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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint of BEAVER COUNTY, et al. Complainants, vs. QWEST CORPORATION fka U S WEST COMMUNICATIONS, INC., fka MOUNTAIN STATES TELEPHONE & TELEGRAPH SERVICES, INC. Respondent.	Docket No. 01-049-75 **QWEST'S MOTION FOR SUMMARY JUDGMENT** **(Oral Argument Requested)**

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Qwest Corporation ("Qwest"), pursuant to Utah Administrative Code R746-100-1.C and R746-100-3.H and Rule 56 of the Utah Rules of Civil Procedure, hereby moves the Commission for summary judgment against Beaver County, et al. ("Counties"). This motion is based upon the testimony of Eckhardt Arthur Prawitt and Bill Thomas Peters filed by the Counties on December 1, 2004, and the affidavit of Philip E. Grate, filed herewith. Qwest urges the Commission to make findings of fact based upon this testimony and then to grant Qwest the relief requested herein. Qwest requests oral argument on this motion.

I. INTRODUCTION

Although Qwest has sought summary disposition of this matter on previous occasions, this is the first time Qwest has moved for summary judgment under Rule 56 as opposed to moving for dismissal under Rule 12.[1] This is the first motion for summary disposition submitted after the Counties have had the full opportunity to develop factual support for their case. This motion, therefore, allows the Commission to fully and fairly determine whether there is any genuine issue of material fact and whether Qwest is entitled to judgment as a matter of law. Qwest understands that a primary motivation for the Commission's previous unwillingness to consider dismissal was the Commission's desire to allow the Counties an opportunity to develop and present their case in support of their claim for a refund to Qwest's customers of the $16.9 million property tax refund received by Qwest in early 1999. Transcript of Hearing 1/29/02 at 55. It has now been nearly three and one-half years since the Counties filed their complaint in this docket.

[1] The Commission denied Qwest's Motion to Dismiss filed October 17, 2001 ("2001 Motion"), without prejudice, and has not yet ruled on Qwest's Answer to Amended Complaint and Motion to Dismiss filed August 8, 2002 ("2002 Motion"), and Qwest's Notice of Request for Further Consideration of Motions to Dismiss filed September 30, 2004 ("2004 Motion").

Over the course of that time, the Counties have had every opportunity to develop and present their case. Despite this, they have failed to do so.

In September 2001, the Counties filed a complaint claiming unjust enrichment and seeking equitable relief. After narrowly avoiding dismissal of that complaint on the ground that the claim was not within the jurisdiction of the Commission, the Counties filed an amended complaint in July 2002, adding a claim, without factual support, that both exceptions to the rule against retroactive ratemaking justified a refund in this case. The only basis for their claim of utility misconduct was an allegation that Qwest had filed information in property tax proceedings in the Utah State Tax Commission that was inconsistent with information filed in regulatory proceedings with the Commission. *See* Amended Complaint ¶ 28. The Counties presented nothing beyond this bare allegation.

Two and one-half years later, on December 1, 2004, the Counties filed direct testimony in support of their claims. The testimony fails to even mention the prior allegations, let alone provide any factual basis upon which the Commission could find an exception to the rule against retroactive ratemaking and order a refund based on filing of inconsistent information. Instead, the Counties' testimony makes allegations regarding unspecified misconduct in connection with a prior Commission docket, Docket No. 88-049-18, and unspecified government investigations of alleged, but unproven, financial fraud. The record in Docket No. 88-049-18 was closed in 1999, with the Commission releasing Qwest from any claim of misconduct and without any finding of misconduct. Presumably, the government investigations the Counties are referring to are investigations into Qwest's financial reports for calendar years after 1999. Yet, those alleged activities occurred four to twelve years **after** the years in question in this docket,

and have nothing to do with the annual decisions made by Qwest's predecessors[2] to file property tax appeals each year during the actual years in question or the rate case filings made during this period. In other words, nearly two and one-half years after filing their amended complaint and six years since they initially sought a refund, the Counties are starting over with new allegations, but still without any supporting facts.

This should come as no surprise given the Counties' past conduct in connection with the refund. When they wanted to maintain their claim in district court, the Counties steadfastly maintained that they were raising no question about the reasonableness of the rates Qwest charged its customers during the period at issue, 1988 through 1996. *Beaver v. Qwest, Inc*., 2001 UT 81, ¶ 13, 31 P.3d 1147, 1150 ("[The Counties] insist that although rate making and related issues are exclusive functions of the PSC, this case differs in that it is not a rate making issue, but an issue of whether ratepayers should receive a refund of a specific award."). They continued to maintain that position when they instituted this action following their loss in the Supreme Court. *See* Memorandum in Opposition to Qwest's Motion to Dismiss (Nov. 5, 2001) at 10 ("[T]he Counties are not now challenging the reasonableness of the rates and charges allowed during that time period."). However, after narrowly avoiding dismissal of the complaint on the ground that they failed to raise any claim cognizable before the Commission, the Counties turned 180 degrees and discovered that the real problem was that the rates charged in 1988 through 1996 were unjust and unreasonable because of an alleged unforeseen and

[2] In Utah, Qwest is the successor to U S WEST Communications, Inc., which was the successor to The Mountain States Telephone and Telegraph Company ("Mountain Bell"). Generally, Qwest and its predecessors will be referred to as Qwest in this motion.

extraordinary event, the property tax refund, and because Qwest had engaged in utility misconduct. Amended Complaint ¶ 32.

Now almost three years after changing theories, the Counties still cannot provide any factual underpinning for a claim that the tax refund was unforeseen and extraordinary nor can they identify any specific misconduct that resulted in the rates being unjust and unreasonable. All they offer is a bald opinion on the ultimate issue of law from a person who has no expertise in regulatory accounting or ratemaking.

The Counties have submitted no evidence that could support their requested relief. Rather than further prolonging this ill-conceived attempt by the Counties to create a disincentive for public utilities to challenge property tax assessments,[3] Qwest requests that the Commission now address the issues in this matter on the basis of the testimony filed by the Counties and the supplemental and clarifying affidavit submitted by Qwest[4] and find that the Counties have failed, as a matter of law, to make their case.

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[3] During oral argument in the appeal of the Counties' original cases, Justice Wilkins asked some telling questions regarding the Counties' motivation to pursue their claims and about the ratemaking implications of that motivation: JUSTICE WILKINS: "If the ratepayers may immediately regain the property tax once U S WEST has worked a resolution with the Counties over what the amount ought to be, why in the future would U S WEST bother to contest the amount of the property taxes? And if U S WEST 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? . . . Essentially the answer to my question is that there wouldn't be any incentive for U S WEST to do it if every time they got it, they had to just turn it over to the ratepayers, right? . . . There's no logic to it. MR. SCOFIELD: I think that would be right. JUSTICE WILKINS: And if the scheme of ratemaking, as I understand it is, that those things are supposed to be taken into account in ratemaking, both assessment and past history, with respect to taxes, wouldn't that be the appropriate setting for ratepayers' interests to be presented and that would be taken into account so that, I mean, it appears that the law suggests that U S WEST would be allowed to keep that, perhaps partly because it's an incentive for them to fight for the best possible tax structure." Unofficial Transcript of Oral Argument 4/5/01.

[4] Qwest has provided the Affidavit of Mr. Grate to clarify the record and provide context missing from the Counties' testimony. Qwest believes the facts introduced in the affidavit are undisputed.

II. BACKGROUND

A. QWEST'S PROPERTY TAX APPEALS

In each of the years 1988 through 1996, Qwest appealed the assessed valuation of its property subject to property tax in Utah. Qwest appealed these assessments each year because it believed the assessments overstated the valuation. As a public utility, Qwest is centrally assessed by the Property Tax Division of the Utah State Tax Commission using the unitary method. The central assessment is then allocated to the Counties, the counties in Utah in which Qwest has property and operations. The Counties and taxing entities within the Counties then apply their various tax rates to the assessed value allocated to them. The Counties have the right to initiate and participate in valuation appeals. They either support the assessment of the Property Tax Division or seek a higher valuation.

Although several issues were raised in the valuation appeals, the major issue involved the inclusion of intangible assets in the assessment, through several alternative valuation approaches. Although Utah law is clear that intangible assets are not to be taxed, the Property Tax Division had successfully argued before the State Tax Commission that valuation using the unitary method required valuation of the entire business, which Qwest argued necessarily involved the taxation of intangible assets.

A hearing was held in 1994 on the appeal of the 1988 assessment and the State Tax Commission issued a decision in November 1995, slightly reducing the assessment. Qwest appealed that decision to the Utah Tax Court. While the appeal was pending, the State Tax Commission issued a decision in *WilTel Inc. v. Beaver County, et al. v. Property Tax Division*, Appeal Nos. 95-0789 and 95-0824 (April 21, 1997), holding that intangible assets could not be included in assessments. With that issue resolved, the Property Tax Division and Counties entered into negotiations with Qwest to resolve the

1988-1996 appeals. In March 1998, the parties entered into a stipulation in which they compromised their positions on assessed value for each year in question and established the basis for a refund based on the revised valuations. By signing the stipulation, the Counties agreed that Qwest was entitled to a refund. At no time did the Counties disclose any intention to seek to avoid making the refund payment based on the claims they have asserted in this docket. The Tax Commission approved the stipulation on April 13, 1998 and entered a supplemental order on October 2, 1998, finding that the Counties should refund $16.9 million to Qwest by December 31, 1998. The $16.9 million total was comprised of $11.5 million in principal and $5.4 million in interest.

