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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint of: BEAVER COUNTY, et al, and all other Persons or Entities Similarly Situated, Complainants, vs. QWEST CORPORATION, fka U S WEST COMMUNICATIONS, INC., fka MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, INC. Respondent.	:	Docket No. 01-049-75 **QWEST'S REPLY TO COUNTIES' 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 Counties' motions to amend their complaint and to consolidate Docket Nos. 01-049-75 and 98-049-48. Qwest does not oppose the

motion to amend the complaint in Docket No. 01-049-75, [1] but opposes the motion to consolidate.

I. THE MOTION TO AMEND IN DOCKET NO. 01-049-75 IS REASONABLE AND SHOULD BE GRANTED.

Qwest's position is that the original cause of action propounded by the Counties, which continues to be part of the amended complaint, should be dismissed because it pleads a claim for equitable relief that is outside the statutory authority granted to the Commission and that the Counties' claim, if anything, is one for rate reparations. Because Qwest's motion to dismiss that claim was denied by the Commission without prejudice, Qwest preserves that position but does not seek further hearing on it at this time. By allowing the Counties to amend their complaint in Docket No. 01-049-75, the Counties can at least attempt to plead a cause of action that falls within the Commission's powers.

While factually incorrect and otherwise inadequate, the new cause of action in the proposed Amended Complaint—the second cause of action—at least allows this issue to now be directly addressed by the parties and ruled on by the Commission. Therefore, while reserving its right to challenge the Amended Complaint in a motion to dismiss or motion for summary judgment, Qwest does not oppose the Counties' effort to file an amended complaint in Docket No. 01-049-75.

II. THE MOTION TO CONSOLIDATE SHOULD BE DENIED.

The only reason the Counties are even pursuing a motion to consolidate is in an effort to avoid Qwest's argument that the statute of limitations in Utah Code Ann. § 54-7-20(2) bars relief

[1] As set forth in section B below, Qwest strongly opposes the Counties' motion to consolidate. Thus, while Qwest does not oppose the motion to amend insofar as it relates to Docket No. 01-049-75, Qwest opposes any effort to amend in Docket No. 98-049-48 for the reasons set forth herein in section B.

in this matter. Thus, they are attempting to revive the original declaratory order petition filed in December 1998. Their arguments for doing so are completely lacking in legal merit.

A. Rule 42(a) Is Not Applicable.

The Counties argue that Rule 42(a) of the Utah Rules of Civil Procedure allows the consolidation of Docket No. 98-049-48, its prior declaratory order action, with Docket No. 01-049-75, the proceeding it filed in September 2001.[2] However, Rule 42(a) does not support the motion to consolidate in this case. Rule 42(a) states:

> When actions involving a common question of law or fact **are pending before the court,** it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary delay.

(Emphasis added). On the face of the rule, therefore, in order for two matters to be consolidated, both must be pending before the court (or, in this case, the Commission). Docket No. 98-049-08 is not pending before the Commission and therefore cannot be consolidated with Docket No. 01-049-75 under the provisions of Rule 42(a).

As a matter or law, Docket No. 98-049-48 concluded on March 22, 1999, when the Counties failed to file a petition for reconsideration.

The Counties filed their Request for a Declaratory Ruling in Docket No. 98-049-48 with the Commission on December 31, 1998.[3] The Utah Administrative Procedures Act states:

> An agency may issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party, only if that person consents in writing to the determination of the matter by declaratory proceeding.

[2] Qwest accepts, for purposes of this response, that Rule 42 would apply to this proceeding before the Commission.

[3] The Counties simultaneously filed a putative class action lawsuit in Third District Court.

Utah Code Ann. § 63-46b-21(3)(b). Another provision of the same section states that "[u]nless the petitioner and the agency agree in writing to an extension, if an agency has not issued a declaratory order within 60 days after receipt of the petition for declaratory, the order is denied." *Id.* § 63-46b-21(7). Qwest did not consent and no action was taken by the Counties and the Commission to extend the 60 day time period. Furthermore, the Commission issued no order or decision of any kind in the case. Thus, effective March 2, 1999 (the 61st day after the petition was filed), the Counties' petition for declaratory order was denied as a matter of law.

Utah Code Ann. § 54-7-15 states unequivocally that "[b]efore seeking judicial review of the commission's action" a party dissatisfied with the Commission's order shall file a petition for rehearing or reconsideration. Such a petition must be filed within 20 days of the Commission action. Utah Code Ann. § 63-46b-13(1)(a). Rather than file such a petition as required by law, the Counties instead filed a Petition for Writ of Review with the Utah Supreme Court on or about March 30, 1999. Ultimately, the Counties' purported appeal of the denial of their petition was consolidated with their appeal of the dismissal of the district court action.

