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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of the Complaint of: BEAVER COUNTY, BOX ELDER COUNTY, CACHE COUNTY, CARBON COUNTY, DAVIS COUNTY, DUCHESNE COUNTY, EMERY COUNTY, GARFIELD COUNTY, GRAND COUNTY, IRON COUNTY, JUAB COUNTY, KANE COUNTY, MORGAN COUNTY, PIUTE COUNTY, RICH COUNTY, SALT LAKE COUNTY, MILLARD COUNTY, SAN PETE COUNTY, SEVIER COUNTY, SUMMIT COUNTY, TOOELE COUNTY, UINTAH COUNTY, UTAH COUNTY, WASATCH COUNTY, WASHINGTON COUNTY, WAYNE COUNTY, WEBER COUNTIES, AND ALL OTHER PERSONS OR ENTITIES SIMILARLY SITUATED, 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 QWEST'S MOTION TO DISMISS** **ORAL ARGUMENT REQUESTED**

Through its Motion to Dismiss, Qwest would have this Commission believe that the issues of the Motion have not already been litigated and determined against Qwest. But the Utah Supreme Court has held that the PSC has exclusive jurisdiction over this very lawsuit.

I. THE UTAH SUPREME COURT'S DECISION IN BEAVER COUNTY DISPOSES OF QWEST'S MOTION.

A Complaint filed in the state district court that Qwest challenged by a motion to dismiss there, virtually verbatim to the one it challenges here, was claimed by Qwest in the district court to be subject to the exclusive jurisdiction of the PSC. A genuine copy of the Amended Complaint in the district court, Qwest's motion to dismiss the Amended Complaint and memorandum in support thereof, Qwest's reply memorandum, and the order drafted by Qwest's counsel in the district court is attached as Exhibit "A". It is that Complaint as to which Qwest argued that this Commission, and not the district court had exclusive jurisdiction.

Indeed, the Utah Supreme Court described the proceedings below in *Beaver County v. Qwest, Inc.*, 31 P.3d 1147,1148-49 (Utah 2001), as follows:

> Qwest moved in the district court to dismiss the Counties' complaint for lack of subject matter jurisdiction, asserting the case should be before the PSC because the decision would require an assessment of rates.

The Utah Supreme Court, again, addressing the very same class-action claims then-asserted before the district court held:

> We hold that the decision regarding whether a tax refund to Qwest from the Tax Commission was considered in assessing rates charged to rate payers is an issue in extricably intertwined with an investigation into the make up of rates charged by Qwest. Such an investigation would clearly "trench upon [the PSC's] delegated powers." [quoting *Atkin Wright & Miles v. Mountain States Telephone & Telegraph Co.,* 709 P.2d 330, 334 (Utah 1985)]. We conclude that under these circumstances, jurisdiction properly lies with the PSC and, therefore, the district court properly dismissed the case for lack of subject matter jurisdiction.

Id. at 1152.

In sum, Qwest argued that the very allegations in the Complaint now before this Commission were exclusively within this Commission's jurisdiction to resolve, and not the district court's jurisdiction. The Utah Supreme Court agreed. The Utah Supreme Court then reversed the district court's dismissal with prejudice and made the dismissal without prejudice precisely to avoid any preclusive effect on the ability of the counties to pursue those very same claims before the PSC. *See id.* at 1152 ("In essence, the counties assert that the dismissal with prejudice must be modified so as to eliminate its potential preclusive effect on the

ability of the Counties to pursue their claims before the PSC. We agree."). The Utah Supreme Court continued to clarify that the very class-action claims the Counties raised before the district court were claims ***within***, not without, the PSC's jurisdiction: "Although the issues the Counties raise clearly fall under the PSC's exclusive jurisdiction, the district court erred in dismissing the case with prejudice." The Utah Supreme Court's determination of where jurisdiction lies for this dispute is final and binding on this Commission, and dispositive of Qwest's motion.

The Counties also note that, in the Brief of The Public Service Commission, filed before the Supreme Court, The Public Service Commission itself took the position that the Supreme Court's "resolution of the issues associated with the appeal of the District Court's rulings will also determine whether the Commission is or is not the only forum in which the claims may be addressed." *See* Brief of The Public Service Commission at 8, n.1, attached as Exhibit "B".

A. Judicial Estoppel and Issue Preclusion Preclude Qwest from Succeeding on its Motion.

Under the doctrine of judicial estoppel, "[a] person may not, to the prejudice of another person deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject-matter, if such prior position was successfully maintained." *Salt Lake City v. Silver Fork Pipeline*, 913 P.2d 731, 734 (Utah 1996) (citing *Tracy Loan & Trust Co. v. Openshaw Inv. Co.,* 102 Utah 509, 515, 132 P.2d 388, 390 (1942). By adopting in the district court, and asserting to a successful conclusion, the proposition that the PSC has exclusive jurisdiction over the very class-action claims the Counties now assert here, Qwest got the Counties kicked out of the court system. The Counties have clearly been prejudiced by that result and Qwest is now estopped from asserting its one-hundred eighty degree reversal of its successfully asserted position before the district and Supreme Court before this Commission.

