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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| In the Matter of the Complaint of<br><br>BEAVER COUNTY, et al.<br><br>Complainants,<br><br>vs.<br><br>QWEST CORPORATION,<br><br>Respondent. | Docket No. 01-049-75<br><br>**REPLY MEMORANDUM IN SUPPORT OF QWEST'S MOTION FOR SUMMARY JUDGMENT** |

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Qwest Corporation ("Qwest") hereby respectfully replies to Utah Committee of Consumer Services' Response to Qwest's Motion for Summary Judgment ("Committee Response") submitted by the Committee of Consumer Services ("Committee") and Complainant's Memorandum in Opposition to Respondent's Motion for Summary Judgment ("Counties Response") submitted by Beaver County, et al. ("Counties").

## I. INTRODUCTION

Neither the Committee Response nor the Counties Response demonstrates any genuine issue of material fact such that summary judgment in Qwest's favor would be inappropriate at this stage of the proceeding. Neither response demonstrates that an exception to the rule against retroactive ratemaking might apply such that judgment as a matter of law would be inappropriate. Both responses fail to acknowledge that the Counties have already received all the process they need in order to present their affirmative case. The Counties have had years to conduct discovery and present their case, but have failed to do so. Instead, the Counties Response resorts to references to the Counties' theory of the case without any factual evidence to support that theory except for the undisputed facts as to how Qwest reported property taxes in reports to the Commission, how property taxes were treated in rate cases, and how Qwest pursued and accounted for the $16.9 million property tax refund. As Qwest's motion for summary judgment ("Motion") demonstrated, those facts do not support a refund of all or any part of the property tax refund to its customers. Qwest is entitled to judgment as a matter of law that the relief requested by the Counties is barred by the rule against retroactive ratemaking and otherwise precluded by law.

## II. FACTS

The Committee Response contains no statement of facts or rebuttal of Qwest's statement of facts and does not claim there are any material facts in dispute. To the extent its "Statement of the Case and the Issue" contains factual allegations, the facts are either not in dispute, not material, or in the case of the statement that Qwest charged Utah ratepayers "$16,900,000 in excess of the property taxes Qwest actually paid,"[1] the allegation is demonstrably untrue—leaving no room for reasonable minds to differ.[2] The amount at issue is not a material fact in any event with respect to Qwest's Motion; Qwest has moved for summary judgment that ratepayers are not entitled to any refund based on the undisputed facts and the controlling law.

The Counties Response either accepts Qwest's statement of facts, identifies possible disputes that are not material, claims that there are factual disputes without setting forth specific facts as required by Rule 56(e), or misstates legal disputes as factual disputes. As such, the Counties present no genuine issue of material fact sufficient to preclude summary judgment. The only "fact" addressed in the March 31, 2005 Affidavit of Eckhardt A. Prawitt filed with the Counties Response is a preliminary analysis of Qwest's earnings for the years 1988 through 1996 prepared by the Division of Public Utilities ("Division") in October 2002. This simply provides the basis for Mr. Prawitt's Direct Testimony ("Prawitt") at 7, and does not identify a dispute regarding a material

[1] *See* Committee Response at 3.

[2] *See, e.g., Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 445, 450 (Utah Ct. App. 1995) ("A trial court may properly grant a motion for summary judgment or directed verdict . . . when reasonable minds could not differ on the facts to be determined from the evidence presented.") (citations omitted).

issue of fact.[3] For purposes of its Motion, Qwest does not dispute that in the aggregate it earned in excess of the rate of return found reasonable by the Commission in its rate cases from 1988 to 1996; however, Qwest fails to see how that fact is material or relevant.

The following replies to the Counties' position regarding Qwest's statement of facts with respect to each undisputed fact presented in the Motion:

1. The Counties fail to identify any factual dispute about Qwest's statement that 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; and that in instances where rates set in these cases were adjusted following appeals, Qwest made a refund to customers of amounts paid in excess of rates ultimately found just and reasonable in a manner ordered by the Commission. Instead, the Counties merely dispute that "refunds were made consistent with [the Counties] theory of this case regarding Qwest's windfall received from the property tax appeal."[4] There is no dispute that Qwest has not refunded the property tax refund to ratepayers—the need for such payment is what this case is about. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

2. The Counties fail to dispute the facts set forth in this paragraph that allegations of misconduct in Docket No. 88-049-18 had nothing to do with property taxes paid, included in regulatory financial reports or considered in setting rates or appeals of

[3] The fact that Mr. Prawitt's affidavit and testimony relies solely on a preliminary Division analysis further demonstrates his lack of qualifications.

[4] Counties Response at 2.

property taxes, and instead merely complain that the facts are "compound." This is insufficient to create a genuine issue of material fact as Rule 56 contains no requirement that facts not be "compound." The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

3. The Counties fail to identify any factual dispute about Qwest's statement that 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; that 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; that 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; and that 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.[5]

Instead, the Counties merely assert that the facts alleged in this paragraph have no bearing on the Counties' theory of this case.[6] The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

4. The Counties fail to identify any factual dispute about Qwest's statement that 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; that 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; and that 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. Instead, the Counties merely dispute the relevance of these facts and assert that Qwest "has failed to provide the best evidence to support any indication" of these facts.[7] This is insufficient to create a genuine issue of material fact as Rule 56 contains no "best evidence" requirement and

[5] *Release Agreement* at 20 (emphasis added).

[6] Counties Response at 4.

[7] *See id*. at 4-5.

