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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matters of the Complaint of  
BEAVER COUNTY, et al.,  
Complainants,  
v.

QWEST CORPORATION,  
Respondent.

**RESPONSE OF THE COMMITTEE OF CONSUMER SERVICES**

Docket No. 01-049-75

Docket No. 98-049-48

Pursuant to Utah Admin. Code R746-100-3(I), the Committee of Consumer Services (“Committee”) makes this response to the Complainant’s Amended Complaint and Motion to Consolidate in these proceedings before the Utah Public Service Commission (“Commission”).

**INTRODUCTION**

1. The Committee believes the Complainants’ Request for a Declaratory Ruling and Amended Complaint reflect the ambiguity which might be expected in a cause of action brought by utility customers rather than by the utility or a state agency concerned with utility matters and versed in the customs and practices of regulatory and administrative proceedings. The Committee therefore appreciates the Commission’s July 26, 2002 Order denying Qwest’s Motion to Dismiss and granting the Complainants a further opportunity to be heard.

2. There appear to be several procedural issues created not only by the nature of the Complainants’ cause of action and the relief they seek, but also by the 1995 Public Telecommunications Law currently governing how telecommunications rates are set and adjusted in Utah. The Committee represents the interests of Utah residential and

small commercial Qwest customers in these proceedings, and is sympathetic to the Complainants' cause of action. We would like to see a resolution of this matter which continues to provide an incentive to Qwest to contest and recover improper property tax assessments, but at the same time appropriately addresses the inequity and unfairness evident in Qwest's double recovery of certain property tax expenses – once in the telephone rates paid by Qwest consumers, which include a cost component that recovers such expenses, and then again in the property tax refunds it receives such as the \$16.9 million at issue here.

3. The Committee has not yet fully determined its course of action and participation in these proceedings and may only do so as the proceedings progress. We would at this time like to highlight and briefly discuss three procedural issues which we see manifest in the Complainants' filings to date, and which we believe will require early attention and resolution by the Commission. First, the Commission will need to rule on the Complainants' Motion to Consolidate. Second, it will need to respond to the Complainants' petition to hear this matter as a class action. Third, the Complainants are asking for both some reparation or award to Complainants of past property tax refunds collected by Qwest and its predecessors as well as an "adjustment in future rates,"  which forces the question whether this matter is to proceed as a reparations proceeding, a rate proceeding or adjunct thereto, some combination of both, or in some other format. 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 carry out its statutory duty to "regulate" those telecommunication matters under its jurisdiction and "to do all things . . . necessary or convenient in the exercise of such power and jurisdiction"  to see that inequities and issues 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."

4. How the Commission responds to these initial procedural issues will critically affect the further course of the proceedings. Whether this matter is barred by the statute of limitations may depend upon whether the Motion to Consolidate is granted. Whether issues regarding retroactive rate making are relevant may depend upon whether this matter progresses as some kind of rate proceeding. If it progresses as a rate proceeding – or a proceeding to define costs

and revenues to be thereafter reflected in rates – the Complainants’ request to have the matter heard as a class action may be largely resolved. If this matter is structured as a reparations proceeding issues will likely arise as to whether the Complainants’ claim fits the statutory requirements for such a proceeding, and whether they can claim not only on their own behalf but on behalf of their requested class as well.

5. These are the issues which the Committee sees presently before the Commission in these proceedings, and which will require some early resolution for this matter to proceed. We recognize that the Complainants and Qwest – indeed the Commission – may have a different perspective We further respond as follows:

**COMPLAINANTS’ MOTION TO CONSOLIDATE  
AND AMENDED COMPLAINT**

6. The Committee supports the Complainants’ Motion to Consolidate. A denial of the Complainants’ motion would seriously jeopardize their opportunity to have the substance of their complaint heard by the Commission and would thus work an arbitrary and unwarranted injustice. While not drafted in a customary way, the Complainants’ original December 31, 1998 Request for a Declaratory Ruling in Docket No. 98-049-48 did clearly ask for a “formal adjudication pursuant to Utah Code Ann. 63-46b-3” and anticipated a “contested” proceeding.  Any uncertainty regarding portions of that 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. That end is accomplished by allowing the Complainants’ Motion to Consolidate and Amended Complaint as filed.

**COMPLAINANTS’ PETITION FOR THIS MATTER  
TO BE HEARD AS A CLASS ACTION**

7. The Amended Complaint seeks to have this matter heard as a class action pursuant to Rule 23 of the Utah Rules of Civil Procedure.  The Complainants seek to bring their action: on behalf of a Class (“the Class”) of all persons with billing addresses within the state of Utah or who otherwise paid rates governed by the Utah Public Service Commission who utilized telecommunication services from MST&T and its successors, US West and/or Qwest from January 1, 1988 through and including December 31, 1996, inclusive (the “Class Period”).

