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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, Respondent.	: : : : : : : : : :	Docket No. 01-049-75 **QWEST'S REPLY TO COMMITTEE ON MOTIONS TO AMEND AND CONSOLIDATE**
In the Matter of the Request of: BEAVER COUNTY, et al. for an Order Directing that 1988 Through 1996 Property Tax Refunds be Returned to the Ratepayers from whom said Property Taxes Were Previously Recovered and for Similar Relief for 1997, 1998 and Subsequent Years	: : : : : : : :	Docket No. 98-049-48

Qwest Corporation ("Qwest") hereby replies to the August 9, 2002 response of the Committee of Consumer Services ("Committee") on the Counties' motions to amend their complaint and to consolidate Docket Nos. 01-049-75 and 98-049-48 ("Committee Response"). The Committee Response raises a variety of issues. While many of these issues are interesting

and would warrant a full reply in a different procedural setting, the only matters now pending before the Commission are the Counties' motions to amend and consolidate.[1] The Committee has not presented a position on the motion to amend, which in any event Qwest does not oppose. Therefore, this reply will focus on discussion of the motion to consolidate, which the Committee Response does address. Section II of this reply provides a limited response to certain issues raised by the Committee that are not before the Commission at this time, but which nonetheless warrant some preliminary comment by Qwest.

ARGUMENT

I. THE MOTION TO CONSOLIDATE SHOULD BE DENIED.

The Committee's position on the motion to consolidate must be rejected. In effect, the Committee would have the Commission find that Docket No. 98-049-48 was never really a request for a declaratory ruling at all, but rather a poorly-phrased request for an adjudicative proceeding or treat Docket No. 98-049-48 as a hybrid request for both a declaratory ruling and an adjudicative proceeding. Neither of these courses is consistent with the history of Docket No. 98-049-48, including the Counties' appeal to the Utah Supreme Court, nor are they lawful. As Qwest demonstrated in its August 9, 2002 reply to the Counties' motion to consolidate, Docket No. 98-049-48 concluded as a matter of law on March 22, 1999, when the Counties failed to file a petition for reconsideration. It no longer is pending and is not susceptible to consolidation.

[1] Also pending is Qwest's August 9, 2002 motion to dismiss. However, Qwest has not sought a hearing on that motion at this time.

A. Docket No. 98-049-48 Could Not Have Been Some Sort Of Hybrid Declaratory And Adjudicative Proceeding.

The Committee states that "any uncertainty regarding portions of [the Docket No. 98-049-48 petition] which speak of a declaratory rule proceeding should be resolved in a manner that preserves the Complainants' intent to have this matter heard and resolved as a contested proceeding." Committee Response ¶ 6. The problem with this position is that Docket No. 98-049-49 was either a request for a declaratory proceeding, as it was titled, or it was a request for an adjudicative proceeding. It could not be some hybrid of both.[2]

Section 63-46b-21 of the Utah Code sets forth the statutory limits on the issuance of declaratory orders. Pursuant to that section:

> An agency may not issue a declaratory order if:
>
> (i) the request is one of a class of circumstances that the agency has by rule defined as being exempt from declaratory orders; or
>
> (ii) the person requesting the declaratory order ***participated in an adjudicative proceeding concerning the same issue within 12 months*** of the date of the present request [requesting the issuance of a declaratory order].

Id. at § 63-46b-21(3)(a) (emphasis added).

Thus, during a 12-month period adjudicative and declaratory proceedings are mutually exclusive. A declaratory proceeding conducted in the same docket as an adjudicative proceeding is, *ipso facto*, conducted "within 12 months" of the adjudicative proceeding, and is prohibited by statute. Docket No. 98-049-48 could not, therefore, be a hybrid between an adjudicative and

[2] This is not to suggest that the Counties could not have clearly pled in the alternative, so as to pursue a declaratory proceeding if possible, or an adjudicative proceeding if not possible (which the Counties did not attempt to do in any event); but alternative pleading is altogether different from a hybrid declaratory-adjudicative proceeding. Alternative pleading acknowledges that a choice between declaratory and adjudicative proceedings must be made, it merely defers the choice long enough for a determination to be made about which type of proceeding is more appropriate.

declaratory proceeding. It was either one or the other, and there can be no question about which of the two it was.

