- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Formal 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 County, and all other Persons or Entities Similarly Situated vs. Qwest Corporation fka US West Communications, Inc., fka Mountain States Telephone & Telegraph Services Inc.	DOCKET NO. 01-049-75 ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

ISSUED: June 17, 2005

By The Commission:

On April 29, 2005, the Commission's Hearing Officer conducted a hearing in this docket to address Qwest Corporation's (Qwest) motion for summary judgment. Participating in the proceedings were Beaver County, et al. (Counties), represented by David W. Scofield and Thomas W. Peters, of Peters Scofield Price PC; Qwest, represented by Robert C. Brown, Qwest Corporation, and Gregory B. Monson and David L. Elmont, of Stoel Rives LLP; the Division of Public Utilities (Division), represented by Michael L. Ginsberg, Utah Attorney General's Office; and the Committee of Consumer Services (Committee), represented by Paul Proctor, Utah Attorney General's Office;.

On May 12, 2005, pursuant to a March 22, 2005 Scheduling Order and the request of the parties, the Commission issued its Order Granting Motion for Summary Judgment, granting Qwest's motion for summary judgment filed on February 22, 2005. As discussed in the Scheduling Order and at the conclusion of the April 29 hearing on Qwest's motion, the Commission agreed to provide its decision in advance of its complete order, which would include findings and conclusions, to allow the parties to avoid potentially unnecessary work in connection with completion of discovery, preparation and filing of testimony and preparation for the hearing scheduled for August 9 and 10, 2005. The

Commission now provides its complete order, including findings and conclusions.

I. BACKGROUND

A. Property Tax Appeals in 1988 through 1996

In each of the years 1988 through 1996, Qwest appealed the assessed valuation of its property subject to ad valorem property tax in Utah. Qwest appealed these assessments each year because it believed the assessments overstated the valuation. As a public utility, Qwest is centrally assessed by the Property Tax Division of the Utah State Tax Commission using the unitary method. The central assessment is then allocated to the Counties, the 27 counties in Utah in which Qwest has property and operations. The Counties and taxing entities within the Counties then apply their various tax rates to the assessed value allocated to them. The Counties have the right to initiate and participate in valuation appeals. Typically, they either support the assessment of the Property Tax Division or seek a higher valuation.

A hearing was held in 1994 on the appeal of the 1988 assessment, and the State Tax Commission issued a decision in November 1995, slightly reducing the assessment. Qwest appealed that decision to the Utah Tax Court. While the appeal was pending, the State Tax Commission issued a decision in *WilTel Inc. v. Beaver County, et al. v. Property Tax Division,* Appeal Nos. 95-0789 and 95-0824 (Apr. 21, 1997). Based on that decision, the Property Tax Division and Counties entered into negotiations with Qwest to resolve the 1988-1996 appeals. In March 1998, the parties entered into a stipulation in which they compromised their positions on assessed value for each year in question and established the basis for a refund based on the revised valuations. The Tax Commission approved the stipulation on April 13, 1998 and entered a supplemental order on October 2, 1998, finding that the Counties should refund $16.9 million to Qwest by December 31, 1998. The $16.9 million total was comprised of $11.5 million in principal and $5.4 million in interest.

B. Prior Litigation Regarding Refund

On December 31, 1998, the Counties filed a complaint in state district court, seeking to be appointed as representatives of a class composed of all Utah ratepayers covering the period 1988 through 1996. The Counties sought

class recovery of the $16.9 million stipulated property tax refund they had agreed to make to Qwest. The Counties argued that the rates charged by Qwest during the years covered by the refund were based on the property taxes originally assessed and that equity required the refund be paid to ratepayers in order to avoid a double recovery by Qwest. The Counties obtained an *ex parte* order allowing them to deposit their refund payments with the district court at the time they filed the complaint. In January 1999, the Counties and Qwest stipulated to a release of the funds from the district court upon Qwest posting a bond.

On December 31, 1998, the Counties also filed a petition for a declaratory order with the Commission (Docket No. 98-049-48) seeking a determination that the $16.9 million property tax refund belonged to ratepayers or, alternatively, that rates should be reduced on a going-forward basis to account for the alleged double recovery. The Counties informed the Commission that they wished the district court action to proceed first, and Qwest did not consent to the Commission matter proceeding as a declaratory order in any event. *See* Utah Code Ann. § 63-46b-21(3)(b). Based on the foregoing, the Commission took no action on the petition within 60 days, which caused it to be deemed denied. *See id.* § 63-46b-21(7). Following the 60-day period, the Division recommended to the Commission that it consider the Counties' claim in some type of proceeding. However, before the Commission could act, the Counties appealed the Commission's statutory denial of the petition to the Utah Supreme Court. They were granted a stay of the appeal pending the completion of the district court action.

Qwest moved to dismiss the district court complaint on the ground that the court lacked subject matter jurisdiction over the claim. The district court dismissed the complaint for lack of subject matter jurisdiction and allowed Qwest's bond to be released. The Counties appealed the dismissal to the Utah Supreme Court and moved to consolidate the appeal of the district court decision with the pending appeal of the Commission's statutory denial of the petition in Docket No. 98-049-48. The Supreme Court granted the Counties' motion, and the appeals were consolidated.

On September 7, 2001, the Supreme Court affirmed the decision of the district court on subject matter jurisdiction. *Beaver County v. Qwest, Inc.*, 2001 UT 81 at ¶¶ 10-17. The Court found that even though the Counties had couched their complaint in equitable terms, the complaint really raised issues about the appropriateness of Qwest's rates

during the relevant period. The Court concluded that such issues were properly within the Commission's jurisdiction. *Id.* The Court dismissed the consolidated appeal of the Commission's statutory denial of the petition for a declaratory order because the Counties failed to seek rehearing by the Commission, which is a statutory jurisdictional prerequisite to appeal. *Id.* at ¶¶ 26-30.

C. Procedural History of This Docket

The Counties commenced this docket by filing a class action complaint with the Commission on September 17, 2001. The complaint was virtually identical to the 1998 complaint the Counties had filed in district court. Qwest responded to the complaint on October 17 with a motion to dismiss on the ground that the Commission lacked jurisdiction to grant the equitable relief sought by the Counties. The Commission denied the motion without prejudice in a bench ruling on January 29, 2002. A basis of the denial stated by the Commission during the hearing on January 29 was that the Commission wanted the Counties to have an opportunity to develop facts in support of their contentions. The Commission requested that the parties meet together and discuss ways to move forward.

On June 18, 2002, a meeting was held between the Counties, Qwest, the Division and the Committee at which the parties agreed upon a schedule for initial stages of the proceeding. They agreed that discovery could commence immediately, established a schedule for the Counties to move to amend their complaint to include a claim for reparations based on exceptions to the rule against retroactive ratemaking, for Qwest and others to respond to the amended complaint, and set a technical conference on October 30, 2002, at which the parties would meet to determine whether additional discovery was required and to determine whether factual stipulations could be reached. The parties reported these matters to the Commission, and, on July 26, 2002, the Commission issued its Order Denying Motion to Dismiss Without Prejudice and Establishing a Schedule and Procedures, confirming denial of the Qwest's motion to dismiss without prejudice and adopting the schedule proposed by the parties.

The Division commenced discovery on June 28, 2002. On July 19, 2002, the Counties filed a motion to amend (with an amended complaint) and a motion to consolidate their complaint in this matter with their original petition for declaratory ruling filed on December 31, 1998 in Docket No. 98-049-48. The amended complaint added a claim for

refund based on reparations and exceptions to the rule against retroactive ratemaking. The allegations in support of the latter claim were that Qwest had sought and received tax refunds which it failed to include in rate base and that it had presented differing analyses of its financial status to the State Tax Commission and the Commission. Amended Complaint (Jul. 19, 2002) at ¶¶ 27-29. Qwest responded to the motion and amended complaint on August 9, not objecting to the motion to amend, but answering and moving to dismiss the amended complaint. Qwest filed a memorandum in opposition to the motion to consolidate on the same date. The Committee also responded to the Counties' motions on August 9, 2002. The parties thereafter filed further memoranda and motions related to the Counties' motions and Qwest's response. No party requested that the motions be scheduled for hearing.

The Counties initiated discovery on September 18, 2002. Qwest responded to discovery of the Counties, the Division and the Committee.

The Commission sent a letter to the parties on September 30, 2002, asking the parties to consider at their technical conference whether agreement could be reached on the allocation of the property tax refund to each year, the allocation of the refund in each year to the Utah intrastate jurisdiction based on the allocation of property taxes in rate cases during the period, and the amount of property taxes included in setting rates in each rate case during the years in question. The letter also stated that the Commission had preliminarily determined that proceeding with the matter as a class action under the rules of civil procedure was inappropriate and unnecessarily burdensome. The Commission stated that normal Commission proceedings achieved the same benefit without the unnecessary requirements. The Commission requested that any party disagreeing with its preliminary decision submit a legal memorandum explaining the disagreement. No party did so.

At the technical conference on October 30, 2002, the Division presented a preliminary analysis regarding the allocation of the property tax refund in question to intrastate rates paid by Utah customers. Based on questions raised by Qwest and the Committee, Qwest and the Division agreed to refine this analysis and to provide it to the parties. This was done on March 5, 2003. The joint analysis showed that only approximately $5 million of the $11.5 million principal amount of property taxes refunded had been included in rates and that only approximately $2.8 million had

been included in rates if the period covered by a previous refund in Docket No. 88-049-18, which was given in consideration of a general release of claims, was excluded. The Division and Qwest invited the Counties and the Committee to review and provide comments on the analysis. At a further technical conference on June 3, 2003, the Committee raised a few questions and provided comments that resulted in minor adjustments to the analysis. The Counties refused to accept the analysis, but did not provide any analysis of their own responsive to the Commission's questions except to take the position that because Qwest earned in excess of the rate of return found reasonable by the Commission in rate cases during the period from 1988-1996 in the aggregate, it recovered the entire $16.9 million property tax refund in the rates paid by Utah customers.

Qwest served data requests on the Counties on July 28, 2003. Qwest sought discovery of the factual basis for the Counties' allegations in their amended complaint. The Counties responded on September 26 and reiterated their allegations of inconsistent reporting, but rather than providing factual support for such allegations they noted that discovery was ongoing and that they would be seeking discovery from the Commission and the Utah State Tax Commission regarding Qwest's reporting. The Commission never received any discovery requests from the Counties. Nor have the Counties disputed Qwest's contention that no discovery was ever submitted to the Tax Commission.

The Counties served a second set of data requests on Qwest on October 3, 2003, seeking discovery of all filings made by Qwest with the Utah State Tax Commission and this Commission during the years 1988 through 1996. Qwest responded on November 19, 2003, objecting to the requests for a number of reasons, including that they were unduly burdensome, but also agreeing to produce its files in these matters for inspection and copying at a time and place mutually agreeable to the parties. Qwest represented to the Commission that the Counties never contacted it to arrange inspection of the files, and the Counties have not challenged this representation.

Faced with an absence of significant activity in the docket, the Commission held a status conference on June 28, 2004, and issued a Scheduling Order on July 6, providing that "[o]n or before August 31st, 2004, all parties shall complete their discovery on all issues which they intend to present to the Commission for resolution in this docket." In addition to setting a discovery deadline, the Scheduling Order required parties to file dispositive motions by September

30, 2004. On July 21, the Commission issued its Modified Scheduling Order on Qwest's Motion for Modification of Scheduling Order, limiting the effect of the discovery cutoff previously established to the Counties on the ground that Qwest and other parties should be allowed to pursue discovery once the Counties stated the factual basis for their claims.

