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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of the Complaint of: BEAVER COUNTY, BOX ELDER COUNTY, CACHE COUNTY, CARBON COUNTY, DAVIS COUNTY, DUCHESNE COUNTY, EMERY COUNTY, GARFIELD COUNTY, GRAND COUNTY, IRON COUNTY, JUAB COUNTY, KANE COUNTY, MORGAN COUNTY, PIUTE COUNTY, RICH COUNTY, SALT LAKE COUNTY, MILLARD COUNTY, SAN PETE COUNTY, SEVIER COUNTY, SUMMIT COUNTY, TOOELE COUNTY, UINTAH COUNTY, UTAH COUNTY, WASATCH COUNTY, WASHINGTON COUNTY, WAYNE COUNTY, WEBER COUNTIES, AND ALL OTHER PERSONS OR ENTITIES SIMILARLY SITUATED, Complainants, vs. QWEST CORPORATION fka U S WEST COMMUNICATIONS, INC., fka MOUNTAIN STATES TELEPHONE & TELEGRAPH SERVICES, INC. Respondent.	Docket No. 01-049-75 **QWEST'S REPLY TO COMPLAINANT'S MEMORANDUM IN OPPOSITION TO QWEST'S MOTION TO DISMISS**

The Counties' response to Qwest's Motion To Dismiss fails to even address, let alone rebut, most of the substantive grounds and supporting legal authority for Qwest's motion.

Instead, the Counties' argument is based on a wishful and tortuous misreading of the Supreme Court's recent decision in this matter, *Beaver County v. Public Serv. Comm'n*, 31 P.3d 1147 (Utah 2001).

The Counties' effort to avoid dismissal of their Complaint can be distilled down to two main points. First, they erroneously argue that the Supreme Court ruled, as a matter of law, that the Commission has jurisdiction over the equitable relief claim they have chosen to plead. Second, they claim that the Commission has carte blanche authority to grant any type of relief, despite compelling, unrebutted law to the contrary. Qwest will address each point in turn.

I. The Counties Have Completely Misread the Supreme Court's Decision.

The Counties' reading of the Supreme Court decision is tortuous and clearly wrong. The Counties claim, for example, that "the Supreme Court has held that the PSC has exclusive jurisdiction over **this very lawsuit**."[1] Counties' Memorandum at 2; emphasis added. The Counties state that the Supreme Court refused to dismiss their claim with prejudice "to avoid any preclusive effect on the ability of the counties to pursue **those very same claims before the PSC.**" *Id.* at 3; emphasis added. The Counties state that the "Court's determination of where jurisdiction lies for this dispute is final and binding on this Commission, and dispositive of Qwest's motion." *Id.* They argue that "the obvious holding in *Beaver County* [is] that this Commission has exclusive jurisdiction over the **very** class-action, equity allegations of the Complaint. *Id.* at 8, emphasis added.

In other words, the Counties would have the Commission believe that the Supreme Court ruled conclusively that the equitable claims that the Counties brought in the original lawsuit

[1] By "this very lawsuit," the Counties apparently mean the claim for equitable relief they have chosen to plead in their Complaint.

(which they have repeated virtually verbatim here) **must** be considered by the Commission, not as a claim for reparations of excessive rates, but as they have been pled as a claim in equity.

It is instructive to compare what the Court actually said to what the Counties claim it said. The Supreme Court was considering a decision by the District Court to dismiss a complaint that was virtually identical to the one now before the Commission. The District Court had concluded that the relief sought by the Counties "required rate making or an adjustment of rates, both of which are within the exclusive jurisdiction of the PSC." *Id.* at 1149. The Supreme Court agreed, citing prior law holding that "courts are prohibited from exercising the powers properly belonging to the PSC, which is an arm of the legislative branch of government." *Id.* Despite the District Court's conclusion that the Counties' underlying claim necessarily means that ratemaking must take place, the Counties, in their arguments to the Supreme Court, continued to "emphasize that equitable rights, rather than rate making functions and duties of the PSC, govern this case . . . [and to argue] that 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." *Id.* at 1150. The Supreme Court agreed with the District Court, concluding that "the Counties' contention in this court [is] inconsistent with the underlying premise of the Counties' original position." *Id.* The Court analyzed several elements of the Counties' pleadings and arguments and concluded that "[e]ach of these statements discounts the Counties' assertions that the relief they seek does not involve utility ratemaking and does not require reference to Qwest's overall rate structure." *Id.* at 1151.

The heart of the Supreme Court's analysis is the following paragraph:

> Essentially, the Counties allege that equity requires the return of the ratepayers funds to the ratepayers because the ratepayers initially overpaid telephone rates that were based on estimates of costs provided by Qwest to substantiate its rates to the PSC. **Overpayment alleged by the Counties is necessarily premised on an unjustifiable, changed, or otherwise incorrect initial rate.** Simple labeling of the issue in an envelope of equity because a bond in the amount in controversy was posted does not mandate our opening of the

> discussion of the same where the Counties have clearly acknowledged that the relief they seek involves rate making and rate adjustment. Such relief can be administered only through the PSC as discussed above.