B. THE COUNTIES' INITIAL EFFORTS TO SEEK A REFUND

On December 31, 1998, even before they made the refund pursuant to the stipulation, the Counties filed a complaint in state district court, seeking to be appointed as representatives of a class composed of all Utah ratepayers covering the period 1988 through 1996. The Counties sought class recovery of the $16.9 million stipulated property tax refund they had agreed to make to Qwest. The Counties argued that the rates charged by Qwest during the years covered by the refund were based on the property taxes originally assessed and that equity required the refund be paid to the ratepayers in order to avoid a double recovery by Qwest. The Counties obtained an *ex parte* order allowing them to deposit their refund payments with the district court at the time they filed the complaint.[5]

[5] The Counties and Qwest stipulated to a release of the funds in January 1999 from the district court upon Qwest posting a bond. The district court allowed the bond to be released after it granted Qwest's motion to dismiss the complaint.

Coincident with the district court complaint, the Counties filed a petition for a declaratory order with the Commission seeking a determination that the $16.9 million belonged to ratepayers or, alternatively, that rates should be reduced on a going-forward basis to account for the alleged double recovery. The Commission took no action on the petition within 60 days, which under the statute[6] caused the declaratory order petition to be denied. Following the 60-day period, the Division of Public Utilities ("Division") recommended to the Commission that it consider the Counties' claim. However, before the Commission could act, the Counties appealed the Commission's statutory denial of the petition to the Utah Supreme Court and were granted a stay of the appeal pending the completion of the district court action. By filing their appeal, the Counties acknowledged that their original petition was solely one for declaratory relief.[7]

Qwest moved to dismiss the district court complaint on the ground that the court lacked subject matter jurisdiction over the claim. Despite the Counties' couching the claim as one in equity, Qwest argued that the real issue was whether the rates charged by Qwest during the relevant period were proper.

The district court dismissed the complaint, with prejudice, for lack of subject matter jurisdiction, and the Counties appealed the dismissal to the Utah Supreme Court. The Counties also moved to consolidate the appeal of the district court decision with the pending appeal of the Commission's statutory denial of the petition. The Supreme Court granted the motion and the appeals were consolidated.

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[6] Utah Code Ann. § 63-46b-21(7).

[7] This position is inconsistent with the Counties' motion filed July 19, 2002 to consolidate the current docket with the original docket.

On September 7, 2001, the Supreme Court affirmed the decision of the district court on subject matter jurisdiction.[8] The court found that even though the Counties had couched their complaint in equitable terms, the complaint really raised issues about the appropriateness of Qwest's rates during the relevant period. The court concluded that such issues were properly within the Commission's jurisdiction.[9] The court dismissed the consolidated appeal of the Commission's statutory denial of the petition for a declaratory order because the Counties failed to seek rehearing by the Commission, which is a statutory prerequisite to appeal.[10]

C. POST-APPEAL LITIGATION

Following their loss on appeal, the Counties filed a class action complaint in the Commission on September 17, 2001. The complaint was virtually identical to the 1998 complaint the Counties had filed in district court. Qwest responded to the complaint with the 2001 Motion. Following briefing and oral argument, the 2001 Motion was denied by the Commission without prejudice in a bench ruling on January 29, 2002. An important basis of the denial was that the Commission did not wish to prevent the Counties from receiving an opportunity to develop a record in support of their contentions.[11] The Commission also stated that it was "not in a position to narrow precisely how we are

[8] *Beaver County v. Qwest, Inc.*, 2001 UT 81 at ¶¶ 10-17.

[9] *Id.*

[10] *Id.* at ¶¶ 26-30.

[11] Transcript of Hearing 1/29/02 at 55 (Commissioner Campbell).

going to go forward," and requested that "the parties meet together and discuss . . . ways to move forward."[12]

Thereafter, the Counties made no effort to develop a record for four months. On May 24, 2002, the Counties contacted Qwest about setting up a meeting to discuss how the case might move forward. The meeting was held on June 18, 2002. At the meeting, the Counties, Qwest, the Division and the Committee of Consumer Services ("Committee") met and agreed upon a schedule for initial stages of the proceeding. They agreed that discovery could commence immediately,[13] established a schedule for the Counties to move to amend their complaint to include a count for reparations based on exceptions to the rule against retroactive ratemaking, for Qwest and others to respond to the amended complaint, and set a technical conference on October 30, 2002, at which the parties would meet to determine whether additional discovery was required and to determine whether factual stipulations could be reached. The parties reported these matters to the Commission, and, on July 26, 2002, the Commission issued its Order Denying Motion to Dismiss Without Prejudice and Establishing a Schedule and Procedures, confirming denial of the 2001 Motion without prejudice and adopting the schedule proposed by the parties.

The Division commenced discovery on June 28, 2002. On July 19, 2002, the Counties filed a motion to amend (with an amended complaint) and a motion to consolidate their complaint in this matter with their original petition for declaratory ruling

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[12] *See* Order Denying Motion to Dismiss Without Prejudice and Establishing a Schedule and Procedures, Docket No. 01-049-75 (July 26, 2002), at 3. Transcript of Hearing 1/29/02 at 72-73 (Chairman Mecham).

[13] There was no reason discovery could not have commenced earlier, but the agreement made clear that it could proceed at that time.

filed on December 31, 1998 in Docket No. 98-049-48. Qwest responded to the amended complaint with its 2002 Motion, answering and seeking dismissal of the amended complaint, on August 9, 2002. Qwest filed a memorandum in opposition to the motion to consolidate on the same date. The Committee also responded to the Counties' motions on August 9, 2002. The parties thereafter filed further memoranda and motions related to the Counties' motions and Qwest's response. The Commission has not ruled on these motions.

The Counties initiated discovery on September 18, 2002. Qwest responded to the Counties' discovery on October 22, 2002, providing hundreds of pages of requested accounting documents. Qwest also responded to discovery of the Division and Committee.

The parties held a technical conference on October 30, 2002. Prior to the conference, the Commission sent a letter to the parties on September 30, 2002, asking the parties to consider whether agreement could be reached on the allocation of the property tax refund to each year, the allocation of the refund in each year to the Utah intrastate jurisdiction based on the allocation of property taxes in rate cases during the period, and the amount of property taxes included in setting rates in each rate case during the years in question.[14]

At the technical conference, the Division presented a preliminary analysis regarding the allocation of the property tax refund in question to intrastate rates paid by Utah

[14] The letter also stated that the Commission had preliminarily determined that proceeding with the matter as a class action under the rules of civil procedure was inappropriate and unnecessarily burdensome. The Commission stated that normal Commission proceedings achieved the same benefit without the unnecessary requirements. The Commission requested that any party disagreeing with its preliminary decision submit a legal memorandum explaining the disagreement. No party has done so.

customers. Based on questions raised by Qwest and the Committee, Qwest and the Division agreed to refine this analysis and to provide it to the parties. This was done on March 5, 2003. It showed that only approximately $5 million of the $11.5 million principal amount of property taxes refunded had been included in rates and that only approximately $2.8 million had been included in rates if the period covered by the refund in Docket No. 88-049-18, for which a general release applied, was excluded.[15] The Division and Qwest invited the Counties and the Committee to review and provide comments on the analysis. At a further technical conference on June 3, 2003, the Committee raised a few questions and provided comments that have resulted in minor adjustments to the analysis.[16] The Counties refused to accept the analysis without providing any refuting analysis of their own.

Qwest served data requests on the Counties on July 28, 2003. Qwest sought discovery of the factual basis for the Counties' allegations in their amended complaint. The Counties responded on September 26, 2003, stating:

> Discovery is ongoing. The Counties have submitted, or will shortly submit, data requests to the Utah State Tax Commission and the Public Service Commission requesting all filings made by Qwest or its predecessors in

[15] Following the Utah Supreme Court's decision in *MCI Telecommunications Corp. v. Public Serv. Comm'n*, 840 P.2d 765 (Utah 1992), reversing the Commission's order denying a refund of rates paid through November 15, 1989, the Commission issued an order approving a settlement agreement of the parties obligating Qwest to provide a substantial refund to its customers. The settlement agreement stated that it resolved **all** potential refunds for the period from January 1, 1986 through November 15, 1989, and provided a general release to Qwest for any claims arising with respect to rates charged during this period. The Commission's order approving the settlement included language specifically releasing Qwest from all claims for refunds during this period. Report and Order Approving Amended Release and Settlement Agreement, *In the Matter of and Investigation into the Reasonableness of the Rates and Charges of the Mountain States Telephone and Telegraph Company*, Docket No. 88-049-18 (Utah PSC, Apr. 19, 1999) ("*Release Order*") at 20.

[16] The analysis as amended to address the Committee's points is provided as Attachment 1 to Mr. Grate's affidavit.

> interest, Mountain State Telephone & Telegraph and U S West, to either agency during the years in question. . . .

Qwest does not believe the Counties ever submitted the referenced data requests.

However, apparently in response to Qwest's data requests, the Counties served a second set of data requests on Qwest on October 3, 2003, seeking discovery of all filings made by Qwest with the Utah State Tax Commission and the Commission during the years 1988 through 1996. Qwest responded on November 19, 2003, objecting to the requests for a number of reasons, but also agreeing to produce its voluminous files in these matters for inspection and copying at a time and place mutually agreeable to the parties. The Counties never contacted Qwest to arrange inspection of the files.

Faced with an absence of significant activity by the Counties to develop a record or prosecute their claims, the Commission held a status conference on June 28, 2004 and issued a Scheduling Order on July 6, 2004, providing that "[o]n or before August 31st, 2004, all parties shall complete their discovery on all issues which they intend to present to the Commission for resolution in this docket."[17] The only action taken by the Counties in response to that order was the service by fax on Friday, August 20, 2004, at 4:33 p.m., of a Notice of Rule 30(b)(6) Deposition of Respondent Qwest Corporation, setting the deposition for August 30, 2004 at 9:30 a.m. at the offices of the Counties' counsel in Salt Lake City, Utah. The notice identified an immense subject matter for the deposition, including detailed information relating to property tax proceedings in all fourteen of Qwest's states from 1985 through 2000, detailed information regarding amounts of property taxes paid or anticipated to be paid or pendency of refund proceedings reported

[17] On July 21, 2004, the Commission issued its Modified Scheduling Order on Qwest's Motion for Modification of Scheduling Order, limiting the effect of the discovery cutoff previously established to apply only to the Counties.

in each and every regulatory proceeding in all fourteen of Qwest's states for the same period and information regarding any and all allegations of or investigations of tax, reporting, financial or accounting irregularities, misconduct or fraud, without any time or geographic limitation. Qwest responded on August 24, agreeing to produce its two employees most knowledgeable about the matters identified in the notice, on August 30 and August 31, respectively, if the questions were limited to the Utah property tax proceedings for the years 1988 through 1996 and to regulatory reports and proceedings in Utah for the years 1988 through 1997, to the accounting matters identified in the notice and to alleged irregularities with respect to reports filed with the Commission for the foregoing period of time. Qwest also agreed to allow the witnesses to respond to general questions about whether procedures and practices in Utah were also used by Qwest in other states, but stated that the witnesses would not be prepared to testify regarding specific proceedings or matters in any of the thirteen other states. The Counties informed Qwest on August 25 that they were not willing to agree to these conditions.

