

BILL THOMAS PETERS - 2574  
DAVID W. SCOFIELD - 4140  
**PETERS SCOFIELD PRICE**  
*A Professional Corporation*  
340 Broadway Centre  
111 East Broadway  
Salt Lake City, Utah 84111  
Telephone: (801) 322-2002  
Facsimile: (801) 322-2003

Attorneys for Complainants

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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Complaint of  
BEAVER COUNTY, et al.,

Complainants,

-vs-

QWEST CORPORATION fka U S WEST  
COMMUNICATIONS, INC. fka MOUNTAIN STATES  
TELEPHONE & TELEGRAPH SERVICES, INC.,

Respondent.

**AFFIDAVIT OF DAVID W. SCOFIELD**

Docket No. 01-049-75

STATE OF UTAH                    )  
  : ss.  
County of Salt Lake            )

David W. Scofield, being first duly sworn and upon his oath, deposes and says:

1. I am the litigation attorney for Complainants in the above-captioned matter.
2. Attached to this affidavit as Exhibit "A" is a true and correct, but unsigned, copy of the First Amended Class Action Complaint for Declaratory Relief, Construction Trust and for Attorney's Fees filed in the Third Judicial District Court for Salt Lake County, Utah on or about January 7, 1999.
3. Attached to this affidavit as Exhibit "B" is a true and correct copy of the docket in Case

Number 980913349, Third Judicial District Court for Salt Lake County, Utah, obtained from the Court's online information retrieval system (X-Change) on September 30, 2004 at approximately 3:20 p.m.

4. Attached to this affidavit as Exhibit "C" is a true and correct, but unsigned, copy of the Brief of Appellants filed in the Utah Supreme Court on or about June 9, 2000.

5. Attached to this affidavit as Exhibit "D" is a true and correct, but unsigned, copy of the Reply Brief of Appellants filed in the Utah Supreme Court on or about August 11, 2000.

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David W. Scofield

**SUBSCRIBED AND SWORN** to before me this 30th day of September, 2004.

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Notary Public  
Residing at Salt Lake County, Utah

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of the foregoing **AFFIDAVIT OF DAVID W. SCOFIELD** was served via e-mail transmission, this 30th day of September, 2000, to the following:

Gregory B. Monson  
STOEL RIVES LLP  
201 South Main, Suite 1100  
Salt Lake City Utah 84111

Michael L. Ginsberg  
Reed T. Warnick  
Assistant Attorneys General  
500 Heber M. Wells Building  
160 East 300 South  
Salt Lake City Utah 84111

# Exhibit "A"

BILL THOMAS PETERS - 2574  
DAVID W. SCOFIELD - 4140  
PARSONS, DAVIES, KINGHORN & PETERS  
185 South State Street, Suite 700  
Salt Lake City, Utah 84111  
Telephone: (801) 363-4300  
Attorneys for the Petitioning Counties and All Other Persons and/or Entities similarly situated

**IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

---

BEAVER, BOX ELDER, CACHE,  
CARBON, DAVIS, DUCHESNE, EMERY,  
GARFIELD, GRAND, IRON, JUAB,  
KANE, MILLARD, MORGAN, PIUTE,  
RICH, SALT LAKE, SAN PETE, SEVIER,

**PROPOSED  
CLASS ACTION  
FIRST AMENDED CLASS ACTION  
COMPLAINT**

SUMMIT, TOOELE, Uintah, UTAH,  
WASATCH, WASHINGTON, WAYNE  
AND WEBER COUNTIES AND ALL  
OTHER PERSONS OR ENTITIES  
SIMILARLY SITUATED.,

Plaintiffs,

-vs-

US WEST COMMUNICATIONS, INC.,

Defendant.

**FOR DECLARATORY RELIEF;  
CONSTRUCTIVE TRUST AND FOR  
ATTORNEY'S FEES.**

Civil No. 980913349

Judge David S. Young

**JURY TRIAL DEMANDED**

Beaver, Box Elder, Cache, Carbon, Davis, Duchesne, Emery, Garfield, Grand, Iron, Juab, Kane, Millard, Morgan, Piute, Rich, Salt Lake, San Pete, Sevier, Summit, Tooele, Uintah, Utah, Wasatch, Washington, Wayne and Weber Counties ("Petitioning Counties" or "Counties") in behalf of themselves and all other persons and entities similarly situated allege as follows:

**JURISDICTION**

1. This court has jurisdiction under Utah Code Ann. § 78-3-4(1):

The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.

and Utah Code Ann. § 78-33-1:

The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

**VENUE**

2. Venue is appropriate in this court under Utah Code Ann. § 78-13-7:

In all other cases the action must be tried in the County in which the cause of action arises, or in the County in which any defendant resides at the commencement of the action; provided, that if any such defendant is a corporation, any County in which such corporation has its principal office or place of business shall be deemed the County in which such corporation resides within the meaning of this section. If none of the defendants resides in this state, such action may be commenced and tried in any County which the plaintiff may designate in his complaint; and if the defendant is about to depart from the state, such action may be tried in any County where any of the parties resides or service is had, subject, however, to the power of the court to change the place of trial as provided by law.

### **PARTIES**

3. Plaintiff Counties are political subdivisions of the state of Utah and as such, are authorized by law to sue.

4. Said Counties are authorized by law to assess, collect and distribute ad valorem property taxes upon all tangible taxable property located within their respective Counties.

5. Plaintiff Counties and the other members of the proposed Class were and are users of Mountain States Telephone and Telegraph's and US West Communications, Inc.'s telecommunications services.

6. Defendant US West Communications, Inc. is a Colorado corporation duly authorized to do business in the state of Utah and is regulated by the Utah Public Service Commission and is authorized to provide telecommunication services to Utah residences as well as governmental and other entities located within the state of Utah.

### **CLASS ACTION ALLEGATIONS**

7. Plaintiffs bring this Action on their own behalf and as a Class Action pursuant to Rule 23 of the Utah

Rules of Civil Procedure, on behalf of a Class (the "Class") of all persons with billing addresses within the state of Utah or who otherwise paid rates governed by the Utah Public Service Commission who utilized telecommunication services from Mountain States Telephone and Telegraph and its successor, US West Communications, Inc. ("US West") from January 1, 1988, through and including December 31, 1996, inclusive (the "Class Period").

8. The members of the Class for whose benefit this action is brought are dispersed substantially throughout the state of Utah, and are so numerous that joinder of all Class members is impracticable. While the exact number of Class members can only be determined through appropriate discovery, Plaintiffs believe that there are tens of thousands of Class members. The Class members used telecommunication services from Mountain States or US West Communications and paid a rate approved by the Public Service Commission of Utah, which rates contained, among other things, a charge to reimburse Mountain States and US West for property taxes levied against said companies for tangible, taxable property located within the state of Utah during the Class Period.

9. Mountain States Telephone and Telegraph and US West are to receive a tax refund from the Counties of the state of Utah for property taxes previously paid during the Class Period which were recouped by Mountain States and US West in their rates charged to and paid by Class Members. The tax refund, therefore, constitutes a double payment by the Class Members and unjustly enriches the Defendants. The Class Members are entitled to judgement against the Defendants for the amount they are proven to have been unjustly enriched.

10. Plaintiffs are representative parties who will fairly and adequately protect the interests of the other members of the Class, and have retained counsel competent and experienced in Class Action litigation. Plaintiffs have no interest antagonistic to, or in conflict with, the Class they seek to represent.

11. A Class action is superior to other available methods for the fair and efficient adjudication of the claims asserted herein. Furthermore, because the benefit conferred by each individual Class member upon Mountain States and US West may be relatively small, the expense and burden of individual litigation make it virtually impossible for the Class members to individually seek redress for the claims alleged herein, and the likelihood of individual Class members prosecuting separate claims is remote.

12. This action will allow for the orderly and expeditious administration of the Class claims, produce economies of time, effort and expense, and insure uniformity of decisions. Plaintiffs anticipate no unusual difficulties in the management of this action as a Class Action.

13. There are questions of law, equity and fact common to all Class members which predominate over any questions affecting any individual members of the Class. Among the questions of law, equity and fact which are common to the Class are:

a. Whether Mountain States Telephone and Telegraph Company and its successor, US West, have been fully reimbursed through their rates for property taxes initially assessed and paid for each of the years 1988 through 1996;

b. Whether Mountain States and US West have recovered through their rates the property taxes assessed and paid for each of the years 1988 through 1996;

c. Whether, and to what extent, the \$16,900,000.00 refund to be paid by the Counties constitutes a duplicative recovery by Mountain States and US West respectively for each of the years in question;

d. Whether Mountain States and US West, its successor, will be unjustly enriched at the expense of the members of the Class by virtue of receiving said \$16,900,000.00 refund or any portion thereof;

e. Whether the court should in equity, impress a constructive trust upon the \$16,900,000.00 or such portion thereof as constitutes a duplicative recovery for property taxes assessed by the Utah State Tax Commission; and

f. Whether or not to the extent the Class has contributed to said duplicative recovery, what is the proper amount to be reimbursed by the Mountain States and US West, to each member of the Class.

14. US West provides telecommunications services in the state of Utah and, as a telecommunications provider in the state of Utah, US West functions as a public utility and is, therefore, regulated by the Public Service Commission of Utah. Additionally, Mountain States Telephone and Telegraph, the predecessor to US West, was at all times pertinent to this action, regulated by the Public Service Commission of Utah on the Cost

of Service and Rate of Return form of regulation.

15. The amounts allowed by the Public Service Commission of Utah to be recovered by Mountain States Telephone and Telegraph and US West included an amount sufficient to reflect a return on and a return of Mountain States and US West's investment in and to its regulated system.

16. Petitioners are informed and believe that in determining the amount to be charged by Mountain States Telephone and Telegraph Co. and US West, its successor, to those persons and entities using said companies' telecommunication services reflected a component in the rate structure for the recovery of ad valorem property taxes assessed upon the fair market value of Mountain States and US West's taxable property located within the state of Utah which taxable value was then apportioned to each of the petitioning Counties and incorporated into their assessment rolls for purposes of ad valorem taxation within each of said respective Counties.

17. In each of the years 1988 through 1996, Mountain States Telephone and Telegraph and its successor US West appealed the initial valuation seeking a reduction of their taxable property located within the state of Utah to the Utah State Tax Commission.

18. As a result of the appeals filed by Mountain States and US West for the tax years 1988 through 1996, their taxable value for the years in question was subject to modification and was in fact reduced.

19. As a result of said appeals and reductions, the Counties as participants in said appeals proceedings and the property tax division of the Utah State Tax Commission agreed to compromise the taxable value thereby fixing the amount of tax refund Mountain States and US West would receive as a result of said appeals. A copy of the settlement agreement is attached hereto as Exhibit "A" and by this reference, incorporated herein.

20. The total amount of agreed refund by the Counties for the respective years in question was Sixteen Million Nine Hundred Thousand (\$16,900,000.00) Dollars.

**FIRST CAUSE OF ACTION  
(UNJUST ENRICHMENT/CONSTRUCTIVE TRUST)**



21. Because US West and its predecessor Mountain States Telephone and Telegraph have negotiated a refund of taxes from each of the Counties in which US West's allocated Utah properties are located, US West will receive a duplicative recovery for property taxes because US West and Mountain States' approved rates included a component for recovery of payment of property taxes which the Plaintiffs are informed and believe were based upon the initial value assessed by the respective Counties upon the taxable property of US West and its predecessor Mountain States Telephone and Telegraph prior to appeal.

22. To the extent that US West will receive duplicative recovery for property taxes as a result of the Sixteen Million Nine Hundred Thousand (\$16,900,000.00) Dollar refund, US West will be unjustly enriched at the expense of the rate payers including the Plaintiff Counties unless US West is required to repay the 16.9 million dollars back to its rate payers who were US West and Mountain States Telephone and Telegraph customers during the years 1988 through 1996.