Qwest's evidence is competent.[8] The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

5. The Counties merely respond to this paragraph, which demonstrates that Qwest accurately reported the intrastate portion of its property taxes to the Commission and that the amounts were set forth in Attachment 1 to Grate, by referring to their response to Paragraph 4. As noted above, this is insufficient to create a genuine issue of material fact.[9]

6. The Counties do not dispute that Qwest appealed the valuation of its property assessed by the Property Tax Division of the Utah State Tax Commission in each year from 1988 through 1996.

7. The Counties fail to identify any factual dispute about Qwest's statement that the Commission and the Division were aware that Qwest was appealing its property tax valuations. Instead the Counties merely assert that Qwest has failed to "provide the best evidence to prove indisputably" that that the Commission and the Division were aware. This is insufficient to create a genuine issue of material fact as Rule 56 contains no "best evidence" requirement and Qwest's evidence is competent.[10] The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

8. The Counties fail to identify any factual dispute about Qwest's statement that 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

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[8] *See* Affidavit of Philip E. Grate ("Grate") at ¶ 12.

[9] *Id.* at ¶ 13.

[10] *Id.* at ¶ 14.

each year from 1988 through 1996; that on April 13, 1998, the Utah State Tax Commission entered its Order of Approval, approving the stipulation; that 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; that 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 31, 1998; and that 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 were set forth in Attachment 1 to Grate. Instead, the Counties merely assert that Qwest has not provided the "underlying best evidence to support a finding which amounts were attributable to intrastate versus interstate" rates.[11] This is insufficient to create a genuine issue of material fact as Rule 56 contains no "best evidence" requirement and Qwest's evidence is competent.[12] The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

9. The Counties do not dispute that 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; or that with

[11] Counties Response at 7.

[12] *See* Grate ¶ 15, Attachment 1.

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 change 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.[13]

10. The Counties do not dispute the fact that the Commission has discussed the known and measurable standard in other decisions. *See, e.g., Re PacifiCorp*, 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 [after 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. 96-2178-01, 1996 WL 769262, *2 (Utah P.S.C. August 7, 1996).

11. The Counties fail to identify any factual dispute about Qwest's statement that 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

[13] Qwest notes, incidentally, that this policy was adopted as a rule in R746-407-3.D, E & F in 1990.

known and measurable; that 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; and that the fact that a refund would be received was not known and the amount of any such refund was not measurable. Instead, the Counties merely assert that they "are not in a position to opine as to whether Qwest knew it would prevail on its property tax valuation appeals."[14] This is not sufficient to create a genuine issue of material fact. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

12. The Counties do not dispute the accounting entries identified in this paragraph. Instead, they assert that the amount of overearning is a matter of material dispute in the Counties theory of the case.[15] The Commission can take administrative notice of the public records indicating the facts of Qwest's earnings, and, in any event, Qwest does not dispute the Counties' claim of aggregate overearning for purposes of the Motion but regards the "fact" as immaterial. The Counties' statement is insufficient to create a genuine issue of material fact. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

13. The Counties do not dispute the accounting entries identified in this paragraph.

14. The Counties do not dispute that the accounting entries were entered in accordance with the appropriate Commission rule.

[14] Counties Response at 9.

[15] *See id*. at 10.

15. The Counties do not dispute the accuracy of Qwest's statement of what the Federal Communications Commission ("FCC") rules provide. Instead, they assert, without basis, that their theory of the case raises a matter of factual dispute inconsistent with what the rules provide. This is a non sequitur insufficient to raise a genuine issue of material fact, as the Counties' theory of the case can have no bearing on the accuracy of Qwest's statement of what the FCC rules provide. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

16. The Counties do not dispute the accuracy of Qwest's statement of what the FCC rules provide. Instead, they assert, without basis, that their theory of the case raises a matter of factual dispute inconsistent with what the rules provide. This is a non sequitur insufficient to raise a genuine issue of material fact, as the Counties' theory of the case can have no bearing on the accuracy of Qwest's statement of what the FCC rules provide. The Counties cannot dispute the statement that "Qwest's credit to operating tax expense results in a proportional increase in net income which is available for distribution to shareholders." The source of this statement is their own testimony.[16] The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

17. The Counties do not dispute the accuracy of Qwest's statement of what the USOA rules provide. Instead, they assert without basis that their theory of the case raises a matter of factual dispute inconsistent with what the rules provide. This is a non sequitur insufficient to raise a genuine issue of material fact, as the Counties' theory of the case can have no bearing on the accuracy of Qwest's statement of what the USOA

[16] *See* Prawitt at 6.

rules provide. The Counties cannot dispute the statements that "Qwest's credit to non-operating income results in a proportional increase in net income which is available for distribution to shareholders" and that "a credit to non-operating income appears . . . below the line" so that it is "not an operational item that would be considered in setting rates." The source of this statement is their own testimony.[17] The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

18. The Counties do not dispute the accuracy of Qwest's statements that in *MCI Telecommunications Corp. v. Public Service Comm'n*, 840 P.2d 765, 771 (Utah 1992), 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," or that in *Beaver County v. Utah State Tax Comm'n*, 916 P.2d 344 (Utah 1996), the 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. Instead, the Counties assert without basis that their theory of the case raises a matter of factual dispute inconsistent with what the court has stated. This is a non sequitur insufficient to raise a genuine issue of material fact, as the Counties' theory of the case can have no bearing on the accuracy of Qwest's statements of what the court has stated. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

[17] *See id.* at 7.