Moreover, under the doctrine of issue preclusion, the Supreme Court's decision that this Commission has exclusive jurisdiction over these very class-action claims precludes the re-litigation of those issues through Qwest's current Motion to Dismiss. "[I]ssue preclusion, or collateral estoppel, . . . prevents parties or

their privies from re-litigating 'particular issues that have been contested and resolved.'" *Macris & Associates, Inc. v. Neways, Inc.,* 16 P.3d 1214, 1221 (Utah 2000) (quoting 18 James Wm. Moore, Moore's Federal Practice § 131.13[1] *(Matthew Bender, 3d ed. 2000.))* Four elements must be present for issue preclusion to apply:

> First, the issue challenged must be identical in the previous action and in the case at hand. Second, the issue must have been decided in a final judgment on the merits in the previous action. Third, the issue must have been competently, fully and fairly litigated in the previous action. Fourth, the party against whom collateral estoppel is invoked in the current action must have been either a party or privy to a party in the previous action.

Macris, 16 P.3d at 1222.

Here, all four elements are clearly met. First, the issue of whether the PSC had exclusive jurisdiction over the class-action claims asserted in the district court was raised by Qwest's predecessor, U.S. West, in the state court action. Second, that very issue was decided by the district court against the Counties and in favor of Qwest and ultimately decided on appeal to the Utah Supreme Court. The time for petitioning for reconsideration has past and the Supreme Court's decision on the merits is final. Third, the issue was competently, fully, and fairly litigated in the previous action. Indeed, it was the fundamental issue raised by Qwest in the motion to dismiss before the district court and in the appeal to the Utah Supreme Court. Fourth, Qwest is a privy to U.S. West Communications, as the successor in interest to U.S. West Communications, Inc., which was party to the previous action.

Qwest is thus barred by issue preclusion from asserting that the PSC does not now have full and complete jurisdiction to proceed to hear fully the Counties' class-action claims and to provide all available relief sought by the Counties.

B. Qwest's Claims of Preemption Are Not Supported by the Law of this State.

Qwest cites to decisions from foreign jurisdictions for most of its preemption arguments. But the foreign PSC jurisdictional grants have not been construed as broadly as Utah's. Qwest then cites to a dram shop case from Utah, *Gilger v. Hernandez,* 997 P.2d 305 (Utah 2000), for the proposition that the Counties' claims

are preempted. But that case held that the Dram Shop Act preempted all common law claims against dram shops, not that the broad jurisdictional grant of power to the Utah PSC "preempts" the PCS from considering any form of claims within its broad jurisdiction, let alone those claims which the Utah Supreme Court has held in *Beaver County* that the PSC has exclusive jurisdiction from the Legislature to hear. In light of the Utah Supreme Court's holding that the Counties' very same claims are exclusively within the jurisdiction of the PSC, the preemption argument is unsupported and unsupportable under Utah law. Indeed, Utah Code Ann. § 54-4-1 expressly grants the PSC plenary jurisdiction beyond dealing with particularly enumerated functions:

> The Commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the State, and to supervise all of the business of every such public utility in the State, ***and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction . . . ."***

Brief of Appellee U.S. West Communications, Inc., at 25. (quoting Utah Code Ann. § 54-4-1)(emphasis added), attached as Exhibit "C".

II. WITH RESPECT TO DISMISSAL FOR FAILURE TO STATE A CLAIM, QWEST HAS THE BURDEN TO SHOW THAT THERE IS NO CONCEIVABLE SET OF FACTS UPON WHICH COMPLAINANTS WOULD BE ENTITLED TO RELIEF - A BURDEN IT HAS NOT MET.

The law in the state of Utah is clear: "A dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." *Colman v. Utah State Land Board,* 795 P.2d 622, 624 (Utah 1990) (citing *Liquor Control Comm'n v. Athas,* 121 Utah 457, 460, 243 P.2d 441, 443 (1952)). Further " if there is any doubt about whether a claim should be dismissed for the lack of a factual basis, the issue should be resolved in favor of giving the party an opportunity to present its proof." *Id.*

Here, Complainants have pleaded that Qwest's rates, when set, contemplated reimbursement for assessed *ad valorem* property taxes and that Qwest has, therefore, already once been properly reimbursed for those property taxes pursuant to the rates set by this Commission that were charged to and collected from its customers in those prior years. Complainants have also pleaded that Qwest received a lump sum of 16.9 million dollars in the beginning of 1999 as a refund for a portion of *ad valorem* property taxes paid in

those years, which had already been recovered through its rate structure. Complainants have alleged that the equitable owners of that *ad valorem* tax refund are the customers of Qwest who paid for services and thereby had already reimbursed Qwest for the *ad valorem* property taxes paid through rates set by this Commission during those prior years. The Utah Supreme Court held that the issues raised by the question of whether the rates charged and collected had been designed to and did adequately reimburse Qwest was so closely related to the claim of equitable ownership of the refund monies paid in 1999 that such determination was within the exclusive jurisdiction of this Commission.