On August 20, 2004, the Counties served a Notice of Rule 30(b)(6) Deposition of Respondent Qwest Corporation, setting the deposition for August 30. The notice identified as subject matter for the deposition information relating to property tax proceedings in all fourteen of Qwest's states from 1985 through 2000, information regarding amounts of property taxes paid or anticipated to be paid or pendency of refund proceedings reported in every regulatory proceeding in all fourteen of Qwest's states for the same period and information regarding allegations or investigations of tax, reporting, financial or accounting irregularities, misconduct or fraud, without any time or geographic limitation. Qwest responded on August 24, agreeing to produce its two employees most knowledgeable about the matters identified in the notice, on August 30 and August 31, respectively, if the depositions were limited to one day each and if questions were limited to the Utah property tax proceedings for the years 1988 through 1996 and to regulatory reports and proceedings in Utah for the years 1988 through 1997, to the accounting matters identified in the notice and to alleged irregularities with respect to reports filed with the Commission for the foregoing period of time. Qwest also agreed to allow the witnesses to respond to general questions about whether procedures and practices in Utah were also used by Qwest in other states, but stated that the witnesses would not be prepared to testify regarding specific proceedings or matters in any of the thirteen other states. The Counties informed Qwest on August 25 that they were not willing to agree to these conditions.

Qwest filed a Motion for Protective Order on Notice of Rule 30(b)(6) Deposition on August 27, 2004, and the Counties filed a Motion for Modification of Scheduling Order on August 31. Following responsive filings, the Commission issued its Order Denying Motion for Modification of Scheduling Order on September 21 and the discovery period lapsed without the Counties having taken either of the last-minute depositions offered by Qwest. The Counties have not requested an opportunity for further discovery.

Pursuant to the July 6, 2004 Scheduling Order, the Counties filed a motion for partial summary judgment on September 30, 2004, seeking summary judgment that Qwest was barred from claiming that the entire $16.9 million property tax refund was not available for refund to Utah ratepayers, and Qwest filed a renewal of its prior motions to dismiss. Although the parties filed responsive memoranda on these motions, no party sought to schedule them for hearing.

On October 6, 2004, the Commission issued its Order Designating Hearing Officer and Notice of Scheduling Conference. Pursuant to that order and notice, a Scheduling Conference was held before the designated Hearing Officer, Sandy Mooy, on October 20, 2004, and a further Scheduling Order was issued on October 21, 2004. Pursuant to agreement of the parties, the Counties were to file their direct testimony by December 3, 2004, the other parties were to file rebuttal testimony by April 1, 2005, all parties were to file surrebuttal testimony by May 6, the attorneys were to hold a conference on June 2 and submit an issues matrix, and hearings were scheduled for June 7 and 8, 2005.

On December 1, 2004, the Counties filed their direct testimony, consisting of the testimony and essentially identical affidavit of Eckhardt Arthur Prawitt and the testimony of Bill Thomas Peters. On February 22, 2005, Qwest filed its motion for summary judgment based on the testimony of the Counties and an affidavit of Philip E. Grate, on behalf of Qwest, filed with the motion. The parties agreed on a schedule for responses, replies and a hearing on Qwest's motion and an adjustment of the other dates previously scheduled, which the Commission incorporated in a Scheduling Order issued March 22, 2005. On March 31, the Counties and the Committee filed responses in opposition to Qwest's motion. The Counties' response included attachments among which was a second affidavit of Mr. Prawitt. On April 22, Qwest replied. A hearing was held on the motion on April 29, 2005.

II. LEGAL STANDARD ON MOTION

Summary judgment is appropriate when documents on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See* Utah R. Civ. P. 56(c). Defending parties may move, at any time, with or without supporting affidavits for summary judgment in their favor. *See* Utah R. Civ. P. 56(b). On a motion for summary judgment, the moving party bears the burden of demonstrating that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. However, in opposing a properly supported motion for summary judgment, the plaintiff still has the ultimate burden of proving all the elements of his or her cause of action. *See Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120, 124 (Utah 1994). Further, "when a party fails to produce evidence sufficient to meet one of the elements of a claim, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Sanns v. Butterfield Ford*, 2004 UT App 203, ¶ 9, 94 P.3d 301, 304 (quotations omitted). Thus, "once the moving party has brought forth evidence either tending to prove a lack of genuine issue of material fact or challenging the existence of one of the elements of the cause of action, the nonmoving party then bears the burden of providing some evidence, by affidavit or otherwise, in support of the essential elements of his or her claim." *Jensen v. IHC Hospitals, Inc*., 944 P.2d 327, 339 (Utah 1997) (quotation and bracketing omitted).

It is common in Commission proceedings for the Commission to direct parties to file their testimony in written form prior to hearing. *See* Utah Admin. Code R746-100-10.G. When that is done, the practice in the hearing is to place witnesses under oath, allow them to authenticate and provide any corrections to their testimony, allow the party presenting the witness to move admission of the testimony, allow the witness to present a brief oral summary of the testimony and subject the witness to cross examination on the testimony. *Id.* Thus, upon the filing of their direct testimony, the Counties effectively presented their direct case in this matter, subject to cross examination. Accordingly, Qwest noted in its reply memorandum and in oral argument that its motion was akin to a motion under Rule 41(b) Utah R. Civ. P. to dismiss following the close of the Counties' case, in which case it would be appropriate for the Commission to actually weigh the sufficiency of the Counties' evidence rather than accord them the benefit of the higher threshold for dismissal associated with a motion for summary judgment. The Commission views such weighing of the evidence following the presentation of a direct case by the party bearing the burden of persuasion to be an efficient method to resolve some disputes without denying the complainant the opportunity to present its affirmative case but without requiring the Commission, the defendant or other parties, to bear the expense of completing a hearing; and in this case, were the Commission to engage in such weighing of the evidence it would find that the Counties

clearly have not sustained their burden. However, weighing of the evidence is not necessary in order to require dismissal in this case, and by the motion being presented as one for summary judgment rather than as a motion to dismiss at the conclusion of the complainant's case, the Counties and any other interested party have been afforded an additional opportunity to present facts in support of their claim because, as noted above, parties are entitled to submit affidavits in response to a motion for summary judgment. The Counties did file such an affidavit in conjunction with their response to Qwest's motion, but it did not set forth additional material facts in dispute.

At the hearing on April 29, 2005, the Counties argued that they also intended to subpoena and call Qwest employees as witnesses in their direct case and that it would be a denial of due process if they were not allowed to do so. The Commission does have authority to subpoena witnesses, however it also has the authority to summarily dismiss a matter prior to hearing in appropriate circumstances. *See, e.g.*, Utah Code Ann. § 63-46b-1(4)(b). When those circumstances are met and summary judgment is appropriate, it is not a denial of due process to dismiss a matter prior to allowing or requiring witnesses of the opposing party to be called to the stand. When the Commission directed the Counties to file their direct testimony, it was contemplated that they would present their direct case. If the Counties were unable to fully present their direct case, on responding to Qwest's properly-supported motion for summary judgment they were required to at least provide some evidence, by affidavit or otherwise, in support of the essential elements of their claims. *Jensen*, 944 P.2d at 339. Although Utah R. Civ. P. 56(f) does further allow denial or deferral of summary judgment in the case where a party opposing summary judgment cannot, for reasons stated in an affidavit, present facts sufficient to oppose summary judgment, a party ultimately bearing the burden of persuasion cannot avoid summary judgment merely by asserting that it will obtain additional information from the movant's employees at trial. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). In this case, the Counties did not present a Rule 56(f) affidavit and, in any case, had ample opportunity to develop evidence for their case prior to the date on which they filed their testimony. The Counties have made no proffer of the evidence they would hope to adduce through subpoenas and examination of Qwest witnesses at hearing, or to even identify the witnesses. As noted, the Counties were required to provide evidence that supported the essential elements of their claims in response to Qwest's motion for summary

judgment. Therefore, our consideration will be limited to the evidence presented on the record.

The Counties originally made their claim as one in equity that Qwest should be required to disgorge the property tax refund under a theory of unjust enrichment and constructive trust. Complaint (Sept. 21, 2001) at ¶¶ 22-24. However, they filed an amended complaint on July 19, 2002 adding a claim for reparations based on an exception to the rule against retroactive ratemaking.

Qwest contended in its motion for summary judgment that the only valid basis for a claim for refund before the Commission was under the reparations statute, Utah Code Ann. § 54-7-20, and that such a claim could only be maintained for a refund of rates paid from 1988-1996 if an exception to the rule against retroactive ratemaking applied. In *Utah Dept. of Business Regulation v. Public Service Comm'n of Utah,* 720 P.2d 420 (Utah 1986) ("*EBA*"), the Utah Supreme Court acknowledged that the rule against retroactive ratemaking applies in Utah:

> To provide utilities with some incentive to operate efficiently, they are generally not permitted to adjust their rates retroactively to compensate for unanticipated costs or unrealized revenues. [Citations omitted.] This process places both the utility and the consumers at risk that the rate-making procedures have not accurately predicted costs and revenues. If the utility underestimates its costs or overestimates its revenues, the utility makes less money. By the same token, if a 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.

Id. at 420-21. In *MCI Telecommunications Corp. v. Public Service Comm'n*, 840 P.2d 765 (Utah 1992), the Court recognized two exceptions to the rule against retroactive ratemaking: (1) unforeseen and extraordinary increases and decreases in utility expenses that have an extraordinary effect on the utility's earnings and (2) utility misconduct that subverts the integrity of ratemaking proceedings. *Id.* at 771-72, 775.

In Qwest's reply to the responses of the Counties and the Committee to its motion, it noted that the Counties and the Committee did not maintain that the motion should be defeated based on the Counties' equitable claims. Rather, the Counties argued that summary judgment should be denied because there were disputes of material fact on the issue of exceptions to the rule against retroactive ratemaking. The Committee did not argue that there were disputes of fact or that there was evidence that one of the previously recognized exceptions to the rule against retroactive ratemaking was present, but rather argued that the Commission should fashion a remedy to deal with the

refund in light of the legislative change in regulation of Qwest that occurred in 1995.

Based on the foregoing, we must decide two issues in connection with Qwest's motion: (1) whether on the undisputed material facts, the property tax refund is potentially an unforeseen and extraordinary event or Qwest potentially engaged in utility misconduct in a manner that subverted the integrity of the ratemaking process with respect to property taxes during 1988-1996, such that an exception to the rule against retroactive ratemaking might apply, and (2) whether we have authority to fashion some other remedy given the change in the manner of regulation of Qwest.

III. TESTIMONY OF COUNTIES

A. Counties' Testimony.

The Counties' testimony and the second affidavit of Mr. Prawitt provided the following evidence:

Mr. Prawitt's testimony describes Qwest's accounting of the refund and notes that the crediting of the interest portion of the refund to non-operating income

> results in a proportional increase in net income, which is available for distribution to shareholders. In addition, this credit appears, in accounting parlance, "below the line," meaning that it is not an operational item that goes into rates of return for regulatory purposes. It therefore avoids the regulatory books and goes straight to the shareholders.

Direct Testimony of Eckhardt Arthur Prawitt (Prawitt) at lines 134-40. He also testified that from 1988 to 1996, Qwest over-earned, in the aggregate by 3.86% in its return on rate base and 12.51% in its return on equity and that, accordingly, in the aggregate it recovered all of its expenses including the property taxes it paid by virtue of the rates the Commission allowed Qwest to charge. *Id.* at lines 145-51.

With regard to the unforeseen and extraordinary exception to the rule against retroactive ratemaking, Mr. Prawitt testified:

> I have specifically reviewed Federal Communications Commission regulation 47 C.F.R. § 32.7600(a), concerning the accounting definition for regulatory purposes of "extraordinary event." I have also specifically reviewed APB Opinion Nos. 9 and 30 which pertain to "extraordinary events." Based on my experience, education, skill, training and applicable generally accepted accounting standards, its is my opinion, from an accounting standpoint, that the $16.9 million property tax refund, regardless of how Qwest booked it, such a decrease in property tax expense qualifies as an "unforeseeable and extraordinary event." My opinion in this regard is based on the fact that the property tax refund qualifies as both an unforeseeable and extraordinary decrease in Qwest's property tax expense.

Id. at lines 154-63.