19. The Counties fail to identify any factual dispute that USOA Accounts 7240 and 7320 were the proper USOA accounts in which to credit the Utah property tax refund or to dispute the accuracy of Qwest's statement of what the USOA rules provide. The Counties' bare statement that their theory of the case raises a matter of factual dispute inconsistent with Qwest's statements in this paragraph identifies a legal dispute or fails to set forth any facts that would demonstrate a genuine issue of material fact. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

20. The Counties fail to identify any genuine issue of material fact in response to this paragraph, which states facts regarding Qwest's appeals of property taxes and refunds, but instead merely negatively characterize the undisputed facts of how Qwest has pursued tax appeals in various jurisdictions. At this stage in this case it is insufficient to create a genuine issue of material fact for the Counties to merely allege a common plan or scheme to shift a windfall to shareholders and directors. The Counties must come forward with evidence in support of their bare allegation. In addition, as noted in Qwest's Motion, this theory of the case is not only without factual support, it is plainly unbelievable.[18] The Commission is not precluded from granting summary judgment by allegations that no reasonable person could accept as true.[19] The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

21. The Counties fail to identify any factual dispute about the size of the tax refund as a portion of Qwest's 1998 operating revenues, operating expenses or operating

[18] *See, e.g.*, Motion at 53.

[19] *See, e.g., Olympus Hills*, 889 P.2d at 450.

income. The Counties' bare statement that their theory of the case raises a matter of factual dispute inconsistent with Qwest's statements in this paragraph identifies a legal dispute or fails to set forth any facts that would demonstrate a genuine issue of material fact. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

22. The Counties fail to identify any factual dispute about the size of the tax refund as a portion of Qwest's operating revenues, operating expenses or operating income in each year from 1988 through 1996. The Counties' bare statement that their theory of the case raises a matter of factual dispute inconsistent with Qwest's statements in this paragraph identifies a legal dispute or fails to set forth any facts that would demonstrate a genuine issue of material fact. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

23. The Counties fail to identify any factual dispute about Qwest's statement that it properly included the refund in its financial reports filed with the Commission in the applicable periods. The Counties' bare statement that their theory of the case raises a matter of factual dispute inconsistent with Qwest's statements in this paragraph identifies a legal dispute or fails to set forth any facts that would demonstrate a genuine issue of material fact. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

24. The Counties fail to identify any factual dispute about Qwest's statement that 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; and that 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 Counties' bare statement that their theory of the case raises a matter of factual dispute inconsistent with Qwest's statements in this paragraph identifies a legal dispute or fails to set forth any facts that would demonstrate a genuine issue of material fact. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

25. The Counties fail to identify any factual dispute about Qwest's statement that it 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; that 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; and that Qwest accrued the refund in September 1998 and received cash payment of portions of the refund in January, February and March 1999. The Counties' bare statement that their theory of the case raises a matter of factual dispute inconsistent with Qwest's statements in this paragraph identifies a legal dispute or fails to set forth any facts that would demonstrate a genuine issue of material fact. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

26. The Counties fail to identify any factual dispute about Qwest's statement that had it 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; that the 1998 property tax refund pertained to the years 1988 through 1996; and that, accordingly, the refund would have been removed from a 1998 or later test year by a "prior period adjustment." The Counties' bare statement that their theory of the case

raises a matter of factual dispute inconsistent with Qwest's statements in this paragraph identifies a legal dispute or fails to set forth any facts that would demonstrate a genuine issue of material fact. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

27. The Counties do not dispute the statements of this paragraph regarding their deposit of the property tax refund in court.

28. The Counties do not dispute the statements of this paragraph regarding an alleged conversation between Mr. Peters and counsel for Qwest.

29. The Counties fail to identify any factual dispute about Qwest's statement that the property tax refund accounted for 0.48% of Qwest's pre-tax operating income in 1998; that 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; and that the Utah portion of this decreased bonus amount would have been an amount significantly less than $1,000. The Counties' bare statement that their theory of the case raises a matter of factual dispute inconsistent with Qwest's statements in this paragraph identifies a legal dispute or fails to set forth any facts that would demonstrate a genuine issue of material fact. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

30. The Counties do not dispute the statements of this paragraph regarding governmental investigations of financial reporting irregularities.

31. The Counties fail to identify any factual dispute about Qwest's statement that 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. The Counties' bare statement that their theory of the case raises a matter of factual dispute inconsistent with Qwest's statement in this paragraph identifies a legal dispute or fails to set forth any facts that would demonstrate a genuine issue of material fact. The Counties have failed to set forth specific facts showing that there is a genuine issue for trial regarding this paragraph.

## III. ARGUMENT

### A. REPLY TO THE COMMITTEE RESPONSE.

The Committee Response appears to be mistaken as to points of fact and procedural background, and is mistaken as to a key point of law in this case. Fundamentally, the Committee relies on an incorrect understanding of the rule against retroactive ratemaking that causes it to conclude that ratepayers would have received the $16.9 million tax refund through future ratemaking but for the fact that the legislature removed Qwest from rate-of-return regulation. This conclusion is erroneous. The relief the Counties seek in this case would be retroactive ratemaking regardless of the way Qwest is regulated—the change in the regulation of Qwest following the enactment of the 1995 Public Telecommunications Law ("1995 Act") has not altered this fact in the least.

#### 1. The Committee Appears to Be Mistaken as to Points of Fact and Procedural Background.

The Committee ultimately relies on an erroneous statement of the rule against retroactive ratemaking for its conclusion that the Counties should receive the relief they have requested. However, there are two additional errors the Committee appears to make that are worthy of brief mention. First, the Committee Response argues from the erroneous factual premise that the entire $16.9 million tax refund is appropriately at issue in this

case.[20] Second, the Committee Response may suggest that a grant of Qwest's motion for summary judgment would somehow deny the Counties adequate process and an opportunity to be heard on the merits.[21]

**a. The Committee is mistaken as to the amount at issue in this case, but the amount is not relevant to the Motion in any event.**

As to the factual issue of how much of the $16.9 million tax refund is appropriately at issue, the Committee never says why it believes that the entire amount is at issue except for erroneously stating that ratepayers were billed "$16,900,000 in excess of the property taxes Qwest actually paid."[22] Qwest finds it odd for the Committee to take this position when the Committee carefully considered and failed to raise any objection to the facts presented by the Division and Qwest in prior technical conferences addressing this very issue (except for seeking minor correction and clarification of the calculations made by the Division and Qwest, which was provided). In any event, whether the Committee has intentionally switched its position or only made statements in the Committee Response inadvertently, the entire $16.9 million refund is not appropriately at issue in this case.