B. The Circumstances Surrounding The Counties' Appeal Demonstrate That Docket No. 98-049-48 Was A Declaratory Proceeding.

Docket No. 98-049-48 was, as the Counties titled it, a request for a declaratory ruling. The Committee's view that the matter should be treated as an adjudicative proceeding may have had merit if presented prior to the conclusion of the docket. Indeed, the Division of Public Utilities ("Division") in a March 15, 1999 response ("1999 Division Memorandum") argued that the matter should be treated as a formal adjudicative proceeding rather than as a request for a declaratory ruling. 1999 Division Memorandum ¶ 8. For purposes of this reply, the key element of the 1999 Division Memorandum was its timing. It was filed exactly one week before the Counties were required to seek reconsideration of the Commission's denial of their request for a declaratory ruling. In other words, the Counties were on notice that because of the confused phrasing of their request for a declaratory ruling, they would have support from the Division if they sought to have the matter treated as a request for an adjudicative proceeding. Yet the Counties failed to make any effort to recast their request for Commission action as a request for an adjudicative proceeding, and instead proceeded to file a petition for writ of review of the Commission's denial of their request for a declaratory ruling.

The Commission, appropriately, took no action to convert the docket from a declaratory to an adjudicative proceeding—it had no indication from the Counties that the Counties wished for such action despite the clear opportunity for the Counties to make such a wish known. To the contrary, the Commission had every reason to believe that the Counties intended to have the matter treated as a declaratory proceeding because the Counties filed an appeal based on the fact that the Commission's failure to act on the petition within 60 days was a denial of the petition

under section 63-46-21(7), the section dealing with petitions for declaratory orders. Even when the Commission itself noted, in its brief to the Supreme Court on the Counties appeal, that "rather than limiting themselves to a declaratory order, the Counties could attempt to amend their application before the Commission to conduct a normal formal adjudicative proceeding before the Commission"[3] the Counties did not seek to dismiss the PSC portion of their appeal or otherwise attempt to pursue adjudicative proceedings before the Commission.

The Counties proceeded with their appeal of the denial of their request for a declaratory ruling, and the Supreme Court expressly noted in the resulting decision that the Counties had "pled for a limited form of relief [declaratory order] that can be granted only upon Qwest's consent." *Beaver County v. Qwest, Inc.*, 2001 UT 81 at ¶ 28, 31 P.3d 1147, 1153 (Utah 2001). Noting the Counties failure to seek reconsideration, the Court determined that it lacked jurisdiction—concluding that "we must dismiss the petition for review of the declaratory action." 2001 UT 81 at ¶ 30, 31 P.3d at 1154. Thus, Docket No. 98-049-48 was treated by the parties and the Court and disposed of by the Court as a declaratory action under Utah Code Ann. § 63-46b-21.

After the Supreme Court decision, the Counties filed a <u>new</u> complaint in a <u>new</u> docket (Docket No. 01-049-75). Even assuming they could have, they did not come back to the Commission after the Supreme Court decision and request to deal with any supposedly unfinished "adjudicative" portion of Docket No. 98-049-48. Moreover, they did not come back to the Commission and say that the whole appeal was a mistake, and that Docket No. 98-049-48 was actually an adjudicative proceeding that was still pending all along.

[3] Brief of the Public Service Commission, *Beaver County v. U S WEST Communications*, Case No. 990268 (Consolidated) (July 26, 2000) at 8.

The Counties only attempted to resurrect Docket No. 98-049-48 after they realized that they had a potential statute of limitations problem under Utah Code Ann. § 54-7-20. But their own past actions in appealing the denial of their request for a declaratory ruling, their failure to seek to have Docket No. 98-049-48 heard as an adjudicative proceeding despite notice and opportunity to do so, and the *res judicata* effect of the Supreme Court's decision, estop the Counties from asserting that Docket No. 98-049-48 is somehow still pending as an adjudicative proceeding. In such circumstances, it would be contrary to law for the Commission to determine that Docket No. 98-049-48 is capable of consolidation with Docket No. 01-049-75. The motion to consolidate must, therefore, be denied.