23. In order to ensure that the refund of taxes is used for the benefit of the rate payers including the Plaintiff Counties, the court should impress a constructive trust upon said funds and direct that said funds be held and used for the benefit of the rate payers of US West, including the Plaintiff County rate payers.

24. Contemporaneously with the filing of this complaint, Plaintiff Counties have filed a request for agency action and declaratory relief before the Public Service Commission of the state of Utah.

25. The Public Service Commission has been currently prohibited from engaging in rate making by the Utah State Legislature pursuant to Utah Code Ann. § 54-8b-2.4(4) and (5).

26. Plaintiff Counties and the members of the Class are, therefore, without a plain, speedy or adequate remedy at law, and thereby, require the equitable power of the court.

WHEREFORE, Plaintiffs, on behalf of themselves and other members of the Class, pray for judgement against the defendants as follows:

a. Declaring this action to be properly maintainable as a Class Action pursuant to Rule 23 of the Utah Rules of Civil Procedure and declaring Plaintiffs to be proper Class representatives;

- b. Declaring and determining that the defendants, if paid the sums paid to the clerk of the court herein, would receive a duplicative recovery by virtue of said payment and would therefore be unjustly enriched at the expense of the members of the Class;
- c. Impressing a constructive trust upon the funds paid into court by the respective Counties said trust to be for the use and benefit of the members of the Class;
- d. For an order directing that any County whose refund check has not been deposited contemporaneously herewith with the court, to pay any such refunds directly to the clerk of the court.
- e. Awarding equitable and/or injunctive relief, including the imposition of a constructive trust upon the funds agreed to be paid by the respective Counties to the defendants, pursuant to Rules 64 and 65 of the Utah Rules of Civil Procedure, and any appropriate other remedies;
- f. Awarding Plaintiffs the costs, expenses and disbursements incurred in this action, including reasonable attorneys and expert fees; and
- g. Awarding Plaintiffs and other members of the Class such other and further relief as the Court may deem just and proper in light of all the circumstances of this case.

**JURY DEMAND**

Plaintiffs demand a trial by jury of all issues so triable.

**DATED** this day of January, 1999.

PARSONS, DAVIES, KINGHORN & PETERS

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BILL THOMAS PETERS

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DAVID W. SCOFIELD  
Attorneys for Plaintiff

# Exhibit "B"

3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

BEAVER COUNTY vs. US WEST

CASE NUMBER 980913349 Miscellaneous

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CURRENT ASSIGNED JUDGE  
DAVID S YOUNG

## PARTIES

Plaintiff - BEAVER COUNTY  
Represented by: BILL THOMAS PETERS  
Represented by: DAVID W SCOFIELD

Plaintiff - BOX ELDER COUNTY

Plaintiff - CACHE COUNTY

Plaintiff - CARBON COUNTY

Plaintiff - DAVIS COUNTY

Plaintiff - DUCHESENE COUNTY

Plaintiff - EMERY COUNTY

Plaintiff - GARFIELD COUNTY  
Plaintiff - GRAND COUNTY  
Plaintiff - IRON COUNTY  
Plaintiff - JUAB COUNTY  
Plaintiff - KANE COUNTY  
Plaintiff - MILLARD COUNTY  
Plaintiff - MORGAN COUNTY  
Plaintiff - PIUTE COUNTY  
Plaintiff - RICH COUNTY  
Plaintiff - SALT LAKE COUNTY  
Plaintiff - SAN PETE COUNTY

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CASE NUMBER 980913349 Miscellaneous

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Plaintiff - SEVIER COUNTY  
Plaintiff - SUMMIT COUNTY  
Plaintiff - TOOELE COUNTY  
Plaintiff - UINTAH COUNTY  
Plaintiff - UTAH COUNTY  
Plaintiff - WASATCH COUNTY  
Plaintiff - WASHINGTON COUNTY  
Plaintiff - WAYNE COUNTY  
Plaintiff - WEBER COUNTY

Defendant - US WEST  
Represented by: MARK K BUCHI  
Represented by: GEORGE M HALEY  
Represented by: ROBERT L STOLEBARGER

ACCOUNT SUMMARY

TOTAL REVENUE Amount Due: 400.50  
Amount Paid: 400.50  
Credit: 0.00  
Balance: 0.00

REVENUE DETAIL - TYPE: VIDEO TAPE COPY  
Amount Due: 15.00  
Amount Paid: 15.00  
Amount Credit: 0.00  
Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE  
Amount Due: 1.00  
Amount Paid: 1.00  
Amount Credit: 0.00  
Balance: 0.00

REVENUE DETAIL - TYPE: APPEAL  
Amount Due: 190.00  
Amount Paid: 190.00  
Amount Credit: 0.00  
Balance: 0.00

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CASE NUMBER 980913349 Miscellaneous

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REVENUE DETAIL - TYPE: COPY FEE  
Amount Due: 1.00  
Amount Paid: 1.00  
Amount Credit: 0.00  
Balance: 0.00

REVENUE DETAIL - TYPE: APPEAL  
Amount Due: 190.00  
Amount Paid: 190.00  
Amount Credit: 0.00  
Balance: 0.00

REVENUE DETAIL - TYPE: CERTIFIED COPIES  
Amount Due: 1.50  
Amount Paid: 1.50  
Amount Credit: 0.00  
Balance: 0.00

REVENUE DETAIL - TYPE: CERTIFICATION  
Amount Due: 2.00  
Amount Paid: 2.00  
Amount Credit: 0.00  
Balance: 0.00

CASE NOTE

PROCEEDINGS

12-31-98 Judge YOUNG assigned.  
12-31-98 Filed: Complaint  
01-07-99 Filed: First Amended Class Action Complaint for Declaratory  
Relief; Constructive Trust and For Attorneys Fees  
01-07-99 Note: \*\*\*\*\*ACCOUNTING DEPARTMENT HAS FILE AS WELL AS ALL  
CHECKS ON THIS CASE IN THE VAULT\*\*\*\*\*  
01-12-99 Filed order: Order regarding release of funds and substitution  
of surety bond  
Judge dyoung  
Signed January 12, 1999  
01-12-99 Filed: stipulation & joint motion regarding release of funds &  
substituion of surety bond  
01-13-99 Filed: Certificate of Service  
01-19-99 Filed: Certificate of Service  
01-20-99 Filed: Notice of Appearance of Counsel  
01-26-99 Filed: Acceptance of Service Re: First Amended Complaint  
02-09-99 Filed: Memorandum in Support of Defendant's Motion to Dismiss  
Plaintiffs' First Amended Complaint for lack of Subject Matter  
Jurisdiction  
02-09-99 Filed: Defendant's Motion to Dismiss Plaintiffs' First Amdended

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CASE NUMBER 980913349 Miscellaneous

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Complaint for Lack of Subject Matter Jurisdiction.  
03-03-99 Filed: Memorandum in Opposition to Defendnant's Motion to  
Dismiss  
03-19-99 Filed: Reply Memorandum in Support of Defendant's Motion to  
Dismiss Plaintiffs' First Amended Complaint for lack of Subject  
Matter Jurisidiction  
03-19-99 Filed: Notice to Submit for Decision  
03-23-99 Minute Entry - Minutes for MINUTE ENTRY  
Judge: DAVID S. YOUNG  
Clerk: uman

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#### HEARING

The above entitled matter is set for oral arguments to hear  
Defendant's Motion to Dismiss Plaintiff's First Amended Complaint  
for Lack of Subject Matter Jurisdiction on May 14, 1999 at 8:30 am.  
Counsel are requested to arrange their schedules to attend and  
argue the motion.

C.C. to Counsel.

03-24-99 ORAL ARGUMENT scheduled on May 17, 1999 at 08:30 AM in Third  
Floor - S35 with Judge YOUNG.  
05-17-99 Minute Entry - Minutes for ORAL ARGUMENT  
Judge: DAVID S. YOUNG  
Clerk: taunah  
PRESENT

Plaintiff's Attorney(s): BILL THOMAS PETERS  
DAVID W. SCOFIELD  
Defendant's Attorney(s): GEORGE M. HALEY  
ROBERT L STOLEBARGER  
MIKE THOMPSON  
GREGORY MONSON

Video

Tape Number: 051799 Tape Count: 9:35-10:40

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HEARING

This matter comes now before the Court for argument on defendant's motion to dismiss plaintiff's first amended complaint for lack of subject matter jurisdiction. Mr. Haley argues said motion.

TIME: 10:01 Mr. Peters argues response in opposition. 10:31) Mr. Haley rebuttal argument.

TIME: 10:37 The Court rules re 12(b)(1) the defendant's motion to dismiss for lack of subject matter jurisdiction is granted. Mr. Haley to prepare order consistent with findings and ruling of the

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CASE NUMBER 980913349 Miscellaneous

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Court.

05-24-99 Fee Account created Total Due: 15.00

05-24-99 VIDEO TAPE COPY Payment Received: 15.00

Note: VIDEO TAPE COPY

05-28-99 Filed: Transcript from 5/17/99 hearing

06-04-99 Filed: Plaintiffs' Objections to Proposed Form of Order Dismissing, with Prejudice, Plaintiffs' First Amended Complaint for Lack of Subject Matter Jurisdiction

06-08-99 Filed: US West Communications, Inc's Response to Plaintiffs' Objections to Proposed form of Order Dismissing, With Prejudice, Plaintiffs' First Amended Complaint for Lack of Subject Matter Jurisdiction

07-08-99 Filed: Plaintiffs' Reply in Further Support of Their Objection to Proposed form of Order

07-09-99 Filed: US West Communications, Inc's Response to Plaintiffs' Reply in Further Support of Their Objection to Proposed form of Order

07-21-99 Filed: Notice to Submit for Decision

08-06-99 Filed order: Order Dismissing with Prejudice Plaintiff's First Amended Complaint for Lack of Subject Matter Jurisdiction (objections denied)

Judge dyoung

Signed August 06, 1999

08-12-99 Fee Account created Total Due: 1.00

08-12-99 COPY FEE Payment Received: 1.00

08-12-99 Note: Order signed on 8/6/99 releases surety bond. Surety bond was released to Matt Evans attorney for defts.

08-23-99 Filed: Motion to Have Costs Taxed by Court

08-23-99 Filed: Memorandum in Support of Motion to have costs Taxed by Court

08-27-99 Filed: Reply Memorandum in Support of Defendant's Memorandum of Costs and in Opposition to Plaintiffs' Motion to Tax Costs

09-02-99 Filed: Notice of Appeal

09-02-99 Filed: Notice of Appeal

09-02-99 Fee Account created Total Due: 190.00

09-02-99 APPEAL Payment Received: 190.00

Note: Code Description: APPEAL

09-03-99 Filed: Amended Notice of Appeal

09-07-99 Note: Forwarded: cert. copy of Notice of Appeal to Supreme Court

09-08-99 Note: Forwarded: Cert. Copy of Amended Notice of Appeal to Supreme Court

09-14-99 Filed: Letter from Supreme Court-Notice of Appeal sealed S.C.#990771

09-17-99 Filed: Certificate that Transcript is not Required  
09-17-99 Filed: Notice to Submit for Decision  
09-23-99 Fee Account created Total Due: 1.00  
09-23-99 COPY FEE Payment Received: 1.00  
09-27-99 Filed: Designation of Hearing Transcript for Record on Appeal

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CASE NUMBER 980913349 Miscellaneous

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10-15-99 Filed: Request for Transcript  
11-09-99 Filed: Reporter's Notice of Filing Transcript  
11-09-99 Filed: Reporter's Transcript of Proceedings, Defendant's Motion  
To Dismiss Plaintiff's First Amended Complaint For Lack Of  
Subject Matter Jurisdiction, Videotape Proceedings, May 17,  
1999  
11-30-99 Filed: Letter from Supreme Court - Order (SC # 990268/990771  
SC): Motion to withdraw the motion to suspend rules and stay  
proceedings is granted. It is ordered that 990268-SC and  
990771-SC are consolidated under 990771-SC.  
12-23-99 Filed: Letter from Supreme Court - Order - 990771-SC - Motion  
for Reconsideration of Order Granting Counties' Motion to  
Consolidate 990771-sc with 990268-sc is denied  
01-04-00 Minute Entry - Minutes for MINUTE ENTRY  
Judge: DAVID S. YOUNG  
Clerk: uman

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#### HEARING

The Court has reviewed US West's Memorandum of Costs, Plaintiff's  
Objections and Motion to tax Costs and the accompanying pleadings.  
The Court grants Plaintiff's Objection to the surety bond. The  
Counties would not have borne the interest cost had the money been  
placed in an interest bearing account.