Only a portion of the property taxes paid from which $16.9 million was refunded was allocated to Qwest's Utah intrastate business and included in Qwest's Utah rates. The remaining portion of the property taxes in question was allocated to Qwest's interstate business and was not included in Utah rates. Attachment 1 to Grate, attached to Qwest's Motion, sets forth the appropriate and undisputed allocation of intrastate versus interstate

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[20] *See, e.g.*, Committee Response at 3 ("From the ratepayers' perspective, in the years 1988 to 1996 Qwest charged and collected as part of their telephone bill, $16,900,000 in excess of the property taxes Qwest actually paid.").

[21] *See, e.g.*, *id.* at 2, 3 ("Despite a series of legal proceedings, . . . the Counties' claim has progressed only a short distance from where it began." "The Committee continues to believe that the case deserves to be heard on its merits.").

[22] *See id.* at 3.

rates. Because the period in 1988 and 1989 subject to the release in the *MCI* remand is appropriately excluded from consideration, the total amount of principal at issue in this case is $2,858,248. However, even if the release of Qwest in the *MCI* remand is improperly ignored, the total amount of principal at issue is $4,999,910. Qwest finds it difficult to believe that the Committee is actually advocating that the Commission has the jurisdiction to order a refund of interstate rates, but that is precisely the effect of urging a refund of the entire $16.9 million. The Committee Response's stated position on the amount at issue in this case is erroneous.

More importantly, for purposes of Qwest's Motion, the amount at issue is entirely irrelevant. Qwest seeks summary judgment that the Counties' claim for a refund is barred as a matter of law based on the undisputed facts. A ruling on the Motion does not depend on the amount at issue.

**b. The Counties have received all the process they need.**

As to the suggestion possibly implied in the Committee Response that a grant of Qwest's motion for summary judgment would somehow deny the Counties adequate process and an opportunity to be heard on the merits,[23] Qwest reminds the Committee that the Counties had more than two years from the time they filed their amended complaint in July 2002 until the close of discovery on August 31, 2004 and that the Counties have now submitted their direct testimony. Thus, even if one were to disregard the lengthy period (dating back to 1998 when the Counties filed their first complaint and petition on this issue) available to the Counties to develop their case prior to filing the amended complaint, they have certainly received ample opportunity to develop and present their

[23] *See, e.g., id.* at 2, 3.

case. Notwithstanding that ample time, the Counties' direct testimony provided no support for a Commission ruling in their favor beyond impermissible and unsupported conclusions of law presented by an unqualified witness. And now, in the Counties Response, they continue to fail to provide any factual support that would allow the Commission to appropriately rule in their favor. In a Commission proceeding like this one, where the Commission orders the parties to file their testimony in writing in advance of the hearing, such testimony **is** the opportunity to be heard on the merits. Other than providing an oral summary of the testimony, which would not include matters outside the testimony, the purpose of the hearing is for cross examination.[24]

As Qwest noted in its Motion, "when a party fails to produce evidence sufficient to meet one of the elements of a claim, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Sanns v. Butterfield Ford*, 2004 UT App 203, ¶ 9, 94 P.3d 301, 304 (quotations omitted). Thus, "once the moving party has brought forth evidence either tending to prove a lack of genuine issue of material fact or challenging the existence of one of the elements of the cause of action, the nonmoving party then bears the burden of providing some evidence, by affidavit or otherwise, in support of the essential elements of his or her claim." *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327, 339 (Utah 1997) (quotation and bracketing omitted). This should be all the more true in a procedural setting where direct evidence is intended to be presented through written testimony and such testimony has already been filed. In such a

[24] *See generally* Utah Admin. Code R746-100-10.G.

setting, Qwest's Motion is essentially akin to a motion for dismissal under Rule 41(b) upon the close of the presentation of the plaintiff's case.[25]

The Counties do not need any more process, and would not be denied a chance to be heard if Qwest's Motion is granted. The Counties bear the burden of persuasion in a complaint proceeding.[26] Through its Motion, Qwest merely seeks to have the Commission evaluate the sufficiency of the Counties' evidence to determine whether the Counties have met that burden, or whether they have at least presented a genuine issue of material fact requiring a hearing (notwithstanding that the Counties have already had their opportunity to present their direct evidence). The Counties have failed to put forth any evidence establishing a genuine issue of material fact. Qwest is entitled to judgment as a matter of law that the relief requested by the Counties would be a violation of the rule against retroactive ratemaking and is therefore impermissible.

### 2. The Committee's Understanding of the Rule Against Retroactive Ratemaking Is Erroneous.

The Committee Response argues that under rate-of-return regulation, ratepayers would have received "a reduced future rate as restitution for having overpaid eight years

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[25] *See* Utah R. Civ. P. 41(b) ("After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."); *see also 438 Main Street v. Easy Heat, Inc*., 2004 UT 72, ¶ 58, 99 P.3d 801, 815 ("As we explained in Bair v. Axiom Design, L.L.C., 2001 UT 20, 20 P.3d 388, a trial judge may properly grant a motion to dismiss under rule 41(b) when the plaintiff has (1) failed to make out a prima facie case, or (2) when the trial judge is not persuaded by the evidence presented by the claimant. In other words, **a trial judge may grant a motion to dismiss, even where a plaintiff has established a prima facie case, if the trial judge is nevertheless unpersuaded by the plaintiff's evidence**.") (internal citation and quotation omitted) (emphasis added).