Qwest filed a Motion for Protective Order on Notice of Rule 30(b)(6) Deposition on August 27, 2004, and the Counties filed a Motion for Modification of Scheduling Order on August 31. Following responsive filings, the Commission issued its Order Denying Motion for Modification of Scheduling Order on September 21, 2004.

III. FACTS

The following facts are undisputed, except as noted, on the record in this matter:

1. During the years 1988 through 1996, Qwest's customers in Utah purchased telephone services from Qwest at rates found just and reasonable in Commission orders issued prior to or following appeals in Docket Nos. 87-049-T35, 88-

049-07, 90-049-06, 92-049-05 and 95-049-05. In instances where rates set in these cases were adjusted following appeals, Qwest has made a refund to customers of amounts paid in excess of rates ultimately found just and reasonable in a manner ordered by the Commission. Affidavit of Philip E. Grate ("Grate") ¶ 8.

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

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

found reasonable by the Commission and used in setting rates in connection with rates paid from January 1, 1986 through November 14, 1989. Paragraph 3 of the ordering paragraph in the order provided:

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

Grate ¶ 10.

4. In setting the rates in each of the foregoing dockets, the Commission considered Utah property taxes accrued by Qwest during the test year used in setting rates. In each case, the amount of property taxes considered in setting rates was the intrastate portion of Qwest's accrual for property taxes Qwest owed to county treasurers

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

for the test year.[19] 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. Grate ¶ 11.

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

[19] In his testimony, Mr. Prawitt states that because "[d]uring the regulatory years 1988 to 1996, [Qwest] over-earned, in the aggregate," it "had recovered all of its expenses, including all of the property taxes that it had in fact paid, including the full $16.9 million at issue, from its ratepayers by virtue of the rates that the . . . Commission . . . allowed [Qwest] to charge, long before it obtained such refund." Prawitt at 7. This testimony suggests a dispute of fact between Mr. Grate and Mr. Prawitt on the amount of property taxes included in setting rates charged during the period 1988 to 1996, Mr. Grate testifying that it was the intrastate portion of the property taxes and Mr. Prawitt apparently believing it was the entire amount of property taxes paid. This factual issue is not material to the legal issues argued in this motion. Nonetheless, Qwest has provided Mr. Grate's testimony on this issue to correct the erroneous impression left by Mr. Prawitt's testimony. The amount of property taxes included in setting rates in each applicable rate case is a matter of public record and is a matter of which the Commission can take administration notice. It should also be noted that Mr. Prawitt's testimony on this issue clearly demonstrates his lack of qualification to offer expert testimony on regulatory accounting and ratemaking issues. The Division and Qwest have both independently reviewed this issue and provided the correct facts to Mr. Prawitt, *see* Attachment 1 to Grate, yet he continues to ignore them.

Division. It was reviewed by the Committee and adjusted based on input from the Committee. Adjustments based on Committee input are highlighted in Attachment 1. Grate ¶ 12.

6. Qwest appealed the valuation of its property tax assessed by the Property Tax Division of the Utah State Tax Commission in each year from 1988 through 1996. Prawitt at 5; Grate ¶ 13.

7. Qwest understands that the Commission and the Division were aware that Qwest was appealing its property tax valuations. For example, Carl Mower, Chief Auditor of the Division, testified before the Utah State Tax Commission in the hearing on Qwest's appeal of the 1988 property tax valuation. Grate ¶ 14.

8. In March 1998, Qwest, the Property Tax Division and the Counties entered into a stipulation that reduced the property tax valuations that were the subject of appeals for each year from 1988 through 1996. On April 13, 1998, the Utah State Tax Commission entered its Order of Approval, approving the stipulation. In September of 1998, Qwest, the Property Tax Division and the Counties agreed upon the principal amount of property taxes paid in each year, and the interest on such principal amount, to be refunded by the Counties to Qwest pursuant to the earlier stipulation. On October 2, 1998, the Utah State Tax Commission entered its Supplemental Order, finding that the total amount of the refund of property taxes for tax years 1988 through 1996 was the sum of $16,900,000, including principal and interest up to and including December 31, 1998. Grate ¶ 15; *see also* Prawitt at 5. The amounts of the principal and interest components of the refund attributable to each year and the estimated intrastate portion of the

components of the refund agreed upon and approved by the Utah State Tax Commission are set forth in Attachment 1 to Grate. Grate ¶ 15.

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

> 3. The changes must be specific in that it occurs at a known moment or moments in time.
>
> 4. The effects of the change must be measurable.
>
> . . . .
>
> 6. The change must have already occurred or will occur before any increase in rates occurs.

Id. at 21-22. Grate ¶ 16.

10. 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)). Grate ¶ 17.

11. Until the stipulation was reached, Qwest did not know whether it would prevail in its valuation appeals and the amount of excess property tax paid for each year was not known and measurable. Because the outcome of Qwest's valuation appeals and the refund of property taxes resulting from such appeals were not known until September 1998, no test year adjustments for them would have been made in any test year from 1988 through 1996; the fact that a refund would be received was not known and the amount of any such refund was not measurable. Grate ¶ 18.

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

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

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

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

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

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

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

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

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

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

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

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

Grate ¶ 20.

14. The foregoing accounting entries were entered in accordance with Utah Administrative Code R746-340-2.D, "Uniform System of Accounts," the rule promulgated by the Commission regarding the system of accounts to be used by telephone companies in Utah. The rule provides:

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

Grate ¶ 21.

15. According to 47 C.F.R. § 32.1, the Uniform System of Accounts ("USOA") is a historical financial accounting system which reports the results of operational and financial events in a manner which enables both management and regulators to assess these results within a specified accounting period. USOA Account No. 7240, Operating Other Taxes, USOA Account No. 7320, Non-operating Income, and USOA Account 7600, Extraordinary Items, are Other Income Accounts under Subpart F of 47 C.F.R. Part 32. *See* 47 C.F.R. § 32.6999(b), Other Income Account Listing, a copy of which is provided as Attachment 2 to Grate. 47 C.F.R. § 32.6999, Structure of Other Income Accounts, provides in subsection (a) as follows:

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

Grate ¶ 22.

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

> This account shall be charged and Account 4080, Other Taxes - Accrued, shall be credited for all taxes, other than Federal, state and local income taxes and payroll related taxes, related to regulated operations applicable to current periods. Among the items includable in this account are property, gross receipts, franchise and capital stock taxes; **this account shall also reflect subsequent adjustments to amounts previously charged**.

Grate ¶ 23 (emphasis added). Qwest's credit to operating tax expense results in a proportional increase in net income which is available for distribution to shareholders. Prawitt at 6.

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

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

(Emphasis added.) Grate ¶ 24. Qwest's credit to non-operating income results in a proportional increase in net income which is available for distribution to shareholders. In addition, a credit to non-operating income appears, in accounting parlance, "below the line," meaning that it is not an operational item that would be considered in setting rates. Prawitt at 7.

18. In *MCI*, the Utah Supreme Court said that for the extraordinary component of the unforeseen and extraordinary exception to the rule against retroactive ratemaking to apply the event "must have an extraordinary effect on the utility's earnings." 840 P.2d at 771. In *Beaver County v. Utah State Tax Comm'n*, 916 P.2d 344 (Utah 1996), the Utah Supreme Court said that the "Counties must expect, as is obvious from this case, that initial property tax assessments, especially those of large utility systems, are subject to challenges . . . ." 916 P.2d at 352. Grate ¶ 25.

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

> (a) This account is intended to segregate the effects of events or transactions that are extraordinary. Extraordinary events and transactions are distinguished by both their unusual nature and by the infrequency of their occurrence, taking into account the environment in which the company operates. This account shall also include the related income tax effect of the extraordinary items.

> (b) This account shall be credited and/or charged with nontypical, noncustomary and infrequently recurring gains and/or losses which would significantly distort the current year's income computed before such extraordinary items, if reported other than as extraordinary items.

Grate ¶ 26.

20. Taking into account the environment in which Qwest operates, a property tax refund is neither unusual nor infrequent. Qwest actively monitors its property tax assessments in all states and routinely litigates what it believes to be excessive assessments. For example, during the past four years, Qwest has engaged in property tax valuation litigation in Arizona, Idaho, Iowa, Montana, Oregon, Utah, and Washington. Qwest received a refund/credit of $5.6 million for tax years 2001 through 2004 in Idaho. Qwest received a refund/credit of $3.3 million in Montana for tax years 2003 and 2004. Qwest received a refund/credit of $11.1 million in Oregon for tax years 2003 and 2004. Qwest received a refund of $1.0 million in Utah for tax year 2000. Qwest has property tax valuation litigation currently pending in four states. The amount of property tax in dispute in each state is as follows: Arizona, $55.6 million; Iowa, $6.6 million; Utah, $26.3 million; and Washington, $24.6 million. These numbers represents disputed property tax amounts and are not necessarily the amounts Qwest would receive as a result of settlements or court rulings. Grate ¶ 27.

