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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint of Beaver County, et al.,	:	DOCKET NO. 01-049-75
Complainants,	:	
vs.	:	**PRELIMINARY RESPONSE OF THE DIVISION OF PUBLIC UTILITIES TO THE COUNTIES' COMPLAINT AND QWEST'S MOTION TO DISMISS**
Qwest Corporation, fka U S West Communications, Inc., fks Mountain States Telephone & Telegraph Services, Inc.	:	
Respondent.	:	

The following constitutes the Division's Preliminary Response to the "Petitioning Counties'" (Counties) Complaint and Qwest's Motion to Dismiss.

The Utah Supreme Court having ruled that any jurisdiction over the Complaint of the Counties was with the Public Service Commission, on September 20, 2001, the "Counties" filed a Complaint with the Commission. Qwest responded on October 16, 2001, with a Motion to Dismiss. On November 5, 2001, the Counties filed a Memorandum in Opposition to Qwest's Motion to Dismiss. On November 16, 2001, Qwest replied to the Counties' Memorandum Opposing Qwest's Motion to Dismiss.

The Division, after a preliminary review, concludes as follows:

(1) That the Commission cannot entertain a Class Action, but that the Counties may be able to proceed under §54-7-9 in an adjudicatory proceeding against Qwest if the Counties are allowed to proceed under their initial action filed in

Docket No. 98-049-48 and if that Complaint is amended to satisfy the requirements of §54-7-9 (see paragraph (5) below).

(2) That although legal fees would not be recoverable by means of a class-action because the Commission cannot entertain same, if the Counties were successful in pursuing a Complaint and prevailing on appeal, attorneys fees may be recoverable from the Courts under the *Stewart Case* (*Justin C. Stewart v. Utah Public Service Comm'n*, 885 P.2d 759, 781-84).

(3) That the Commission lacks the equity powers to award the relief sought by the Counties, and that any claim must allege unjust, unreasonable or discriminatory rates.

(4) That in order to recover reparations (§54-7-20(2)) by successfully alleging unjust, unreasonable or discriminatory rates, the Complaint would have to justify an exception to the rule against retroactive ratemaking. Since there appears to be no allegation of utility misconduct (see *Charitable Case--(Salt Lake Citizens Congress v. Mountain States Tel. & Telegraph Co.*, 846 P.2d 1245 [Utah 1992]), the Counties would have to demonstrate that an exception were justified "for unforeseeable and extraordinary increases or decreases in expenses." (*MCI Telecommunications v. PSC*, 840 P.2d 765 [Utah 1992]). The "extraordinary and unforeseen" exception was most recently explained by the Utah Supreme Court in the *Stewart Case* (885 P.2d at 777), where the Court stated:

> We hold that the rule against retroactive rate making is not constitutionally mandated. Rather, that rule is based on sound rate-making policies, not constitutional in nature, and is subject to a number of limitations and exceptions.

The Court went on to state that "justice and equity may require appropriate adjustments in future rates to offset extraordinary financial consequences" (*Id.* at 778). (This case was never cited by Qwest in its Motion to Dismiss or Reply to the Counties' Complaint.) The Division's internal informal guidelines for determining whether an event is extraordinary and unforeseen are as follows:

A. Unforeseen -- Events where the impacts could not be anticipated in the ratemaking process.

B. Extraordinary-- Events that are *all* of the following:
   1. Specific
   2. Unusual
   3. Unique
   4. Infrequent
   5. Material
   6. Not ongoing
   7. Not a part of normal operations

C. Examples:
   1. Storm damage
   2. Power plant explosion

Applying these guidelines, the Division does not believe that the Counties' Complaint satisfies the "extraordinary" test in that Qwest's property tax appeals are not "unusual", "unique," or "infrequent," and may be said to be "a part of normal

operations." In addition, when the amount being complained of is considered on an annual basis, rather than as a total sum, it may not be material. Of course, it is impossible to predict with certainty whether the Utah Supreme Court would conclude that this case falls within the language of the *Stewart Case* where "justice and equity may require appropriate adjustments in future rates to offset extraordinary financial consequences" (*Stewart Case* at 778).

(5) Finally, there is a 1 year statute-of-limitations for reparations under §54-7-20(2), which Qwest mentions in its Motion to Dismiss at 12 (note 9), and in its Reply at 9 (note 8). The Request for a Declaratory Ruling was filed before the Commission on December 31, 1998; the present Complaint before the Commission was filed September 17, 2001. It appears that the Counties are clearly beyond the 1 year statute-of-limitations. The Counties might, however, be able to argue that they should be allowed to proceed under their initial request filed on December 31, 1998 (Docket No. 98-049-48) because in that filing, they asked not only for a declaratory ruling, but also for an "Alternative Request for Relief" (p. 6) in which they "request that the Commission enter an order requiring U S West to exercise a decrease in price of service sufficient to return the 16.9 million to its Utah rate payers...." This appears to be a request for an adjudicative proceeding (in addition to the request for a declaratory ruling). The request for an adjudicative proceeding in Docket No. 98-049-48 may still be pending before the Commission. The Utah Supreme Court's opinion in *Beaver, et al. v. Qwest, Inc.* (2001 Ut 81) only held (with respect to the PSC) that the Counties' petition for review of the declaratory action must be dismissed because the Counties did not seek a rehearing before the PSC (of an order which was never issued.) It is also unclear if and how the Price Cap Statute (specifically 54-8b-2.5(5)) affects reparations under §54-7-20.

In conclusion, it is the Division's position that based on the pleadings as they now stand, Qwest's Motion to Dismiss ought to be granted if for no other reason the problem with the statute of limitations. If the Counties were permitted to proceed under the original docket (No. 98-049-48), however, and were allowed to amend their pleading to allege a complaint for reparations, there would presumably be factual issues dealing with whether the "extraordinary and unforeseen" exception to the rule against retroactive ratemaking ought to apply. It is the Division's position, based on its guidelines, that the Counties' Complaint does not allege facts justifying an exception to the rule against retroactive ratemaking.

Dated this 11th day of December, 2001.

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Kent Walgren
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Division of Public Utilities

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Preliminary Response of the Division of Public Utilities to the Counties' Complaint and Qwest's Motion to Dismiss was served upon the following by U.S. Mail, postage prepaid, on the 11th day of December, 2001.

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