With regard to the utility misconduct exception to the rule against retroactive ratemaking, Mr. Prawitt's testimony identifies what he refers to as "red flags" with respect to "financial reporting issues." *Id.* at lines 173, 192. The "red flags" are (1) the accounting of the refund by Qwest under the Uniform System of Accounts (USOA), which leads to an increase in net income and "to funnel millions of dollars to shareholder return, almost one third (1/3) of which is 'below the line,'" (2) the fact that Qwest has appealed its property tax assessment in Utah every year, and (3) unspecified conclusions drawn from his review of "the proceedings in . . . Docket No. 88-049-18" and unspecified "matters of public record as to governmental investigations of financial fraud by former [Qwest] officers." *Id.* at lines 167-91. Based on these "red flags," Mr. Prawitt draws the conclusion: "It is therefore my opinion that the financial reporting issues that I identify as red flags in this property tax refund scenario are, to a reasonable certainty, the result of utility misconduct." *Id.* at lines 191-93.

Mr. Prawitt's second affidavit contained the following, which is essentially duplicative of his testimony:

> 2.I attended a Technical conference in the above-captioned matter on October 30, 2002. Copies of pages 1 and 4 of the DPU handout I received at that Technical Conference are attached hereto as Exhibit A.
>
> 3.As noted in the DPU Handout, based on a review of Qwest's earnings, "[i]n the aggregate for years [1988] though 1996, Qwest actual earnings exceeded its authorized [earnings] by approximately 3.73% to 3.86% on rate base . . . ."
>
> 4.Given the fact that Qwest exceeded it authorized earnings return by approximately 3.73% to 3.88%, it is my opinion and conclusion that the $16.9 million refund to Qwest should be returned to Qwest's ratepayers, rather than inappropriately inuring to the benefit of Qwest's shareholders.

Affidavit of Eckhardt A. Prawitt (Mar. 31, 2005) at ¶¶ 2-4.

Mr. Peters' testimony provides a partial history of this matter relating to the Counties' deposit of the property tax refund in the district court and the parties' stipulation that the funds could be released upon the posting of a bond by Qwest. Direct Testimony of Bill Thomas Peters (Dec. 1, 2004) (Peters) at lines 30-62. In the course of providing this history, Mr. Peters provides his recollection of a telephone conversation that he states he had during the first week of January 1999 with counsel for Qwest. Mr. Peters testifies that counsel for Qwest told him that Qwest was displeased

with the fact that the property tax refund had been deposited in court because the year-end bonuses of Qwest officers were largely dependent upon the refund being paid into the Company by the end of 1998. *Id.* at lines 36-55. Mr. Peters does not attempt to draw any conclusion from this statement or to state how it relates to the Counties' claim. We note that Qwest disputes the substance of the conversation, but accepts it for purposes of the motion.

B. Competency and Admissibility of Counties' Testimony

Qwest raised questions in its motion regarding the competency and admissibility of the testimony filed by the Counties. With respect to the testimony of Mr. Prawitt, Qwest contended that Mr. Prawitt's education and experience did not qualify him to offer opinions on accounting issues, and particularly regulatory accounting and ratemaking issues, or on the ultimate issues to be decided by the Commission with regard to exceptions to the rule against retroactive ratemaking. In support of its position, Qwest cited *Patey v. Lainhart*, 1999 UT 31, ¶15, 977 P.2d 1193, 1196 ("The critical factor in determining the competency of an expert is whether that expert has knowledge that can assist the trier of fact in resolving the issues before it.") (quotation omitted); *Kent v. Pioneer Valley Hosp*., 930 P.2d 904, 906-07 (Utah Ct. App. 1997) ("By definition, an expert is one who possesses a significant depth and breadth of knowledge on a given subject. . . . [O]ne cannot become an expert in another specialty merely by a review of the documents in the particular case.") (quotation omitted); *Anton v. Thomas*, 806 P.2d 744, 746 (Utah Ct. App. 1991) (disqualification appropriate where no foundation had been laid regarding doctor's qualifications to testify).

Qwest argued that expert witnesses are not allowed to opine on matters of law. In support of this position Qwest cited *State v. Larsen*, 828 P.2d 487, 493 (Utah Ct. App. 1992) ("Despite the appropriateness of expert testimony on an ultimate issue, Utah R. Evid. 704 was not intended to allow experts to give legal conclusions."); *Steffensen v. Smith's Management Corp*., 862 P.2d 1342, 1347-48 (Utah 1993) ("Even though experts can testify as to ultimate issues, their testimony must still assist the trier of fact under rule 702. . . . [A]n expert generally cannot give an opinion as to whether an individual was negligent because such an opinion would require a legal conclusion.") (quotation and citations omitted). Qwest argued that the applicability of an exception to the rule against retroactive ratemaking is a question of law. *MCI*, 840 P.2d at 770.

Finally, Qwest maintained that the real issue with regard to Mr. Prawitt's testimony was not necessarily his competency, but the fact that he did not offer facts in support of his ultimate conclusions. In support of this position, Qwest cited *Smith v. Four Corners Mental Health Center, Inc*., 2003 UT 23, ¶ 50, 70 P.3d 904, 917 ("An affidavit that merely reflects the affiant's unsubstantiated opinions and conclusions is insufficient to create an issue of fact.") (quotation omitted). Qwest argued that expert opinion must be grounded on a sufficient factual basis for a qualified expert to reasonably draw the conclusion offered to the trier of fact and that Mr. Prawitt's testimony fails to satisfy this standard. Qwest argued that his testimony fails to set forth any facts that would lead an expert on regulatory accounting or ratemaking to conclude that an exception to the rule against retroactive ratemaking applies (even assuming such a conclusion to otherwise be an appropriate subject of expert testimony), citing Utah R. Evid. 703 (facts upon which an expert bases an opinion must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject"); *Williams v. Melby*, 699 P.2d 723, 725 (Utah 1985) ("An [expert] affidavit which merely reflects the affiant's unsubstantiated conclusions and which fails to state evidentiary facts is insufficient to create an issue of fact.") (citation omitted).

With respect to the testimony of Mr. Peters, Qwest noted that Mr. Peters was legal counsel to the Counties in this matter and that his testimony ought to be excluded on that basis. Qwest cited *Watkiss and Campbell v. Foa and Son*, 808 P.2d 1061, 1066 (Utah 1991) ("We deem it generally inadvisable for members of the bar to testify in litigation where they personally represent a party. The need for the testimony of counsel must be compelling and must be necessary . . . as set forth in [Utah Rules of Professional Conduct] 3.7 above.").

The Counties submitted lengthy argument on the competency of Mr. Prawitt's testimony in its response and at hearing, arguing that at most Qwest's arguments went to the weight to be given to the testimony and not to its admissibility. In support of their argument, the Counties cited cases such as *State v. Kelley*, 2000 UT 41, 1 P.3d 546; *Patey v. Lainhart*, 1999 UT 31, 977 P.2d 1193; *Boice v. Marble*, 1999 UT 71, 982 P.3d 565; *Randle v. Allen*, 862 P.2d 1329 (Utah 1993); *State v. Clayton*, 646 P.2d 723 (Utah 1982).

The Counties did not respond to Qwest's argument on the testimony of Mr. Peters.

In response to questions from the Hearing Officer, the Counties made concessions during oral argument that clarified the testimony of Mr. Prawitt. In response to Qwest's argument that Mr. Prawitt did not actually ever say that Qwest had accounted for the property tax refund impropriety, the Hearing Officer asked the Counties whether it was their position that Qwest had improperly accounted for the refund. The Counties conceded that they did not claim that Qwest had improperly accounted for the refund, but only that Qwest's manner of accounting for the refund allowed the refund to be available for distribution to shareholders. Tr. (Apr. 29, 2005) at 73. Qwest argued that there was no improperly with respect to property taxes' treatment in setting rates from 1988 to 1996, and that this was not a disputed fact. In response to a question from the Hearing Officer, the Counties conceded, again, that they agreed with the Committee that there was no basis for such a contention. *Id.* at 78.

These concessions, together with the fact that Mr. Prawitt has offered no facts that would support a conclusion that either of the exceptions to the rule against retroactive ratemaking apply in this case, makes it unnecessary for us to determine whether Mr. Prawitt's testimony is competent or qualified. Were we required to make such a determination, we would likely conclude that Mr. Prawitt is not qualified to offer opinions on appropriate regulatory accounting or ratemaking because he has no education or experience that would provide a basis for such opinion or that would likely be helpful to the Commission as a trier of fact in determining whether an exception to the rule against retroactive ratemaking applies in this case. Mr. Prawitt's testimony indicates that he took business and accounting courses in college and that he has extensive experience in tax auditing and appraising. However, he has no experience in public accounting or in utility regulation or ratemaking. Even if we assume Mr. Prawitt is qualified to offer opinions on regulatory accounting and ratemaking issues, his testimony provides no facts in support of his conclusions that the property tax refund was unforeseen or extraordinary in its impact on Qwest's earnings or that Qwest engaged in utility misconduct that subverted the integrity of the ratemaking process. We will discuss this issue further below.

With regard to Mr. Prawitt's opinion that because Qwest over-earned in the aggregate from 1988 through 1996, it must have recovered the entire $16.9 million property tax refund in rates, we note that Mr. Prawitt's opinion is not based on any supporting facts. On the other hand, the joint analysis of the Division and Qwest, which the Committee

reviewed, provides detailed factual analysis of this issue based on public records. Mr. Prawitt has not pointed to any flaw in the analysis. As our September 30, 2002 letter indicated, many of Qwest's expenses, including its property taxes, are allocated between the intrastate and interstate jurisdictions. In setting Qwest's rates, only the intrastate portion of its expenses are considered. Therefore, even if Qwest over-earned in aggregate, which we assume it did for purposes of deciding Qwest's motion, that would only indicate that it recovered the intrastate portion of its property taxes in the rates paid by its customers. That amount is a matter of public record in the rate case proceedings. In considering Qwest's motion, we are not required to accept opinion which we know, based on our own experience and expertise and based on public record of which we may take administrative notice, is not accurate. In any event, the amount of the property taxes that are subject to refund is only relevant if Qwest's motion is denied. Since we have granted Qwest's motion, the amount of potential refund to customers is not at issue. We do finally note with regard to the size of the potential refund, however, that we reject the Counties arguments that Qwest has waived or is estopped from raising arguments about (a) intrastate versus interstate rates and (b) the effect of the limitations period contained in Utah Code Ann. § 54-7-20. The Commission has no jurisdiction to award a refund of an interstate rate; jurisdiction is not conferred or obtained from a private party, it is delegated or granted by action of the legislative body having authority over the conferral of such jurisdiction.

IV. UNDISPUTED FACTS

Based on the direct testimony filed by the Counties and the affidavit of Mr. Grate, Qwest identified undisputed facts in support of its motion. The Counties responded, arguing that many of the facts were in dispute, but they failed to provide any specific factual allegations that controverted the facts provided by Qwest. Instead, the Counties contended that the facts as stated by Qwest were inconsistent with the Counties' theory of the case, that they were compound or that they were not based on the best evidence. The Commission concludes that none of these grounds creates a dispute of fact regarding the facts as provided by Qwest.

There is, of course, a dispute between the parties whether the Commission may find an exception to the rule against retroactive ratemaking based on the undisputed facts. The Counties characterize Mr. Prawitt's opinions on the

exceptions to the rule as facts that are in dispute. The Commission does not agree for two reasons. First, even if Mr. Prawitt's opinions are considered to be "facts," they are questions of ultimate fact. As noted above, Mr. Prawitt is not entitled to opine on ultimate facts without providing the underlying facts that would be relied upon by experts in the field in arriving at those opinions. He has not done so. Second, Mr. Prawitt's opinions are really conclusions of law on the ultimate issues to be decided by the Commission. Again, as noted above, such opinion is not the proper subject of expert opinion.