[26] *See, e.g., Taylor v. Public Service Comm'n*, 2005 UT App 121, 2005 WL 615164 (Ut. Ct. App. March 17, 2005).

of property taxes"[27] and that it was only the change in Qwest's regulation that prevented such "restitution" from occurring. While Qwest agrees that under its present regulation (even before the implementation of 1st Substitute Senate Bill 108 passed in the 2005 General Session of the Utah Legislature), there is no ability for the Commission to adjust Qwest's rates based on changes in Qwest's cost of service, that fact only goes towards establishing that if the Counties are to receive any relief in this case it must be through the operation of the reparations statute rather than through some unspecified and unsupported "adjustment of future rates" as the Counties and Committee have previously advocated in this case.[28] Whether or not Qwest's form of regulation had been changed (which Qwest notes, and the Committee concedes, happened before the refund in this case), "a reduced future rate as restitution for having overpaid eight years of property taxes"[29] would constitute impermissible retroactive ratemaking.

The Committee cites the *EBA* case, *Utah Department of Business Regulation v. Public Service Commission*, 720 P.2d 420 (Utah 1986), for the proposition that "[o]verestimates and underestimates are . . . taken into account at the next general rate proceeding in an attempt to arrive at a just and reasonable future rate."[30] The Committee apparently reads this statement as if each rate case were an opportunity to true-up the past over and underearnings. But such truing up would be making adjustments for out-of-period expenses or revenues and would strike at the core of impermissible retroactive ratemaking.

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[27] Committee Response at 6.

[28] *See, e.g.*, Amended Complaint ¶ 31; Response of the Committee of Consumer Services (on the Counties' motions to amend their complaint and to consolidate dockets) at 9-10.

[29] Committee Response at 6.

[30] *Id.* at 4-5; 720 P.2d at 421.

The Committee seems to believe that the fact such adjustments would apply to "future" rates would prevent them from constituting "retroactive" ratemaking, but this is a fundamental misconception of the rule. Impermissible retroactive ratemaking is always accomplished through future rates in one way or another. It could hardly be otherwise because the past over-collection or under-collection is exactly that—in the past. The violation comes precisely when regulators seek to use **future** rates to provide "restitution" for past over or undercollections.[31] While the Committee cites a New York case for this proposition,[32] the result in that case was only possible through a unique

[31] *See, e.g., Madison Gas and Elec. Co. v. Public Service Comm'n of Wisc.*, 441 N.W.2d 311, 316 (Wisc. 1989) ("Adjustments to future rates to rectify undue past profits is retroactive ratemaking. The commission cannot install lower rates to recapture a utility's excess profits in the past. Similarly, rates may not be reduced to make up for taxes the utility did not incur because of a change in the tax law minor correction and while prior service rates were in effect.") (citation omitted); *Chesapeake and Potomac Tel. Co. v. Public Serv. Comm' of West Virginia*, 300 S.E.2d 607, 619 (W.Va. 1982) ("Generally, retroactive rate making occurs when a utility is permitted to recover an additional charge for past losses, or when a utility is required to refund revenues collected, pursuant to then lawfully established rates.") (citation omitted); *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41, 59 (Mo. 1979) (retroactive ratemaking is "the setting of rates which permit a utility to recover past losses or which require it to refund excess profits"); *In re Amerada Hess Pipeline Corp*., Order Nos. 157, 116, 2003 WL 1870940, *6 (Ak. P.U.C. March 6, 2003) ("The rule against retroactive ratemaking prevents us from allowing a pipeline carrier to charge rates higher than current costs to make up losses it incurred under past rates. The rule also prevents us from setting rates lower than a pipeline carrier's current requirements to take into account overcollections under past rates."); *Re Proposed Amendment to Chapter 88, Attachments to Joint-Use Utility Poles*, Docket No. 93-087, 1993 WL 284940, *15 (Me. P.U.C. May 13, 1993) ("In general, the Commission does not have the authority to establish 'retroactive' rates, i.e., rates which compensate a utility for prior underearnings or which compensate ratepayers for past overearnings, unless such rates are specifically allowed by statute.") (citations omitted); *In re New York Telephone Co*., Opinion No. 92-36, 1992 WL 675251, *10 (N.Y.P.S.C. Nov. 30, 1992) ("[T]he principle against retroactive ratemaking bars raising future rates to compensate for past earnings deficiencies."); *see also EBA*, 720 P.2d at 420-21 ("If the utility underestimates its costs or overestimates its revenues, the utility makes less money. By the same token, if a utility's revenues exceed expectations or if costs are below predictions, the utility keeps the excess.").

[32] *See* Committee Response at 8-9 citing *In re Central Hudson Gas & Elec. Corp*., 2004 WL 3098825 (N.Y.P.S.C. December 20, 2004).

statute that expressly altered the traditional rule.[33] New York has a statute that explicitly authorizes the commission "[w]henver any public utility company . . . receives any refund of amounts charged and collected from it by any source . . . to determine whether or not such refund should be passed on, in whole or in part, to the consumers of such public utility company. . . ."[34] No such statute has been enacted by the Utah Legislature, however, and here the rule against retroactive ratemaking is enforced unless one of the exceptions identified in the *MCI* case applies.[35]

Thus, the Committee's apparent understanding of the statement in the *EBA* case that "[o]verestimates and underestimates are then taken into account at the next general rate proceeding in an attempt to arrive at a just and reasonable future rate"[36] is mistaken. If that statement meant what the Committee seems to think it means, there would be no such thing as impermissible retroactive ratemaking—each new rate case would be an opportunity for a true-up. But over and underestimates are not trued-up in future rate

