonable." Utah R. Civ. P. 6(d) provides some guidance in determining, generally, what constitutes a reasonable notice period. That rule establishes the notice period for *hearings* as requiring that notice be served "not later than 5 days before the time specified for a hearing . . .." *Id.* Since hearing preparation is generally far more time intensive than preparing for or defending a deposition, it should be presumed that 5 days' notice for a deposition is also generally reasonable.

Qwest's argument to this Comission that the notice period is unreasonable is very similar to the

unsuccessful argument made by the defendant in *Lehman Bros. Kuhn Loeb, Inc. v. Good Hope Industries, Inc. (In re Good Hope Industries, Inc.),* 14 B.R. 942 (Bankr. D. Mass. 1981). On September 18, 1981, Lehman Bros. served a notice of deposition to take the depositions of a Good Hope Industries, Inc. designee and one other witness, on September 25, 1981, the date of the discovery cutoff. *See id.* at 944. The Court soundly rejected Good Hope's argument that such notice was unreasonable, stating: "The court will not, on the basis of either of the first two procedural grounds argued by Good Hope, prohibit the taking of depositions of Stanley and Good Hope." *Id.* at 945.

There, like here, plaintiff stood ready to reschedule the deposition date to accommodate Good Hope. *See id.* There, like here, examination on the issues set forth in the notice "should assist the parties in their case preparation and ultimately contribute to a fair resolution of the disputed claim." *Id.* In addition, here, Qwest was aware of the cutoff date and was aware that Complainants had voiced their intent to do deposition discovery. It was therefore reasonably foreseeable that such discovery would be noticed for the August 30-31 time frame. Qwest could have prepared designees for the deposition it knew would be coming, long before the depositions were noticed. Without laboring that point, Complainants always stood ready to remediate any scheduling difficulty by rescheduling by agreement.

The sticking point was never that the timing of the depositions, within the discovery period, was impractical, as is evidenced by Qwest's willingness to produce designees to testify on the scheduled date. What Qwest was not willing to do was to produce designees who would testify in areas as to which Qwest does not want to provide discovery.

That is not an issue of reasonableness of timing, it is a question of appropriateness of scope of the areas in the notice. Since it made no sense to go forward with the deposition without Qwest's scope objection being resolved, the parties mutually agreed that the Commission should decide the appropriateness of the scope of the notice, which was challenged by Qwest, before any deposition took place. Because that scope issue must be resolved in any event, the ten days' notice (which is, itself, reasonable) is, in reality, a red

herring.

II. Qwest's Offer To Do Less Than The Notice of Rule 30(b)(6) Deposition Requires Does Not Meet Its Discovery Obligation.

Qwest argues that its offer to produce designees to testify in fewer areas than the notice set forth "went far beyond what it was required to do." Qwest Motion, Part III.B, at 10-12. This argument is entirely incorrect.

Utah R. Civ. P. 26(c) does not speak in terms of entering protective orders based on what positions the parties take in attempting to resolve a discovery dispute. Indeed, the discussion in the Qwest Motion of what Qwest offered to do is wholly immaterial to any conclusion as to why Qwest ought to be relieved (and it should not be so relieved) from full compliance with its discovery obligations, the same as any other litigant:

> "The [United States Supreme] Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing litigants in civil trials." *Cotracom Commodity Trading Co. v. Seaboard Corp.,* No. CIV. A. 97-2391-GTV, 2000 WL 796142, at *2 (D. Kan. June 14, 2000)(quoting *Herbert v. Lando,* 441 U.S. 153, 176, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979)). To accomplish that purpose, Federal Rule of Civil Procedure 26(b)(1) provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed.R.Civ.P. 26(b)(1). Relevancy is broadly construed, and a request for discovery should be considered relevant if there is "any possibility" that the information sought may be relevant to the subject matter in the action. *Beach v. City of Olathe,* No. CIV. A. 99-2210-GTV, 2000 WL 960808, at *2 (D. Kan. July 6, 2000). A request for discovery should be allowed "unless it is clear that the information sought can have no possible bearing on the subject matter of the action." *Id.* When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance. *Employers Commercial Union Ins. Co. of America v. Browning-Ferris Industries of Kansas City, Inc.,* No. CIV. A. 91-2161-JWL, 1993 WL 210012, at *3 (D. Kan. Apr.5, 1993).