Therefore, for purposes of deciding Qwest's motion, the Commission notes the following facts that are undisputed on the record in this matter. The Commission does not necessarily make findings on each of these "undisputed facts," as the Commission's findings will be addressed separately below; and the Commission notes that some of these undisputed facts (such as number 28) are conceded by Qwest solely for purposes of the Commission's consideration of Qwest's motion. The Commission has added to fact number 24 the fact noted above from Mr. Prawitt's testimony and reiterated in his second affidavit regarding Qwest's over-earnings on an aggregate basis from 1988-1996, to the undisputed facts previously provided by Qwest. In addition, the Commission has slightly modified some of the facts as stated by Qwest to remove potentially argumentative terms or emphasis or for editorial purposes based on prior references in this order. The Commission notes that several of these facts are not material to its decision on Qwest's motion. However, they provide background and context and they are undisputed for purposes of our consideration of the motion, so they are provided in this statement of facts.

1. During the years 1988 through 1996, Qwest's customers in Utah purchased telephone services from Qwest at rates found just and reasonable in Commission orders issued prior to or following appeals in Docket Nos. 87-049-T35, 88-049-07, 90-049-06, 92-049-05 and 95-049-05. In instances where rates set in these cases were adjusted following appeals, Qwest has made a refund to customers of amounts paid in excess of rates ultimately found just and reasonable in a manner ordered by the Commission. Affidavit of Philip E. Grate (Grate) ¶ 8.

2. In Docket No. 88-049-18, allegations of misconduct were made against Qwest. Grate ¶ 9; *see also* Prawitt at lines 179-81, 183-86. The allegations related to representations made by Qwest to the Commission and

Division in response to questions regarding the effect of the 1986 Tax Reform Act (TRA) on Qwest's earnings and filings and responses to data requests which may have disclosed current or anticipated earnings by Qwest in excess of the rate of return found reasonable and used by the Commission in setting Qwest's rates in Docket No. 85-049-02. The allegations had no relation to the property taxes paid, the amount of property taxes included in financial reports to the Commission, the amount considered in setting rates, or any appeal of Qwest's property tax valuation in 1988 or in any other year. Grate ¶ 9.

3. No evidentiary hearing was ever held on the allegations of misconduct in Docket No. 88-049-18, and the Commission never made a finding regarding them. Following extensive discovery, the parties to the docket entered into a release and settlement agreement and a conditional amendment to the release and settlement agreement in which Qwest agreed, without acknowledging any misconduct, to make a substantial refund to customers to resolve the matter. Following public notices and hearings, the Commission entered an order in Docket No. 88-049-18 on April 19, 1999, approving the release and settlement agreement as amended and releasing Qwest from all claims arising out of any alleged misconduct or earnings in excess of the rate of return found reasonable by the Commission and used in setting rates in connection with rates paid from January 1, 1986 through November 14, 1989. Paragraph 3 of the ordering paragraph in the order provided:

> In consideration of the refund referenced in the foregoing paragraph and the other terms and conditions of the Release and Settlement Agreement as amended by the Conditional Amendment to Release and Settlement Agreement, U.S. WEST, its officers, directors, agents, authorized representatives, parent and affiliate corporations and entities and their respective officers, directors, agents, and authorized representatives, and attorneys are hereby released and discharged from any and all claims, causes of action, liabilities, obligations, suits, losses, expenses, and costs, of whatever kind or nature, which now exist or which may hereafter accrue, whether known or unknown, because of, for, arising out of, or in any way connected with Docket No. 88-049-18 before the Commission and Case Nos. 890251 and 890252 before the Utah Supreme Court or the subject matter of any of them, including, without limitation, all claims arising out of or related to any alleged over earnings on the part of Mountain Bell for the period January 1, 1986, through November 15, 1989, including any over earnings resulting from the TRA or any alleged misconduct on the part of Mountain Bell, including any penalties, interest, late charges, or attorney fees or costs with respect thereto.

Report and Order Approving Amended Release and Settlement Agreement, *In the Matter of and Investigation into the Reasonableness of the Rates and Charges of the Mountain States Telephone and Telegraph Company*, Docket No. 88-

049-18 (Utah PSC, Apr. 19, 1999) ("*Release Order*") at 20; Grate ¶ 10.

4. In setting the rates in each of the foregoing dockets, the Commission considered Utah property taxes accrued by Qwest during the test year used in setting rates. In each case, the amount of property taxes considered in setting rates was the intrastate portion of Qwest's accrual for property taxes Qwest owed to county treasurers for the test year. Because the intrastate portion of property taxes considered in setting rates in each case was less than the full amount of property taxes accrued by Qwest, rates were lower than they would have been by the difference between the full amount of property taxes accrued and the intrastate portion of the property taxes accrued. Grate ¶ 11.

5. In financial reports filed by Qwest with the Commission during the period from 1988 through 1996, Qwest reported the intrastate portion of accrued property taxes for the year. In reports filed prior to assessment by the Property Tax Division, the amount Qwest reported was based on an accrued liability for property taxes. The property tax amounts shown in reports Qwest filed after the assessment reflected the true up of the accrual to reflect the amount assessed, which was also the amount paid. In each case, the intrastate portion of the property taxes included in the reports was less than the total amount of property taxes paid in each year. A schedule of accrued property taxes and the intrastate portion of such amounts for each year from 1988 through 1996 was attached to the Grate affidavit. The schedule was prepared jointly by Qwest and the Division. It was reviewed by the Committee and adjusted based on the Committee's input. Grate ¶ 12.

6. Qwest appealed the valuation of its property tax assessed by the Property Tax Division of the Utah State Tax Commission in each year from 1988 through 1996. Prawitt lines 101-04; Grate ¶ 13.

7. The Commission and the Division were aware that Qwest was appealing its property tax valuations. For example, Carl Mower, Chief Auditor of the Division, testified before the Utah State Tax Commission in the hearing on Qwest's appeal of the 1988 property tax valuation. Grate ¶ 14.

8. In March 1998, Qwest, the Property Tax Division and the Counties entered into a stipulation that reduced the property tax valuations that were the subject of appeals for each year from 1988 through 1996. On April 13, 1998, the Utah State Tax Commission entered its Order of Approval, approving the stipulation. In September of 1998,

Qwest, the Property Tax Division and the Counties agreed upon the principal amount of property taxes paid in each year, and the interest on such principal amount, to be refunded by the Counties to Qwest pursuant to the earlier stipulation. On October 2, 1998, the Utah State Tax Commission entered its Supplemental Order, finding that the total amount of the refund of property taxes for tax years 1988 through 1996 was the sum of $16,900,000, including principal and interest up to and including December 31, 1998. Grate ¶ 15; *see also* Prawitt at lines 106-10. The amounts of the principal and interest components of the refund attributable to each year and the estimated intrastate portion of the components of the refund agreed upon and approved by the Utah State Tax Commission are set forth in an attachment to Grate. Grate ¶ 15.

9. In Qwest's 1988 general rate case, the Commission, in considering proposed adjustments to 1988 salaries and wages, referred to the *Report to the Public Service Commission of the State of Utah by the Task Force on Annualization of Test Year Data*, dated May 14, 1986, submitted by the Division, Utah Power and Light Company, Qwest and Mountain Fuel Supply Company. *See* Report and Order, *In the Matter of the Investigation into the Reasonableness of the Rates and Charges of the Mountain States Telephone and Telegraph Company*, Docket No. 88-049-07 (Utah PSC, Oct. 18, 1989) ("*1988 Order*") at 20-24. With regard to the application of the known and measurable standard to proposed test year adjustments, the "Recommended Annualization Policy" of May 14, 1986 included the following points that the Commission quoted with approval in the *1988 Order*:

> 3.The changes must be specific in that it occurs at a known moment or moments in time.
>
> 4.The effects of the change must be measurable.
>
> . . . .
>
> 6.The change must have already occurred or will occur before any increase in rates occurs.

Id. at 21-22. Grate ¶ 16. Thereafter, the Commission adopted these same standards as a rule. Utah Admin. Code R746-407-3.

10. The Commission has discussed the known and measurable standard in other decisions. *See*, *e.g.*, *Re PacifiCorp*, Docket No. 97-035-01, 1999 WL 218118 (Utah P.S.C. Mar. 4, 1999) (denying utility's attempt to include an income tax contingency, stating in part: "The record shows that possible future tax assessments [after audit] for the

1997 tax year are unknown at this time."); *see also id*. (refusing to approve expenses for a dam removal "since . . . the outcome of negotiations is unknown, removal of the dam is an uncertain event. We conclude that this is a post-test-year event. The costs of removal are merely estimates, presented by the Company, grounded in this uncertain future event. . . . We find that the estimates do not satisfy the known and measurable standard."); *see also In re Little Plains Water Co*., Docket No. 96-2178-01, 1996 WL 769262, *2 (Utah P.S.C. August 7, 1996)). Grate ¶ 17.

11. Until the stipulation was reached, Qwest did not know whether it would prevail in its valuation appeals and the amount of excess property tax paid for each year was not known and measurable. Because the outcome of Qwest's valuation appeals and the refund of property taxes resulting from such appeals were not known until September 1998, no test year adjustments for them would have been made in any test year from 1988 through 1996; the fact that a refund would be received was not known and the amount of any such refund was not measurable. Grate ¶ 18.

12. When Qwest accrued the property tax refund in September 1998, it made the following accounting entries:

a.Debited $11,479,398 to Account No. 4080.11, Other Taxes Accrued – Property Tax - Operating. Grate ¶ 19.

b.Credited $11,479,398 to Account No. 7240.19, Operating Other Taxes – Property Taxes – Real and Personal Property. Prawitt at lines 129-30; Grate ¶ 19.

c.Debited $5,420,422 to Account No. 1210.99, Interest and Dividend Receivable – Other. Grate ¶ 19.

d.Credited $5,420,422 to Account No. 7320.90, Non-operating Income. Prawitt at lines 134-35; Grate ¶ 19.

13. When Qwest received the property tax refund in 1999, it made the following accounting entries:

a.In January it debited $7,101,502.60 to Account No. 1130.1, Cash.

b.In January it credited $ 7,101,502.60 To Account No. 4080.11, Other Taxes Accrued – Property Tax – Operating.

c.In February it debited $9,572,269.38 to Account No. 1130.1, Cash.

d.In February it credited $9,572,269.38 to Account No. 4080.11, Other Taxes Accrued – Property Tax – Operating.

e.In March it debited $5, 420,422 to Account No. 4080.11, Other Taxes Accrued – Property Tax – Operating.

f.In March it credited $ 5,420,422 to Account No. 1210.99, Interest and Dividend Receivable – Other.

Grate ¶ 20.

14. The foregoing accounting entries were entered in accordance with Utah Administrative Code R746-340-2.D, "Uniform System of Accounts," the rule promulgated by the Commission regarding the system of accounts to be used by telephone companies in Utah. The rule provides:

> Uniform System of Accounts - The Uniform System of Accounts for Class A and Class B telephone utilities, as prescribed by the Federal Communications Commission at 47 CFR 32 is the prescribed system of accounts to record the results of Utah intrastate operations.

Grate ¶ 21.

15. According to 47 C.F.R. § 32.1, the Uniform System of Accounts (USOA) is a historical financial accounting system which reports the results of operational and financial events in a manner which enables both management and regulators to assess these results within a specified accounting period. USOA Account No. 7240, Operating Other Taxes, USOA Account No. 7320, Non-operating Income, and USOA Account 7600, Extraordinary Items, are Other Income Accounts under Subpart F of 47 C.F.R. Part 32. *See* 47 C.F.R. § 32.6999(b), Other Income Account Listing, a copy of which was provided as an attachment to Grate. 47 C.F.R. § 32.6999, Structure of Other Income Accounts, provides in subsection (a) as follows:

> The Other Income Accounts are designed to reflect both operating and nonoperating income items including taxes, extraordinary items and other income and expense items not properly included elsewhere.

Grate ¶ 22.