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

the Company's 1998 pretax operating income of $2,391 million (a figure that included the $11.5 million property tax refund). Grate ¶ 28.

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

a. 0.02% or less of the operating revenue of Qwest in any year and 0.01% of the operating revenue of Qwest for all nine years.

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

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

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

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

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

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

23. Qwest properly included the refund in its financial reports filed with the Commission in the applicable periods. Grate ¶ 30.

24. The portion of the $11.5 million property tax refund included in rates paid by Qwest's customers during 1988 through 1996 was $4,999,910. The portion of the property tax refund included in rates paid by Qwest's customers from November 16, 1989 through December 31, 1996 was $2,858,248. The derivation of these amounts is set forth in Attachment 1 to Grate. Grate ¶ 31.

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

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

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

28. Within the first week of January 1999, Mr. Peters had a telephone conversation with either George Haley or Robert Stolebarger, who were attorneys for

Qwest, who expressed Qwest's displeasure at the fact that the funds had been deposited in the court and asked whether the Counties would be willing to consider having Qwest post a bond for $16.9 million in lieu of having the funds deposited in court. The Qwest attorney told him that the year-end bonus for Qwest officers was largely dependent upon the $16.9 million they had anticipated being paid into the Company at year-end 1998, and that it would have a serious impact on those officers if the funds were not paid to Qwest. Peters at 2-3.[20]

29. As mentioned previously, the property tax refund accounted for 0.48% of Qwest's pre-tax operating income in 1998. Had there been no accrual of an $11.5 million Utah property tax refund and no accrual of the related $5.4 million of interest income in 1998, the amount of annual bonus Qwest paid to its executives for 1998 operations would have been approximately $5,700 less. The Utah portion of this decreased bonus amount would have been an amount significantly less than $1,000. Grate ¶ 34.

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

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

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[20] Qwest accepts this as a fact solely for purposes of this motion. Qwest does not acknowledge that it is a material or even a relevant fact. Although Qwest does not wish to introduce contested facts at this juncture, if necessary Messrs. Haley and Stolebarger would testify that they neither recall nor do their contemporaneous billing records reflect any conversation with Mr. Peters. Nor would they have had any meaningful knowledge of the workings of Qwest's bonus system such that they would have opined on the need for the refund in the manner described by Mr. Peters. Mr. Haley's expressions of displeasure made to Mr. Scofield with the Counties' failure to provide the refund would have been based on the inappropriateness of the Counties agreeing to a settlement only to then to seek to withhold the refund, and then to pursue their course via *ex parte* motion, with no attempt to provide notice to Qwest, on New Year's Eve.

IV. TESTIMONY OF THE COUNTIES

The Counties have filed the testimony of two witnesses, Bill Thomas Peters and Eckhardt Arthur Prawitt, in support of their claims. In the event Qwest and other parties fail to file any testimony or to cross examine these witnesses, the Commission would be left with this testimony as the sole basis upon which to make a decision in this case. Those few portions of the testimony that provide "facts" have been included in the foregoing summary of facts. As will be argued below, the remaining portions of the Counties' testimony (and some of the foregoing facts) are improper and should be disregarded. However, even assuming all of the foregoing facts are accepted, they fail to provide any basis for the award of a refund from Qwest.

Mr. Peters' testimony simply provides some selective history in this matter relating to the Counties' deposit of the property tax refund in the district court and the parties' stipulation that the funds could be released upon the posting of a bond by Qwest. Peters at 1-3. These facts are matters of record and are not in dispute. In the course of providing this history, Mr. Peters provides his recollection of a telephone conversation that he states occurred during the first week of January 1999 between counsel for Qwest and him. Assuming for purposes of this motion that Mr. Peters' recollection of the telephone conversation is accurate, it simply establishes that counsel for Qwest told him that Qwest was displeased with the fact that the property tax refund had been deposited in court because the year-end bonuses of Qwest officers were largely dependent upon the refund being paid into the Company by the end of 1998.[21] Mr. Peters does not attempt to draw any conclusion from this "fact" or to state how it relates to the Counties' claim.

[21] *Id.* at 3. As noted above, except for purposes of this motion, Qwest does not concede the accuracy of Mr. Peters' testimony. *See supra* note 20.

Mr. Prawitt's testimony describes Qwest's accounting of the refund and on the basis of that accounting and his review of various accounting matters states his opinion that "from an accounting standpoint, that the $16.9 million property tax refund, regardless of how Qwest booked it, such a decrease in property tax expense [sic] qualifies as an 'unforeseeable and extraordinary event.'" Prawitt at 8. Mr. Prawitt's testimony also identifies what he refers to as "red flags" with respect to "financial reporting issues." Prawitt at 9. The "red flags" are (1) the accounting of the refund by Qwest under the USOA, which leads to an increase in net income and "to funnel millions of dollars to shareholder return, almost one third (1/3) of which is 'below the line,'" (2) the fact that Qwest has appealed its property tax assessment in Utah every year, and (3) unspecified conclusions drawn from his review of "the proceedings in . . . Docket No. 88-049-18" and unspecified "matters of public record as to governmental investigations of financial fraud by former [Qwest] officers." *Id.* at 6-9. Based on these "red flags," Mr. Prawitt draws the conclusion that "it is [his] opinion that the financial reporting issues that [he] identif[ies] as red flags in this property tax refund scenario are, to a reasonable certainty, the result of utility misconduct." *Id.* at 9.

In subsequent portions of this motion, Qwest will explain why Mr. Prawitt's conclusions on questions of law should be disregarded by the Commission and why his factual statements do not as a matter of law justify a refund.

V. ARGUMENT

A. STANDARD FOR SUMMARY JUDGMENT.

Summary judgment is appropriate when papers of file "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as

a matter of law." *See* Utah R. Civ. P. 56(c). Defending parties may move, at any time, with or without supporting affidavits for summary judgment in their favor. *See* Utah R. Civ. P. 56(b). On a motion for summary judgment, the moving party bears the burden of proving that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. However, in opposing a properly supported motion for summary judgment the plaintiff still has the ultimate burden of proving all the elements of his or her cause of action. *See Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120, 124 (Utah 1994). Further, "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).

In this case, Qwest demonstrates, based on the undisputed facts, that (1) the Counties' first cause of action fails as a matter of law and (2) the Counties second cause of action fails as a matter of law because they have not submitted any evidence that could support the finding of an exception to the rule against retroactive ratemaking.

B. THE COUNTIES' TESTIMONY IS IMPROPER OR UNFOUNDED AND SHOULD BE DISREGARDED BY THE COMMISSION.

As will be discussed below, even if their testimony is not rejected as improper the Counties have failed to submit evidence that could support the application of an exception to the rule against retroactive ratemaking. In the absence of such an exception, there is no basis for the Commission to grant the relief the Counties seek in this case. But in reaching its conclusion on Qwest's motion, the Commission need not consider improper evidence.[22] Rather, affidavits (or in this case testimony) should "set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *See* Utah R. Civ. P. 56(e). Moreover, "[a]n affidavit that merely reflects the affiant's unsubstantiated opinions and conclusions is insufficient to create an issue of fact." *Smith v. Four Corners Mental Health Center, Inc.*, 2003 UT 23, ¶ 50, 70 P.3d 904, 917 (quotation omitted).

1. Mr. Peter's Testimony Is Improper Testimony of Legal Counsel.

Mr. Peters, Mr. Scofield and their firm of Peters Scofield Price, are legal counsel for the Counties in this matter. *See, e.g.*, Peters at 1. Except with respect to procedural issues, it is normally inappropriate for legal counsel to submit testimony in a case. *See Watkiss and Campbell v. Foa and Son*, 808 P.2d 1061, 1066 (Utah 1991) ("We deem it generally inadvisable for members of the bar to testify in litigation where they personally represent a party. The need for the testimony of counsel must be compelling and must be necessary . . . as set forth in [Utah Rules of Professional Conduct] 3.7 above.").

[22] Although the Commission is not bound by technical rules of evidence, no finding may be predicated solely on incompetent evidence and the Commission may exclude non-probative evidence. *See* Utah Admin. Code R746-100-10.F.1.

The Comment to Rule 3.7 explains that "combining the roles of advocate and witness can prejudice the opposing party," and "[t]he opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others . . . ."

Mr. Peters' testimony is not limited to procedural issues. Indeed, the procedural issues on which he testifies—the deposit of funds in the district court and their stipulated release upon the posting of a bond by Qwest—are undisputed matters of public record. No testimony is needed with respect to them. The obvious purpose of Mr. Peters' testimony is to attempt to establish a fact—that Qwest needed the property tax refund to pay executive bonuses. As discussed below, even if that fact were true, it would not support a finding of utility misconduct. However, the truth and relevance of the fact is not the issue here. The issue here is that Mr. Peters is offering testimony on a non-procedural matter which the Counties apparently believe is necessary to make their case. Such testimony is inappropriate. Either Messrs. Peters and Scofield and their firm must be disqualified as counsel for the Counties, *Watkiss* at 1065, or the testimony must be disregarded.

2. Mr. Prawitt Lacks Appropriate Qualifications as a Regulatory Accounting and Ratemaking Expert.

Mr. Prawitt's testimony demonstrates that he is not qualified to offer the opinions contained in his testimony. Mr. Prawitt testifies that he graduated from the University of Utah in 1973 with a B.S. degree. He states that he "took various business and accounting courses at the College of Business," but does not state that his degree was concentrated in

business, much less accounting. *See* Prawitt at 2. He states that his education since graduating has been in "classes and seminars emphasizing the valuation of property." *Id.*

After graduation, Mr. Prawitt was employed from 1973 through 1978 and then from 1984 through 1992 by the Utah State Tax Commission. The early years were in the Auditing Division, where he was responsible for auditing companies with respect to income, sales, payroll and special taxes. *Id.* at 2-3. From 1984 through 1992, Mr. Prawitt was employed in the Property Tax Division first as a research/valuation analyst, and later as a valuation manager. In these positions, Mr. Prawitt worked on valuations of companies subject to valuation by the Property Tax Division. *Id.* at 3.