In *Beaver County v. Qwest*, 2001 UT 81, 31 P.3d 1147 (Utah 2001), the Supreme Court upheld the district court dismissal and separately addressed the Counties' effort to appeal the denial of their declaratory order petition. The Court noted that the Counties had "pled for a limited form of relief [declaratory order] that can be granted only upon Qwest's consent." 2001 UT 81 at ¶ 28, 31 P.3d at 1153. It also noted that "[t]he Counties apparently seek review of the 'deemed denial' to this court to avoid an argument that section 63-46b-21(7) turns the inability of the PSC to issue a declaratory order into final agency action, thereby initiating the running of the review process." *Id.* The Court observed that the Counties had failed to seek review of the denial of the petition and concluded that "[w]e are without jurisdiction to review administrative

orders unless and until the Counties apply for review or rehearing pursuant to section 54-7-15 of the Utah Code." 2001 UT 81 at ¶ 29, 31 P.3d at 1153. Noting that it lacks jurisdiction under these standards, the Court concluded that "we must dismiss the petition for review of the declaratory action." 2001 UT 81 at ¶ 30, 31 P.3d at 1154. *See also Utah Associated Mun. Power Systems v. Public Service Comm'n of Utah*, 789 P.2d 298, 300 (Utah 1990) ("under section 54-7-15 of the Code, an issue is not preserved for consideration on appeal unless it has been specifically raised in a petition for rehearing before the PSC"); *Williams v. Public Service Comm'n of Utah*, 754 P.2d 41, 48-49 (Utah 1988) ("the parties' failure to request rehearing before the PSC leaves this Court without subject matter jurisdiction"); *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Ut. Ct. App. 1989) ("When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action").

Thus, as a matter of law, when the Counties failed to file the necessary petition for reconsideration of the Commission's denial of their Declaratory Order petition, Docket No. 98-049-48 came to an end. At that point, it was no longer "pending" before the Commission, which—by statute—had denied the petition. Further, it was not "pending" before the Supreme Court because, as the Court observed, it lacked the jurisdiction to even review the Commission's denial of the petition because the Counties failed to file a petition for review. Effective on about March 22, 1999 (the date by which the Counties should have filed their petition for review), Docket No. 98-049-48 ended. There is nothing in the Supreme Court's decision that does anything to revive the docket. The fact that the Counties felt it necessary to file a completely new action after the Supreme Court decision was rendered demonstrates the Counties' own conclusion that Docket No. 98-049-48 was no longer pending. Because Rule 42(a) of the Utah Rules of Civil Procedure requires that two actions be "pending" before the same court or

Commission before they can be consolidated, and because Docket No. 98-049-48 is not, nor can it ever be, "pending" in any sense of that word, the Commission must deny the motion to consolidate.

B. Utah Code Ann. §78-12-40 Is Not Applicable.

The Counties argue that Utah Code Ann. § 78-12-40 is somehow relevant to the motion to consolidate. Section 78-12-40, the so-called "savings statute of limitations," is likewise inapplicable here. Section 78-12-40 states:

> If any action is commenced within due time and . . . the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, **the plaintiff . . . may commence a new action within one year after the reversal or failure**.

(Emphasis added.) In order for the savings statute to allow the revival of an action, the original action must have been filed within due time. Thereafter, if that action failed otherwise than upon the merits, the plaintiff may commence a new action "within one year after the reversal or failure." In this matter, the Counties fail to meet these requirements.

First, the declaratory order petition filed by the Counties on December 31, 1998 was not within the period during which relief could be granted. The tax refund was for taxes paid in 1996 and prior years. Any claim under section 54-7-20 based on unjust or unreasonable rates must be brought within one year. December 31, 1998 is not within one year of any part of 1996. However, that question need not be resolved in this motion. Suffice it to say that even if consolidation were appropriate and allowed by the Commission, the Counties still have a serious statute of limitations problem.

Regardless, the second action was not commenced within "one year of the reversal or failure" of the prior action. The Counties take the position that their filing of the complaint in

September 2001 was within the one-year period because they filed only a month after the Supreme Court's decision. That position is not supported by the law.

As a matter of law, the first action concluded on March 22, 1999, the day following the date upon which the Counties were legally required to seek reconsideration of the Commission's denial of their petition for declaratory order. The Supreme Court ruled unequivocally that it lacked the "jurisdiction to entertain the review because the Counties did not petition for rehearing pursuant to section 54-7-15." 2001 UT 81 at ¶ 30, 31 P.3d at 1154. The Court did not affirm the Commission's action on the declaratory order petition, but instead concluded that the matter was not properly before the Court. Thus, because the matter was not "preserved for consideration on appeal," s*ee Utah Associated Mun. Power Systems*, 789 P.2d at 300, and was never properly within the Court's jurisdiction, the "failure of the action" did not occur when the Court rendered its decision—it occurred when the Counties failed to petition for rehearing. Even assuming the other requirements of the savings statute were met, the Counties should have filed an action with the Commission prior to March 22, 2000. The filing of the complaint on September 17, 2001 was nearly 18 months late.

In the end, the issues relating to the statute of limitations will need to be resolved by the Commission, but they cannot be resolved by attempting to revive a matter that died of its own weight more than three years ago.

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

DATED: August 9, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the **QWEST'S REPLY TO COUNTIES' MOTIONS TO AMEND AND CONSOLIDATE** was served upon the following for Docket No. 01-049-75 by U.S. Mail, postage prepaid, on the 9th day of August, 2002,

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