The Court grants, based on Form 23 Item 2(g), the costs incurred  
by Defendants for preparation of the exhibits.

Defendants are asked to prepare a judgment consistent with the  
Court's findings.  
C.C. to Counsel.

01-14-00 Note: INDEXED: Cert/Copy of Index sent to Supreme Court -  
S.C.#990771-sc  
02-08-00 Stay begins: January 10, 2000 Reason: Other Agency Control taunah  
Note: Appeal taunah  
02-09-00 Filed order: Judgment (favor US West against plaintiffs for  
costs of exhibits; grants plaintiffs' objs to costs re US  
WSeest's posting surety bond)  
Judge dyoung  
Signed February 09, 2000  
02-11-00 Case Disposition is Judgment debrajoo  
Disposition Judge is DAVID S YOUNG debrajoo  
02-11-00 Judgment #1 Entered  
Debtor: BEAVER COUNTY  
Debtor: BOX ELDER COUNTY  
Debtor: CACHE COUNTY  
Debtor: CARBON COUNTY  
Debtor: DAVIS COUNTY  
Debtor: DUCHESENE COUNTY



CASE NUMBER 980913349 Miscellaneous

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Debtor: EMERY COUNTY  
Debtor: GARFIELD COUNTY  
Debtor: GRAND COUNTY  
Debtor: IRON COUNTY  
Debtor: JUAB COUNTY  
Debtor: MILLARD COUNTY  
Debtor: MORGAN COUNTY  
Debtor: PIUTE COUNTY  
Debtor: SALT LAKE COUNTY  
Debtor: SAN PETE COUNTY  
Debtor: SEVIER COUNTY  
Debtor: SUMMIT COUNTY  
Debtor: TOOELE COUNTY  
Debtor: UINTAH COUNTY  
Creditor: US WEST  
Debtor: UTAH COUNTY  
Debtor: WASATCH COUNTY  
Debtor: WASHINGTON COUNTY  
Debtor: WAYNE COUNTY  
Debtor: WEBER COUNTY  
Debtor: KANE COUNTY  
Debtor: RICH COUNTY

1,014.58 Costs  
1,014.58 Judgment Grand Total

02-11-00 Filed judgment: Judgment @  
Judge dyoung  
Signed February 10, 2000  
02-16-00 Filed: Notice of Appeal  
02-16-00 Fee Account created Total Due: 190.00  
02-16-00 APPEAL Payment Received: 190.00  
Note: Code Description: APPEAL  
02-17-00 Note: Cert. Copy of Notice of Appeal forwarded to Supreme Court  
02-23-00 Filed: Letter to Counsel from Supreme Court (SC # 20000140-SC)  
- Notice of Appeal received by Supreme Court  
02-24-00 Filed: Certificate that Transcript is Not Required  
02-25-00 Fee Account created Total Due: 1.50  
02-25-00 Fee Account created Total Due: 2.00  
02-25-00 CERTIFIED COPIES Payment Received: 1.50  
02-25-00 CERTIFICATION Payment Received: 2.00  
03-31-00 Filed: Letter from Supreme Court - Order - S.C.#990771  
05-03-00 Filed: Supreme Court Letter to Bill Thomas Peters & David W.  
Scofield (SC #990771-SC) - Motion to consolidate cases  
(20000140 and 990771) granted.  
02-27-01 Note: Record: File-1, Trans-1 sent to Supreme Court #990771-SC  
09-26-01 Filed: Remittitur: affirmed in part, reversed in part,  
dismissed in part. Rec. returned: 1 file, 1 transcript. @J

# Exhibit "C"

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IN THE UTAH SUPREME COURT

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BEAVER, BOX ELDER, CACHE, CARBON, DAVIS, DUCHESNE,  
EMERY, GARFIELD, GRAND, IRON, JUAB, KANE, MILLARD, MORGAN,  
PIUTE, RICH, SALT LAKE, SAN PETE, SEVIER, SUMMIT, TOOELE,  
UINTAH, UTAH, WASATCH, WASHINGTON, WAYNE AND WEBER  
COUNTIES, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS  
OR ENTITIES SIMILARLY SITUATED,

Plaintiffs and Appellants,

-VS-

U S WEST COMMUNICATIONS,

Defendant and Appellee.

Docket No. 90268-SC  
Docket No. 990771-SC  
Docket No. 200144-SC  
[Consolidated]

Priority No. 15

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BRIEF OF APPELLANTS

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APPEAL FROM THE ORDER OF THE HONORABLE DAVID S. YOUNG, DATED

AUGUST 6, 1999; THE PUBLIC SERVICE COMMISSION'S DENIAL OF PLAINTIFFS' PETITION  
FOR DECLARATORY JUDGMENT, DEEMED DENIED ON MARCH 1, 1999, AND THE ORDER  
OF THE HONORABLE DAVID S. YOUNG, DATED FEBRUARY 9, 2000, AWARDING COSTS

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George M. Haley  
Robert I. Stolebarger  
Jessica L. Dillon  
Holme Roberts & Owen, LLP  
111 East Broadway, Suite 1100  
Salt Lake City, Utah 84111  
and  
Gregory B. Monson  
David L. Mortensen  
Stoel Rives LLP  
201 South Main, Suite 1100  
Salt Lake City, Utah 84111  
Attorneys for Defendant U S WEST

Michael L. Ginsberg and  
Sander J. Mooy  
Assistant Attorneys General  
160 East 300 South, Fifth Floor  
P. O. Box 140857  
Salt Lake City, Utah 84114-0857  
Attorneys for Public Service Comm. &  
Division of Public Utilities, Respectively

Bill Thomas Peters - 2574  
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**IDENTIFICATION OF PARTIES**

In addition to the parties identified in the caption, the Utah Public Service Commission and the Division of Public Utilities are parties by reason of the deemed denial, through failure to act, regarding the Plaintiffs' Petition for Declaratory Judgment filed in the Public Service Commission. Counsel for the Public Service Commission and the Division of Public Utilities are listed on the cover of this opening brief and has been served with copies of all motions and other papers during these appeal

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- 20 AM. JUR. 2D, COSTS § 72 (1995)
- CHARLES ALLEN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE &  
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- ARTICLE V, § 1, UTAH STATE CONSTITUTION
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**JURISDICTION**

THE UTAH SUPREME COURT HAS JURISDICTION OVER THE SUBJECT MATTER OF THIS APPEAL PURSUANT TO UTAH CODE

### STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR WHEN IT DETERMINED THAT THE PUBLIC SERVICE COMMISSION HAS EXCLUSIVE SUBJECT MATTER JURISDICTION OVER THE PROPOSED CLASS ACTION CLAIMS OF THE APPELLANTS?

**STANDARD OF REVIEW:** THE DETERMINATION OF WHETHER A COURT HAS SUBJECT MATTER JURISDICTION IS A QUESTION OF LAW, WHICH IS REVIEWED FOR CORRECTNESS, ACCORDING NO DEFERENCE TO THE TRIAL COURT'S DETERMINATION.

RIMENSBURGER V. RIMENSBURGER, 841 P.2D 709, 710 (UTAH CT. APP.1992); UTAH DEPT. OF HUMAN RESOURCES V. CHILD SUPPORT ENFORCEMENT, 888 P.2D 690, 691 (UTAH CT. APP. 1994).

**PRESERVED FOR APPEAL:** APPELLEE'S MOTION TO DISMISS THE PROPOSED CLASS ACTION COMPLAINT WAS PREDICATED ON THE TRIAL COURT'S ARGUED LACK OF SUBJECT MATTER JURISDICTION. APPELLANTS' OPPOSITION TO THAT MOTION PRESERVES THE ISSUE FOR APPEAL. R. 82-92.

2. DID THE TRIAL COURT ERR WHEN IT DETERMINED THAT THE PROPOSED CLASS ACTION CLAIMS OF THE APPELLANTS ARE NOT EQUITABLE IN NATURE, INCLUDING APPELLANTS' CLAIM FOR IMPOSITION OF A CONSTRUCTIVE TRUST AND RECOVERY UNDER AN UNJUST ENRICHMENT THEORY?

**STANDARD OF REVIEW:** WHETHER SUBJECT MATTER JURISDICTION OVER APPELLANTS' CONSTRUCTIVE TRUST AND UNJUST ENRICHMENT PROPOSED CLASS ACTION CLAIMS LIE EXCLUSIVELY WITH THE PUBLIC SERVICE COMMISSION IS A QUESTION OF LAW, REVIEWED UNDER A CORRECTION OF ERROR STANDARD. CAMPBELL V. MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, 120 ARIZ. 426, 586 P.2D 987 (1978); ATKIN WRIGHT & MILES V. MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, 709 P.2D 330 (UTAH 1985).

**PRESERVED FOR APPEAL:** APPELLEE'S MOTION TO DISMISS THE COMPLAINT WAS PREDICATED ON THE TRIAL COURT'S ARGUED LACK OF SUBJECT MATTER JURISDICTION. APPELLANTS' OPPOSITION TO THAT MOTION PRESERVES THE ISSUE FOR APPEAL. R. 82-92.



3. DID THE TRIAL COURT ERR WHEN IT DETERMINED IT DID NOT HAVE SUBJECT MATTER JURISDICTION TO HEAR THE CLAIMS OF THE APPELLANT, DESPITE THE COMMISSION'S HAVING DECLINED TO EXERCISE JURISDICTION?

**STANDARD OF REVIEW:** WHETHER THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION TO ENTERTAIN THE CLAIMS OF THE APPELLANT IS AN ISSUE OF LAW, REVIEWED UNDER A CORRECTION OF ERROR STANDARD. CAMPBELL V. MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, 120 ARIZ. 426, 586 P.2D 987 (1978); ATKIN WRIGHT & MILES V. MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, 709 P.2D 330 (UTAH 1985).

**PRESERVED FOR APPEAL:** APPELLEE'S MOTION TO DISMISS THE COMPLAINT WAS PREDICATED ON THE TRIAL COURT'S ARGUED LACK OF JURISDICTION. APPELLANTS' OPPOSITION TO THAT MOTION PRESERVES THE ISSUE FOR APPEAL. R. 82-92.

4. DID THE TRIAL COURT ERR WHEN IT RELEASED THE SURETY BOND TO APPELLEE PRIOR TO FINAL RESOLUTION OF THE LITIGATION, CONTRARY TO THE STIPULATION OF THE PARTIES AND PRIOR ORDER OF THE TRIAL COURT?

**STANDARD OF REVIEW:** WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT THE ENTRY OF AN ORDER OF DISMISSAL WAS A FINAL RESOLUTION OF THE LITIGATION, REGARDLESS OF APPELLANTS' RIGHT TO APPEAL, SO AS TO JUSTIFY RELEASE OF THE SURETY BOND WHICH COMPRISED THE RES OF THE CONSTRUCTIVE TRUST APPELLANT SEEKS TO IMPOSE IS AN ISSUE OF LAW, REVIEWED UNDER A CORRECTION OF ERROR STANDARD. MATTER OF HOMESTAKE MINING COMPANY, 472 N.W.2D 766, 772 (S.D. 1991).