II. QWEST'S REPLY TO ADDITIONAL ISSUES RAISED BY THE COMMITTEE

A. The 1995 Public Telecommunications Law Precludes Traditional Rate-of-Return Ratemaking By The Commission.

Based on unfounded allegations, the Counties' Amended Complaint pleads in the alternative that "justice and equity require appropriate adjustments in future rates to offset the extraordinary financial consequence of over $16 million in property tax refund." Amended Complaint ¶ 31. The Committee Response appropriately notes that a ratemaking proceeding and a reparations proceeding "may be mutually exclusive." Committee Response ¶ 10. However, the Committee frets over and ultimately does not take a position on the more fundamental question of whether the Commission retains statutory authority under the 1995 Public Telecommunications Law, Utah Code Ann. § 54-8b-1 *et seq*., to engage in traditional, rate-of-return ratemaking.[4] The answer to this question is clearly no.

[4] *See, e.g.*, Committee Response at 6-7 (". . . rate proceedings, which the Commission is obviously empowered to hear . . . "); *but see id*. at 3 ("This third issue raises the further question whether, under the provisions of the 1995 Public Telecommunications Law currently governing the setting of telecommunication rates in Utah, the Commission still has the means to . . . see that inequities and issues

Pursuant to Utah Code Ann. § 54-8b-3.3(1)(b), "tariffed public telecommunications services and price-regulated services provided by a telecommunications corporation with more than 30,000 access lines in the state [Qwest] shall be nondiscriminatory, cost-based, and subject to resale as determined by the commission." "Cost-based" in this context means "that the prices for the telecommunications services shall be established after taking into consideration the total service long-run incremental cost of providing the service." *Id*. at 54-8b-3.3(1). Total service long-run incremental costs are forward looking, based on a reasonable provider's estimated future incremental costs[5]—there is no room for a cost component based on any past alleged "double recovery" of tax assessments just as there is no room for a component for the under-recovery of costs that may have actually been higher. In addition, prices for public telecommunications services are now determined either by application of a price index or price indices to tariffed services[6] and through pricing flexibility for services for which competitive alternatives exist.[7] Any rate-setting by the Commission is confined to the conditions and requirements of those two methods of setting prices.

The legislature, consistent with federal telecommunications law, has preemptively covered the field in telecommunications ratemaking. There is no room for argument, such as that possibly implied by the Committee (*see* Committee Response at 9-10), that the language of Section 54-4-1 somehow preserves Commission authority to deviate from the specific rate-

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such as those raised by the Complainants in these proceedings are effectively heard and resolved in a manner which ensures that telecommunication utility rates in Utah are 'just and reasonable'").

[5] *See* Utah Code Ann. § 54-8b-2(17).

[6] *See id.* at § 54-8b-2.4.

[7] *See id*. at § 54-8b-2.3

setting provisions of the 1995 Public Telecommunications Law.[8] Chapter 8b is more recently enacted and more specific than Chapters 3 and 4 of Title 54. Even assuming it is true that "essential provisions of the Public Telecommunications Law contradict" other public utilities provisions, it is not for the Commission to decide whether the other provisions are "of equal, if not greater, importance." Committee Response ¶ 3, n.4. Rather the Commission must give effect to legislative intent. Thus, if the Commission is in fact put in "a position of having to ignore or violate the duties imposed by the one in order to comply with those required by the other" (*id.*) then proper statutory construction requires that the Public Telecommunications Law prevail over the remaining older, more general provisions of the Utah Public Utilities Code.[9]

B. No Facts Or Law Support The Committee's Suggestion That This Matter May Justify Retroactive Ratemaking.

The Committee raises the specter that "issues regarding retroactive ratemaking" may be relevant if this matter proceeds as "some kind of rate proceeding." Committee Response ¶ 4. For the reasons set forth above, this cannot be a traditional ratemaking proceeding; however, Qwest agrees that principles of retroactive ratemaking are relevant to the Counties' Amended