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[33] *Compare Niagara Mohawk Power Corp. v. Public Service Comm'n*, 54 A.D.2d 255, 256 (N.Y. App. Div. 1976) ("[W]e may not approve [the refund] unless it is authorized by existing law. It is well settled that the Commission may exercise only such powers as are conferred upon it by the Legislature, or which are incidental to such power, or necessarily implied therefrom. We find no statutory power, either express or implied, permitting a refund under these circumstances.") (citation omitted) *with Spring Valley Water Co. v. Public Service Comm'n*, 71 A.D.2d 55, 57 (N.Y. App. Div. 1979) ("Since our decision in [*Niagara Mohawk*], however, the Public Service Law has been amended to provide the commission with the power to require a public utility to pass on to the consumers of the utility tax and other refunds received by the utility.") (citation omitted).

[34] N.Y.P.S.L. § 113(2), quoted in *Central Hudson* at 2, n.2.

[35] *See, e.g.*, *MCI*, 840 P.2d at 770-75; Utah Code Ann. § 54-3-7 ("[N]o public utility shall . . . receive a greater or less or different compensation . . . than the rates . . . specified in its schedules on file and in effect at the time. . . ."); *id*. at § 54-4-4(1)(b)(i) (rates are to be adjusted and "**thereafter** observed and in force.") (emphasis added); *Utah Copper Co. v. Public Service Comm'n*, 203 P. 627, 632 (Utah 1921) ("[T]he effect of filing rate schedules is to make the published rates the only lawful rates and all alike must abide by them until modified, vacated and set aside by the Commission.").

[36] Committee Response at 4-5; 720 P.2d at 421.

cases. Instead, such things are "taken into account" through the situation as it exists during the test year (as potentially adjusted to account for known and measurable changes)—or, in the specific example of property tax refunds a utility has fought to obtain, to provide future benefits to ratepayers through reduced property tax expense based on more appropriate valuation by taxing authorities going forward.

While the Committee Response argues that the 1995 Act "upset the balance" that otherwise would have allowed ratepayers to collect the tax refund, a true "upsetting of the balance" would occur were a utility required to retroactively lower rates to account for subsequent tax refunds while not being allowed to retroactively raise rates to account for subsequent tax increases.[37] If the Committee wishes to maintain a fair "balance," it should consider what it would say if Qwest sought in this proceeding to do the mirror image of what the Counties seek to do—collect from ratepayers tax payments that were increased after an audit conducted following Qwest's last rate case (and now that Qwest is no longer subject to rate-of-return regulation). And if the Committee wishes to look out for the long-term best interests of ratepayers, it should follow the example of Justice Wilkins by seeing the Counties' actions in this case for what they really are—not a boon for ratepayers but an attempt to discourage utilities from appealing excessive tax assessments.[38]

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[37] *See, e.g.*, *Re PacifiCorp*, Docket No. 97-035-01, 1999 WL 218118 (Utah P.S.C. Mar. 4, 1999).

[38] Unofficial Transcript of Oral Argument 4/5/01 ("And if [a public utility] had no incentive to contest the amount of the property taxes, wouldn't the ratepayers ultimately come out of the short end, not the long end? . . . [I]t appears that the law suggests that [the public utility] would be allowed to keep [the refund], perhaps partly because it's an incentive for them to fight for the best possible tax structure.").

**B. REPLY TO THE COUNTIES RESPONSE.**

The Counties Response raises various issues that will be addressed below, but its principal importance is in confirming (through silence) that the ultimate issue the Commission must decide in this case is whether an exception to the rule against retroactive ratemaking applies. In the absence of such an exception, the Counties' relief is precluded. The Counties present no argument to the contrary. Further, there is no dispute as to any material fact regarding the applicability of any exception to the rule against retroactive ratemaking. The Commission knows what Qwest did in obtaining and accounting for the tax refund and in filing financial reports of and presenting its property tax expense in rate cases in 1988 through 1996. Now all that remains is for the Commission to apply the law to the undisputed facts to determine whether an exception to the rule applies. The Counties repeatedly assert that they have a different "theory of this case"[39] and that their different theory raises a genuine issue of material fact. In fact, however, all the Counties have is a different **legal** theory about the effect of the undisputed facts. That is precisely the situation where summary judgment is appropriate.[40] If summary judgment were precluded merely by a dispute over legal theories it could never be used. The Commission has the facts, and can determine as a matter of law whether those facts provide the basis for a finding that an exception to the rule against retroactive ratemaking may apply. If not, the Commission should grant the Motion.

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[39] *See, e.g.*, Counties Response at 10, 11, 12, 13, 14, 15, 16, 17, 18, 19.

[40] *See, e.g., Canyon Meadows Home Owners Ass'n v. Wasatch County*, 2001 UT App 414, ¶ 8, 40 P.3d 1148, 1151 ("Summary judgment is proper only when there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law.").

### 1. The "Ultimate Issue" in This Case Is the Legal Question of Whether an Exception to the Rule Against Retroactive Ratemaking Applies; There Is No Material Factual Dispute About That Issue.

For the reasons set forth in Qwest's Motion (unrebutted by the Counties), the only type of relief the Counties could even theoretically be entitled to would be reparations under Utah Code Ann. § 54-7-20, and the only way the Counties could even theoretically be entitled to reparations would be if an exception to the rule against retroactive ratemaking applies.[41] The Utah Supreme Court has held that the applicability of an exception to the rule against retroactive ratemaking is ultimately a question of law. *MCI*, 840 P.2d at 770.