**PRESERVED FOR APPEAL:** APPELLANTS' OBJECTION AND REPLY IN FURTHER OBJECTION TO THE APPELLEE'S PROPOSED FORM OF ORDER RELEASING THE BOND PRESERVES THE ISSUE FOR APPEAL. R. 138-42 AND 153-56.

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**STANDARD OF REVIEW:** THE DETERMINATION OF WHETHER A COURT HAS IMPROPERLY TAXED COSTS IS REVIEWED UNDER AN ABUSE OF DISCRETION STANDARD. CORNISH TOWN V. KOLLER, 817 P.2D 305, 316 (UTAH 1991); FRAMPTON V. WILSON, 605 P.2D 771 (UTAH 1980).

**PRESERVED FOR APPEAL:** APPELLANTS' OBJECTION TO THE APPELLEE'S MOTION TO TAX COSTS AND VERIFIED

MEMORANDUM OF COSTS PRESERVES THE ISSUE FOR APPEAL. R. 174-79.

6. DID THE TRIAL COURT ERR WHEN IT ENTERED A DISMISSAL OF THE ACTION WITH PREJUDICE, RATHER THAN WITHOUT PREJUDICE?

**STANDARD OF REVIEW:** THE DETERMINATION OF WHETHER AN ORDER OF DISMISSAL WAS IMPROPERLY ENTERED WITH PREJUDICE IS AN ISSUE OF LAW, REVIEWED UNDER A CORRECTION OF ERROR STANDARD. ALDRICH, NELSON, WEIGHT & ESPLIN, 878 P.2D 1191, 1194 (UTAH CT. APP. 1994)

**PRESERVED FOR APPEAL:** APPELLANTS' OBJECTION TO THE APPELLEE'S PROPOSED FORM OF ORDER PRESERVES THE ISSUE FOR APPEAL. R. 138-42 AND 153-56.

### RELEVANT STATUTES AND RULES

ARTICLE V, § 1, UTAH STATE CONSTITUTION:

THE POWERS OF THE GOVERNMENT OF THE STATE OF UTAH SHALL BE DIVIDED INTO THREE DISTINCT DEPARTMENTS, THE LEGISLATIVE, THE EXECUTIVE AND THE JUDICIAL; AND NO PERSON CHARGED WITH THE EXERCISE OF POWERS PROPERLY BELONGING TO ONE OF THESE DEPARTMENTS SHALL EXERCISE ANY FUNCTIONS APPERTAINING TO EITHER OF THE OTHERS, EXCEPT IN THE CASES HEREIN EXPRESSLY DIRECTED OR PERMITTED.

ARTICLE VIII, § 1, UTAH STATE CONSTITUTION:

THE JUDICIAL POWER OF THE STATE SHALL BE VESTED IN A SUPREME COURT, IN A TRIAL COURT OF GENERAL JURISDICTION KNOWN AS THE DISTRICT COURT, AND IN SUCH OTHER COURTS AS THE LEGISLATURE BY STATUTE MAY ESTABLISH. THE SUPREME COURT, THE DISTRICT COURT, AND SUCH OTHER COURTS DESIGNATED BY STATUTE SHALL BE COURTS OF RECORD. COURTS NOT OF RECORD SHALL ALSO BE ESTABLISHED BY STATUTE.

ARTICLE VIII, § 5, UTAH STATE CONSTITUTION:

THE DISTRICT COURT SHALL HAVE ORIGINAL JURISDICTION IN ALL MATTERS EXCEPT AS LIMITED BY THIS CONSTITUTION OR BY STATUTE AND POWER TO ISSUE ALL EXTRAORDINARY WRITS. THE DISTRICT COURT SHALL HAVE APPELLATE JURISDICTION AS PROVIDED BY STATUTE. THE JURISDICTION OF ALL OTHER COURTS, BOTH ORIGINAL AND APPELLATE, SHALL BE PROVIDED BY STATUTE. EXCEPT FOR MATTERS FILED ORIGINALLY WITH THE SUPREME COURT, THERE SHALL BE IN ALL CASES AN APPEAL OF RIGHT FROM THE COURT OF ORIGINAL JURISDICTION TO A COURT WITH APPELLATE JURISDICTION OVER THE CAUSE.

UTAH CODE ANN. § 54-1-1:

THE PUBLIC SERVICE COMMISSION OF UTAH IS ESTABLISHED AS AN INDEPENDENT AGENCY. THE PUBLIC SERVICE COMMISSION IS CHARGED WITH DISCHARGING THE DUTIES AND EXERCISING THE LEGISLATIVE, ADJUDICATIVE, AND RULE-MAKING POWERS COMMITTED TO IT BY LAW AND MAY SUE AND BE SUED IN ITS OWN NAME.

UTAH CODE ANN. § 54-4-1:

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; PROVIDED, HOWEVER, THAT THE DEPARTMENT OF TRANSPORTATION SHALL HAVE JURISDICTION OVER THOSE SAFETY FUNCTIONS TRANSFERRED TO IT BY THE DEPARTMENT OF TRANSPORTATION ACT.

UTAH CODE ANN. § 54-4-4(2):

THE COMMISSION SHALL HAVE POWER TO INVESTIGATE A SINGLE RATE, FARE, TOLL, RENTAL, CHARGE, CLASSIFICATION, RULE, REGULATION, CONTRACT OR PRACTICE, OR ANY NUMBER THEREOF, OR THE ENTIRE SCHEDULE OR SCHEDULES OF RATES, FARES, TOLLS, RENTALS, CHARGES, CLASSIFICATIONS, RULES, REGULATIONS, CONTRACTS AND PRACTICES, OR ANY NUMBER THEREOF, OF ANY PUBLIC UTILITY, AND TO ESTABLISH, AFTER HEARING, NEW RATES, FARES, TOLLS, RENTALS, CHARGES, CLASSIFICATIONS, RULES, REGULATIONS, CONTRACTS OR PRACTICES, OR SCHEDULE OR SCHEDULES IN LIEU THEREOF.

UTAH CODE ANN. § 63-46B-7(1):

PROCEDURES FOR FORMAL ADJUDICATIVE PROCEEDINGS -- DISCOVERY & SUBPOENAS.

(1) IN FORMAL ADJUDICATIVE PROCEEDINGS, THE AGENCY MAY, BY RULE, PRESCRIBE MEANS OF DISCOVERY ADEQUATE TO PERMIT THE PARTIES TO OBTAIN ALL RELEVANT INFORMATION NECESSARY TO SUPPORT THEIR CLAIMS OR DEFENSES. IF THE AGENCY DOES NOT ENACT RULES UNDER THIS SECTION, THE PARTIES MAY CONDUCT DISCOVERY ACCORDING TO THE UTAH RULES OF CIVIL PROCEDURE.

UTAH CODE ANN. § 63-46B-21:

DECLARATORY ORDERS.

(1) ANY PERSON MAY FILE A REQUEST FOR AGENCY ACTION, REQUESTING THAT THE AGENCY ISSUE A DECLARATORY ORDER DETERMINING THE APPLICABILITY OF A STATUTE, RULE, OR ORDER WITHIN THE PRIMARY JURISDICTION OF THE AGENCY TO SPECIFIED CIRCUMSTANCES.

(2) EACH AGENCY SHALL ISSUE RULES THAT:

(A) PROVIDE FOR THE FORM, CONTENTS, AND FILING OF PETITIONS FOR DECLARATORY ORDERS;

(B) PROVIDE FOR THE DISPOSITION OF THE PETITIONS;

(C) DEFINE THE CLASSES OF CIRCUMSTANCES IN WHICH THE AGENCY WILL NOT ISSUE A DECLARATORY ORDER;

(D) ARE CONSISTENT WITH THE PUBLIC INTEREST AND WITH THE GENERAL POLICY OF THIS CHAPTER; AND

(E) FACILITATE AND ENCOURAGE AGENCY ISSUANCE OF RELIABLE ADVICE.

(3)(A) AN AGENCY MAY NOT ISSUE A DECLARATORY ORDER IF:

(I) THE REQUEST IS ONE OF A CLASS OF CIRCUMSTANCES THAT THE AGENCY HAS BY RULE DEFINED AS BEING EXEMPT FROM DECLARATORY ORDERS; OR

(II) THE PERSON REQUESTING THE DECLARATORY ORDER PARTICIPATED IN AN ADJUDICATIVE PROCEEDING CONCERNING THE SAME ISSUE WITHIN 12 MONTHS OF THE DATE OF THE PRESENT REQUEST.

(B) AN AGENCY MAY ISSUE A DECLARATORY ORDER THAT WOULD SUBSTANTIALLY PREJUDICE THE RIGHTS OF A PERSON WHO WOULD BE A NECESSARY PARTY, ONLY IF THAT PERSON CONSENTS IN WRITING TO THE DETERMINATION OF THE MATTER BY A DECLARATORY PROCEEDING.

(4) PERSONS MAY INTERVENE IN DECLARATORY PROCEEDINGS IF:

(A) THEY MEET THE REQUIREMENTS OF SECTION 63-46B-9; AND

(B) THEY FILE TIMELY PETITIONS FOR INTERVENTION ACCORDING TO AGENCY RULES.

(5) AN AGENCY MAY PROVIDE, BY RULE OR ORDER, THAT OTHER PROVISIONS OF SECTIONS 63-46B-4 THROUGH 63-46B-13 APPLY TO DECLARATORY PROCEEDINGS.

(6) (A) AFTER RECEIPT OF A PETITION FOR A DECLARATORY ORDER, THE AGENCY MAY ISSUE A WRITTEN ORDER:

(I) DECLARING THE APPLICABILITY OF THE STATUTE, RULE, OR ORDER IN QUESTION TO THE SPECIFIED CIRCUMSTANCES;

(II) SETTING THE MATTER FOR ADJUDICATIVE PROCEEDINGS;

(III) AGREEING TO ISSUE A DECLARATORY ORDER AND STATING THE REASONS FOR ITS ACTION.

(B) A DECLARATORY ORDER SHALL CONTAIN:

(I) THE NAMES OF ALL PARTIES TO THE PROCEEDING ON WHICH IT IS BASED;

(II) THE PARTICULAR FACTS ON WHICH IT IS BASED; AND

(III) THE REASONS FOR ITS CONCLUSION.

(C) A COPY OF ALL ORDERS ISSUED IN RESPONSE TO A REQUEST FOR A DECLARATORY PROCEEDING SHALL BE MAILED PROMPTLY TO THE PETITIONER AND ANY OTHER PARTIES.

(D) A DECLARATORY ORDER HAS THE SAME STATUS AND BINDING EFFECT AS ANY OTHER ORDER ISSUED IN AN ADJUDICATIVE PROCEEDING.

(7) UNLESS THE PETITIONER AND THE AGENCY AGREE IN WRITING TO AN EXTENSION, IF AN AGENCY HAS NOT

ISSUED A DECLARATORY ORDER WITHIN 60 DAYS AFTER RECEIPT OF THE PETITION FOR A DECLARATORY ORDER, THE PETITION IS DENIED.

UTAH CODE ANN. § 78-3-4(1):

THE DISTRICT COURT HAS ORIGINAL JURISDICTION IN ALL MATTERS CIVIL AND CRIMINAL, NOT EXCEPTED IN THE UTAH CONSTITUTION AND NOT PROHIBITED BY LAW.

UTAH CODE ANN. § 78-27-4:

(1) (A) ANY PERSON DEPOSITING MONEY IN COURT, TO BE HELD IN TRUST, SHALL PAY IT TO THE COURT CLERK.