[8] The Committee appears to seek the very same broad reading of Section 54-4-1 that has consistently been rejected by the courts. *See, e.g., Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 917 P.2d 1017, 1021 (Utah 1995) ("Despite its broad language, section 54-5-1 does not confer upon the Commission a limitless right to act as it sees fit, and this court has never interpreted it as doing so. . . . To ensure that the administrative powers of the PSC are not overextended, any reasonable doubt of the existence of any power must be resolved against the exercise thereof"); *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 50 (Utah 1988) (in evaluating the Commission's jurisdiction, the court is "guided by the principle that where a specific power is conferred by statute upon a tribunal, board, or commission with limited powers, the powers are limited to such as are specifically mentioned") (quotation omitted).

[9] *See, e.g., Murray City v. Hall*, 663 P.2d 1314, 1318 (Utah 1983) ("Statutes *in pari materia*, although in apparent conflict, are so far as reasonably possible construed to be in harmony with each other. But if there is an irreconcilable conflict between the new provision and the prior statutes relating to the same subject matter, the new provision will control as it is the later expression of the legislature."); *Floyd v. Western Surgical Associates, Inc.*, 773 P.2d 401, 404 (Ut. Ct. App. 1989) ("Under general rules of statutory construction, where two statutes treat the same subject matter, and one statute is general while the other is specific, the specific provision controls").

Complaint. Regardless, this case does not warrant a deviation from the general proscription against retroactive ratemaking.

The rule against retroactive ratemaking provides that utilities may not "adjust their rates retroactively to compensate for unanticipated costs or unrealized revenues." *Utah Dept. of Bs. Reg. v. Public Serv. Comm'n*, 720 P.2d 420, 420 (Utah 1986) ("*EBA*"). Likewise, the Commission may not retroactively adjust rates to account for costs lower or revenues higher than those anticipated. *Id.* Two recognized exceptions exist. *See generally MCI Telecom. Corp. v. Public Serv. Comm'n*, 840 P.2d 765, 770-76 (Utah 1992). However, for the exceptions to apply, the rates at issue must have been premised on utility misconduct or the additional revenues must have been unforeseeable ***and*** extraordinary. *Id*.

The Counties' last-minute, baseless allegations of misconduct by Qwest (*see* Amended Complaint ¶¶ 27-29) notwithstanding, the real issue is whether the $16.9 million tax refund was unforeseeable and extraordinary. It was neither. It represented an average refund of less than $1.9 million per year (only a fraction of which was considered in setting intrastate, regulated rates), and the Counties and others were fully aware of Qwest's pending appeals at the time the subject rates were established. Moreover, as the Utah Supreme Court held in *Beaver County v. Utah State Tax Comm'n*, 916 P.2d 344, 352 (Utah 1996), a case involving most of the same counties (represented by the same legal counsel) involved in this action: "Counties must expect, as is obvious from this case, that initial property tax assessments, especially those of large utility systems, are subject to challenges. . . ."

Thus, the exceptions to the rule against retroactive ratemaking would not apply even if ratemaking rules were applicable to this action. This is consistent with the public interest and with principles of equity.

C. The Committee Appears To Support A Position Out Of Step With Sound Public Tax Policy That Would Result In The Inconsistent Application Of The Rule Against Retroactive Ratemaking.

The Committee implicitly acknowledges[10] that it is in the public interest for utilities to appeal excessive tax assessments. As Justice Wilkins put the issue during oral argument of the Counties' appeal that preceded this action:

> 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 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 on the short end, not the long end?

Although Qwest is no longer subject to rate-of-return regulation, other utilities are; and the benefits from a victorious tax appeal flow to the customers of those utilities by the inclusion of the downward-adjusted value of assets in future tax calculations, which flow into future rates.[11] The public interest also favors accuracy in tax assessments, simply for the sake of fairness, impartiality and accuracy in the imposition and collection of taxes. *Cf. United States v.*