In addition to employment with the Tax Commission, Mr. Prawitt spent approximately six years from 1978 to 1984 as the Chief Financial Officer/Comptroller of Vrendenburg, Inc., which public records show to be a small, privately-held manufacturing company in West Valley City. In that position, Mr. Prawitt was responsible for the financial management of the company, including the preparation of financial statements, operating reports and tax returns. *See* Prawitt at 2. He has been employed since 1992 as a valuation analyst with the Utah Association of Counties. In this latter position, Mr. Prawitt continues to review property tax assessment made by the Property Tax Division and to prepare independent appraisals of property. *Id.* at 3-4.

In connection with his positions with the Property Tax Division and the Utah Association of Counties, Mr. Prawitt has appeared as an expert witness on property tax valuation matters in proceedings before the Tax Commission and the state and federal courts. *Id.*

For purposes of this motion, Qwest does not challenge Mr. Prawitt's qualifications as an expert on property tax valuation matters or on general business financial matters. However, Mr. Prawitt's testimony provides no foundation for his conclusions on matters of public utility regulation, regulatory accounting, ratemaking or generally accepted accounting principles ("GAAP"). Mr. Prawitt has neither a degree in nor any professional experience as an accountant. He has no professional certification as an accountant. He has no training or experience with public utility regulation or ratemaking. Therefore, he is not properly qualified as an expert in the areas of his testimony dealing with public utility regulation and ratemaking, his opinions regarding the two exceptions to the rule against retroactive ratemaking are without foundation, and his testimony should be disregarded by the Commission. *See, e.g., Patey v. Lainhart*, 1999 UT 31, ¶15, 977 P.2d 1193, 1196 ("The critical factor in determining the competency of an expert is whether that expert has knowledge that can assist the trier of fact in resolving the issues before it.") (quotation omitted); *Kent v. Pioneer Valley Hosp.*, 930 P.2d 904, 906-07 (Utah Ct. App. 1997) ("By definition, an expert is one who possesses a significant depth and breadth of knowledge on a given subject. . . . [O]ne cannot become an expert in another specialty merely by a review of the documents in the particular case.") (quotation omitted); *Anton v. Thomas*, 806 P.2d 744, 746 (Utah Ct. App. 1991) (disqualification appropriate where no foundation had been laid regarding doctor's qualifications to testify).

It is stunning that while opining on the two exceptions to the rule against retroactive ratemaking, Mr. Prawitt fails to discuss anything the Utah Supreme Court has said regarding those exceptions or even to acknowledge an awareness of the existence of the *MCI* case wherein the exceptions were recognized (or any other case, from any other

jurisdiction, discussing the meaning of the exceptions to the rule against retroactive ratemaking). Mr. Prawitt somehow found it more relevant, in his consideration of exceptions to the rule against retroactive ratemaking, to review, but not comment on, opinions by the Accounting Principles Board than to discuss the only binding precedent in Utah addressing relevant exceptions to the rule. These are not the actions of an expert on utility regulation.

Equally important, even if Mr. Prawitt were a qualified expert witness, "[a]n affidavit that merely reflects the affiant's unsubstantiated opinions and conclusions is insufficient to create an issue of fact." *Smith v. Four Corners Mental Health Center, Inc.*, 2003 UT 23, ¶ 50, 70 P.3d 904, 917 (quotation omitted). Mr. Prawitt's opinions are completely conclusory in nature. He fails to state any specific facts upon which he bases his conclusions, except the facts that Qwest accounted for the refund in a certain manner and has appealed its property tax valuation in Utah every year. These facts clearly do not support an opinion that Qwest's rates set in rate cases from 1987 through 1996 were in any way improper because of an unforeseen and extraordinary event or utility misconduct in the ratemaking process. Expert opinion must be grounded on a sufficient factual basis for a qualified expert to reasonably draw the conclusion offered to the trier of fact. Mr. Prawitt's testimony fails to satisfy this standard. His testimony fails to set forth any basis to qualify him as an expert on regulatory accounting or ratemaking and fails to set forth any facts that would lead an expert on regulatory accounting or ratemaking to conclude that an exception to the rule against retroactive ratemaking applies (even assuming such a conclusion to otherwise be an appropriate subject of expert testimony). *See* Utah R. Evid. 703 (facts upon which an expert bases an opinion must be "of a type reasonably relied upon by

experts in the particular field in forming opinions or inferences upon the subject"); *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.") (citation omitted).

3. In the Absence of any Factual Basis, Mr. Prawitt's Testimony Is an Improper Attempt to Usurp the Commission's Role as Decision Maker.

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 applicability of an exception to the rule against retroactive ratemaking is a question of law. *MCI*, 840 P.2d at 770.

Although an expert might conceivably provide some value in establishing any factual issues relating to this question of law, Mr. Prawitt has certainly not done so in this case. His mere allegations that Qwest accounted for the refund in a certain manner and has appealed its property tax valuation in Utah every year in question provide no assistance to any Commission fact-finding related to exceptions to the rule against retroactive ratemaking. His references to Docket No. 88-049-18 and governmental investigations of alleged financial fraud, without providing any specific acts that might amount to utility misconduct with respect to the ratemaking in this case, likewise provide no assistance to

any Commission fact-finding. Therefore, his testimony is merely a legal conclusion without factual support—an attempt to reach the very legal conclusion the Commission is charged to make, and a poor attempt at that given his failure to acknowledge or explain precedent that will guide the Commission's decision-making on whether an exception to the rule against retroactive ratemaking applies in this case. As such, Mr. Prawitt's testimony attempts to usurp the Commission's decision-making role, and his conclusions are improper and should be disregarded.

C. THE COUNTIES' TESTIMONY FAILS TO PROVIDE ANY BASIS FOR A REFUND.

1. The Counties' Only Valid Basis to Claim a Refund Would Be that the Rates in 1988 Through 1996 Were Unjust and Unreasonable.

It is well-understood that the authority of the Commission is limited to that which is expressly granted or clearly implied by statute,[23] and "any reasonable doubt of the existence of any power must be resolved against the exercise thereof."[24] While Qwest will not re-argue the 2001 Motion wherein Qwest set forth the reasons that the Counties' first cause of action alleging unjust enrichment must fail (instead, Qwest incorporates the arguments set forth in the 2001 Motion by reference), given the Commission's limited jurisdiction, a claim for unjust enrichment or common-law reparations is clearly inappropriate. *See* 2001 Motion; *see also* Report and Order, *In the Matter of the Formal Complaint of Olympus Clinic Inc. against Qwest Corporation,* Docket No. 03-049-17 (March 15, 2004) ("*Olympus Order*") at 5 ("While we recognize that Olympus' complaint follows an approach cognizable in courts with broad law and equity powers,

[23] *See, e.g., Basin Flying Service v. Public Service Comm'n*, 531 P. 2d 1303, 1305 (Utah 1975).

[24] *See Hi-Country Estates v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995).

we are not a court. Our powers are those conferred by statute enacted by the legislature.").

The only statutory provision allowing for a refund of rates paid pursuant to final, unappealed orders of the Commission is Utah Code Ann. § 54-7-20, the reparations statute. Only if the Counties could state a claim under the reparations statute could they be entitled to the refund they seek in this action. Subsection 1 of that statute provides:

> When complaint has been made to the commission concerning any rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility **has charged an amount** for such product, commodity or service **in excess of the schedules, rates and tariffs on file** with the commission, **or has charged an unjust, unreasonable or discriminatory amount** against the complainant, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection.

(Emphasis added.)

Thus, the statute provides for rate reparations when charges have been in excess of the tariff or schedules in effect or have been unjust, unreasonable, or discriminatory. There is no claim here that the rates paid were in excess of the tariffs or schedules of Qwest or were discriminatory. Therefore, the only valid basis for a claim of refund would be that the rates were unjust or unreasonable.

2. Absent an Exception to the Rule Against Retroactive Ratemaking, the Tax Refund Could Not Serve as a Basis to Award Reparations for Rates Previously Found Just and Reasonable, and a Claim that Rates Were Unjust or Unreasonable Is Barred by the Limitation in 54-7-20.

In *American Salt Co. v. W.S. Hatch Co.*, 748 P.2d 1060 (Utah 1987), the Utah Supreme Court concluded that reparations under section 54-7-20 for "unjust" or

"unreasonable" charges cannot be awarded when the Commission had previously determined the charges complained of to be just and reasonable in a final rate order. This holding was consistent with holdings by other courts that also found that later facts that render the previously charged rate unjust or unreasonable should only be addressed prospectively in rate-setting, not through reparations. *See, e.g., Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 390 (1932) ("Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate."); *Entergy Gulf States, Inc. v. Louisiana Public Service Comm'n*, 730 So.2d 890, 920-21 (La. 1999) ("A commission-made rate furnishes the applicable law for the utility and its customers until a change is made by the Commission. Therefore, the utility is entitled to rely on a final rate order until a new rate in lieu thereof is fixed by the Commission. Consequently, the revenues collected under the lawfully imposed rates become the property of the utility and cannot rightfully be made the subject of a refund."); *State ex re. Boynton v. Public Service Comm'n*, 11 P.2d 999, 1006 (Kan. 1932) ("any rate . . . prescribed by the commission and put into effect by the carriers may be confidently collected and retained by them as their very own, without misgiving that at some future time a further hearing of the commission may be had and more evidence taken and a different conclusion reached and those rates condemned as unreasonable and reparation certificates allowed . . . .").

Under these principles, a tax refund that, after the fact, affects the calculus underlying rates previously found just and reasonable by the Commission does not bring into effect the backward-looking operation of the reparations statute.

Moreover, section 54-7-20 contains a statute of limitations that would bar recovery for the Counties even if reparations were otherwise available for rates that were unjust and unreasonable at the time they were collected. Subsection (2) of section 54-7-20, provides, in part:

> All complaints concerning unjust, unreasonable or discriminatory charges shall be filed with the commission within one year . . . from the time such charge was made . . . .