(B) THE CLERK SHALL DEPOSIT THE MONEY IN A COURT TRUST FUND OR WITH THE COUNTY TREASURER OR CITY RECORDER TO BE HELD SUBJECT TO THE ORDER OF THE COURT.

(2) THE JUDICIAL COUNCIL SHALL ADOPT RULES GOVERNING THE MAINTENANCE OF COURT TRUST FUNDS AND THE DISPOSITION OF INTEREST EARNINGS ON THOSE TRUST FUNDS.

(3) (A) ANY INTEREST EARNED ON TRUST FUNDS THAT IS NOT REQUIRED TO ACCRUE TO THE LITIGANTS BY JUDICIAL COUNCIL RULE OR COURT ORDER SHALL BE DEPOSITED IN A RESTRICTED ACCOUNT.

(B) THE LEGISLATURE SHALL APPROPRIATE FUNDS FROM THAT RESTRICTED ACCOUNT TO THE JUDICIAL COUNCIL TO:

(i) OFFSET COSTS TO THE COURTS FOR COLLECTION AND MAINTENANCE OF COURT TRUST FUNDS; AND

(ii) PROVIDE ACCOUNTING AND AUDITING OF ALL COURT REVENUE AND TRUST ACCOUNTS.

UTAH CODE ANN. § 78-33-1:

THE DISTRICT COURTS WITHIN THEIR RESPECTIVE JURISDICTIONS SHALL HAVE POWER TO DECLARE RIGHTS, STATUS, AND OTHER LEGAL RELATIONS, WHETHER OR NOT FURTHER RELIEF IS OR COULD BE CLAIMED. NO ACTION OR PROCEEDING SHALL BE OPEN TO OBJECTION ON THE GROUND THAT A DECLARATORY JUDGMENT OR DECREE IS PRAYED FOR. THE DECLARATION MAY BE EITHER AFFIRMATIVE OR NEGATIVE IN FORM AND EFFECT; AND SUCH DECLARATION SHALL HAVE THE FORCE AND EFFECT OF A FINAL JUDGMENT OR DECREE.

PSC RULE R746-101-2, PETITION PROCEDURE:

A. A PERSON OR AGENCY MAY PETITION THE COMMISSION FOR A DECLARATORY RULING.

B. THE PETITION SHALL BE ADDRESSED TO THE COMMISSION AND DIRECTED TO THE CHAIRMAN OF THE COMMISSION.

C. THE COMMISSION WILL STAMP UPON THE PETITION THE DATE OF ITS RECEIPT.

D. THE PETITIONER SHALL SERVE A COPY OF THE PETITION UPON THE PUBLIC UTILITY WHICH COULD OR WOULD BE ADVERSELY AFFECTED BY A COMMISSION RULING FAVORABLE TO THE PETITIONER AND SHALL FILE WITH THE COMMISSION THE CERTIFICATE OF SERVICE WITHIN FIVE DAYS OF THE FILING OF THE PETITION; OR PETITIONER SHALL INCLUDE IN THE PETITION A STATEMENT TO THE EFFECT THAT NO PUBLIC UTILITY UNDER THE COMMISSION'S JURISDICTION WILL BE ADVERSELY AFFECTED BY A RULING FAVORABLE TO THE PETITIONER.

PSC RULE R746-101-4, PETITION REVIEW AND DISPOSITION:

A. THE COMMISSION SHALL:

1. REVIEW AND CONSIDER THE PETITION;
2. PREPARE A DECLARATORY RULING IN COMPLIANCE WITH THE REQUIREMENTS OF 63-46B-21(6) AND STATING:

A. THE APPLICABILITY OR NON-APPLICABILITY OF THE STATUTE, RULE, OR ORDER IN QUESTION;

B. THE REASONS FOR THE APPLICABILITY OR NON-APPLICABILITY OF THE STATUTE, RULE, OR ORDER IN QUESTION;

C. REQUIREMENTS IMPOSED UPON THE COMMISSION, PETITIONER, OR A PERSON AS A RESULT OF THE RULING.

B. THE COMMISSION MAY:

1. INTERVIEW THE PETITIONER;
2. HOLD A PUBLIC HEARING ON THE PETITION;
3. CONSULT WITH COUNSEL OR THE ATTORNEY GENERAL; OR
4. TAKE ACTION WHICH THE COMMISSION, IN ITS DISCRETION AND JUDGMENT DEEMS NECESSARY TO PROVIDE THE PETITIONER WITH ADEQUATE REVIEW AND DUE CONSIDERATION OF THE PETITION.

C. THE COMMISSION SHALL PREPARE THE DECLARATORY RULING WITHOUT UNNECESSARY DELAY AND SHALL SEND THE PETITIONER AND EACH PARTY A COPY OF THE RULING.

D. THE COMMISSION SHALL RETAIN THE PETITION AND A COPY OF THE DECLARATORY RULING IN ITS RECORDS.

UTAH R CIV. P. 12(B). DEFENSES.

(B) EVERY DEFENSE, IN LAW OR FACT, TO CLAIM FOR RELIEF IN ANY PLEADING, WHETHER A CLAIM, COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM, SHALL BE ASSERTED IN THE RESPONSIVE PLEADING THERETO IF ONE IS REQUIRED, EXCEPT THAT THE FOLLOWING DEFENSES MAY AT THE OPTION OF THE PLEADER BE MADE BY MOTION: (1) LACK OF JURISDICTION OVER THE SUBJECT MATTER, (2) LACK OF JURISDICTION OVER THE PERSON, (3) IMPROPER VENUE, (4) INSUFFICIENCY OF PROCESS, (5) INSUFFICIENCY OF SERVICE OF PROCESS, (6) FAILURE TO

STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, (7) FAILURE TO JOIN AN INDISPENSABLE PARTY. A MOTION MAKING ANY OF THESE DEFENSES SHALL BE MADE BEFORE PLEADING IF A FURTHER PLEADING IS PERMITTED. NO DEFENSE OR OBJECTION IS WAIVED BY BEING JOINED WITH ONE OR MORE OTHER DEFENSES OR OBJECTIONS IN A RESPONSIVE PLEADING OR MOTION OR BY FURTHER PLEADING AFTER THE DENIAL OF SUCH MOTION OR OBJECTION. IF A PLEADING SETS FORTH A CLAIM FOR RELIEF TO WHICH THE ADVERSE PARTY IS NOT REQUIRED TO SERVE A RESPONSIVE PLEADING, HE MAY ASSERT AT THE TRIAL ANY DEFENSE IN LAW OR FACT TO THAT CLAIM FOR RELIEF. IF, ON A MOTION ASSERTING THE DEFENSE NUMBERED (6) TO DISMISS FOR FAILURE OF THE PLEADING TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, MATTERS OUTSIDE THE PLEADING ARE PRESENTED TO AND NOT EXCLUDED BY THE COURT, THE MOTION SHALL BE TREATED AS ONE FOR SUMMARY JUDGMENT AND DISPOSED OF AS PROVIDED IN RULE 56, AND ALL PARTIES SHALL BE GIVEN REASONABLE OPPORTUNITY TO PRESENT ALL MATERIAL MADE PERTINENT TO SUCH A MOTION BY RULE 56.

#### UTAH R. CIV. P. 23. CLASS ACTIONS.

(A) PREREQUISITES TO A CLASS ACTION. ONE OR MORE MEMBERS OF A CLASS MAY SUE OR BE SUED AS REPRESENTATIVE PARTIES ON BEHALF OF ALL ONLY IF (1) THE CLASS IS SO NUMEROUS THAT JOINDER OF ALL MEMBERS IS IMPRACTICABLE, (2) THERE ARE QUESTIONS OF LAW OR FACT COMMON TO THE CLASS, (3) THE CLAIMS OR DEFENSES OF THE REPRESENTATIVE PARTIES ARE TYPICAL OF THE CLAIMS OR DEFENSES OF THE CLASS, AND (4) THE REPRESENTATIVE PARTIES WILL FAIRLY AND ADEQUATELY PROTECT THE INTERESTS OF THE CLASS.

(B) CLASS ACTIONS MAINTAINABLE. AN ACTION MAY BE MAINTAINED AS A CLASS ACTION IF THE PREREQUISITES OF SUBDIVISION (A) ARE SATISFIED, AND IN ADDITION:

(1) THE PROSECUTION OF SEPARATE ACTIONS BY OR AGAINST INDIVIDUAL MEMBERS OF THE CLASS WOULD CREATE A RISK OF:

(A) INCONSISTENT OR VARYING ADJUDICATIONS WITH RESPECT TO INDIVIDUAL MEMBERS OF THE CLASS WHICH WOULD ESTABLISH INCOMPATIBLE STANDARDS OF CONDUCT FOR THE PARTY OPPOSING THE CLASS, OR

(B) ADJUDICATIONS WITH RESPECT TO INDIVIDUAL MEMBERS OF THE CLASS WHICH WOULD AS A PRACTICAL MATTER BE DISPOSITIVE OF THE INTERESTS OF THE OTHER MEMBERS NOT PARTIES TO THE ADJUDICATIONS OR SUBSTANTIALLY IMPAIR OR IMPEDE THEIR ABILITY TO PROTECT THEIR INTERESTS; OR

(2) THE PARTY OPPOSING THE CLASS HAS ACTED OR REFUSED TO ACT ON GROUNDS GENERALLY APPLICABLE TO THE CLASS, THEREBY MAKING APPROPRIATE FINAL INJUNCTIVE RELIEF OR CORRESPONDING DECLARATORY RELIEF WITH RESPECT TO THE CLASS AS A WHOLE; OR

(3) THE COURT FINDS THAT THE QUESTIONS OF LAW OR FACT COMMON TO THE MEMBERS OF THE CLASS PREDOMINATE OVER ANY QUESTIONS AFFECTING ONLY INDIVIDUAL MEMBERS, AND THAT A CLASS ACTION IS SUPERIOR TO OTHER AVAILABLE METHODS FOR THE FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY. THE MATTERS PERTINENT TO THE FINDINGS INCLUDE:

(A) THE INTEREST OF MEMBERS OF THE CLASS IN INDIVIDUALLY CONTROLLING THE PROSECUTION OR DEFENSE OF SEPARATE ACTIONS;

(B) THE EXTENT AND NATURE OF ANY LITIGATION CONCERNING THE CONTROVERSY ALREADY COMMENCED BY OR AGAINST MEMBERS OF THE CLASS;

(C) THE DESIRABILITY OR UNDESIRABILITY OF CONCENTRATING THE LITIGATION OF THE CLAIMS IN THE PARTICULAR FORUM;

(D) THE DIFFICULTIES LIKELY TO BE ENCOUNTERED IN THE MANAGEMENT OF A CLASS ACTION.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) AS SOON AS PRACTICABLE AFTER THE COMMENCEMENT OF AN ACTION BROUGHT AS A CLASS ACTION, THE COURT SHALL DETERMINE BY ORDER WHETHER IT IS TO BE MAINTAINED. AN ORDER UNDER THIS SUBDIVISION MAY BE CONDITIONAL, AND MAY BE ALTERED OR AMENDED BEFORE THE DECISION ON THE MERITS.

(2) IN ANY CLASS ACTION MAINTAINED UNDER SUBDIVISION (B)(3), THE COURT SHALL DIRECT TO THE MEMBERS OF THE CLASS THE BEST NOTICE PRACTICABLE UNDER THE CIRCUMSTANCES, INCLUDING INDIVIDUAL NOTICE TO ALL MEMBERS WHO CAN BE IDENTIFIED THROUGH REASONABLE EFFORT. THE NOTICE SHALL ADVISE EACH MEMBER THAT

(A) THE COURT WILL EXCLUDE HIM FROM THE CLASS IF HE SO REQUESTS BY A SPECIFIED DATE;

(B) THE JUDGMENT, WHETHER FAVORABLE OR NOT, WILL INCLUDE ALL MEMBERS WHO DO NOT REQUEST EXCLUSION; AND

(C) ANY MEMBER WHO DOES NOT REQUEST EXCLUSION MAY, IF HE DESIRES, ENTER AN APPEARANCE THROUGH HIS COUNSEL.