[41] It is important to clarify that the need for an exception to the rule against retroactive ratemaking is independent of Qwest's argument regarding the reparations statute of limitations. That is, even if the Counties were able to successfully argue that the reparations statute of limitations were tolled or that Qwest has waived any argument regarding the statute of limitations so that this case were assumed to have been brought within the timeframe allowed by Section 54-7-20, the rule against retroactive ratemaking would still apply. The rule covers all approved past rates regardless of whether a complaint about those rates is made within the limitations period. *See, e.g.*, Motion at 37-38 (and cases cited therein). Thus, the argument in the Counties Response about Qwest waiving its statute of limitations argument is not dispositive. Moreover, the argument is clearly wrong. Statutes of limitations are affirmative defenses to be presented in a responsive pleading (i.e., an answer to the complaint). *See* Utah R. Civ. P. 8(c). They are only waived if the defendant fails to present them in that answer. *See* Utah R. Civ. P. 12(b), 12(h). The Counties' complaint in district court was dismissed based on Qwest's preliminary motion challenging the court's subject-matter jurisdiction. The case never proceeded far enough for Qwest to file an answer; the court did not consider the statute of limitations issue; and the Supreme Court did not and could not consider the issue on appeal. It is only in very limited circumstances that a statute of limitations defense even **could** be presented by preliminary motion. *See, e.g.*, *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶¶ 7, 9, 53 P.3d 947, 949-50 ("Because dismissal under rule 12(b)(6) is justified only when the allegations of the complaint itself clearly demonstrate that the plaintiff does not have a claim, this general rule recognizes that **affirmative defenses**, which often raise issues outside of the complaint, **are not generally appropriately raised in a motion to dismiss under rule 12(b)(6)**. . . . [I]n the **narrow instance** where a plaintiff's complaint describes events which establish when a statute of limitations begins to run but fails to explicitly set forth the relevant date on which those events occurred, a defendant **may** raise a statute of limitations defense in a motion to dismiss under rule 12(b)(6) of the Utah Rules of Civil Procedure, **provided** that the trial court treats the motion as one for summary judgment, thus giving all parties the 'reasonable opportunity to present all material made pertinent to such a motion. . . .' Utah R. Civ. P. 12(b).") (citation and quotation omitted, emphasis added). Under Rules 8 and 12, however, there is no circumstance where an affirmative defense is waived prior to the defendant being required to file its answer.

Of course, the underlying actions of Qwest in presenting its rate cases, appealing its tax assessments, and accounting for the tax refund involve questions of fact. But those actions are not in dispute. Instead, when the Counties talk about things being a matter of material dispute in the Counties' theory of this case, what they mean is that it is legally disputed whether Qwest's undisputed actions legally constitute utility misconduct and it is legally disputed whether the undisputed refund legally constituted an unforeseen and extraordinary event in relation to Qwest's undisputed earnings. They refer to the affidavit of Mr. Prawitt as though it presents disputed facts, but in reality it presents disputes about the legal conclusions (from a person who is not qualified to draw such conclusions, even if they were otherwise permissible) that the Commission should draw for itself.[42]

The Counties seek to skirt this distinction between legal and factual issues by citing the Utah Rules of Evidence for the proposition that experts can testify about "ultimate issues" in the case.[43] In so doing they fail to acknowledge that Qwest already noted as much in its Motion but that testifying about the "ultimate issues" does not mean testifying about ultimate **legal** conclusions. Rather, the testimony must still go toward assisting the trier of fact and must be based on underlying facts.[44] Here, the matters in

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[42] *See, e.g.*, Motion at 31-36.

[43] *See, e.g.*, Counties Response at 32-33.

[44] As Qwest noted in its Motion, expert witnesses are not allowed to opine on matters of law. *See, e.g., State v. Larsen*, 828 P.2d 487, 493 (Utah Ct. App. 1992) ("Despite the appropriateness of expert testimony on an ultimate issue, Utah R. Evid. 704 was not intended to allow experts to give legal conclusions."). Thus, "[e]ven though experts can testify as to ultimate issues, their testimony must still assist the trier of fact under rule 702." *Steffensen v. Smith's Management Corp.*, 862 P.2d 1342, 1347 (Utah 1993). An expert generally cannot, for example, give an opinion as to whether an individual was negligent "because such an opinion would require a legal conclusion." *Id*. at 1348 (quotation omitted). The Counties Response failed to even mention, let alone meaningfully rebut, this distinction between fact and law.

dispute are legal conclusions, and in any event the "trier of fact" needs no assistance of the type Mr. Prawitt offers.[45] Rather, the Commission must determine whether—based on the undisputed facts—Qwest is entitled to judgment as a matter of law.

### 2. Mr. Prawitt's Qualifications Are Irrelevant in Light of His Testimony.

The bulk of the Counties' argument is directed at Qwest's assertions that the Commission need not consider unqualified evidence in deciding a motion for summary judgment.[46] For example, the Counties argue that "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,[47] and that "Mr. Prawitt relied upon financial reports . . ., information provided at discovery. . ., federal regulations, Accounting Board

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*See also Williams v. Melby*, 699 P.2d 723, 725 (Utah 1985)("An [expert] affidavit which merely reflects the affiant's unsubstantiated conclusions and which fails to state evidentiary facts is insufficient to create an issue of fact.")