Steil v. Humana Kansas City, Inc., 197 F.R.D. 442, 445 (D. Kan. 2000). A corporation served with a Rule 30(b)(6) notice of deposition has particular duties to respond:

> [W]hen a party seeking to depose a corporation announces the subject matter of the proposed deposition, the corporation must produce someone familiar with that subject. *See* Fed.R.Civ.P. 30(b)(6); James Wm. Moore et al., Moore's Federal Practice, ¶ 30.25[3] (3d ed.1998). To satisfy Rule 30(b)(6), the corporate deponent has an affirmative duty to make available "such number of persons as will" be able "to give complete, knowledgeable and binding answers" on its behalf. *Securities & Exchange Comm'n v. Morelli,* 143 F.R.D. 42, 45 (S.D.N.Y.1992) (quotations omitted); *see* Moore's Federal Practice, at ¶ 30.25. When a party fails to comply with Rule 30(b)(6), Rule 37 allows courts to impose various sanctions, including the preclusion of evidence. *See*

FED.R.CIV.P. 37(b)(2)(B); *see, e.g., Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc.,* 67 F.3d 766, 770-71 (9th Cir.1995).

Reilly v. Natwest Markets Group, Inc., 181 F.3d 253, 268 (2d Cir. 1999). By refusing to produce witnesses prepared to testify in all areas set forth in Complainants' notice, Qwest "violated Rule 30(b)(6)." *Id.* at 269. *Accord Rainey v. American Forest and Paper Ass'n, Inc.,* 26 F. Supp.2d 82, 94-95 (D.D.C. 1999); *Starlight International, Inc. v. Herlihy,* 186 F.R.D. 626, 637-38 (D. Kan. 1999); *Harris v. IES Associates, Inc.,* 2003 UT App. 112 ¶ 32 n.10, 69 P.3d 297, 306 n.10 (discussing duty of corporate litigant served with Rule 30(b)(6) notice).

Qwest's offers aside, it plainly refused to produce designee witnesses who were prepared to testify fully as to areas of examination set forth in the notice, which areas, as discussed below, are within the scope of Rule 26. Qwest therefore failed to discharge its duty to provide discovery under the applicable rules, and its proposal to provide less than the rules require is immaterial.

III. THE AREAS OF EXAMINATION SET FORTH IN THE NOTICE ARE PLAINLY RELEVANT AS WITHIN THE SCOPE OF RULE 26.

Qwest argues that the Rule 30(b)(6) notice is "Overly Broad and Unduly Burdensome and Seeks Information That Is Privileged, Publicly Available and Irrelevant." Qwest's Motion, Part III.A.3. As noted above, the determination of relevancy in discovery "is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the subject matter in the action." *Steil,* 197 F.R.D. at 445. Qwest concedes that the years in question for property tax refunds are "for the years 1988 through 1996." Qwest Motion at 2. Thus, the number of years in question is reasonably related to the actual time period at issue in this case, and the fact that many years are involved cannot make the notice "Overly Broad."

Qwest concedes that it has raised as a defense "that the claim is barred by the rule against retroactive ratemaking." Qwest Motion at 9-10. Qwest expressly concedes that Complainants' Rule 30(b)(6) deposition notice "is designed to elicit information which might support an allegation of utility misconduct." Qwest Motion

at 10. Qwest also concedes that utility misconduct is one of two recognized exceptions to its pleaded defense. *See id.* Qwest has therefore conceded that the very areas of examination set forth in the Rule 30(b)(6) notice served on it are in fact relevant to the subject matter of this action.

Additionally, Qwest has repeatedly refused in this proceeding to acknowledge that the entire amount of its Utah property taxes were in fact paid by Utah ratepayers. Instead, Qwest, along with the Division of Public Utilities ("Division"), has attempted to suggest at the technical conferences that because non-Utah ratepayers paid part of the Utah property taxes, that such circumstance limits the amount of recovery the class of ratepayers may expect in this proceeding.

Such factual assertions by Qwest and the Division, which go to the amount of damages Complainants may recover, clearly opens the door for discovery into (1) which ratepayers in fact paid the Utah property taxes each year; (2) whether Utah ratepayers paid property taxes for other jurisdictions in each such year, from whom Qwest also received refunds that should go back to the Utah ratepayers; (3) whether, if non-Utah ratepayers paid Utah property taxes, they should be included in the plaintiff class as entitled to the refund; (4) whether the overall property tax and regulatory strategy among all system components, including Utah, demonstrates a pattern of windfall tax reimbursements to Qwest that were not included in rate base and considered in setting rates; (5) where the tax refund monies actually went; (6) how the tax refund monies were accounted for; and related issues. All of these areas of inquiry go directly to refute Qwest's own assertion that the ratepayers in Utah should receive none, or only a fraction of, the huge windfall that Qwest received, based entirely on defenses and factual assertions proffered by Qwest. Complainants are not required to blithely grant the correctness or the credibility of such assertions.