Thus, for each charge made to customers, the period of time in which a complaint for reparations on the ground that the rate was unjust or unreasonable may have been filed was within one year of the relevant charge. For example, if a customer wished to file a reparations claim for a charge made on January 1, 1988, the claim had to be filed by January 1, 1989. If a customer wished to file a reparations claim for a charge made on December 31, 1996, the claim had to be filed by December 31, 1997.

It has been suggested in prior filings and hearings in this matter that the limitations period in section 54-7-20(2) may have been tolled until the refund was paid. This suggestion has no legal basis. To argue that the refund should trigger the statute of limitations is the same as arguing that it was the refund that rendered the rates unjust or unreasonable or that the statute of limitations was tolled pending "discovery" of the refund. But the cases cited above stand for the proposition that a later occurring event, such as the tax refund, does not warrant a finding of reparations for rates that were previously found just and reasonable. This is consistent with the plain language of

section 54-7-20, which ties the running of the statute of limitations to the "time such charge was made," not to some later event that supposedly rendered a previous charge unjust or unreasonable. In other words, under the one-year limitations period of section 54-7-20, the Counties were untimely in filing a reparations claim at the end of 1998 for charges that were incurred, at the latest, in 1996.[25] As the Commission stated in the *Olympus Order*, in a similar context where the complainant argued for a tolling of the statute of limitations:

> Olympus argues that the discovery rule applies; the time limitation should begin to run only after Olympus knew or should have known that it had a possible claim. Therefore, a refund for more than two years may be ordered. Olympus' argument is at odds with the unambiguous language of Utah Code 54-7-20. We reject Olympus' position that we can extend the time period beyond that clearly stated in the statute . . . . A refund of a monthly charge for private line service can only be had if complaint is made within two years of the monthly billing containing the private line charge. Once two years have passed since an amount was charged, a claim for a refund of the charge is time barred.[26]

The Commission also stated in the *Olympus Order*: "While we recognize that Olympus' complaint follows an approach cognizable in courts with broad law and equity

[25] As set forth in Qwest's 2001 Motion, its Reply to Counties' Motions to Amend and Consolidate (filed August 9, 2003), and as an affirmative defense in its 2002 Motion, there is a further statute-of-limitations bar to the Counties' claims in this case. That is, Docket No. 98-049-48 ended when the Counties failed to petition the Commission for review of the automatic denial of the Counties' request for relief. Docket No. 98-049-48 has long been concluded and is not now subject to consolidation with Docket No. 01-049-75. Thus, the Counties current complaint (filed in 2001) is even more stale than its prior complaint (from 1998). Qwest will not fully re-argue these issues herein, particularly when, even if consolidation is allowed, the earlier 1998 action was still filed out of time; but Qwest incorporates its previous arguments by reference.

[26] *Olympus Order* at 7. Although in the Olympus case the Commission applied the two-year limitations period applying to charges in excess of tariff rates, the question of whether the one-year period or the two-year period applied was not at issue in that case. In this case, the one-year period from section 54-7-20 is clearly applicable since there is no allegation that Qwest charged other than the tariff rate.

powers, we are not a court. Our powers are those conferred by statute enacted by the legislature."[27] Thus, unless an exception to the rule against retroactive ratemaking applies, reparations cannot be awarded because Qwest's rates during the relevant period were previously found by the Commission to be just and reasonable and the Counties are time barred from pursuing a reparations claim.

3. The Counties' Testimony Fails to Establish any Possibility that an Exception to the Rule Against Retroactive Ratemaking Is Present in this Case.

Even ignoring the impropriety and lack of foundation of the Counties' testimony for purposes of this motion, the testimony, beyond Mr. Prawitt's improper legal conclusions, fails to provide any basis for the Commission to find an exception to the rule against retroactive ratemaking and order a refund. Putting the testimony in its best light, it only establishes that (1) Qwest appealed its property tax assessment in Utah in each of the years from 1988 through 1996, (2) it ultimately received in 1999 a refund of a portion of the amounts paid, (3) it accounted for those refunds in a way that increased net income and that one-third of that amount was recorded in a "below-the-line" account in a period after Qwest was no longer subject to cost-of-service, rate-of-return regulation, (4) Qwest may have wanted to use the refund to pay executive bonuses attributable to the year 1998, (5) it was involved in a docket in 1988 in which allegations of utility misconduct were made and (6) there have been unspecified governmental investigations of alleged financial fraud by former Qwest officers. These facts, even if accepted, are not material and cannot forestall summary judgment because they fall woefully short of establishing a factual basis for finding that any exception to the rule against retroactive ratemaking is

[27] *Id*. at 5 (citing *Basin Flying Service*).

present in this case. *See, e.g.*, 10A Charles Alan Wright, et al., *Federal Practice and Procedure*, § 2725 (a fact is only material for purposes of summary judgment "if it tends to resolve any of the issues that have been properly raised by the parties. . . . [A] factual issue that is not necessary to the decision is not material within the meaning of Rule 56(c) . . . .") (citations omitted). This is particularly so where it is undisputed that (1) Qwest accurately reported the amount of property taxes accrued attributable to the intrastate jurisdiction during each test year in each rate case during the relevant period, (2) Qwest accurately reported the intrastate portion of property taxes accrued in its financial reports to the Commission throughout the relevant period, (3) the Commission and Division were apparently aware that Qwest was appealing its property tax assessment in each year, (4) the amount of potential refund Qwest might receive based on its appeals was not known and measurable in any of the rate cases during the relevant period, (5) the amount was not known until the parties reached agreement in 1998 (after Qwest was no longer subject to cost-of-service, rate-of-return regulation), (6) Qwest properly accounted for and reported the refund when it was received, (7) the amount of the refund whether looked at on a year-by-year basis or considered in total for the nine years amounted to at most (a) 0.12% of Qwest's overall operating income before taxes or (b) 1.72% of Qwest's Utah operating income before taxes, and (8) even if Qwest were still subject to cost-of-service, rate-of-return rate regulation when the refund was received, the refund would not have resulted in any change in rates because it was related to prior periods. Accordingly, Qwest is entitled to summary judgment as a matter of law.

4. The Rule Against Retroactive Ratemaking Prohibits a Refund Absent a Recognized Exception.

The *MCI* decision created two specific exceptions to the rule against retroactive ratemaking: (1) unforeseen and extraordinary increases and decreases in utility expenses and (2) utility misconduct. These exceptions were created in the context of the court's analysis of the potential impact of the TRA on the earnings of Qwest.

The *MCI* court stated that for the extraordinary component of extraordinary-and-unforeseeable exception to apply the event "must have an extraordinary effect on the utility's **earnings**." 840 P.2d at 771 (emphasis added). Thus, the "increase or decrease [in earnings] will necessarily be outside the normal range of variance that occurs in projecting future expenses." *Id*. at 771-72. The court cited cases where utilities were permitted to change rates on a retroactive basis in response to severe storms or other acts of God. *Id*. at 771. Thus, the unforeseen and extraordinary exception had its genesis in situations in which a utility experienced unanticipated and extraordinary increases in expenses that would not otherwise be recoverable in normal ratemaking processes to deal with something like a severe storm or some other event outside of its control.

The court also considered statements by Company representatives made in response to a Commission request for information on the anticipated impact of the TRA, as well as information provided by the Company during discovery, and determined that it was arbitrary and capricious for the Commission to have failed to hold a factual hearing on whether the Company had engaged in utility misconduct. In so doing, the court recognized an exception to the rule against retroactive ratemaking for utility misconduct, holding "[t]he rule against retroactive rate making was not intended to permit a utility to subvert the integrity of rate-making proceedings." *Id*. at 775.

Thus, two exceptions to the rule against retroactive ratemaking have been accepted in Utah: an event causing an unforeseen and extraordinary impact on utility earnings and utility misconduct in ratemaking.

5. The Property Tax Refund Was Neither Unforeseen nor Extraordinary.

Mr. Prawitt's testimony concludes that the property tax refund was an unforeseeable and extraordinary event based on his review of 47 C.F.R. § 32.7600(a) and APB Opinion Nos. 9 and 30, and based on the fact that it decreased Qwest's property tax expense. Prawitt at 8. This testimony falls far short of meeting the test enunciated in *MCI*. In this case, the property tax refund was neither unforeseen nor extraordinary. It was foreseeable because the Commission and Division knew that the Company was appealing its property tax assessments in each year and because the Company would not have filed appeals if it had no chance of prevailing. Thus, it was foreseeable that the Company might prevail and if it prevailed that it would obtain a refund of some portion of the property taxes previously paid.[28] The property tax refund was not extraordinary because it not atypical or noncustomary and did not significantly distort income computed before extraordinary items. Grate ¶ 26.

Under *MCI*, there must be a significant impact **on earnings** before an event becomes extraordinary. *See, e.g.,* 840 P.2d at 771. This standard applied by the Supreme Court is supported by the very section of the FCC's regulations cited by Mr. Prawitt. According to that section, the account for extraordinary items "shall be credited and/or

[28] While Qwest will demonstrate, below, that the Counties "evidence" with respect to utility misconduct is based on an absurd premise, it is worth noting that the Counties' premise supports the view that the refund was foreseeable. Otherwise, how could the Company "use property tax appeals as a mechanism . . . to funnel millions of dollars to shareholder return." Prawitt at 8. This mechanism would only work if it was clearly foreseeable that the Company would prevail in its property tax appeals and receive a refund.

charged with nontypical, noncustomary and infrequently recurring gains and/or losses **which would significantly distort the current year's income computed before such extraordinary items**, if reported other than as extraordinary items." 47 C.F.R. § 32.7600(b) (emphasis added).