(3) THE JUDGMENT IN AN ACTION MAINTAINED AS A CLASS ACTION UNDER SUBDIVISION (B)(1) OR (B)(2), WHETHER OR NOT FAVORABLE TO THE CLASS, SHALL INCLUDE AND DESCRIBE THOSE WHOM THE COURT FINDS TO BE MEMBERS OF THE CLASS. THE JUDGMENT IN AN ACTION MAINTAINED AS A CLASS ACTION UNDER SUBDIVISION (B)(3), WHETHER OR NOT FAVORABLE TO THE CLASS, SHALL INCLUDE AND SPECIFY OR DESCRIBE THOSE TO WHOM THE NOTICE PROVIDED IN SUBDIVISION (C)(2) WAS DIRECTED, AND WHO HAVE NOT REQUESTED EXCLUSION, AND WHOM THE COURT FINDS TO BE MEMBERS OF THE CLASS.

(4) WHEN APPROPRIATE (A) AN ACTION MAY BE BROUGHT OR MAINTAINED AS A CLASS ACTION WITH RESPECT TO PARTICULAR ISSUES, OR (B) A CLASS MAY BE DIVIDED INTO SUBCLASSES AND EACH SUBCLASS TREATED AS A CLASS, AND THE PROVISIONS OF THIS RULE SHALL THEN BE CONSTRUED AND APPLIED ACCORDINGLY.

(d) ORDERS IN CONDUCT OF ACTIONS. IN THE CONDUCT OF ACTIONS TO WHICH THIS RULE APPLIES, THE COURT MAY MAKE APPROPRIATE ORDERS:

(1) DETERMINING THE COURSE OF PROCEEDINGS OR PRESCRIBING MEASURES TO PREVENT UNDUE REPETITION OR COMPLICATION IN THE PRESENTATION OF EVIDENCE OR ARGUMENT;

(2) REQUIRING, FOR THE PROTECTION OF THE MEMBERS OF THE CLASS OR OTHERWISE FOR THE FAIR CONDUCT OF THE ACTION, THAT NOTICE BE GIVEN IN SUCH MANNER AS THE COURT MAY DIRECT TO SOME OR ALL OF THE MEMBERS OF ANY STEP IN THE ACTION, OR OF THE PROPOSED EXTENT OF THE JUDGMENT, OR OF THE OPPORTUNITY OF MEMBERS TO SIGNIFY WHETHER THEY CONSIDER THE REPRESENTATION FAIR AND ADEQUATE, TO INTERVENE AND PRESENT CLAIMS OR DEFENSES, OR OTHERWISE TO COME INTO THE



ACTION;

(3) IMPOSING CONDITIONS ON THE REPRESENTATIVE PARTIES OR ON INTERVENORS;

(4) REQUIRING THAT THE PLEADINGS BE AMENDED TO ELIMINATE THEREFROM ALLEGATIONS AS TO REPRESENTATION OF ABSENT PERSONS, AND THAT THE ACTION PROCEED ACCORDINGLY;

(5) DEALING WITH SIMILAR PROCEDURAL MATTERS. THE ORDERS MAY BE COMBINED WITH AN ORDER UNDER RULE 16, AND MAY BE ALTERED OR AMENDED AS MAY BE DESIRABLE FROM TIME TO TIME.

(E) DISMISSAL OR COMPROMISE. A CLASS ACTION SHALL NOT BE DISMISSED OR COMPROMISED WITHOUT THE APPROVAL OF THE COURT, AND NOTICE OF THE PROPOSED DISMISSAL OR COMPROMISE SHALL BE GIVEN TO ALL MEMBERS OF THE CLASS IN SUCH MANNER AS THE COURT DIRECTS.

#### UTAH R. CIV. P. 41(B):

UNLESS THE COURT IN ITS ORDER FOR DISMISSAL OTHERWISE SPECIFIES, A DISMISSAL UNDER THIS SUBDIVISION AND ANY DISMISSAL NOT PROVIDED FOR IN THIS RULE, OTHER THAN A DISMISSAL FOR LACK OF JURISDICTION OR FOR IMPROPER VENUE OR FOR LACK OF AN INDISPENSABLE PARTY, OPERATES AS AN ADJUDICATION UPON THE MERITS.

#### UTAH R. CIV. P. 54(D) COSTS.

(1) TO WHOM AWARDED. EXCEPT WHEN EXPRESS PROVISION THEREFOR IS MADE EITHER IN A STATUTE OF THIS STATE OR IN THESE RULES, COSTS SHALL BE ALLOWED AS OF COURSE TO THE PREVAILING PARTY UNLESS THE COURT OTHERWISE DIRECTS; PROVIDED, HOWEVER, WHERE AN APPEAL OR OTHER PROCEEDING FOR REVIEW IS TAKEN, COSTS OF THE ACTION, OTHER THAN COSTS IN CONNECTION WITH SUCH APPEAL OR OTHER PROCEEDING FOR REVIEW, SHALL ABIDE THE FINAL DETERMINATION OF THE CAUSE. COSTS AGAINST THE STATE OF UTAH, ITS OFFICERS AND AGENCIES SHALL BE IMPOSED ONLY TO THE EXTENT PERMITTED BY LAW.

(2) HOW ASSESSED. THE PARTY WHO CLAIMS HIS COSTS MUST WITHIN FIVE DAYS AFTER THE ENTRY OF JUDGMENT SERVE UPON THE ADVERSE PARTY AGAINST WHOM COSTS ARE CLAIMED, A COPY OF A MEMORANDUM OF THE ITEMS OF HIS COSTS AND NECESSARY DISBURSEMENTS IN THE ACTION, AND FILE WITH THE COURT A LIKE MEMORANDUM THEREOF DULY VERIFIED STATING THAT TO AFFIANT'S KNOWLEDGE THE ITEMS ARE CORRECT, AND THAT THE DISBURSEMENTS HAVE BEEN NECESSARILY INCURRED IN THE ACTION OR PROCEEDING. A PARTY DISSATISFIED WITH THE COSTS CLAIMED MAY, WITHIN SEVEN DAYS AFTER SERVICE OF THE MEMORANDUM OF COSTS, FILE A MOTION TO HAVE THE BILL OF COSTS TAXED BY THE COURT IN WHICH THE JUDGMENT WAS ENTERED.

A MEMORANDUM OF COSTS SERVED AND FILED AFTER THE VERDICT, OR AT THE TIME OF OR SUBSEQUENT TO THE SERVICE AND FILING OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW, BUT BEFORE THE ENTRY OF JUDGMENT, SHALL NEVERTHELESS BE CONSIDERED AS SERVED AND FILED ON THE DATE JUDGMENT IS ENTERED.

#### UTAH R. CIV. P. 67. DEPOSIT IN COURT.

WHEN IT IS ADMITTED BY THE PLEADINGS, OR SHOWN UPON THE EXAMINATION OF A PARTY, THAT HE HAS IN HIS POSSESSION OR UNDER HIS CONTROL ANY MONEY OR OTHER THING CAPABLE OF DELIVERY, WHICH, BEING THE

SUBJECT OF LITIGATION, IS HELD BY HIM AS TRUSTEE FOR ANOTHER PARTY, OR WHICH BELONGS OR IS DUE TO ANOTHER PARTY, THE COURT MAY ORDER THE SAME, UPON MOTION, TO BE DEPOSITED IN COURT OR DELIVERED TO SUCH PARTY UPON SUCH CONDITIONS AS MAY BE JUST, SUBJECT TO THE FURTHER DIRECTION OF THE COURT; PROVIDED THAT IF MONEY IS PAID INTO COURT UNDER THIS RULE IT SHALL BE DEPOSITED AND WITHDRAWN IN ACCORDANCE WITH SECTION 78-27-4, UTAH CODE ANNOTATED 1953, OR ANY LIKE STATUTE.

## STATEMENT OF THE CASE

### A. NATURE OF PROCEEDINGS.

THIS IS AN ACTION TO RECOVER, FOR THE BENEFIT OF A CLASS CONSISTING OF THE COUNTIES AND ALL OTHERS SIMILARLY SITUATED, A PROPERTY TAX REFUND ORDERED BY THE TAX COMMISSION, WHERE PAYMENT TO APPELLEE WOULD REPRESENT DUPLICATE PAYMENT TO APPELLEE IN THE APPROXIMATE AMOUNT OF \$16.9 MILLION, OVER AND ABOVE THE RATES APPROVED BY THE PUBLIC SERVICE COMMISSION UNDER UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST THEORIES.

### B. COURSE OF PROCEEDINGS BELOW.

THE COUNTIES FILED THEIR PROPOSED CLASS ACTION COMPLAINT IN THE THIRD JUDICIAL DISTRICT COURT, FOR SALT LAKE COUNTY STATE OF UTAH, TO IMPOSE A CONSTRUCTIVE TRUST ON \$16.9 MILLION IN AD VALOREM PROPERTY TAX PAYMENTS ORDERED BY THE TAX COMMISSION TO BE REFUNDED AS A RESULT OF A SETTLEMENT OF DISPUTES INVOLVING AD VALOREM TAXES ON US WEST'S TAXABLE PROPERTY, FOR THE BENEFIT OF THE PUTATIVE CLASS. US WEST FILED A MOTION TO DISMISS THE PROPOSED CLASS ACTION COMPLAINT, ALLEGING (1) THAT THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER WHAT US WEST MISCHARACTERIZED AS AN ACTION FOR RETROACTIVE RATE-MAKING, AND (2) THAT SUBJECT MATTER JURISDICTION EXCLUSIVELY LAY IN THE PSC. THE TRIAL COURT DISMISSED THE PROPOSED CLASS ACTION COMPLAINT WITH PREJUDICE. THE COUNTIES TIMELY FILED THEIR NOTICE OF APPEAL (DOCKET No. 990268-SC). AT THE TIME THE NOTICE OF APPEAL WAS FILED, THE US WEST MEMORANDUM OF COSTS WAS PENDING BEFORE THE TRIAL COURT. THE COUNTIES OBJECTED TO REASONABLENESS AND NECESSITY OF THE COSTS REQUESTED BY US WEST, AND MOVED TO HAVE COSTS TAXED BY THE TRIAL COURT. THE TRIAL COURT DENIED THE REQUEST OF US WEST FOR REIMBURSEMENT OF THE SURETY BOND PREMIUM AS A COST, BUT ALLOWED THE LITIGATION EXPENSES INCURRED FOR PREPARATION OF HEARING EXHIBITS TO BE TAXED AS COSTS. THE

COUNTIES APPEALED THE TRIAL COURT'S AWARD OF THOSE COSTS (DOCKET No. 2000144-SC).

CONTEMPORANEOUSLY WITH THE FILING OF THE PROPOSED CLASS ACTION COMPLAINT IN THE THIRD DISTRICT COURT, THE COUNTIES INITIATED AN ACTION BEFORE THE PSC, REQUESTING THAT THE PSC DETERMINE THAT THE REFUND AMOUNT WOULD BE A DOUBLE RECOVERY OF PROPERTY TAXES BY US WEST FOR THE YEARS IN QUESTION AND FURTHER REQUESTING THE PSC TO DECLARE THAT THE \$16.9 MILLION TAX REFUND SHOULD BE PAID TO A CLASS OF RATE PAYERS INCLUDING THE COUNTIES AND ALL OTHER PERSONS AND/OR ENTITIES SIMILARLY SITUATED, RATHER THAN US WEST. THE PSC TOOK NO ACTION ON THE COUNTIES' PETITION WITHIN SIXTY DAYS AFTER IT WAS FILED AND, PURSUANT TO PSC RULE R746-101-4(2) AND UTAH CODE ANN. § 63-46B-21, THE SECTION OF THE UTAH ADMINISTRATIVE PROCEDURES ACT WHICH GOVERNS DECLARATORY ORDERS, THE COUNTIES' PETITION WAS "DEEMED DENIED" ON MARCH 1, 1999 (DOCKET No. 990771-SC).