In requesting a form of action not specifically provided for in the rules promulgated by the legislature to govern

Commission proceedings,  the Complainants' petition broaches the issue of the statutory power of the Commission to constitute and hear such a form of action, and directly raises the issue of the appropriateness or workability of that form of action in this instance. The Committee has not found any dispositive legal authority that the Commission does or does not have the requisite power to entertain a class action brought by private parties as the representatives of a class under Rule 23. Respondent Qwest, in its October 17, 2001 Motion to Dismiss, makes reference to an earlier decision of the Commission in Docket 97-035-09 where, according to Qwest, the Commission determined it lacked such power. However, the Commission's reasoning in that order addressed the complainant's "standing" to seek back wages relief for other employees, and not the Commission's powers to hear a class action, as such.  The Commission's careful wording may indicate an awareness that rate proceedings, which the Commission is obviously empowered to hear, are themselves a kind of class action, albeit not ones brought under the provisions of Rule 23 of the Utah Rules of Civil Procedure.

8. It may not be necessary for the Commission to address the issue of its *power* to hear a Rule 23 class action in this instance. It could respond to the Complainants' petition for a class action on more narrow grounds. Both the Utah Rules of Civil Procedure and the Commission's own promulgated rule, R746-100-1C do provide for application of the Utah Rules of Civil Procedure to Commission proceedings, but both provisions contain significant exceptions for instances where the Rules are "clearly inapplicable"  or "unworkable or inappropriate."  Thus, without expounding on whether or not it has the statutory *power* to hear a Rule 23 class action, the Commission could determine such a proceeding to be "by its nature clearly inapplicable" or "unworkable or inappropriate" in this particular instance.

9. The Committee takes no initial position regarding the Commission's power to grant the Complainants' petition to hear this matter as a class action or the appropriateness or workability of such a form of action for purposes of these proceedings, other than to note that the decision the Commission makes regarding the nature of these proceedings – which is addressed further below – may bear upon and facilitate a decision regarding the Complainants' desire for a Commission decision with operating effect upon all members of their described class.

## NATURE OF COMPLAINANTS' CAUSE OF ACTION

10. The Complainants' Amended Complaint appear to seek what may be mutually exclusive remedies, depending upon how the Commission decides these early procedural issues. The relief which the Commission can grant and the persons it can grant that relief to, may depend upon how the proceedings are henceforth structured.

11. If, as indicated by Paragraph 31 of the Amended Complaint, the Complainants seek an adjustment of future rates, these proceedings are obviously "rate" proceedings to be governed by the procedures and legal precedents relevant to same – including those relating to the issue commonly described as "retroactive ratemaking." If, on the other hand, as Paragraph 9 of the Amended Complaint states, the Complainants seek a monetary award equivalent to the amount by which Qwest has been "unjustly enriched" as a result of past property tax refunds it has received, then these proceedings are not rate proceedings but rather reparation proceedings under the provisions of U.C.A. 54-7-20, or some other form of proceeding not clear to the Committee.

12. The issue of retroactive ratemaking will certainly arise if this matter is progressed as a rate case proceeding. However, that issue may completely disappear if the matter is progressed as something other than a rate case. If this matter is heard as a reparations proceeding questions will likely arise as to whether the Complainants' cause of action and requested relief fit within the statutory provisions for a reparations proceeding. If the Commission were to constitute a form of proceeding other than a rate proceeding or reparations proceeding in order to address the Complainants' unjust enrichment claim, questions might arise regarding its power to conduct such a proceeding.

### SUMMARY

13. While this case has raised significant procedural issues, the underlying cause of action is meritorious and clear: to the extent Qwest has received – and is likely to continue to receive – double recovery, in significant dollar amounts, for Utah state property tax expenses already included in the tariffed rates its charges customers, those tariffed rates are unjust and unreasonable. As a public utility, Qwest has a clear statutory duty to only charge "just and reasonable" rates; any other rate being enjoined as "prohibited" and "unlawful."  As already stated, the Commission is vested with the duty to:

supervise and regulate every public utility in this state . . . and to do all things necessary, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction. . .

Given these clear and fundamental statutory delineations, a monetary claim and related issues of the magnitude asserted in the Complainants' cause of action must have a forum and procedure to be heard and justly, and reasonably, resolved.

Respectfully submitted this 9<sup>th</sup> day of August, 2002.

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REED T. WARNICK  
Assistant Attorney General  
Committee of Consumer Services

#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **RESPONSE OF THE COMMITTEE OF CONSUMER SERVICES** in Docket Number 02-035-03 were mailed or hand delivered on this \_\_\_\_\_ day of August , 2002 to the following:

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