16. 47 C.F.R. § 32.7240, Operating Other Taxes, subsection (a), provides:

> This account shall be charged and Account 4080, Other Taxes - Accrued, shall be credited for all taxes, other than Federal, state and local income taxes and payroll related taxes, related to regulated operations applicable to current periods. Among the items includable in this account are property, gross receipts, franchise and capital stock taxes; this account shall also reflect subsequent adjustments to amounts previously charged.

Grate ¶ 23. Qwest's credit to operating tax expense results in a proportional increase in net income which is available for distribution to shareholders. Prawitt at lines 130-31.

17. USOA Account 7320.90, Non-operating Income, is a subaccount of USOA Account 7300. In pertinent part, USOA Account 7300, Nonoperating Income and Expense, provides:

> (a) This account shall be used to record the results of transactions, events and circumstances affecting the company during a period and which are not operational in nature. This account shall include such items as nonoperating taxes, dividend income and interest income.

Grate ¶ 24. Qwest's credit to non-operating income results in a proportional increase in net income which is available for distribution to shareholders. In addition, a credit to non-operating income appears, in accounting parlance, "below the line," meaning that it is not an operational item that would be considered in setting rates. Prawitt at lines 135-39.

18. In *MCI*, the Utah Supreme Court said that for the extraordinary component of the unforeseen and extraordinary exception to the rule against retroactive ratemaking to apply the event "must have an extraordinary effect on the utility's earnings." 840 P.2d at 771. In *Beaver County v. Utah State Tax Comm'n*, 916 P.2d 344 (Utah 1996), the Utah Supreme Court said that the "Counties must expect, as is obvious from this case, that initial property tax assessments, especially those of large utility systems, are subject to challenges . . . ." 916 P.2d at 352. Grate ¶ 25.

19. USOA Accounts 7240 and 7320 were the proper USOA accounts in which to credit the Utah property tax refund. The Utah property tax refund would not have been properly recorded as an extraordinary item. In pertinent part, USOA Account 7600, Extraordinary Items, provides:

> (a) This account is intended to segregate the effects of events or transactions that are extraordinary. Extraordinary events and transactions are distinguished by both their unusual nature and by the infrequency of their occurrence, taking into account the environment in which the company operates. This account shall also include the related income tax effect of the extraordinary items.
>
> (b) This account shall be credited and/or charged with nontypical, noncustomary and infrequently recurring gains and/or losses which would significantly distort the current year's income computed before such extraordinary items, if reported other than as extraordinary items.

Grate ¶ 26. The Counties do not contend that these accounting entries were improper. Tr. (Apr. 29, 2005) at 73.

20. Taking into account the environment in which Qwest operates, a property tax refund is neither unusual nor infrequent. Qwest actively monitors its property tax assessments in all states and routinely litigates what it believes to be excessive assessments. For example, during the past four years, Qwest engaged in property tax valuation litigation in Arizona, Idaho, Iowa, Montana, Oregon, Utah, and Washington. Qwest received a refund/credit of $5.6 million for

tax years 2001 through 2004 in Idaho. Qwest received a refund/credit of $3.3 million in Montana for tax years 2003 and 2004. Qwest received a refund/credit of $11.1 million in Oregon for tax years 2003 and 2004. Qwest received a refund of $1.0 million in Utah for tax year 2000. Qwest has property tax valuation litigation currently pending in four states. The amount of property tax in dispute in each state is as follows: Arizona, $55.6 million; Iowa, $6.6 million; Utah, $26.3 million; and Washington, $24.6 million. These numbers represent disputed property tax amounts and are not necessarily the amounts Qwest would receive as a result of settlements or court rulings. Grate ¶ 27.

21. When accrued in 1998, the Utah property tax refund was not a nontypical, noncustomary and infrequently recurring gain and did not significantly distort the current year's income computed before extraordinary items. Specifically, the refund of $11.5 million (which does not reflect the effect of income taxes) was 0.11% of the Company's operating revenues, 0.14% of the Company's pre-tax operating expenses and 0.48% of the Company's 1998 pretax operating income of $2,391 million (a figure that included the $11.5 million property tax refund). Grate ¶ 28.

22. The property tax refund attributable to each year from 1988 through 1996 accounted for:

a.0.02% or less of the operating revenue of Qwest in any year and 0.01% of the operating revenue of Qwest for all nine years.

b.0.03% or less of the operating expense of Qwest in any year and 0.02% of the operating expense of Qwest for all nine years.

c.0.12% or less of the income from operations before taxes of Qwest in any year and 0.08% of the income from operations before taxes of Qwest for all nine years.

d.0.42% or less of the operating revenue of Qwest in Utah in any year and 0.26% of the operating revenue of Qwest in Utah for all nine years.

e.0.57% or less of the operating expense of Qwest in Utah in any year and 0.33% of the operating expense of Qwest in Utah for all nine years.

f.1.72% or less of the income from operations before taxes of Qwest in Utah in any year and 1.23% of the income from operations before taxes of Qwest in Utah for all nine years.

Had the refund attributable to each year been recorded in that year, it would not have significantly distorted income computed before extraordinary items. Grate ¶ 29.

23. Qwest properly included the refund in its financial reports filed with the Commission in the applicable periods. Grate ¶ 30.

24. The portion of the $11.5 million property tax refund included in rates paid by Qwest's customers during 1988 through 1996 was $4,999,910. The portion of the property tax refund included in rates paid by Qwest's customers from November 16, 1989 through December 31, 1996 was $2,858,248. Grate ¶ 31. In the aggregate for 1988 though 1996, Qwest's actual earnings exceeded its authorized earnings by approximately 3.73% to 3.86% on rate base. Affidavit of Eckhardt A. Prawitt (Mar. 31, 2005) at ¶ 3.

25. Qwest ceased being subject to cost-of-service, rate-of-return regulation upon issuance of the Commission's February 17, 1998 final order in Docket No. 97-049-08. The Property Tax Division, the Counties and Qwest stipulated to reduced property tax valuations in March 1998 and to the amount of the refund in September 1998. Qwest accrued the refund in September 1998 and received cash payment of portions of the refund in January, February and March 1999. Grate ¶ 32.

26. Had Qwest been subject to cost-of-service, rate-of-return regulation following the property tax settlement and refund accrual in 1998, and had a rate case been commenced with a 1998 or later test year, the 1998 property tax refund would not have been considered in setting rates. The 1998 property tax refund pertained to the years 1988 through 1996. Accordingly, it would have been removed from a 1998 or later test year by a "prior period adjustment." Grate ¶ 33.

27. The Counties obtained an *ex parte* order of the Third District Court on December 31, 1998, allowing the deposit of the property tax refund in the court. Mr. Peters deposited most of the refund into the court on December 31, 1998. Direct Testimony of Bill Thomas Peters (Peters) at lines 30-35.

28. Within the first week of January 1999, Mr. Peters had a telephone conversation with either George Haley or Robert Stolebarger, who were attorneys for Qwest, who expressed Qwest's displeasure at the fact that the

funds had been deposited in the court and asked whether the Counties would be willing to consider having Qwest post a bond for $16.9 million in lieu of having the funds deposited in court. The Qwest attorney told him that the year-end bonus for Qwest officers was largely dependent upon the $16.9 million they had anticipated being paid into the Company at year-end 1998, and that it would have a serious impact on those officers if the funds were not paid to Qwest. Peters at lines 36-55.

29. The property tax refund accounted for 0.48% of Qwest's pre-tax operating income in 1998. Had there been no accrual of an $11.5 million Utah property tax refund and no accrual of the related $5.4 million of interest income in 1998, the amount of annual bonus Qwest paid to its executives for 1998 operations would have been approximately $5,700 less. The Utah portion of this decreased bonus amount would have been an amount significantly less than $1,000. Grate ¶ 34.

30. There are public records of governmental investigations of alleged financial reporting irregularities by former Qwest officers. Prawitt at lines 181-83, 186-188.

31. The only governmental investigations of alleged financial reporting irregularities by Qwest or its former officers from 1988 through the present relate to financial reports for calendar years after 1999. Grate ¶ 35.

V. DISCUSSION, FINDINGS AND CONCLUSIONS

A. Equitable Relief

The authority of the Commission is limited to that which is expressly granted or clearly implied by statute, *Basin Flying Service v. Public Service Comm'n*, 531 P. 2d 1303, 1305 (Utah 1975), and "any reasonable doubt of the existence of any power must be resolved against the exercise thereof." *Hi-Country Estates v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995) (quotation omitted). Although the Counties and the Committee are no longer urging that a refund should be based on a claim for unjust enrichment or other common-law relief, so the point may be moot, we note that, as expressed by the Utah Supreme Court, the exceptions to the rule barring retroactive ratemaking have a similar basis. "The rule . . . is a sound rate-making principle, but . . . it does not apply where justice and equity require that adjustments be made . . ." *MCI, supra,* 840 P.2d, at 772.

B. Claim for Reparations

The only statutory provision allowing for a refund of rates paid pursuant to final, unappealed orders of the Commission is Utah Code Ann. § 54-7-20, the reparations statute. Subsection 1 of that statute provides:

> When complaint has been made to the commission concerning any rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an amount for such product, commodity or service in excess of the schedules, rates and tariffs on file with the commission, or has charged an unjust, unreasonable or discriminatory amount against the complainant, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection.

The statute provides for rate reparations when charges have been in excess of the tariff or schedules in effect or have been unjust, unreasonable, or discriminatory. There is no claim by the Counties that the rates paid were in excess of the tariffs or schedules of Qwest or were discriminatory. Therefore, the only valid basis for a claim of refund would be that the rates were unjust or unreasonable.

In *American Salt Co. v. W.S. Hatch Co.*, 748 P.2d 1060 (Utah 1987), the Utah Supreme Court concluded that reparations under section 54-7-20 for "unjust" or "unreasonable" charges cannot be awarded when the Commission had previously determined the charges complained of to be just and reasonable in a final rate order. This holding was consistent with holdings by other courts that also found that later facts that render the previously charged rate unjust or unreasonable should only be addressed prospectively in rate-setting, not through reparations. *See, e.g., Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 390 (1932) ("Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate."); *Entergy Gulf States, Inc. v. Louisiana Public Service Comm'n*, 730 So.2d 890, 920-21 (La. 1999) ("A commission-made rate furnishes the applicable law for the utility and its customers until a change is made by the Commission. Therefore, the utility is entitled to rely on a final rate order until a new rate in lieu thereof is fixed by the Commission. Consequently, the revenues collected under the lawfully imposed rates become the property of the utility and cannot

rightfully be made the subject of a refund."); *State ex re. Boynton v. Public Service Comm'n*, 11 P.2d 999, 1006 (Kan. 1932) ("any rate . . . prescribed by the commission and put into effect by the carriers may be confidently collected and retained by them as their very own, without misgiving that at some future time a further hearing of the commission may be had and more evidence taken and a different conclusion reached and those rates condemned as unreasonable and reparation certificates allowed . . . .").

Under these principles, a tax refund that, after the fact, affects the calculation underlying rates previously found just and reasonable by the Commission does not bring into effect the backward-looking operation of the reparations statute.

Moreover, section 54-7-20 contains a statute of limitations that would bar recovery for the Counties even if reparations were otherwise available for rates that were unjust and unreasonable at the time they were collected. Subsection (2) of section 54-7-20, provides, in part:

> All complaints concerning unjust, unreasonable or discriminatory charges shall be filed with the commission within one year . . . from the time such charge was made . . . .

Thus, for each charge made to customers, the period of time in which a complaint for reparations on the ground that the rate was unjust or unreasonable may have been filed was within one year of the relevant charge. For example, if a customer wished to file a reparations claim for a charge made on January 1, 1988, the claim had to be filed by January 1, 1989. If a customer wished to file a reparations claim for a charge made on December 31, 1996, the claim had to be filed by December 31, 1997.