As Mr. Grate's affidavit establishes, a comparison of the refund with the total operating revenues, expenses and income before income taxes over the relevant nine year period shows that the refund constituted 0.01% of revenues, 0.02% of expenses and 0.08% of income from operations before taxes. For any given year, the refund for that year never exceeded 0.02% of operating revenues, 0.03% of operating expenses or 0.12% of income from operations before taxes. Considered on a Utah-only basis, the refund constituted 0.26% of revenues, 0.33% of expenses and 1.23% of income from operations before taxes. This impact on earnings is the relevant consideration under *MCI*. Mr. Grate's undisputed testimony is that, whether looked at in relation to 1998 income or on a year by year basis, the refund did not significantly distort or would not have significantly distorted income computed before extraordinary items. Grate ¶¶ 28-29. There is no room for reasonable minds to differ on whether the refund was extraordinary; with an impact of somewhere between between eight one-hundredths of one percent and slightly over one percent of income before income taxes, it was not.

Other relevant considerations besides the impact on earnings also demonstrate that the property tax refund was not extraordinary. For example, USOA Account 7600, Extraordinary Items, which is also cited by Mr. Prawitt, states, "Extraordinary events and transactions are distinguished by both their unusual nature and by the infrequency of their occurrence, taking into account the environment in which the company operates." It also

refers to extraordinary items as "nontypical, noncustomary and infrequently recurring gains and/or losses." 47 C.F.R. § 32.7600. As noted by Mr. Grate, "Taking into account the environment in which Qwest operates, a property tax refund is neither unusual nor infrequent." Grate ¶ 27. The Division has informal criteria for making a determination in this regard. Among other things, the event must have been unusual, unique, infrequent, and not part of normal operations. The other sources cited by Mr. Prawitt also agree with these criteria. *See, e.g.*, APB Opinion No. 30 at ¶ 30.20 (Requiring an extraordinary event to be both unusual and infrequent. To be unusual it must have a "**high degree of abnormality** and be of a type clearly unrelated to, or only incidentally related to, the ordinary and typical activities of the entity.") (emphasis added); *id*. at ¶ 30.22 (To be infrequent, it must be "an event or transaction of a type **not reasonably expected to recur in the foreseeable future** . . . . The past occurrence of an event or transaction for a particular entity provides evidence to assess the probability of recurrence of that type of event or transaction in the foreseeable future. By definition, extraordinary items occur infrequently. However, mere infrequency of occurrence of a particular event or transaction does not alone imply that its effects should be classified as extraordinary.") (emphasis added); *id*. at ¶ 30.19 ("[A]n event . . . should be **presumed to be an ordinary** and usual activity of the reporting entity, the effects of which should be included in income from operations, **unless the evidence clearly supports its classification as** an **extraordinary** item as defined in this Opinion.") (emphasis added).

Qwest's appeals, and the resulting refund, cannot be said to qualify as extraordinary under any of these additional criteria. As the Utah Supreme Court previously told the Counties in another case: "Counties must expect, as is obvious from

this case, that initial property tax assessments, especially those of large utility systems, are subject to challenges . . . ." *See Beaver County*, 916 P.2d at 352. It is undisputed that Qwest's filing of property tax appeals and receipt of refunds or credits is neither infrequent nor unusual. Grate ¶ 27. As the Division appropriately concluded earlier in this case: "Applying [the Division's] 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.'" Preliminary Response of the Division of Public Utilities to the Counties' Complaint and Qwest's Motion to Dismiss (Dec. 11, 2001) at 3. No new facts have been presented by the Counties that undermine the Division's conclusion.

There is no room for reasonable minds to differ. The appeals and refund were simply not unforeseen or extraordinary under any reasonable, relevant definition of the terms. Thus, summary judgment is appropriate. *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).

6. The Counties Have Failed to Provide any Evidence that Qwest Engaged in Utility Misconduct in a Manner that Affected the Setting of Rates.

a. Even if accepted as true, the Counties' allegations of misconduct, with one exception, have no relationship to setting rates in the rate cases at issue.

The Counties' "evidence" of utility misconduct consists of a phone conversation in which counsel for Qwest allegedly told Mr. Peters that Qwest was displeased with the fact that the funds had been deposited in court because the year-end bonuses of Qwest

officers were largely dependent upon the refund being paid into the Company by the end of 1998 and Mr. Prawitt's three red flags: (1) the accounting of the refund by Qwest under the USOA, which leads to an increase in net income and "to funnel millions of dollars to shareholder return, almost one third (1/3) of which is 'below the line,'" (2) the fact that Qwest has appealed its property tax assessment in Utah every year, and (3) unspecified conclusions drawn from Mr. Prawitt's review of "the proceedings in . . . Docket No. 88-049-18" and unspecified "matters of public record as to governmental investigations of financial fraud by former [Qwest] officers." Prawitt at 6-9. With the possible exception of the allegation relating to Docket No. 88-049-18, these allegations are deficient as a matter of law.

The court in *MCI* made it clear that the utility misconduct exception to the rule against retroactive ratemaking involves conduct that "subvert[s] the integrity of rate-making proceedings." 840 P.2d at 775. Thus, the misconduct cannot be based on general allegations of "financial fraud" or improper motive. It must relate to financial fraud or misrepresentation in the context of the ratemaking process. With the possible exception of Docket No. 88-049-18, which is addressed below, this evidence is completely absent in the Counties' testimony.

Mr. Peters' testimony is apparently provided to establish that Qwest's motive in seeking property tax refunds was to provide money to pay officers' bonuses. Neither witness for the Counties explains how this motive establishes utility misconduct. However, the testimony is irrelevant to any claim of utility misconduct on its face. The rates at issue in this case were set in 1987, 1988, 1990, 1992 and 1995. Obviously, the use of the refund in 1998 or 1999 had no relationship to the setting of rates at issue in this

case and does not constitute evidence of utility misconduct providing an exception to the rule against retroactive ratemaking with respect to the rates at issue in this case.

In addition, there is nothing improper about using a tax refund or any other source of cash and income to pay management bonuses. It is understood that investor-owned utilities, like every other publicly-held business, attempt to achieve the highest level of profits they can within the confines of the law and their responsibilities to customers. In the case of public utilities, the law includes public utility regulation. In addition, how they use those profits, which belong to their shareholders, is a matter between management and the board of directors, who are elected by and represent the interests of shareholders. There is nothing wrong with using a tax refund to pay management bonuses, and even if there were, it is an issue between shareholders and management, not ratepayers.

Mr. Prawitt's first red flag is the accounting of the refund. The refund was accounted for in 1998 and 1999. As previously noted, the accounting of the refund had no relationship to the setting of rates at issue in this case during 1987-95 and, even if improper, could constitute no evidence of utility misconduct providing an exception to the rule against retroactive ratemaking with respect to the rates at issue in this case. In addition, Mr. Prawitt's red flag is not a red flag at all. Other than calling it a red flag, Mr. Prawitt makes no contention that it represented improper accounting for the refund in any way. On the other hand, Mr. Grate's affidavit establishes that Qwest's accounting for the refund complied with 47 C.F.R. Part 32 and was, in fact, the only accounting that could properly be made. Grate ¶ 26.

Mr. Prawitt's second red flag is that Qwest appealed its property tax assessment in Utah in every year. Again, this "evidence" has absolutely nothing to do with setting rates in rate cases. Furthermore, it in no way constitutes any type of misconduct. Qwest is entitled by law to appeal property tax assessments that it believes are excessive. The fact that it not only appealed the assessments but was also successful in obtaining a stipulated refund, representing an acknowledgement by the Property Tax Division and the Counties that Qwest's assessments may have been too high, demonstrates that the appeals were taken in good faith and were appropriate.

Mr. Prawitt's third red flag relates to allegations of improper conduct in Docket No. 88-049-18 and in governmental investigations of alleged financial fraud by former Qwest officers. Because Docket No. 88-049-18 did involve questions about representations made in connection with ratemaking, it will be addressed separately below. However, Mr. Prawitt provides no factual support for the proposition that the governmental investigations of alleged financial fraud by former Qwest officers involved conduct related to any rate case, in Utah or anywhere else. Although Mr. Prawitt has not provided any factual context or basis for his statement, it is likely that he is referencing the governmental investigations of Qwest and certain of its officers relating to accounting used in post-1999 financial statements, which have been widely publicized. Grate at ¶ 35. Mr. Prawitt fails to explain how alleged financial or accounting errors in post-1999 financial statements would have anything to do with the integrity of rate cases in Utah from 1987 through 1995. In addition, Mr. Prawitt has ignored the fact that to the extent these alleged irregularities occurred after the merger of U S WEST, Inc. and Qwest Communications International Inc., they involved former management employees who

principally came from the Qwest Communications side of the merger. Therefore, even if the Counties are attempting to imply that because someone allegedly committed financial fraud after 1999 they may also have done so in 1987 through 1995, the fact is that the senior management team in 1987 through 1995 was dramatically different than the team after 1999. The nexus between alleged financial fraud after 1999 and ratemaking in 1987 through 1995 is simply nonexistent under any theory.

b. The allegation of misconduct in Docket No. 88-049-18 is misplaced and barred by the *Release Order*.

Allegations of misconduct in connection with setting of rates in 1987 and 1988 were made during the course of Docket No. 88-049-18. Mr. Prawitt claims support for his opinion of utility misconduct based on a review of the proceedings in Docket No. 88-049-18. Apparently, Mr. Prawitt did not carefully review the record in that docket. The only allegations of misconduct even hinted at in that docket related to responses by Qwest to the Commission and the Division regarding the effect of the TRA on earnings and filings and responses to data requests which may have disclosed over earnings. Grate ¶ 9. These allegations were never proven and the Commission never made a finding that any misconduct occurred. However, even if it is assumed for purposes of argument that the allegations were true, they had nothing to do with property taxes paid, the amount of property taxes included in financial reports to the Commission, the amount of property taxes considered in setting rates, or any appeal of Qwest's property tax valuation in 1988 or in any other year. *Id.*

More importantly, Qwest and other parties to those proceedings, including the parties making the allegations of misconduct, entered into a release and settlement agreement and conditional amendment to release and settlement agreement to resolve

almost ten years of contentious litigation. In consideration for Qwest's agreement to make a substantial refund to customers, the parties agreed to release Qwest of any further claims relating in any way to the allegations of misconduct or overearnings from January 1, 1986 through November 15, 1989. Following public notice, the Commission reviewed and approved the agreement in public hearings and entered an order releasing Qwest. Thus, even if there were some basis for believing that Qwest may have made misrepresentation in 1987 or 1988 regarding property taxes, claims with respect to any such alleged misrepresentations have been released and are barred.

c. The Counties have failed to establish utility misconduct with particularity.