UPON MOTION OF THE COUNTIES, THIS COURT'S ORDER CONSOLIDATING DOCKET Nos. 990268SC AND 990771-SC WAS ENTERED ON DECEMBER 23, 1999. THE PARTIES STIPULATED TO CONSOLIDATION OF THE APPEAL OF THE TRIAL COURT'S COST AWARD.

**C. STATEMENT OF FACTS.**

6. APPELLEE IS A PUBLIC UTILITY. THE UTAH PUBLIC SERVICE COMMISSION (THE "PSC") IS THE AGENCY OF GOVERNMENT CHARGED WITH THE RESPONSIBILITY OF SETTING RATES FOR PUBLIC UTILITIES. R. 6.

7. THE COUNTIES, AND THE MEMBERS OF THE PROPOSED CLASS, WERE AND ARE USERS OF US WEST'S TELECOMMUNICATIONS SERVICES. R. 3.

8. THE RATES CHARGED BY APPELLEE DURING THE YEARS 1988 THROUGH 1996 WERE ESTABLISHED BY THE PSC. THE PSC DETERMINED THOSE RATES BASED ON THE EXPENSES WHICH US WEST COULD BE EXPECTED TO INCUR TO GENERATE SUFFICIENT REVENUE TO PAY THOSE EXPENSES, AND GENERATE A REASONABLE RETURN FOR US WEST'S SHAREHOLDERS. INCLUDED IN THE RATES AUTHORIZED BY THE PSC IS AN AMOUNT FOR AD VALOREM TAXES ON US WEST'S PROPERTIES. R. 6. THESE RATES, PROPERLY SET AND CHARGED, WERE PAID TO US WEST BY RATEPAYERS, WHO THEREBY PAID THE AD VALOREM PROPERTY TAXES AS CONTEMPLATED IN THOSE RATES.

9. US WEST NEGOTIATED A REFUND OF PROPERTY TAXES FROM EACH OF THE COUNTIES IN WHICH US WEST'S

ALLOCATED UTAH PROPERTIES ARE LOCATED (THE "SETTLEMENT FUND" OR THE "FUNDS"), IN THE APPROXIMATE AMOUNT OF \$16.9 MILLION. R. 6-7. THE RATEPAYERS HAD ALREADY PAID US WEST MONIES TOWARD PAYMENT OF AD VALOREM TAXES IN THE YEARS IN QUESTION PURSUANT TO RATES PROPERLY SET BY THE PSC, AND US WEST HAD USED THOSE MONIES, IN PART, TO PAY THE AD VALOREM TAXES.

10. PRIOR TO RECEIVING THE SETTLEMENT FUNDS, US WEST HAD ALREADY RECEIVED FROM ITS RATEPAYERS AN AMOUNT EQUAL TO THE SETTLEMENT FUND THROUGH THE RATES IT CHARGED AND RECEIVED. US WEST'S CUSTOMERS INCLUDE THE COUNTIES AND OTHERS SIMILARLY SITUATED. R. 7.

11. THE COUNTIES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, SEEK TO IMPOSE A CONSTRUCTIVE TRUST ON THE SETTLEMENT FUND AND COMPEL THE DISTRIBUTION OF THE FUNDS TO THE CLASS ON UNJUST ENRICHMENT GROUNDS.  R. 1-9 AND 25-39.

12. CONTEMPORANEOUSLY WITH THE FILING OF THE PROPOSED CLASS ACTION COMPLAINT IN THE THIRD JUDICIAL DISTRICT COURT,  THE COUNTIES FILED A REQUEST FOR DECLARATORY RULING IN THE PSC (DOCKET No. 98-049-48), REQUESTING THAT THE PSC DETERMINE THAT THE AD VALOREM TAX REFUND IF PAID TO US WEST, WOULD BE A DOUBLE RECOVERY OF PROPERTY TAXES BY US WEST FOR THE YEARS IN QUESTION AND FURTHER REQUESTING THE PSC TO DECLARE THAT \$16.9 MILLION BE DISTRIBUTED TO THE CLASS OF RATEPAYERS, TO PREVENT A DOUBLE RECOVERY BY US WEST COMMUNICATIONS OF EXPENSES ASSOCIATED WITH AD VALOREM TAXATION, FIRST THROUGH RECEIVING ITS APPROVED AND PROPER RATES, AND THEN AGAIN, THROUGH THE TAX REFUND. R. 88.

13. PUBLIC SERVICE COMMISSION RULE R746-101-4(2) PROVIDES THAT, IN RULING ON A REQUEST FOR A DECLARATORY RULING, THE PSC SHALL ACT IN COMPLIANCE WITH § 63-46B-21 OF THE UTAH ADMINISTRATIVE PROCEDURES ACT, WHICH GOVERNS DECLARATORY ORDERS. SECTION 63-46B-21 REQUIRES THAT THE PSC TO ISSUE A DECLARATORY ORDER WITHIN 60 DAYS AFTER THE DATE A PETITION REQUESTING A DECLARATORY ORDER IS FILED, UNLESS THE PETITIONER AND AGENCY AGREE IN WRITING TO AN EXTENSION OF THAT TIME. IF NO EXTENSION IS AGREED TO IN WRITING AND NO DECLARATORY ORDER IS ISSUED BY THE PSC WITHIN THE 60 DAY PERIOD, THE PETITION IS DEEMED DENIED. THE PSC DID NOT ISSUE A DECLARATORY ORDER, NO EXTENSION WAS SOUGHT OR OBTAINED, AND THE COUNTIES' REQUEST FOR DECLARATORY ORDER WAS DEEMED

DENIED ON MARCH 1, 1999. THE COUNTIES TIMELY APPEALED ON MARCH 30, 1999.

14. AT THE COMMENCEMENT OF THIS CASE, THE COUNTIES PAID INTO THE COURT THE AD VALOREM TAX REFUND FUNDS WHICH WERE THE SUBJECT OF THE CONTROVERSY. R. 16-19. THEREAFTER, PURSUANT TO THE REQUEST OF COUNSEL FOR US WEST, THE PARTIES STIPULATED THAT THE FUNDS COULD BE RELEASED TO US WEST IN EXCHANGE FOR A SURETY BOND. R. 43-45.

15. US WEST FILED A MOTION TO DISMISS THE PROPOSED CLASS ACTION COMPLAINT ON GROUNDS THAT THE PSC HAS EXCLUSIVE JURISDICTION OVER RATE-MAKING MATTERS, ASSERTING THAT THE CLASS' ASSERTION OF AN OWNERSHIP INTEREST AND RIGHT TO DISTRIBUTION OF THE FUNDS WAS SOMEHOW AN ATTEMPT TO ENGAGE IN RETROACTIVE RATE-MAKING. R. 79-81. THE MOTION TO DISMISS WAS GRANTED BY THE COURT AND AN ORDER OF DISMISSAL WITH PREJUDICE WAS ENTERED ON AUGUST 6, 1999. R. 165-68. THE COUNTIES' NOTICE OF APPEAL OF THAT ORDER WAS TIMELY FILED ON SEPTEMBER 3, 1999. R. 189-90.

16. THE TRIAL COURT ENTERED ITS ORDER AWARDING COSTS TO US WEST IN THE AMOUNT OF \$1,014.58 ON FEBRUARY 10, 2000. US WEST HAD REQUESTED AN AWARD OF COST FOR THE PREMIUM OF THE SURETY BOND IT HAD FILED. R. 169-71. THE TRIAL COURT REJECTED THAT REQUEST, BUT AWARDED US WEST COSTS FOR PREPARATION OF EXHIBITS USED AT THE HEARING ON THE MOTION TO DISMISS.

17. THE COUNTIES' TIMELY FILED THEIR NOTICE OF APPEAL RELATIVE TO THE TRIAL COURT'S AWARD OF COSTS ON FEBRUARY 16, 2000.

### **SUMMARY OF ARGUMENT**

THE COUNTIES, AS PUTATIVE CLASS PLAINTIFFS, PUT FORTH A VERY SIMPLE SUBSTANTIVE POSITION: BECAUSE US WEST COMMUNICATIONS, INC. ("US WEST") HAS ALREADY, AND QUITE PROPERLY, CHARGED THE RATEPAYERS AND COLLECTED MONIES IT HAS PAID FOR AD VALOREM PROPERTY TAXES THROUGH A PROPER RATE SET BY THE PSC. THE SETTLEMENT FUNDS BELONG NOT TO US WEST, WHICH HAS ALREADY BEEN REIMBURSED FOR THE TAXES PAID BY ITS RATEPAYERS, THEREFORE, BUT TO THE CLASS OF RATEPAYERS THEMSELVES WHO ALREADY REIMBURSED US WEST.

US WEST CLAIMS THAT THE ISSUE IS ONE OF RATE MAKING. IT CLEARLY IS NOT, BECAUSE THE COUNTIES AND PUTATIVE

CLASS DO NOT CHALLENGE THE RATES SET BY THE PSC. INSTEAD, THE COUNTIES POINT OUT THE OBVIOUS -- THAT, BECAUSE THOSE RATES INCORPORATED APPROPRIATE REIMBURSEMENTS TO BE PAID BY THE RATEPAYERS TO US WEST FOR AD VALOREM TAXES PAID, AND THOSE REIMBURSEMENTS UNDER THOSE RATES HAVE ALREADY BEEN RECEIVED BY US WEST, US WEST WOULD RECEIVE A DOUBLE RECOVERY IF IT WERE ALSO AND IN ADDITION ALLOWED TO RETAIN THE SETTLEMENT FUNDS. THAT IS UNJUST AND INEQUITABLE TO THE RATEPAYERS WHO FORM THE PUTATIVE CLASS, AND THE FUNDS SHOULD, THEREFORE, BE DISTRIBUTED TO A DEFINED AND CERTIFIED CLASS, CONSISTING OF THE CUSTOMERS WHO HAD ALREADY REIMBURSED US WEST FOR THE TAXES IN THE FIRST INSTANCE.

THE COUNTIES ASK THIS COURT TO RULE THAT THE THIRD DISTRICT COURT HAS JURISDICTION OVER SUCH A CLASS ACTION PROCEEDING -- NOT TO SET RATES, NOT TO ALTER OR MODIFY RATES, NOT TO REFUND PAYMENTS MADE UNDER SET RATES, BUT RATHER TO DECLARE THE RATEPAYERS THE OWNERS OF THE TAX REFUND.

IF THIS COURT WERE TO RULE THAT THE THIRD DISTRICT COURT DOES NOT HAVE JURISDICTION OVER SUCH A CLASS ACTION PROCEEDING, THEN THE COUNTIES REQUEST THAT THIS COURT CLARIFY THAT A CLASS ACTION PROCEEDING TO HAVE THOSE SETTLEMENT FUNDS PAID DIRECTLY TO THE RATEPAYERS WOULD IN FACT BE WITHIN THE JURISDICTION OF THE PSC AND DIRECT THE ACTION TO SO PROCEED IN THAT FORUM. THE RATES THAT WERE PAID BY RATEPAYERS AS SET IN THE PAST ARE NOT BEING CHALLENGED AS IN ANY WAY UNFAIR OR INEQUITABLE. INSTEAD, IT IS THE SETTLEMENT FUND ITSELF THAT IS THE SUBJECT OF THIS CLAIM. THOSE FUNDS DO NOT STEM FROM RATE-MAKING BY THE PSC. THOSE FUNDS STEM FROM AN ORDER FROM THE UTAH STATE TAX COMMISSION ("TAX COMMISSION") APPROVING A SETTLEMENT AGREEMENT. US WEST HAS ALREADY BEEN MADE WHOLE BY BEING PAID BY ITS CUSTOMERS, THE RATEPAYERS. IT IS THE CUSTOMERS OF US WEST WHO ARE ENTITLED TO THE FUNDS.