Further, Qwest claims it engaged in no misconduct. Questions of intention, plan, motive, *modus operandi* and absence of mistake are necessarily raised by Qwest's profession of innocence, all of which areas may lead to admissible evidence. *See* UTAH R. EVID. 404(b). Absent a confession from Qwest, and none has been forthcoming, the defense of Qwest's allegations of an absence of misconduct entails

investigation into matters that can only be proved circumstantial evidence. The method of treatment and strategies exercised concerning the issue of property taxes, appeals of property tax assessments, acquisition and handling of refunds and reporting of and accounting for refunds is directly relevant to the discovery of such circumstantial evidence. Such evidence, which, again, tests the validity or proves the invalidity of Qwest's own retroactive ratemaking defense, would be derived from how Qwest or its predecessors, on an entire system basis, treated these issues.

The test for relevancy under Rule 26 is not whether the evidence ultimately discovered turns out in fact to be admissible, but rather, whether the information sought at the time of discovery "appears reasonably calculated to lead to the discovery of admissible evidence." UTAH R. CIV. P. 26(b).

Qwest, as the objecting party, has the burden to prove that such areas of inquiry are not relevant. "When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance." *Steil,* 197 F.R.D. at 445. Since Qwest's own positions in the litigation make the discovery relevant, it has failed in its burden of proof.

With respect to Qwest's assertions of overbreadth and undue burden, it likewise carries the burden of proof to demonstrate the overbreadth it claims, and the specific burdens it asserts are undue in light of the claims and defenses at issue:

> Courts have consistently held that an objection to a discovery request cannot be merely conclusory, and that intoning the "overly broad and burdensome" litany, without more, does not express a valid objection. See, *McLeod, Alexander, Powel and Apffel, P.C. v. Quarles,* 894 F.2d 1482 (5th Cir.1990); *Josephs v. Harris Corp.,* 677 F.2d 985 (3rd Cir.1982); *Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.,* 105 F.R.D. 16 (N.Y.1984); *Roesberg v. Johns-Manville Corp.,* 85 F.R.D. 292 (Pa.1980). The party opposing discovery shoulders the burden of showing that discovery request is overly broad and burdensome, *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co.,* 132 F.R.D. 204 (Ind. 1990) . . ..

Mead Corp. v. Riverwood Natural Resources Corp., 145 F.R.D. 512, 515-16 (D. Minn. 1992). Here, Qwest's simply complains that it will have to do "extensive research" and that during the time period in question the number of property tax appeals it has filed "is likely a very large number." Qwest Motion at 8. Qwest offers no analysis of how the discovery sought actually relates to the claims and defenses asserted, something that

would be essential to its ability to meet its burden of proof. Instead, those conclusions are all that Qwest offers.

Complainants, and this Commission, are left to guess at how these burdens, caused by Qwest's own assertion of the defenses it has asserted and to which these areas of inquiry admittedly are directed, *see* Qwest Motion at 10, are "undue" in the context of a case that directly deals with nine years' worth of property tax refunds. Qwest also leaves Complainants, and this Commission, to guess as to why Qwest's own assertions of damages, namely, that the Utah ratepayers are not entitled to the whole of the refund, because ratepayers from other jurisdictions paid part of the Utah property taxes, should not be subjected to scrutiny. Qwest and the Division, not Complainants, have raised the issue of damages that prompts this investigation, and Qwest may not have the benefit of its assertion without the accompanying burden of providing pertinent discovery testing those assertions.

IV. No Protective Order May Issue Based on Qwest's Blanket Claim of Privilege.

Qwest's blanket claim of privilege, is not, in the first instance, sufficiently set forth to show that any and all questions that might be asked in its deposition would be covered by the attorney/client or work product privileges. Indeed, Qwest has utterly failed to make any showing in this regard, although it bears the burden of proof to do so. *See United States v. Lawless,* 709 F.2d 485, 487 (7th Cir. 1983)("The party seeking to invoke the privilege has the burden of establishing all of its essential elements.")

Even if Qwest had set forth any sufficiently-grounded concern in this regard, however, the proper means to deal with matters of privilege, in a deposition, is on a question-by-question basis during the course of the deposition, not by a blanket claim of privilege. *See id.* ("The claim of privilege must be made and sustained on a question-by-question or document-by-document basis; a blanket claim of privilege is unacceptable.") Qwest cannot preempt a proper deposition by a blanket and unsupported claim of privilege.

V. Qwest's Admissions Concerning Information Is A Proper Topic For Deposition, Even If The Information Is Publicly Available.