Those claims raise a plethora of factual issues, including the nature and extent of the consideration of *ad valorem* property taxes, and the reimbursement thereof, the rates originally set, the charges to customers and collections on those charges to reimburse *ad valorem* property taxes paid and, depending on the outcome of those analyses, a determination of where equitable ownership of the property tax refund in 1999 lies. While Qwest purports to raise a defense in its Motion to Dismiss of retroactive rate making, that defense is also subject to an intense factual analysis to determine whether the prohibition against retroactive rate making would actually apply under these circumstances. *MCI Telecommunications Corp. v. Public Service Commission of Utah,* 840 P.2d 765 (Utah 1992), recognizes an exception to the rule against retroactive rate making. In that case, the Utah Supreme Court held "that the Commission's refusal to allow petitioners a factual hearing on whether the exception applies was error." *Id.* at 772. Specifically, the Utah Supreme Court held that the rule against retroactive rate making "does not apply where justice and equity require that adjustments be made for unforseen windfalls or disasters not caused by the utility." *Id.* In other words, this Commission must review all of the facts and determine, whether in justice and equity, the monumental windfall of this *ad valorem* tax refund belongs to the customers of Qwest and is therefore outside the rule against retroactive rate making. That very statement by the Utah Supreme Court also refutes Qwest's contention that this Commission does not have equitable power, in addition to the obvious holding in *Beaver County* that this Commission has exclusive jurisdiction over the very class-action, equity allegations of the

Complaint. The Utah Supreme Court has already held that the determination of the equitable relief requested in the Complaint in the district court, which relief is the same requested in the Complaint before this Commission, is within the jurisdiction of this Commission, for the very reason that an examination of this Commission's prior rate making proceedings is implicated in the determination of justice and equity in the Complainants' request for a determination of equitable ownership of the *ad valorem* tax refund. It is noteworthy that none of the other jurisdictions cited by Qwest have the broad jurisdictional grant that Utah has given to its Public Service Commission. It was that broad jurisdictional grant that the Utah Supreme Court expressly looked to in determining that this very claim was within the jurisdiction of this Commission and resolvable by this Commission.

III. THIS COMMISSION HAS AUTHORITY TO PROCEED UNDER RULE 23.

This Commission has adopted the Utah Rules of Civil Procedure, including Rule 23, and the Utah Supreme Court's *Beaver County* ruling effectively puts to bed any claim that this Commission may not proceed in accordance with Rule 23. Indeed, in *Brandon v. Arkansas Public Service Commission,* 67 Ark. App. 140, 992 S.W.2d 834 (1999), the Arkansas Court of Appeals was confronted with the virtually identical "maybe necessary or convenient language concerning the statue giving its Public Service Commission power and jurisdiction to regulate every public utility, as exists in Utah Code Ann. § 54-4-1. Given the broad grant of jurisdiction in Arkansas statutes, like Utah's, that court held "that the legislature's grant of authority to the Commission is clearly broad enough to allow it to hear a complaint brought as a class action." 67 Ark. App. at 152, 992 S.W.2d at 840.

Although not expressly discussed by the Utah Supreme Court in *Beaver County*, the fact that the court held these class-action claims to be within the exclusive jurisdiction of the Utah Public Service Commission, based on an identical broad grant of authority from the Utah legislature, compels the conclusion that the Utah Supreme Court came to the same conclusion as the Arkansas Court of Appeals, namely, that this Commission does have jurisdiction to entertain this class-action complaint.

Nor does any Commission approved of a prior settlement that the rates and charges of Mountain States Telephone & Telegraph Company were just and reasonable preclude the Counties from proceeding here. First, the Counties were not parties to that proceeding or settlement and are not therefore bound by any form of preclusive effect recognized under Utah law. More importantly, however, the Counties are not now challenging the reasonableness of the rates and charges allowed during that time period. Instead, they are seeking a determination by this Commission as to who is the equitable owner of the 1999 $16.9 million refund of *ad valorem* property taxes, *in light of* the rates and charges that were charged and collected during that time period.

CONCLUSION

For the foregoing reasons, Qwest's motion must be denied.

Respectfully Submitted.

DATED this day of November, 2001.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and Foregoing COMPLAINANT'S MEMORANDUM IN OPPOSITION TO QWEST'S MOTION TO DISMISS was mailed, first class, postage-prepaid, this ___ day of November, 2001, to the following:

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