Id.; emphasis added. In the end, the Court concluded that the claim of the Counties is an issue "inextricably intertwined with an investigation into the makeup of rates charged by Qwest." *Id.* at 1152.

The Court clearly ruled that the Counties' claim, no matter how it was dressed up by the Counties, required an assessment of Qwest rates. Thus, it is a case involving rates and falls within the exclusive jurisdiction of the Commission. In the face of this narrow holding, the Counties now leap to the conclusion that "the obvious holding in *Beaver County* [is] that this commission has exclusive jurisdiction over the very class-action, equity allegations of this Complaint." Counties' Memorandum at 8; emphasis added. In other words, the Counties have concluded that the Commission must hear this case in the manner it has been pled by the Counties. That is not what the Court held. The Court certainly did not conclude that the Commission has the power to consider a claim sounding in equity or to fashion an equitable remedy nor did it hold that the Counties are somehow relieved of their burden of pleading a case that falls within the Commission's statutory authority. Saying that the actual subject matter of a claim falls within the exclusive jurisdiction of the Commission is not the same as saying that the Commission has jurisdiction of a claim that does not fall within its statutory authority.

Given the actual holding of the Supreme Court, the question before the Commission on Qwest's Motion To Dismiss is whether the Counties have stated a claim that Qwest's rates were excessive and, thus, potentially subject to refund. Amazingly, despite being told by the District Court and again by the Supreme Court that the essence of their claim involves rate making, the Counties have not plead that Qwest's rates were excessive. Instead, they insist that **"[t]he Counties are not now challenging the reasonableness of the rates and charges allowed**

during that time period." Counties' Memorandum at 10; emphasis added. That statement is dispositive of the Counties' claim. By their own admission, the Counties are not claiming that an overpayment of rates occurred based on "unjustifiable, changed, or otherwise incorrect initial rate." Therefore, the Commission lacks the jurisdiction to hear the Counties' claim and it must be dismissed.

II. The Counties Ignored the Compelling Authorities Cited in Qwest's Motion To Dismiss. These Authorities Demonstrate that the Counties' Complaint Must Be Dismissed.

If the Counties' interpretation of the Supreme Court decision is correct, then it is truly a landmark decision that both overturns prior law and makes new law. Moreover, under their interpretation, the Court not only rendered a landmark decision overturning numerous prior cases, but it made all of these significant legal decisions implicitly.

To be more specific, in order to accept the Counties' argument, one would have to read the Supreme Court decision as implicitly doing the following things:

1. Overturning the line of cases beginning with *Basin Flying Service v. Public Serv. Comm'n*[2] over 25 years ago that has consistently held that the jurisdiction of the Commission is limited in scope;
2. Overturning well-developed authority that Utah administrative agencies do not have the power to fashion a remedy in equity;
3. Judicially repealing UTAH CODE ANN. § 54-7-20, a statute that has been the law of Utah since 1917; and

[2] 531 P.2d 1301, 1305 (Utah 1975). *See also Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 917 P.2d 1017, 1021 (Utah 1995); *Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n,* 754 P.2d 928, 930 (Utah 1988); *Williams v. Public Serv. Comm'n,* 754 P.2d 41, 50 (Utah 1988); *Kearns-Tribune Corp. v. Public Serv. Comm'n,* 682 P.2d 858, 859 (Utah 1984).

4. Broadening the Commission's authority by granting it jurisdiction over class actions under Rule 23 of the Utah Rules of Civil Procedure.

The Supreme Court, of course, did not do any of these things; a simple reading of the opinion makes that clear.

In its motion, Qwest cited a long line of cases that establish the principle that the Commission's powers are limited to those granted by statute and that is has no inherent powers.[3] The Counties completely ignored that line of cases, instead citing UTAH CODE ANN. § 54-4-1 for the proposition that it "expressly grants the PSC plenary jurisdiction beyond dealing with particularly enumerated functions . . . ." Counties' Memorandum at 6. While this kind of broad reading of section 54-4-1 has been asserted many times, the Supreme Court

[3] *Id.*

has made in clear that this is not what the section means. In *Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 917 P.2d 1017 (Utah 1995), the Court stated: "Despite its broad language, section 54-4-1 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." *Id*. at 1021. Indeed, the Court in the *Hi-Country Estates* case stated:

> Accordingly, [t]o 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.

Id. (citations and quotation marks omitted). In *Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n*, 754 P.2d 928 (Utah 1988), the Court rejected the Counties' claim stating:

> [54-4-1] has never been interpreted by this Court as confirming upon the Commission a limitless right to act as it sees fit. Explicit or clearly implied statutory authority for any regulatory action must exist.

Id. at 930 (citations omitted). Thus, the Counties' interpretation of section 54-4-1 is inconsistent with the controlling authorities in Utah.

The Counties completely ignore Qwest's reliance on *Kerans v. Industrial Comm'n*, 713 P.2d 49 (Utah 1986), a case that establishes the principle that administrative agencies in Utah are bound to the limits of their statutory powers and may not "fashion any common law exception to the statutes."[4] *Id.* at 55. *Kerans* is sound and binding authority.