Qwest's objection that the information sought through its deposition is publicly available is unavailing. First, Complainants are entitled to sworn deposition testimony that binds Qwest and that would be admissible as an admission of a party opponent. Not only is Qwest bound by its testimony, but its admissions relieve time-consuming issues of authenticity, hearsay and weight, especially since admissions of a party opponent are the most powerful evidence that a party may introduce. Even more importantly, "there is no rule that a deponent may only be asked about that which is within his exclusive knowledge; the fact that information is publicly available does not place it beyond the bounds of a proper deposition." *Riddle Sports, Inc. v. Brooks,* 158 F.R.D. 555, 557 (S.D.N.Y. 1994). Thus, there is no legal basis to move for a protective order on such grounds.

VI. The Location Set For The Deposition By Complainants Is Proper.

Finally, Qwest's objection about the location of the deposition is expressed only in terms of the general presumption "that the depositions of a corporation through its agents should be taken at the corporation's principal place of business." *Custom Form Manufacturing, Inc. v Omron Corp.,* 196 F.R.D. 333, 336 (N.D. Ind. 2000). But this presumption is invoked only if all other factors are equal. *See id.* This Commission has no jurisdiction to rule on discovery disputes in Colorado, and so there would be some inconvenience if the depositions were to proceed in a forum where this Commission could not be called upon readily to resolve disputes that may arise in the course of the deposition. Nor has Qwest made any effort to explain how the taking of its Rule 30(b)(6) deposition in Utah would result in an otherwise-avoidable expense of such great magnitude that it could not afford to go forward here. Since not only Complainants' counsel, but also counsel for Qwest, the Division and the Committee of Consumer Services would be required to pack up and attend a deposition in Colorado, it seems more efficient, and less expensive overall, to have Qwest's designees come to Utah. Such considerations are often used to compel corporate designees to appear in locations other than the corporation's principal place of business. *See id.* at 338.

VII. The Counties Are Entitled To Take The Deposition Which Was Timely Noticed Prior To The Discovery Cutoff.

In Part III.C of Qwest's Motion, it argues that it should not be required to provide witnesses because "it is now too late for the Counties to complete appropriate discovery . . .." *See id.* at 12-13. The Rule 30(b)(6) notice was timely served and the deposition would have been completed before the cutoff had Qwest met its obligations under the notice. Its effort to turn those facts on their head, and prevent Complainants from receiving the discovery to which they were entitled prior to cut-off, because Qwest chose to object and file a motion for protective order would not be well taken under any circumstances.

No doubt, this is why Qwest did not cite any cases supporting the result for which it argues, namely, that discovery timely sought within the discovery period would be foreclosed because an objection to the discovery was resolved following the discovery period. In this case, such a result is even more untenable, where the parties agreed that the deposition would not go forward on the date within the discovery period because of the need for this Commission to rule on the objections before the deposition proceeds.

Qwest also posits that "the Counties will likely seek an extension of the prehearing motion deadline established in the Scheduling Order . . .." *Id.* at 13. Complainants do not need to take Qwest's deposition for the purpose of their summary judgment motion on issue preclusion and judicial estoppel grounds.

While Qwest attempts to make it sound as though Complainants are delaying resolution of the matter, the fact is that Complainants served timely under the scheduling order a proper Rule 30(b)(6) notice and that, had Qwest produced one or more properly prepared designees on August 30, 2004, who gave thorough testimony in the areas designated for examination, Complainants would already have completed discovery. Instead, Qwest chose to exercise its right to object.

While Complainants do not take issue with a party's exercise of the right to object, neither will they endure silently Qwest's calumnies that Complainants have improperly caused delay in completing Qwest's submission of properly-prepared Rule 30(b)(6) designees. Based on the conceded agreement to hold off the

deposition until the issues raised by Qwest were resolved, Complainants timely filed a motion for extension of the time they have to take the noticed Rule 30(b)(6) deposition, that would have been completed but for Qwest's right to raise and have decided its objections set forth in its Motion.

CONCLUSION

For the foregoing reasons, Qwest's objections set forth in its motion for protective order should be overruled and its motion denied, in its entirety, and Qwest should be ordered to produce its Rule 30(b)(6) designees, fully prepared to testify as to the areas set forth in the Rule 30(b)(6) notice served on it, at the offices of Complainants' counsel, commencing on a date to be set by the Commission or otherwise agreed by counsel.

RESPECTFULLY SUBMITTED this _____ day of December, 2004.

PETERS SCOFIELD PRICE
A Professional Corporation

_____
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Attorneys for Complainants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Notice of Rule 30(b)(6) Deposition Of Respondent Qwest Corporation was served via e-mail transmission, this _____ day of December, 2004, to the following:

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