It has been suggested by the Counties and the Committee in prior filings and hearings in this matter that the limitations period in section 54-7-20(2) may have been tolled until the refund was paid. To argue that the refund should trigger the statute of limitations is the same as arguing that it was the refund that rendered the rates unjust or unreasonable or that the statute of limitations was tolled pending "discovery" of the refund. But the cases cited above stand for the proposition that a later occurring event, such as the tax refund, does not warrant a finding of reparations for rates that were previously found just and reasonable. This is consistent with the language of section 54-7-20, which ties the running of the statute of limitations to the "time such charge was made," not to some later event that supposedly

rendered a previous charge unjust or unreasonable. Under the one-year limitations period of section 54-7-20, the Counties were untimely in filing a reparations claim at the end of 1998 for charges that were incurred, at the latest, in 1996. As the Commission stated in the *Olympus Order*, in a similar context where the complainant argued for a tolling of the statute of limitations:

> Olympus argues that the discovery rule applies; the time limitation should begin to run only after Olympus knew or should have known that it had a possible claim. Therefore, a refund for more than two years may be ordered. Olympus' argument is at odds with the unambiguous language of Utah Code 54-7-20. We reject Olympus' position that we can extend the time period beyond that clearly stated in the statute . . . . A refund of a monthly charge for private line service can only be had if complaint is made within two years of the monthly billing containing the private line charge. Once two years have passed since an amount was charged, a claim for a refund of the charge is time barred.

Olympus Order at 7.

The Commission also stated in the *Olympus Order*: "While we recognize that Olympus' complaint follows an approach cognizable in courts with broad law and equity powers, we are not a court. Our powers are those conferred by statute enacted by the legislature."

The Counties have also argued that Qwest is barred by prior proceedings from asserting application of the limitations period in section 54-7-20. The basis of this argument is a claim that Qwest waived this argument by not raising it in previous stages of this litigation. Qwest responded that it was not required to raise this argument before it did in responding to the Counties' complaint in this docket because it moved to dismiss the district court complaint on jurisdictional grounds and because it did not respond to the petition for a declaratory order. We note that Qwest did mention the limitations period for a reparations claim in its motion to dismiss filed in this docket in 2001 and in its answer and motion to dismiss with respect to the amended complaint filed in 2002 (the first time Qwest filed an answer to the complaint). Thus, we do not believe there is any factual basis for the Counties' argument that Qwest cannot raise the statute-of-limitations argument. We also reiterate that, whether or not Qwest has preserved the argument, the Commission is bound by the limits of Section 54-7-20. Furthermore, because Qwest has acknowledged (consistent with our understanding of the *MCI* case) that a refund could be ordered, despite the limitations period, if we find an exception to the rule against retroactive ratemaking, it appears that this debate is largely academic. The parties agree

that we may order a refund if an exception to the rule against retroactive ratemaking applies.

1. Exception to the Rule Against Retroactive Ratemaking

The Counties testimony fails to provide any basis for the Commission to find an exception to the rule against retroactive ratemaking and order a refund. Putting the testimony in its best light, it only establishes that (1) Qwest appealed its property tax assessment in Utah in each of the years from 1988 through 1996, (2) it ultimately received a refund of a portion of the amounts paid, which was accrued in September 1998 and received in January, February and March 1999, (3) it accounted for those refunds in a way that increased net income and that one-third of that amount was recorded in a "below-the-line" account in a period after Qwest was no longer subject to cost-of-service, rate-of-return regulation, (4) Qwest wanted to use the refund to pay executive bonuses attributable to the year 1998, (5) it was involved in a docket in 1988 in which allegations of utility misconduct were made, (6) there have been unspecified governmental investigations of alleged financial fraud by former Qwest officers, and (7) on an aggregate basis, Qwest earned in excess of its authorized rate of return during the period from 1988-1996.

Most of these facts are not material to a determination of whether an exception to the rule against retroactive ratemaking is present in this case. *See, e.g.*, 10A Charles Alan Wright, et al., *Federal Practice and Procedure*, § 2725 (a fact is only material for purposes of summary judgment "if it tends to resolve any of the issues that have been properly raised by the parties. . . . [A] factual issue that is not necessary to the decision is not material within the meaning of Rule 56(c) . . . .") (citations omitted). With respect to those facts that are material, they cannot forestall summary judgment because they fall short of establishing a factual basis for finding that any exception to the rule against retroactive ratemaking may be present in this case. This is particularly so where it is undisputed that (1) Qwest accurately reported the amount of property taxes accrued attributable to the intrastate jurisdiction during each test year in each rate case during the relevant period, (2) Qwest accurately reported the intrastate portion of property taxes accrued in its financial reports to the Commission throughout the relevant period, (3) the Commission and Division were aware that Qwest was appealing its property tax assessment in each year, (4) the amount of potential refund Qwest might receive based on its appeals was not known and measurable in any of the rate cases during the relevant period,

(5) the amount was not known until the parties reached agreement in 1998 (after Qwest was no longer subject to cost-of-service, rate-of-return regulation), (6) Qwest properly accounted for and reported the refund when it was received, (7) the amount of the refund whether looked at on a year-by-year basis or considered in total for the nine years amounted to at most (a) 0.12% of Qwest's overall operating income before taxes or (b) 1.72% of Qwest's Utah operating income before taxes, and (8) even if Qwest were still subject to cost-of-service, rate-of-return rate regulation when the refund was received, the refund would not have resulted in any change in rates because it was related to prior periods. Accordingly, Qwest is entitled to summary judgment as a matter of law.

As discussed above, the *MCI* decision recognized two exceptions to the rule against retroactive ratemaking: (1) unforeseen and extraordinary increases and decreases in utility expenses and (2) utility misconduct. These exceptions were acknowledged in the context of the court's analysis of the potential impact of the federal Tax Reform Act (TRA) on the earnings of Qwest. The Committee has argued that the *MCI* exceptions were not intended to be exhaustive, and that there may be other times where an exception to the rule would be appropriate. While that may or may not be true, the Commission will not depart from the exceptions recognized in *MCI*. *MCI* involved the impact of a change in corporate income tax rates on the earnings of a utility. Similarly, this case involves the impact of a tax refund on the earnings of a utility. The *MCI* court's discussion is based on the change in expense levels and the impact on the earnings of the company. The Counties' claim is also based on the change in expense levels of the company (for property taxes) and the impact on the earnings of the utility. The circumstances are analogous enough that we see no basis to depart from the *MCI* standards.

The *MCI* court stated that for the extraordinary component of extraordinary-and-unforeseeable exception to apply the event "must have an extraordinary effect on the utility's earnings." 840 P.2d at 771. Thus, the "increase or decrease [in earnings] will necessarily be outside the normal range of variance that occurs in projecting future expenses." *Id*. at 771-72.

The Court also considered statements by Company representatives made in response to a Commission request for information on the anticipated impact of the TRA on earnings, as well as information provided by the Company

during discovery, and determined that it was arbitrary and capricious for the Commission to have failed to hold a factual hearing on whether the Company had engaged in utility misconduct. In so doing, the court recognized an exception to the rule against retroactive ratemaking for utility misconduct, holding "[t]he rule against retroactive rate making was not intended to permit a utility to subvert the integrity of rate-making proceedings." *Id*. at 775.

a. Unforeseen and Extraordinary Exception

Mr. Prawitt's testimony concludes that the property tax refund was an unforeseeable and extraordinary event based on his review of 47 C.F.R. § 32.7600(a) and APB Opinion Nos. 9 and 30, and based on the fact that it decreased Qwest's property tax expense. Prawitt at lines 154-63. This testimony falls short of meeting the test enunciated in *MCI*. In this case, the property tax refund was neither unforeseen nor extraordinary. It was foreseeable because the Commission and Division knew that the Company was appealing its property tax assessments in each year and because the Company would not have filed appeals if it had no chance of prevailing. Thus, it was foreseeable that the Company might prevail and if it prevailed that it would obtain a refund of some portion of the property taxes previously paid. The property tax refund was not extraordinary because it did not have an extraordinary impact on earnings. The refund also was not atypical or noncustomary, as would be relevant to identifying an extraordinary accounting item, Grate ¶ 26.

The Counties' theory with respect to utility misconduct supports the view that the refund was foreseeable. Otherwise, how could the Company "use property tax appeals as a mechanism . . . to funnel millions of dollars to shareholder return." Prawitt at lines 171-72. This mechanism would only work if it was clearly foreseeable that the Company would prevail in its property tax appeals and receive a refund.

Under *MCI*, there must be a significant impact on earnings before an event becomes extraordinary. *See, e.g.*, 840 P.2d at 771. This standard applied by the Supreme Court is supported by the very section of the FCC's regulations cited by Mr. Prawitt. According to that section, the account for extraordinary items "shall be credited and/or charged with nontypical, noncustomary and infrequently recurring gains and/or losses which would significantly distort the current year's income computed before such extraordinary items, if reported other than as extraordinary items." 47 C.F.R. § 32.7600(b).

As Mr. Grate's affidavit establishes, a comparison of the refund with the total operating revenues, expenses and income before income taxes over the relevant nine-year period shows that the refund constituted 0.01% of revenues, 0.02% of expenses and 0.08% of income from operations before taxes. For any given year, the refund for that year never exceeded 0.02% of operating revenues, 0.03% of operating expenses or 0.12% of income from operations before taxes. Considered on a Utah-only basis, the refund constituted 0.26% of revenues, 0.33% of expenses and 1.23% of income from operations before taxes. The undisputed facts are that, whether looked at in relation to 1998 income or on a year by year basis, the refund did not significantly distort or would not have significantly distorted income computed before extraordinary items. Grate ¶¶ 28-29. Because we are also the trier of fact in the administrative process, we are the 'reasonable person' that is to view the evidence. We are able to conclude that reasonable minds can find that the refund was not extraordinary.

Other considerations outside those strictly relevant under *MCI* also demonstrate that the property tax refund was not extraordinary. For example, USOA Account 7600, Extraordinary Items, which is also cited by Mr. Prawitt, states, "Extraordinary events and transactions are distinguished by both their unusual nature and by the infrequency of their occurrence, taking into account the environment in which the company operates." It also refers to extraordinary items as "nontypical, noncustomary and infrequently recurring gains and/or losses." 47 C.F.R. § 32.7600. As noted by Mr. Grate after providing facts on the regularity of property tax appeals and refunds, "Taking into account the environment in which Qwest operates, a property tax refund is neither unusual nor infrequent." Grate ¶ 27. The Division has informal criteria for making a determination in this regard. Among other things, the event must have been unusual, unique, infrequent, and not part of normal operations.

The other sources cited by Mr. Prawitt also agree with these criteria. *See, e.g.*, APB Opinion No. 30 at ¶ 30.20 (Requiring an extraordinary event to be both unusual and infrequent. To be unusual it must have a "high degree of abnormality and be of a type clearly unrelated to, or only incidentally related to, the ordinary and typical activities of the entity."); *id*. at ¶ 30.22 (To be infrequent, it must be "an event or transaction of a type not reasonably expected to recur in the foreseeable future . . . . The past occurrence of an event or transaction for a particular entity provides

evidence to assess the probability of recurrence of that type of event or transaction in the foreseeable future. By definition, extraordinary items occur infrequently. However, mere infrequency of occurrence of a particular event or transaction does not alone imply that its effects should be classified as extraordinary."); *id*. at ¶ 30.19 ("[A]n event . . . should be presumed to be an ordinary and usual activity of the reporting entity, the effects of which should be included in income from operations, unless the evidence clearly supports its classification as an extraordinary item as defined in this Opinion.").