[45] The Counties cite *Patey v. Lainhart*, 1999 UT 31, ¶ 22, 977 P.2d 1193, regarding the appropriate use of expert testimony. In so doing, they actually demonstrate the distinction between fact and law and why Mr. Prawitt's testimony is of little or no value to the Commission. First, as *Patey* notes, expert opinion may be useful for matters such as determining an "ultimate **fact** in issue, such as the cause of an accident or injury." *Id*. at ¶ 21 (emphasis added, quotation and citation omitted). Determining an ultimate factual issue such as the cause of an accident is distinct from determining an ultimate legal issue such as whether a defendant was negligent in causing the accident. Whether an exception to the rule against retroactive ratemaking applies (which is the focus of Mr. Prawitt's conclusions) is an ultimate legal issue. Second, as the Counties quote from *Patey*, expert opinion is most appropriate on factual issues "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." *Id*. at ¶ 22. The Commission is hardly an "inexperienced person" with regard to regulatory accounting or the rule against retroactive ratemaking. Mr. Prawitt, on the other hand, offers his testimony from only a general business and "accounting standpoint" (Counties Response at 26) and offers no experience whatsoever that would allow him to opine that Qwest's actions constitute "utility misconduct" or that the tax refund qualifies as an "unforeseen and extraordinary event" in the context of the rule against retroactive ratemaking.

[46] Counties Response at 22-33.

[47] *Id.* at 22.

opinions, and Qwest's public filings."[48] While Qwest still maintains that Mr. Prawitt, a property tax appraiser, is not qualified to opine on regulatory accounting or ratemaking, the point ignored by the Counties is that even if Mr. Prawitt were qualified to testify about the propriety of Qwest's financial reporting, he has not done so. Even if he were qualified to interpret the term "extraordinary item," he has provided no basis for his interpretation. Even if he were qualified to rely upon financial reports, information provided in discovery, federal regulations, Accounting Board opinions and Qwest's public filings, he has failed to identify any specific facts or provisions from any of the foregoing matters and explain how those facts or provisions support his bald conclusions. If an expert's opinions are to be helpful to the Commission, the expert must provide the basis for them and explain why they support his conclusions.

### 3. The Counties Are Required to Demonstrate Proof of Their Claims Such That They Could Be Entitled to Relief; They Have Failed to Do So.

The Counties Response, although less expressly so than the Committee Response, seems to operate from the assumption that summary judgment would prevent the Counties' case from being heard on its merits. At least Qwest assumes that the Counties are looking for some further opportunity to prove their "theories" and that all they are required to do for now is punt the merits of their case down the road through Mr. Prawitt's bare-bones, conclusory affidavit.

This view, however, fails to acknowledge the standard on summary judgment that in opposing a properly supported motion for summary judgment the plaintiff still has the

[48] *Id.* at 25.

ultimate burden of proving all the elements of his or her cause of action,[49] and that "when a party fails to produce evidence sufficient to meet one of the elements of a claim, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[50]

Moreover, this view fails to acknowledge the purpose of filed testimony in Commission proceedings. As the word "testimony" (as opposed to "pleading" or "affidavit") implies, direct testimony is supposed to be the time when a complainant presents its affirmative case. The hearing then largely serves the purpose of placing that testimony under oath, making any necessary corrections, and subjecting the witness to cross examination and re-direct. Qwest believes that the Commission has been clear enough for the Counties to understand this process and that in any event litigants bear the responsibility to understand the appropriate administrative procedure. Even if a failure by the Counties to understand the purpose of filing direct testimony is one of those situations that the Committee would describe as an expected lack of understanding "of the customs and practices of regulatory and administrative proceedings,"[51] Qwest wonders when exactly the Counties had planned to present any more of the facts that they

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[49] *See Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120, 124 (Utah 1994).

[50] *Sanns v. Butterfield Ford*, 2004 UT App 203, ¶ 9, 94 P.3d 301, 304 (quotations omitted). Specifically with regard to the Counties' claim of utility misconduct Qwest further notes that the eventual standard of proof for the claim must be considered in determining whether the Counties have demonstrated a genuine issue of material fact. That is, on a claim that is tantamount to fraud (*see, e.g.*, Counties Response at 37: ". . . Qwest engages in utility misconduct, essentially a common plan or scheme in an attempt to subvert the integrity of the ratemaking process.") the Counties must present genuine issues of material fact that could ultimately support a showing of utility misconduct by clear and convincing evidence. *See, e.g., Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1046-47 (Ut. Ct. App. 1994). They have utterly failed to do so—instead relying on mere "theories."

[51] Committee Response at 2-3.

claim are in dispute—on cross examination of Qwest's witnesses? In a case where the complainant bears the burden of persuasion, the defendant has no obligation to even present a case.[52] The Counties had years to conduct discovery but that period is now closed and the Counties have been given the opportunity to present the facts they were able to develop.

In light of this, Qwest wonders what exactly the Counties would have the Commission wait for before making a determination on the merits. What facts are yet required to come out? The answer is none. There are no remaining genuine issues of material fact and, for the reasons set forth in Qwest's Motion as well as its prior pleadings, Qwest is entitled to judgment as a matter of law that there is no applicable exception to the rule against retroactive ratemaking and that the Counties are not entitled to any relief.

## IV. CONCLUSION

The only relief conceivably available in this case would be statutory rate reparations. That relief is barred absent an exception to the rule against retroactive ratemaking. Despite having many years to conduct discovery and make their case, the Counties have failed to introduce any evidence that could support a Commission finding that an exception to the rule against retroactive ratemaking applies. The Counties have

[52] *See, e.g.*, Utah R. Civ. P. 41(b) ("After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.") This is why Qwest likens its current motion to a Rule 41(b) motion made at the close of a plaintiff's case. Even though there has been no "trial," the Counties have already had their opportunity to present their affirmative case.

therefore failed to introduce evidence necessary to support an essential element of their cause of action and summary judgment against the Counties is appropriate.

RESPECTFULLY SUBMITTED: April 22, 2005.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF QWEST'S MOTION FOR SUMMARY JUDGMENT** was served on the following by electronic mail on April 22, 2005:

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