The Counties' judicial estoppel argument is truly bizarre. They claim that because Qwest argued to the Supreme Court that a ratemaking claim falls within the exclusive

[4] Nor did the Counties respond to the cases cited from other jurisdictions that hold that statutorily-created regulatory agencies do not possess equitable powers. See Qwest Motion to Dismiss at 8.

jurisdiction of the Commission, it is judicially estopped from challenging jurisdiction over the equity claim they have now filed with the Commission. The Counties' problem, of course, is that they continue to insist that their cause of action is not a ratemaking claim (*See* Counties' Reply Memorandum at 10) and that the Commission is bound to take jurisdiction of a claim that clearly is not within the statutory power of the Commission. Nothing in Qwest's prior arguments or the holding of the Supreme Court estops Qwest from challenging jurisdiction over the Counties' claim.[5] Qwest has never contended that the Commission does not have jurisdiction to hear a properly-pled claim for a refund of excessive rates. However, that is not a claim the Counties have made—in fact, they continue to deny their claim is based on Qwest's rates being excessive. It is for that reason that their claim must be dismissed.

The Counties' only response to the preemption argument advanced by Qwest[6] is to argue (1) that some of the cases are from other jurisdictions where the jurisdictional grant was not as broad as contained in section 54-4-1[7] and (2) that the Utah case, *Gilger v. Hernandez,* 997 P.2d 305 (Utah 2000), was construing the Dram Shop Act and not section 54-4-1. Of course, the primary problem with this argument is that the Counties read section 54-4-1 as endowing the Commission with the power do things "beyond dealing with particularly enumerated functions." As noted above, that is a manifestly incorrect interpretation of section 54-4-1. The *Gilger* case is binding authority that must be followed by the Commission.

[5] Qwest's arguments in the District and Supreme Courts are entirely consistent with its position here. Qwest argued that the Commission has exclusive jurisdiction over a claim that would require an inquiry into its rates.

[6] Qwest Motion To Dismiss at 9-12.

[7] The Counties did not provide any citations in support of that proposition.

The Counties argue that the Commission should not dismiss this case, citing *Colman v. Utah State Land Board*, 795 P.2d 622 (Utah 1990), for the proposition that a case should not be dismissed unless it is clear that the party is not entitled to relief. Qwest does not dispute that legal proposition. Nevertheless, this case must be dismissed because the relief requested is not within the power of the Commission to grant. The Counties have stated that this is not a proceeding involving a claim that Qwest's rates were excessive, instead arguing that the Commission "has exclusive jurisdiction over the very class-action, equity allegations of the Complaint." Counties' Memorandum at 8. The authorities cited in Qwest's motion are dispositive of that claim as a matter of law. In dismissing this claim, the Commission will be acting consistently with the principles set forth in *Colman.*

In connection with their argument that dismissal is inappropriate under *Colman*, the Counties argue that their claims "raise a plethora of factual issues." Counties Memorandum at 7. They then cite *MCI Telecommunications Corp. v. Public Serv. Comm'n*, 840 P.2d 765 (Utah 1992), for the proposition that they are entitled to a factual hearing. In making this argument the Counties miss a crucial distinction between *MCI* and their claim. In *MCI*, the petitioners filed a reparations claim under section 54-7-20 on the ground that the rates charged were unjust, unreasonable and excessive. Here, the Counties have made no such claim. To the contrary, they have expressly stated that they "are not now challenging the reasonableness of the rates and charges allowed." Counties Memorandum at 10.[8]

The Counties' argument on the class action issue should be ignored for two reasons. First, since the basic claim is not within the jurisdiction of the Commission, the Commission would

[8] Even assuming the Counties could credibly plead their claim as one for reparations based on unjust, unreasonable or discriminatory rates, Qwest has demonstrated that the claim must be dismissed. The claim was not brought within one year of the time the rates were charged. UTAH CODE ANN.§ 54-7-20. *See* Qwest Motion To Dismiss at 12, footnote 9.

have no jurisdiction to turn the claim into a class action. Second, the Commission is not a court, it has no jurisdictional grant of authority beyond the statutes of Utah, there is no statute granting it jurisdiction over class actions, and the Commission has already determined that it lacks the power. The Arkansas case cited by the Counties is inapplicable under Utah law and should be ignored.

III. Conclusion

The Counties' complaint is based on an equitable theory and seeks equitable relief. Qwest has demonstrated that the Commission lacks the power to entertain such a claim. The Counties have not rebutted that argument. Instead, they insist that this is not a claim involving the propriety of Qwest's rates and that the Supreme Court has specifically mandated that the Commission consider their claim as the have chosen to plead it. The Counties' interpretation of the Supreme Court decision is inconsistent with its plain language and assumes that the Court has overruled long standing precedent, judicially repealed statutes, and created new law without ever acknowledging that it was doing any of these things. Qwest respectfully submits that the Commission should dismiss the Counties' complaint because it seeks relief beyond the statutory authority of the Commission.

DATED: November 16, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the QWEST'S REPLY TO COMPLAINANT'S MEMORANDUM IN OPPOSITION TO QWEST'S MOTION TO DISMISS was served upon the following by U.S. Mail, postage prepaid, on November 16, 2001,

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