Qwest's property tax appeals, and the resulting refund, cannot be said to qualify as extraordinary under any of these additional criteria. As the Utah Supreme Court previously told the Counties in another case: "Counties must expect, as is obvious from this case, that initial property tax assessments, especially those of large utility systems, are subject to challenges . . . ." *See Beaver County*, 916 P.2d at 352. It is undisputed that Qwest's filing of property tax appeals and receipt of refunds or credits is neither infrequent nor unusual. Grate ¶ 27. As the Division appropriately concluded earlier in this case: "Applying [the Division's] guidelines, the Division does not believe that the Counties' Complaint satisfies the 'extraordinary' test in that Qwest's property tax appeals are not 'unusual,' 'unique,' or 'infrequent,' and may be said to be 'a part of normal operations.'" Preliminary Response of the Division of Public Utilities to the Counties' Complaint and Qwest's Motion to Dismiss (Dec. 11, 2001) at 3. No new facts have been presented by the Counties that undermine the Division's conclusion.

Finally, as noted above, the Counties do not contend that Qwest accounted for the refund improperly. Although Mr. Prawitt cited the definition of extraordinary items under the USOA, he did not testify that Qwest should have recorded the refund in the extraordinary items account. Therefore, Mr. Grate's testimony that the refund was properly booked in different accounts, and would not properly have been booked in the extraordinary items account, is uncontested.

Summary judgment is appropriate on the issue of the unforeseen and extraordinary prong of the *MCI* exceptions to the rule against retroactive ratemaking. *See, e.g., Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc*., 889 P.2d 445, 450 (Utah Ct. App. 1995) ("A trial court may properly grant a motion for summary

judgment or directed verdict . . . when reasonable minds could not differ on the facts to be determined from the evidence presented.") (citations omitted).

b. Utility Misconduct

The Counties' evidence of utility misconduct consists of a phone conversation in which counsel for Qwest told Mr. Peters that Qwest was displeased with the fact that the funds had been deposited in court because the year-end bonuses of Qwest officers were largely dependent upon the refund being paid into the Company by the end of 1998 and Mr. Prawitt's three "red flags:" (1) the accounting of the refund by Qwest under the USOA, which leads to an increase in net income and "to funnel millions of dollars to shareholder return, almost one third (1/3) of which is 'below the line,'" (2) the fact that Qwest has appealed its property tax assessment in Utah every year, and (3) unspecified conclusions drawn from Mr. Prawitt's review of "the proceedings in . . . Docket No. 88-049-18" and unspecified "matters of public record as to governmental investigations of financial fraud by former [Qwest] officers." Prawitt at lines 167-93. With the possible exception of the allegation relating to Docket No. 88-049-18, these allegations are deficient as a matter of law.

The Court made it clear in *MCI* that the utility misconduct exception to the rule against retroactive ratemaking involves conduct that "subvert[s] the integrity of rate-making proceedings." 840 P.2d at 775. Thus, the misconduct cannot be based on general allegations of "financial fraud" or improper motive. It must relate to financial fraud or misrepresentation in the context of the ratemaking process. With the possible exception of Docket No. 88-049-18, which is addressed below, this evidence is completely absent in the Counties' testimony.

Mr. Peters' testimony was apparently provided to suggest that Qwest's motive in seeking property tax refunds was to provide money to pay officers' bonuses. However, the testimony is irrelevant to any claim of utility misconduct. The rates at issue in this case were set in 1987, 1988, 1990, 1992 and 1995. The use of the refund in 1998 or 1999 had no relationship to the setting of rates at issue in those cases and does not constitute evidence of utility misconduct providing an exception to the rule against retroactive ratemaking with respect to the rates at issue in those cases.

In addition, there is nothing improper about using a tax refund or any other source of cash and income, properly

accounted for, to pay management bonuses. As noted above and as will be discussed in more detail following, there is no contention that Qwest accounted for the refund improperly.

Mr. Prawitt's first red flag is the accounting of the refund. The refund was accounted for in 1998 and 1999. As previously noted, the accounting of the refund had no relationship to the setting of rates at issue in cases during 1987-95 and, even if improper, could constitute no evidence of utility misconduct providing an exception to the rule against retroactive ratemaking with respect to the rates set in those cases. In addition, Mr. Prawitt's red flag is not a red flag at all. Other than calling it a red flag, Mr. Prawitt makes no contention that it represented improper accounting for the refund in any way. On the other hand, Mr. Grate's affidavit establishes that Qwest's accounting for the refund complied with 47 C.F.R. Part 32 and was, in fact, the only accounting that could properly be made. Grate ¶ 26. As noted above, during oral argument the Counties conceded that they do not contend that Qwest accounted for the refund improperly. Tr. (Apr. 29, 2005) at 73.

Mr. Prawitt's second red flag is that Qwest appealed its property tax assessment in Utah in every year. Again, this has nothing to do with setting rates in rate cases. Furthermore, it does not constitute any type of misconduct. Qwest is entitled by law to appeal property tax assessments that it believes are excessive. The fact that it not only appealed the assessments but was successful in obtaining a stipulated refund, representing an acknowledgement by the Property Tax Division and the Counties that there was a risk that the Tax Commission may have found that Qwest's assessments were too high, demonstrates that the appeals were taken in good faith and were appropriate.

Mr. Prawitt's third red flag relates to allegations of improper conduct in Docket No. 88-049-18 and in governmental investigations of alleged financial fraud by former Qwest officers. Allegations of misconduct in connection with setting of rates in 1987 and 1988 were made during the course of Docket No. 88-049-18. Mr. Prawitt claimed support for his opinion of utility misconduct based on a review of the proceedings in Docket No. 88-049-18, but he did not cite any facts disclosed by his review that support a finding of misconduct related to inclusion of property taxes in setting rates. The only allegations of misconduct in that docket related to responses by Qwest to the Commission and the Division regarding the effect of the TRA on earnings and filings and responses to data requests

which may have disclosed over earnings. Grate ¶ 9. These allegations were never proven and the Commission never made a finding that any misconduct occurred. However, assuming that the allegations were true, they had nothing to do with property taxes paid, the amount of property taxes included in financial reports to the Commission, the amount of property taxes considered in setting rates, or any appeal of Qwest's property tax valuation in 1988 or in any other year. *Id.*

Further, Qwest and other parties to those proceedings, including the parties making the allegations of misconduct, entered into a release and settlement agreement and conditional amendment to release and settlement agreement to resolve almost ten years of contentious litigation. In consideration for Qwest's agreement to make a substantial refund to Utah customers, the parties agreed to release Qwest of any further claims relating in any way to allegations of misconduct or overearnings from January 1, 1986 through November 15, 1989. Following public notice, the Commission reviewed the agreement in public hearings and entered an order releasing Qwest. Thus, even if there were some basis for believing that Qwest may have made misrepresentation in 1987 or 1988 regarding property taxes, Qwest has been released from claims with respect to any such alleged misrepresentations.

The Counties contend that they are not bound by the release in Docket No. 88-049-18 because they were not parties to the docket. This contention is not valid. The Division represented the interests of all ratepayers in that docket, and the Committee represented the interests of residential, small commercial and agricultural ratepayers. In addition, other parties appeared in a representative capacity, including MCI Telecommunications Corp. and Tel-America of Salt Lake City, Inc. In fact, it was the latter two parties that initiated the proceeding on behalf of all ratepayers. The Counties could have intervened in the proceeding had they been interested.

As noted above, Commission proceedings with respect to ratemaking and claims related to ratemaking inherently involve the interests of all ratepayers, and the Commission considers the interests of all ratepayers in deciding such cases. An important consideration for Qwest in making a substantial refund in that docket was the agreement of the parties that it would be released from all claims that could result in additional refunds based on over-earnings or claims of utility misconduct during the period at issue in that case. The Commission carefully considered

these issues in requiring Qwest to publish notice of the proposed settlement and in holding public hearings on it. In fact, as a result of the appearance by entities not previously involved in the docket, the Commission required Qwest and the parties to modify the settlement before it could be approved in the public interest.

Just as the Commission can grant ratepayers benefits across customer classes without requiring a class to be certified under Utah R. Civ. P. 23, the Commission need not make a utility litigate claims with every customer before the Commission declares a release to be in the public interest. All of Qwest's customers received the benefit of the multi-million dollar *MCI* refund, after being given ample opportunity to participate in the proceeding. The Commission cannot in fairness now deprive Qwest of the benefit of the bargain it struck in entering into that settlement.

Mr. Prawitt provided no factual support for the proposition that the governmental investigations of alleged financial fraud by former Qwest officers involved conduct related to any rate case in Utah or anywhere else. Although Mr. Prawitt did not provide any factual context or basis for his statement, he was apparently referring to the governmental investigations of Qwest and certain of its officers relating to accounting used in post-1999 financial statements, which have been widely publicized. Grate at ¶ 35. Financial or accounting errors in post-1999 financial statements would have had nothing to do with the integrity of rate cases in Utah from 1987 through 1995. There is no nexus between alleged financial fraud after 1999 and ratemaking in 1987 through 1995.

Utility misconduct in the context raised by the Counties is a serious charge. It amounts to a claim that Qwest committed fraud on the Commission by making false statements or intentionally withholding material information about its property taxes. As such, the Counties were required to allege the fraud with particularity and prove it by clear and convincing evidence. *See e.g., Williams v. State Farm Ins. Co.*, 656 P.2d 966, 972 (Utah 1982) ("The purpose of [the Rule 9(b)] requirement dictates that it reach all circumstances where the pleader alleges the kind of misrepresentations, omissions, or other deceptions covered by the term 'fraud' in its broadest dimension. Consequently, if the pleading had merely alleged that the insured had given 'fraudulent' or 'deceptive' or 'misrepresenting' answers, it would have been insufficient."); *Secor v. Knight*, 716 P.2d 790, 794 (Utah 1986) ("[I]n order to prevail on a claim of fraud, all the elements of fraud must be established by clear and convincing evidence.") (citing *Cheever v. Schramm*,

577 P.2d 951, 954 (Utah 1978)). On a motion for summary judgment it is appropriate to consider the ultimate burden of persuasion that would have to be borne at trial when considering whether there is any genuine issue of material fact. *See, e.g., Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1046 (Utah Ct. App. 1994) ("In granting a motion for summary judgment, a trial judge must consider each element of the claim under the appropriate standard of proof.") (citations omitted). Here, not only did the Counties fail to bring evidence of specific facts that could establish utility misconduct (whether by clear and convincing evidence or merely by a preponderance of the evidence), after years of opportunity to conduct discovery and present their case, they failed to even identify any specific allegation of misconduct related to rate setting. And, as noted above, they conceded at the oral argument on Qwest's motion that other than their theory of the case, they had no facts demonstrating that Qwest had done anything improper in the rate-setting process from 1988-1996. Therefore, it is undisputed that Qwest did not misrepresent or withhold facts related to its property taxes or property tax appeals and there is no basis for a Commission finding that utility misconduct has occurred.

Based on the fact that the Counties have provided no facts which could support a finding of utility misconduct, all that is left is the Counties' theory that Qwest engaged in utility misconduct by filing property tax appeals every year to convert a portion of its property tax expense into net income that would not be considered in setting rates. Prawitt at lines 167-76, 188-91. For this theory to be correct, at least three things must be assumed.

First, it would have to be assumed that the Property Tax Division, with the support of the Counties, purposely overvalues Qwest's property so that Qwest is assured of a refund each and every year. Otherwise, Qwest is unable to successfully engage in this "misconduct." We reject this assumption. Rather, it must be assumed that the Property Tax Division attempts to assess Qwest accurately. We note that the Counties' conduct is inconsistent with this theory because they support the Property Tax Division's valuations or seek an even higher valuation and always oppose Qwest's valuation appeals. Thus, under the Counties' theory, either the Property Tax Division and the Counties are knowingly seeking excessive valuations to assist Qwest in its scheme, or they are unwitting accomplices.

Second, it would have to be assumed that there is something improper about Qwest appealing excessive

valuations. If the Property Tax Division overvalues Qwest's property, Qwest is legally entitled to appeal and seek a reduction in valuation. In fact, if Qwest failed to challenge excessive valuations, it is possible that a party in a Qwest rate case (if Qwest were still subject to cost-of-service regulation) would challenge Qwest's property tax expense as being excessive because it is based on excessive valuations that Qwest has not appealed.

