
In the Matter of the Investigation Into the)	<u>DOCKET NO. 88-049-18</u>
Reasonableness of the Rates and Charges)	<u>ORDER ON U S WEST</u>
of the MOUNTAIN STATES TELEPHONE))	<u>COMMUNICATIONS INC.'S MOTION IN</u>
AND TELEGRAPH COMPANY.)	<u>LIMINE ON PROXIMATE CAUSE</u>

ISSUED: August 31, 1998

By the Commission:

The above-entitled matter having come on regularly for hearing on Thursday, August 13, 1998, at the hour of 9:00 a.m. before the Public Service Commission (Commission) on U S West Communications, Inc.'s (U S West) Motion in Limine on Proximate Cause, U S West appearing through counsel, David J. Jordan and Gregory B. Monson, the State Division of Public Utilities (Division) appearing through counsel, Michael Ginsberg, Assistant Attorney General, and the Committee of Consumer Services (Committee) appearing through counsel, Kent Walgren, Assistant Attorney General, and no other party appearing in person or through counsel, and the Commission, having reviewed the pleadings on file herein, and having received the arguments of counsel, and being fully advised in the premises, hereby makes its following decision:

U S West filed its Motion in Limine on Proximate Cause seeking to have the Commission rule that only overearnings attributable to or the proximate result of utility misconduct are subject to being refunded under the "utility misconduct" exception to the rule against retroactive ratemaking. They argue that customers are only entitled to a refund to the extent that they suffered harm from the utility's misconduct and that only overearnings caused by the utility's misconduct should be refunded. As discussed below, if the Commission is proceeding under an exception to the bar against retroactive ratemaking, the Commission would be retroactively establishing just and reasonable rates, not assessing damages, and U S West's motion is accordingly denied.

This case stems from the 1985 general rate case establishing utility rates. After those rates were established, various matters transpired resulting in a stipulated series of reductions of rates and ultimately, pursuant to a 1988 rate case, the establishment of new general rates effective November 15, 1989. Various utility customers filed a proceeding challenging the rates and requesting refunds of U S West's charges. The Commission ruled that such would constitute retroactive ratemaking, that there were no exceptions to that rule, and therefore dismissed the claim. On appeal, the Utah Supreme Court in MCI Telecommunications Corp. v. Public Service Commission, 840 P.2d 765 (Utah 1992) (MCI), reversed the decision of the Commission, ruling that certain exceptions to the rule against retroactive rulemaking might be available, and remanded the case to the Commission with directions. The two exceptions recognized by the Court as possibly applying were the exception for extraordinary and unforeseeable expenses or revenues and "utility misconduct".

As noted by the Court in MCI, in a general rate proceeding utility rates are fixed on the basis of an analysis of costs and revenues for a "test" year, and that those rates are to be just and reasonable. As stated by the Court, at page 770:

[T]he prohibition against retroactive ratemaking is designed to provide utilities with an incentive to operate efficiently. ...This process places both the utility and the consumers at risk that the ratemaking procedures have not accurately predicted costs and revenues. If the utility underestimates its costs or overestimates revenues, the utility makes less money. By the same token, if the utility's revenues exceed expectations or if costs are below predictions, the utility keeps the excess. Overestimates and underestimates are then taken into account at the next general rate proceeding in an attempt to arrive at a just and reasonable future rate. (internal quotation omitted)

In general, rates are set prospectively only. This encourages the parties to the ratemaking proceedings to ensure the best possible estimates, an appropriate rate of return for the utility, but provide incentives for the utility to operate efficiently. Retroactive ratemaking - revisiting the utilities costs and revenues on the basis of information obtained subsequent to the setting of the rates - is generally prohibited.

As found by the Supreme Court in MCI, there are exceptions to the prohibition of retroactive ratemaking allowing the Commission to look backward, based upon actual experience and figures, to set a just and reasonable rate. Retroactive ratemaking is not an assessment of "damages", assessment of a "penalty", or "punishment" to a utility. Further, its purpose is not to make the ratepayers whole, to compensate them for harm suffered as a result of either the actions of the utility or the existence of unjust or unreasonable rates. Rather, the purpose is the fulfillment of the statutory duty of the Commission to establish a just and reasonable utility rate. However, accomplishing its statutory purpose by retroactive ratemaking is justified only under certain circumstances - i.e. the exceptions to the rule against retroactive ratemaking. The imposition of a proximate cause analysis and damage assessment, as in an ordinary tort case, is inappropriate in the ratemaking context. It is the law and processes of utility ratemaking that should apply.

As stated by the Court:

A utility that misleads or fails to disclose information pertinent to whether ratemaking proceeding should be initiated or to the proper resolution of such a proceeding cannot invoke the rule against retroactive ratemaking to avoid refunding rates improperly collected. The rule against retroactive ratemaking was not intended to permit a utility to subvert the integrity of ratemaking proceedings.

MCI, supra, 840 P.2d at 775. The Court went on to indicate that rates should be fixed by the Commission at just and reasonable levels based on an analysis of the utility's revenues and expenses. Thus, where the Commission is authorized to engage in retroactive ratemaking based upon the utility misconduct exception, if the Commission determines that the utility rates were unjust or unreasonable, or if the utility were earning in excess of its authorized rate of return, the Commission would be authorized to require a refund of those rates over and above that which was just and reasonable or that which was over and above the authorized rate of return. Or as stated by the Court in MCI, 840 p.2D at 776:

Nevertheless, if the utility earns profits in excess of its authorized rate of return because of an exception to the rule against retroactive ratemaking, the authorized rate is the best available measure of a fair return and earnings in excess of that rate are subject to refund. Accordingly, if on remand...U S West is found to have engaged in misconduct, we hold that U S West's earnings, to the extent they exceeded its authorized rate of return established in the 1985 general rate case, should be refunded to U S West ratepayers."

If the utility misconduct exception to the rule against retroactive ratemaking applies, the Commission should engage in the process of retroactive ratemaking, not the process of determining fault, damages, or proximate cause. Therefore U S West's Motion is denied.

IT IS SO ORDERED.

DATED at Salt Lake City, Utah, this 31st day of August, 1998.

/s/ Stephen F. Mecham, Chairman

(SEAL) /s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard

Commission Secretary