[10] *See* Committee Response at 2. Qwest lacks sufficient information to comment at this time on the accuracy of the Committee's recollection that Docket No. 90-035-06 resulted in "a sharing of the property tax refund, with approximately one third of the refund assigned to utility shareholders and two-thirds going to ratepayers." *Id*. Qwest does note, however, that Docket No. 90-035-06 was resolved by stipulation, whereby no party acknowledged "the validity, or invalidity, of any particular methods, theories, or principles of ratemaking," and where "the Commission's acceptance of [the] Stipulation [did] not represent a determination by the Commission on any matters of policy." Stipulation, *In the Matter of the Investigation into the Reasonableness of Allocations and the Rates and Charges for Utah Power & Light Company*, Docket No. 90-035-06, Phase II (Utah PSC Nov. 26, 1991). Plainly, the resolution of any property tax issue in that case was part of settlement of disputed issues and, therefore, cannot serve as precedent for this or any other case.

[11] This is in part why the Counties would make an inadequate class representative even if the Commission were permitted to certify a class. The Counties have a minimal interest in obtaining their portion of any reparations award ordered for Qwest customers. They have a significant interest, however, in reducing incentives for utilities to appeal tax assessments. That interest conflicts with the interests of typical utility customers. Thus, upon being asked the above-quoted question about incentives and "ratepayers ultimately com[ing] out on the short end" by Justice Wilkins, counsel for the Counties tellingly replied: "The Counties would do a lot better."

Frauenkron, No. 99-1777, 2000 WL 637353, *3 (D. Minn. March 3, 2000) (noting the public interest in "the fair administration of the federal tax laws").

Thus, the Commission should not remove the incentives for utilities to appeal tax assessments.

Finally, it is consistent with principles of equity to deny relief to the Counties in this action. The Committee joins with the Counties in decrying the supposed "double recovery" that Qwest has received through the tax refund. Committee Response ¶ 13. What the Committee fails to acknowledge, however, is that, as the Utah Supreme Court held in the *EBA* case, just as rates cannot be adjusted retroactively to account for unanticipated revenues they cannot be adjusted to "compensate for unanticipated costs or unrealized revenues." *EBA*, 720 P.2d at 420. The $16.9 million refund does not exist in a vacuum. Due to the prospective nature of ratemaking it was no doubt accompanied during the relevant period by both unanticipated costs and unrealized revenues. Qwest cannot now seek to introduce evidence of those shortfalls to offset the Counties' allegations of a "double recovery." There is nothing inequitable about throwing the relatively small average of a fraction of $1.9 million per year in revenue that the tax refund represents in with the mix of other revenues, expenses or investments that differed from those projected in setting rates, whether those differences helped or harmed Qwest.

This is made abundantly clear by the fact that the Commission denied similar relief when PacifiCorp (attempting the mirror-image of the very thing the Counties now fault Qwest for failing to do) sought to include a $12 million income tax contingency in its revenue requirement because it was routinely required to pay higher taxes after I.R.S. audits. *See* Report and Order, *In the Matter of the Investigation Into the Reasonableness of Rates and Charges of PacifiCorp, dba Utah Power & Light Company*, Docket No. 97-035-01 (Utah PSC March 4, 1999) at 21. If

it was not in the public interest to allow PacifiCorp to include estimates of higher taxes in its revenue requirement, it was also not in the public interest to require Qwest to include estimates of lower taxes in its revenue requirement.

While the Committee raises other interesting issues,[12] nothing it raises alters the conclusion that the Counties' motion to consolidate should be denied.

CONCLUSION

For the foregoing reasons, the Counties' motion to consolidate should be denied.

DATED: August 23, 2002.

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[12] Indeed, many of the issues raised by the Committee lend support to both the arguments in favor of Qwest's motion to dismiss and the arguments against the Counties' motion to consolidate. The Counties have shown themselves either incapable or unwilling to frame a proper request for agency action, instead framing issues in ways that the Committee charitably characterizes as reflecting "the ambiguity which might be expected in a cause of action brought by utility customers." Committee Response ¶ 1. The Counties ought not be given the opportunity to muddle things further by consolidating dockets.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **QWEST'S REPLY TO COMMITTEE ON MOTIONS TO AMEND AND CONSOLIDATE** for Docket No. 01-049-75was served upon the following by U.S. Mail, postage prepaid, on the 23rd day of August 2002:

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