Third, it would have to be assumed that Qwest could either pay some lesser amount of property taxes pending its appeals or that it should propose an adjustment to its actual property tax expense in rate cases in anticipation of receiving a refund at some time in the future. The first assumption is not valid. Qwest is required to pay the amount assessed pending appeal. The second assumption ignores the Commission's consistent position regarding known and measurable adjustments to test-year expenses which will be discussed in more detail below.

The remaining question is whether knowing that it was appealing its property taxes, Qwest engaged in utility misconduct because it included the property taxes accrued in the test years in its regulatory reports and in its rate case filings rather than an adjusted amount based on a hoped-for refund. Before addressing this question, we note again that no party claims that Qwest engaged in misconduct in the rate setting process. Rather, the Counties suggest that the combination of property tax appeals and refunds which are properly accounted for below-the line is some sort of scheme that together results in misconduct. The Counties did not articulate how this could be the case. However, Qwest argued that this must assume that Qwest engaged in misconduct by failing to make adjustments in its test-year expenses to account for the possibility of a refund. Qwest argued that such an adjustment would be inconsistent with the Commission's rules and standards for known and measurable adjustments and would have been improper.

Pursuant to the known and measurable standard, during the years at issue in this docket, the Commission typically "require[d] an historical test year with adjustments for only known and measurable changes." *Re Little Plains Water Company*, Docket No. 96-2178-01, 1996 WL 769262 (Utah P.S.C. Aug. 7, 1996); *see also, e.g., Public Service Co. of Colorado v. Public Utilities Comm'n*, 26 P.3d 1198, 1206 (Colo. 2001) ("adjustments made outside the test year may occur only when costs are known and measurable"); *Western Resources, Inc. v. State Corp. Comm'n*, 42 P.3d 12, 168 (Kan. Ct. App. 2002) (Kansas commission "has discretion to include in rate calculations any costs and revenues not

part of the test year if the changes are known and measurable."). Thus, Qwest could no more request that rates be based on speculative future lower tax assessments (decreasing its revenue requirement) than it could request that rates be based on speculative future higher assessments (increasing its revenue requirement).

In Qwest's 1988 general rate case, the Commission, in considering proposed adjustments to salaries and wages, addressed the standards for known and measurable adjustments that could be considered in setting rates. Among those standards, the Commission required that:

> 3.The change must be specific in that it occurs at a known moment or moments in time.
>
> 4.The effects of the change must be measurable.
>
> . . . .
>
> 6. The change must have already occurred or will occur before any increase in rates occurs.

See 1988 Order at 21-22. These standards were subsequently adopted in Rule R746-407-3 and remain in effect today.

Possible refunds from property tax appeals do not fit any of these standards. They did not occur at moments in time that were known during the relevant rate cases, the amount of the refunds was not measurable during the rate cases and the refunds had not already occurred and did not occur before the rates under consideration became effective.

The Commission has consistently denied utility requests that they be allowed to include increases in income taxes following audits in rates because, even though the increases occur regularly, they are not known and measurable. *See, e.g.*, *Re PacifiCorp*, Docket No. 97-035-01, 1999 WL 218118 (Utah P.S.C. Mar. 4, 1999), where the Commission addressed this issue and stated:

> The Division argues for the removal of this adjustment on grounds that the results of future tax audits cannot be known and cannot be measured . . . [A] Report [from an outside accounting firm retained by the Division] holds that the inclusion of tax contingencies in cost of service is not common and is not appropriate, and specifically recommends excluding income tax contingency accruals from PacifiCorp's cost of service. The Division testifies that tax contingency accruals have been excluded in recent rate cases and cost-of-service studies for both Mountain Fuel and US West. This recommendation is supported by the Committee.
>
> The record shows that possible future tax assessments [after audit] for the 1997 tax year are unknown at this time.

See also id. (refusing to approve depreciation expenses for a dam removal because "since no agreement to remove the dam had been signed during the test year, and the outcome of negotiations is unknown, removal of the dam is an uncertain event. We conclude that this is a post-test-year event. The costs of removal are merely estimates, presented by the Company, grounded in this uncertain future event. No economic examination of the estimates has been undertaken by all parties in this proceeding. We find that the estimates do not satisfy the known and measurable standard.").

Indeed, even being "known and measurable" would not have assured that a post-test-year expense would have been considered during the 1988-1996 time frame. As the Commission held in the same order quoted immediately above:

> [A] post-test-year adjustment presents a special and serious case of matching and information insufficiency. It is a single-item adjustment, proposed because it is "known and measurable." Since, by definition, it is outside the test year, it cannot be analyzed in a test-year context of matched revenues, expenses, and investments. Hence, it is akin to a single-item rate case. All the arguments against conducting single-item rate cases argue against consideration of post-test-year adjustments. The fact is, events do not occur in isolation. The utility is a complex web of economic relationships, each of which changes as the result of external and internal forces and events. This is the proper context for considering any proposed adjustment.

Id.

Based on these precedents, any attempt to have included an adjustment to Qwest's property tax expense in any of its rate cases based on the potential future outcome of an appeal of the property tax assessments and the possibility of a future refund likely would have been rejected by the Commission as a prohibited out-of-period adjustment. In sum, there is neither factual support for a potential finding of unforeseen and extraordinary circumstances nor factual support for a finding of utility misconduct in this case. Although the Division took no position on Qwest's motion for summary judgment, at the hearing it did confirm that it continues to believe as it did earlier in this case that, even following discovery, there is no applicable exception to the rule against retroactive ratemaking in this case. The Commission agrees.

C. Claim for Future Rate Adjustment

In the alternative to a refund to be awarded as rate reparations, the Counties sought "appropriate adjustments in future rates" to account for the $16.9 million property tax refund. Amended Complaint ¶ 31. Based on the argument on

Qwest's motion, it does not appear that any party continues to urge this result. Such a course of action would be problematic in any event.

From February 17, 1998 to May 2, 2005, prices for Qwest's public telecommunications services were determined either by application of a price index or indices to tariffed services, *see* Utah Code Ann. § 54-8b-2.4 (2004), or through Qwest's exercise of pricing flexibility for services for which competitive alternatives exist. *See id*. at § 54-8b-2.3 (2004). Since May 2, 2005, all of Qwest's prices are subject to pricing flexibility, with a cap on basic residential rates until further competition develops in that market. *See id*. at § 54-8b-2.3(2) (2005). Any rate-setting by the Commission is confined to the conditions and requirements of those two methods of setting prices. The legislature has established the ratemaking process to be followed. The Commission must give effect to legislative intent. Since the Commission has concluded that there is no basis for an exception, whether the remedial tool should be a refund or a rate change is academic in any case

D. Fashion Another Remedy

The Committee does not attempt to dispute any of the foregoing analysis. In fact, the Committee acknowledges that there is no evidence that the property tax refund was unforeseen or extraordinary or that Qwest engaged in utility misconduct under the *MCI* analysis. Instead, the Committee argues that because Qwest was removed by legislation from cost-of-service regulation in 1997, the Commission should fashion a remedy because ratepayers will not benefit from reduced property tax assessment in the future through lower rates—that this change in regulation created a new type of extraordinary circumstance that would qualify for an additional exception to the rule against retroactive ratemaking. The Counties likewise argue that the Commission has authority to fashion some remedy. The Committee and the Counties have cited section 54-4-1 and the *MCI* decision as authority for fashioning such a remedy. Section 54-4-1 provides:

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

On its face, it appears that this statute might provide a basis for the authority to fashion a remedy. However, Qwest

responds that the Commission does not have authority to fashion a remedy other than the remedies expressed or clearly implied by statute. *See Basin Flying Service*; *Hi-Country Estates, supra*. Because of Utah case law holding that Section 54-1-1 is not as expansive as its literal language would lead one to believe and the lack of evidence to explore a possible exception from the rule against retroactive ratemaking, the Commission should not embark on a course to create a remedial tool beyond what has already been recognized.

This conclusion is reached in consideration of the statutory changes that have been made by the Utah legislature with respect to Commission regulation of telecommunications corporations in this state. When Utah departed from traditional cost-based-rate-of-return regulation to a price indexed regime, the legislature indicated that Qwest would "not be regulated on the basis of rate of return or any similar method of regulation that is based on the earnings [of Qwest] . . . ." Section 54-8b-2.4(2) (2004). The legislature's most recent enactments, from the 2005 legislative session, evidence with even greater clarity the state's further distancing from reference to or consideration of Qwest's actual costs or expenses incurred in providing services and the earnings which it may obtain. Effective May 2, 2005, Qwest is authorized to set it own prices without any modification or consideration by the Commission. Section 54-8b-2.3 (2005). The state has departed from even the indirect price-indexing rate setting approach. Since the rule against retroactive ratemaking and its exceptions are based on ratemaking principles, *see Stewart v. Utah Public Service Commission,* 885 P.2dd 759, 777 (Utah 1994), it is not appropriate, at this time, for the Commission to extend remedies beyond *MCI*'s parameters and the rate setting authority delegated by the legislature.

The Committee cited *In re Central Hudson Gas & Elec. Corp*., 2004 WL 3098825 (N.Y.P.S.C. Dec. 20, 2004), in support of its view that the Commission should fashion a remedy. In response, Qwest argued that the case was inapposite because it was based on a New York statute not present in Utah. Specifically, the New York statute explicitly authorizes the commission "[w]henver any public utility company . . . receives any refund of amounts charged and collected from it by any source . . . to determine whether or not such refund should be passed on, in whole or in part, to the consumers of such public utility company. . . ." N.Y.P.S.L. § 113(2) (quoted in *Central Hudson* at 2, n.2). We find that the specific New York statute provided the authority for the New York PSC to divide a refund between ratepayers

and the public utility. No such statute exists in Utah. The Utah legislature does know how to enact such provisions. In its 1995 enactments, the Utah legislature did provide for rates to be impacted by changes in tax rates; in addition to a variety of other specified matters that could be factored in setting rates. Section 54-8b-2.4(5)(b) (2004). In 2005, the legislature did not include any provisions to hold place for rate impacts for any pending regulatory matters or future developments in Commission regulation of Qwest.

VI. CONCLUSION

The Commission concludes that the it can not provide relief through statutory rate reparations. That relief lapses for rates or charges paid in periods more than one year prior to the date a request for refund is made. No relief is available through an exception to the rule against retroactive ratemaking. Despite having many years to conduct discovery and make their case, the Commission concludes that the Counties have failed to introduce sufficient evidence (in opposition to Qwest's Motion for Summary Judgment) that could support a Commission finding that an exception to the rule against retroactive ratemaking could be made in this case. The Counties have failed to introduce evidence necessary to support an essential element of their cause of action and summary judgment is appropriate.

The Commission denied Qwest's original motion to dismiss without prejudice in January of 2002 in order to allow the Counties and any other interested party an opportunity to develop and present facts in support of their claims. Despite having over two and one-half years to develop such evidence, the Counties have failed. In addition, the Division and Committee, who conducted their own discovery, have concluded that there is no basis for any claim that the property tax refund was unforeseen and extraordinary under *MCI* or that Qwest accounted for the property tax refund improperly or engaged in utility misconduct in connection with the setting of rates. Although we have not had an evidentiary hearing on the Counties' claims, there is plainly no reason for such a hearing. The Counties have filed their direct case and opposing affidavits, Qwest has filed an affidavit providing additional evidence and there is no genuine issue as to any material fact. The law does not provide for the relief sought by the Counties.

Based upon the foregoing undisputed facts and the conclusions of law, the Commission makes the following order.

ORDER

IT IS HEREBY ORDERED that:

1. Qwest's motion for summary judgment is granted and the Amended Complaint of the Counties is dismissed with prejudice.

2. This Order consititutes the Commission's final agency action. Pursuant to Utah Code Ann. §§ 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 17th day of June, 2005.

/s/Sandy Mooy
Hearing Officer

Approved and Confirmed this 17th day of June, 2005, as the Report and Order of the Public Service Commission of Utah.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

GW#44790