Utility misconduct in the context raised by the Counties is a serious charge. It amounts to a claim that Qwest committed fraud on the Commission by making improper declarations about its property taxes. As such, the Counties are required to allege (and obviously prove) the fraud with particularity. *See e.g.*, *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 972 (Utah 1982) ("The Rule 9(b) requirement should not be understood as limited to allegations of common-law fraud. The purpose of that requirement dictates that it reach all circumstances where the pleader alleges the kind of misrepresentations, omissions, or other deceptions covered by the term 'fraud' in its broadest dimension. Consequently, if the pleading had merely alleged that the insured had given 'fraudulent' or 'deceptive' or 'misrepresenting' answers, it would have been insufficient."). Here, not only did the Counties fail to even **allege** any particular allegations of utility misconduct, after years of opportunity to conduct discovery and present their case, they still cannot identify any specific act of misconduct related to rate setting. Their failure to do so leaves no basis for a Commission finding that utility misconduct has occurred.

d. The Counties' theory that Qwest appeals property tax valuations to allow funds collected from customers to be shifted below the line is absurd.

Boiled down to its essence, the Counties' theory is that Qwest has engaged in utility misconduct by filing property tax appeals every year to convert a portion of its property tax expense into net income that would not be considered in setting rates. Prawitt at 8. This theory would require the Commission to reach the absurd conclusion that the Property Tax Division was complicit with Qwest by intentionally overvaluing Qwest's property so that Qwest was assured of a refund each and every year. Presumably, this complicity may have involved Mr. Prawitt himself since he was a valuation manager at the Property Tax Division during four of the years in question. However, if the Property Tax Division does overvalue Qwest's property, Qwest is legally entitled to appeal and seek a reduction in valuation. In addition, not surprisingly, the Counties' conduct is inconsistent with this theory because they support the Property Tax Division's excessive valuation or seek an even higher valuation and always oppose Qwest's valuation appeals. Thus, either the Property Tax Division and the Counties are knowingly seeking excessive valuations to assist Qwest in its nefarious scheme, or they are unwitting accomplices.

Plainly, the problem lies with the Property Tax Division and the Counties, not with Qwest. The simple fact is that the Property Tax Division, supported by the Counties, has consistently overvalued Qwest's property. If that were not the case, Qwest's appeals would be pointless and would achieve no refunds. The problem is with the Property Tax Division's valuation techniques, not Qwest's appeals of these excessive valuations.

e. The property tax refund was not known and measurable at the time rates were set and would be a prior period adjustment in a future rate case.

As argued above, the fact that Qwest not only appealed the property tax assessments but was also successful in obtaining a refund, representing an acknowledgement by the Property Tax Division and Counties that the assessments may have been too high, demonstrates that the appeals were taken in good faith and were appropriate. To the extent that the Counties argue that by using taxes accrued in the test years to set rates (rather than some speculative amount based on a hoped-for refund) Qwest intentionally overstated its property tax expense to the Commission, the Counties reveal their lack of understanding of the Commission's known-and-measurable standard (which is also required by Utah Code Ann. § 54-4-4) for ratemaking. Pursuant to that standard, during the years at issue in this docket, the Commission typically "require[d] an historical test year with adjustments for only known and measurable changes." *Little Plains*, 1996 WL 769262; *see also, e.g., Public Service Co. of Colorado v. Public Utilities Comm'n*, 26 P.3d 1198, 1206 (Colo. 2001) ("adjustments made outside the test year may occur only when costs are known and measurable"); *Western Resources, Inc. v. State Corp. Comm'n*, 42 P.3d 12, 168 (Kan. Ct. App. 2002) (Kansas commission "has discretion to include in rate calculations any costs and revenues not part of the test year if the changes are known and measurable."). Thus, Qwest could no more request that rates be based on speculative future lower tax assessments (decreasing its revenue requirement) than it could request that rates be based on speculative future higher assessments (increasing its revenue requirement).

In Qwest's 1988 general rate case, the Commission, in considering proposed adjustments to salaries and wages, addressed standards for known and measurable

adjustments that could be considered in setting rates. Among those standards, the Commission required that:

> 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.

See 1988 Order at 21-22. Possible refunds from property tax appeals do not fit any of these standards. They did not occur at known moments in time, the amount of the refunds was not measurable and the refunds had not already occurred and did not occur before the rates under consideration became effective.

The Commission has denied a utility's request that it be allowed to include increases in income taxes following audits in rates because, even though the increases occurred regularly, they were not known and measurable. *PacifiCorp*, 1999 WL 218118 (citing a report by an outside accounting firm, and stating in part: "This Report holds that the inclusion of tax contingencies in cost of service is not common and is not appropriate, and specifically recommends excluding income tax contingency accruals from PacifiCorp's cost of service. The Division testifies that tax contingency accruals have been excluded in recent rate cases and cost-of-service studies for both Mountain Fuel and US West. This recommendation is supported by the Committee. 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 depreciation expenses for a dam removal because "since no agreement to remove the dam had been signed during the test year, and

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. No economic examination of the estimates has been undertaken by all parties in this proceeding. We find that the estimates do not satisfy the known and measurable standard.").

Indeed, even being "known and measurable" would not have assured that a post-test-year expense would have been considered during the 1988-1996 time frame. As the Commission held in the same order quoted immediately above:

> [A] post-test-year adjustment presents a special and serious case of matching and information insufficiency. It is a single-item adjustment, proposed because it is "known and measurable." Since, by definition, it is outside the test year, it cannot be analyzed in a test-year context of matched revenues, expenses, and investments. Hence, it is akin to a single-item rate case. All the arguments against conducting single-item rate cases argue against consideration of post-test-year adjustments. The fact is, events do not occur in isolation. The utility is a complex web of economic relationships, each of which changes as the result of external and internal forces and events. This is the proper context for considering any proposed adjustment.

Id.

Based on these authorities, any attempt to have included an adjustment to Qwest's property tax expense in any of its rate cases based on the potential future outcome of an appeal of the property tax assessments and the possibility of a future refund would have been rejected by the Commission as a prohibited out-of-period adjustment.

Likewise, consideration of the tax refund in a future rate case would violate other ratemaking principles. It would be a change based on activity in a prior period. The purpose of ratemaking is to set rates for the future based on revenues, expenses, rate base,

capital structure and cost of capital most likely to be in effect in the future. To perform this task, the Commission selects a test year. The actual revenues, expenses, rate base, capital for a historic test year, as was used in 1987-1995, structure and cost of capital are considered. Actual expenses are normalized and adjusted based on known and measurable changes. Events related to prior periods are removed from the test year. Grate ¶ 33. Even when relatively regular changes do occur in expenses, they are not adjusted when using a historic test year. *See, e.g., PacifiCorp, supra*.

f. Even if the property tax refund could otherwise be considered in setting future rates, it is not an appropriate to do so where Qwest is no longer subject to rate regulation.

In the alternative to requiring the refund to be awarded as rate reparations, the Counties seek "appropriate adjustments in future rates" to account for the $16.9 million. Amended Complaint ¶ 31. Such a course of action would be unlawful.

Prices for Qwest's public telecommunications services are now determined either by application of a price index or indices to tariffed services[29] or through pricing flexibility for services for which competitive alternatives exist.[30] Any rate-setting by the Commission is confined to the conditions and requirements of those two methods of setting prices. The legislature has preemptively covered the field in telecommunications ratemaking. There is no room for argument that the Commission retains authority to make adjustments of the type it may have made under cost-of-service, rate-of-return regulation. The Commission must give effect to legislative intent. Thus, unless

[29] *See* Utah Code Ann. § 54-8b-2.4. Effective May 2, 2005, Qwest will no longer have tariffed services or rates subject to determination by a price index. 1st Sub. Senate Bill 108, enacted by the Legislature and signed by Governor Huntsman on February 15, 2005, repeals section 54-8b-2.4, effective May 2, 2005.

[30] *See id*. at § 54-8b-2.3

reparations are appropriate under section 54-7-20, the Counties are not entitled to relief—the tax refund cannot be considered in setting Qwest's forward-looking rates, in some sort of attempt to escape the confines of the reparations statute and the fact that Qwest is no longer subject to cost-of-service, rate-of-return regulation.

VI. 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 therefore failed to introduce evidence necessary to support an essential element of their cause of action and summary judgment is appropriate. The Commission should use this opportunity to save the further waste of Commission and party resources and grant judgment to Qwest.

Doing so would be appropriate not only under Rule 56, but also in the interests of equity and sound public policy. The Counties should not be encouraged to continue their long-running attempt to renege on a settlement. Nor should the Commission grant relief in a case where the Counties do not act in the interests of other ratepayers but rather in the interest of discouraging public utilities from appealing inappropriately high property tax assessments. As Justice Wilkins said: "And if U S WEST 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 U S WEST would be

allowed to keep [the refund], perhaps partly because it's an incentive for them to fight for the best possible tax structure."

The Commission's decision will set a precedent for the treatment of ratepayers of other public utilities in connection with property tax appeals. It is time to finally put an end to this ill-advised, expensive litigation. Qwest respectfully requests that its motion be granted.

RESPECTFULLY SUBMITTED: February 22, 2005.

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CERTIFICATE OF SERVICE

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

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