AS TO THE COUNTIES' APPEAL OF THE COSTS AWARD MADE BY THE THIRD DISTRICT COURT ON FEBRUARY 9, 2000, THE COUNTIES SUBMIT THAT, IN A CASE DIRECTLY ON POINT, THIS COURT HAS RULED AGAINST THE TYPE OF COSTS ALLOWED BY THE TRIAL COURT. THE TRIAL COURT MADE NO FINDING AS TO WHETHER THE COSTS WERE REASONABLY AND/OR NECESSARILY INCURRED, AND THE COUNTIES SUBMIT THAT NO SUCH FINDING COULD HAVE BEEN MADE IN THAT THE COSTS WERE INCURRED TO CREATE HEARING EXHIBITS WHICH WERE NOTHING MORE THAN ENLARGEMENTS OF STATUTES CONTAINED IN THE UTAH CODE AND

PLEADINGS IN THE CASE.

FINALLY, A DISMISSAL **WITH PREJUDICE** IS IMPROPER WHERE THE GROUNDS ARE LACK OF SUBJECT MATTER JURISDICTION.

## ARGUMENT

### I. THE DISTRICT COURT IS THE PROPER FORUM FOR RESOLUTION OF THE COUNTIES' CLAIMS.

THE COUNTIES, ON BEHALF OF THEMSELVES AND ALL OTHER CUSTOMERS OF **US WEST** SIMILARLY SITUATED, INITIATED THIS PROSPECTIVE CLASS ACTION TO RECOVER A SPECIFIC RES, IN THE FORM OF A PROPERTY TAX REFUND, TO BE PAID TO **US WEST** AS A RESULT OF THE SETTLEMENT OF DISPUTED TAXES PAID BY **US WEST** UNDER PROTEST. IN SEEKING TO RECOVER THOSE FUNDS, THE COUNTIES DO NOT ASSERT THAT THE RATES SET BY THE **PSC** FOR THE TAX YEARS IN QUESTION ARE NOT JUST AND REASONABLE. THE COUNTIES' PROPOSED CLASS ACTION COMPLAINT SIMPLY RAISES THE ISSUE OF WHO IS ENTITLED TO RECEIVE THE FUNDS PAID IN CONNECTION WITH THE SETTLEMENT -- **US WEST** OR ITS CUSTOMERS. THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT, IF IT WERE TO TAKE JURISDICTION OVER THE PROPOSED CLASS CLAIMS, THE PRINCIPLES OF SEPARATION OF POWERS WOULD BE VIOLATED.

#### A. THE TRIAL COURT ERRED WHEN IT RULED THAT EXERCISING JURISDICTION OVER THE CLAIMS OF THE COUNTIES, AS PUTATIVE CLASS REPRESENTATIVES, WOULD VIOLATE SEPARATION OF POWERS PRINCIPLES.

THE **UTAH** CONSTITUTION DEFINES THE THREE DEPARTMENTS OF GOVERNMENT (**LEGISLATIVE, EXECUTIVE, AND JUDICIAL**), AND PROHIBITS ANY PERSON CHARGED WITH EXERCISING THE POWERS "PROPERLY BELONGING" TO ONE OF THESE DEPARTMENTS FROM EXERCISING ANY FUNCTIONS "APPERTAINING TO EITHER OF THE OTHERS," EXCEPT AS OTHERWISE AUTHORIZED IN THE CONSTITUTION.

THE GENERAL GRANT OF JURISDICTION TO THE DISTRICT COURTS (A PART OF THE JUDICIAL BRANCH, ALONG WITH THE **UTAH** SUPREME COURT AND OTHER COURTS ESTABLISHED BY THE LEGISLATURE) IS FOUND IN **ARTICLE VIII, §§ 1 AND 5** OF THE **UTAH** CONSTITUTION AND IMPLEMENTED BY **UTAH CODE ANN. § 78-3-4(1)**, WHICH GIVES THE DISTRICT COURT "ORIGINAL JURISDICTION IN ALL MATTERS CIVIL AND CRIMINAL, NOT EXCEPTED IN THE **UTAH** CONSTITUTION AND NOT PROHIBITED BY LAW." THE MANDATE OF DISTRICT COURTS IS TO HEAR AND RESOLVE CONTROVERSIES BETWEEN PARTIES IN LITIGATION.

THE PSC'S GRANT OF AUTHORITY IS FOUND IN UTAH CODE ANN. §§ 54-1-1 AND 54-4-1, WHICH VEST THE PSC, A PART OF THE LEGISLATIVE BRANCH OF GOVERNMENT, 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 . . . ."

THE SEPARATION OF POWERS PROVISIONS OF ARTICLE V, § 1 WERE DISCUSSED EXTENSIVELY BY THIS COURT IN IN RE YOUNG,  WHERE THE ISSUE PRESENTED WAS WHETHER MEMBERS OF THE UTAH LEGISLATURE COULD ALSO SERVE ON THE JUDICIAL CONDUCT COMMISSION. IN THAT CASE, THIS COURT ACKNOWLEDGED THAT

[A] NECESSARY COROLLARY TO THE DOCTRINE THAT SOME POWERS OR FUNCTIONS BELONG EXCLUSIVELY TO THE MEMBERS OF ONE BRANCH IS THAT THERE MUST BE POWERS AND FUNCTIONS WHICH MAY, IN APPEARANCE, HAVE CHARACTERISTICS OF AN INHERENT FUNCTION OF ONE BRANCH BUT WHICH MAY BE PERMISSIBLY EXERCISED BY ANOTHER BRANCH.

THE COURT WENT ON TO NOTE THAT "IT IS JUST THIS SORT OF JUDGMENT ABOUT WHAT IS SO INHERENT IN A BRANCH THAT IT CANNOT BE EXERCISED BY ANOTHER AND WHAT IS NOT SO INHERENT TO ONE THAT IT CAN BE EXERCISED BY SEVERAL THAT OUR CASES HAVE STRIVEN TO DETERMINE OVER THE YEARS,"  AND CONCLUDED THAT "WHEN THE POWER EXERCISED OR THE FUNCTION PERFORMED IS ONE THAT WE DETERMINE IS NOT EXCLUSIVE TO A BRANCH, IT IS NOT APPERTAINING TO THAT BRANCH AND DOES NOT FALL WITHIN THE REACH OF THE SECOND CLAUSE OF ARTICLE V, SECTION 1."

IT IS BEYOND QUESTION THAT THE DISTRICT COURTS AND OTHER STATE AGENCIES ROUTINELY ADDRESS ISSUES THAT TANGENTIALLY RELATE TO THE INCOME AND EXPENSES OF PUBLIC UTILITIES, EXCLUSIVE OF ANY PARTICIPATION BY THE PSC. FOR EXAMPLE, WORKERS COMPENSATION CLAIMS, WHICH HAVE A DIRECT IMPACT ON THE LABOR COSTS OF PUBLIC UTILITIES, ARE DECIDED BY THE DEPARTMENT OF LABOR; TORT CLAIMS, WHICH MAY RESULT IN SUBSTANTIAL LIABILITY TO A PUBLIC UTILITY, ARE BROUGHT BEFORE DISTRICT COURTS; AND CHALLENGES TO THE VALUATION OF TAXABLE PROPERTY (ONE OF WHICH GAVE RISE TO THE SETTLEMENT FUND AT ISSUE HERE) ARE RESOLVED BY THE TAX COMMISSION, EVEN THOUGH THE TAX COMMISSION'S FINAL DETERMINATION OF VALUE UNQUESTIONABLY IMPACTS ON "THE BUSINESS OF . . . SUCH PUBLIC UTILITY."

**B. APPLICATION OF THIS COURT'S SEPARATION OF POWERS TEST DEMONSTRATES THAT THE SEPARATION OF POWERS CLAUSE IS NOT VIOLATED BY RESOLUTION OF THIS DISPUTE BY THE DISTRICT COURT.**



IN YOUNG, THIS COURT ENUNCIATED A TEST TO DETERMINE IF THE SEPARATION OF POWERS PROVISIONS OF ARTICLE V, § 1 HAVE BEEN VIOLATED. THE ANALYSIS REQUIRES THREE INQUIRIES, WHICH, IN THIS CASE, ARE: (1) BY ACCEPTING JURISDICTION, WOULD THE TRIAL COURT BE REQUIRED TO EXERCISE POWERS PROPERLY BELONGING TO THE PSC; (2) WOULD THE TRIAL COURT'S RULING ON THE PROPER DISPOSITION OF THE SETTLEMENT FUND "APPERTAIN" TO THE PSC IN A WAY THAT IS EXCLUSIVE TO THE FUNCTION OF THE PSC; AND (3) IF SO, IS THE EXERCISE OF JURISDICTION OTHERWISE PERMITTED BY THE CONSTITUTION? IF THE ANSWERS TO THE FIRST AND SECOND QUESTIONS ARE IN THE AFFIRMATIVE FURTHER INQUIRY IS NECESSARY.  IN THE INSTANT CASE, THE COUNTIES SEEK TO HAVE THE APPROPRIATE AUTHORITY HEAR AND RESOLVE A CONTROVERSY BETWEEN ADVERSE PARTIES IN LITIGATION. THUS, IF THE DISTRICT COURT HEARS THE CASE, IT IS "EXERCIS[ING] POWERS PROPERLY BELONGING TO IT]," AND IS NOT ENCROACHING ON THE EXCLUSIVE DOMAIN OF THE PSC. THUS, THE ANSWER TO THE FIRST QUESTION IN THE YOUNG TEST IS "NO."

THE SECOND QUESTION, WOULD THE TRIAL COURT'S RULING ON THE PROPER DISPOSITION OF THE SETTLEMENT FUND "APPERTAIN" TO THE PSC IN A WAY THAT IS EXCLUSIVE TO THE FUNCTION OF THE PSC, INVOLVES AN ANALYSIS OF THE PHRASE "APPERTAINING TO," WHICH HAS BEEN INTERPRETED TO REFERENCE THE "PRIMARY," "CORE," OR "ESSENTIAL" POWERS OF THE DEPARTMENT. THE "CORE" POWERS OF THE JUDICIAL DEPARTMENT INCLUDE THE POWER TO HEAR AND DETERMINE CONTROVERSIES BETWEEN ADVERSE PARTIES AND QUESTIONS IN LITIGATION.

THE COUNTIES REQUEST THAT SOME AUTHORITY HEAR AND DETERMINE A CONTROVERSY BETWEEN ADVERSE PARTIES; THAT IS, THE PROPER DISPOSITION OF THE SETTLEMENT FUND, A CORE FUNCTION OF THE JUDICIARY. THE RESPONSE TO THE SECOND QUESTION IN THE YOUNG TEST IS ALSO "NO."  BECAUSE THE AUTHORITY TO RESOLVE THIS CONTROVERSY IS A CORE FUNCTION OF THE JUDICIARY, WE NEED LOOK NO FURTHER UNDER THE YOUNG TEST TO FIND THAT THE DISTRICT COURT IS THE APPROPRIATE FORUM.

C. RESOLUTION OF THE CLAIMS PRESENTED BY THE COUNTIES DOES NOT REQUIRE THE SPECIAL EXPERTISE OF A REGULATORY AGENCY.

IN CAMPBELL V. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO.,  THE ARIZONA COURT OF APPEALS HELD THAT IF A COMPLAINT RAISES ISSUES CONCERNED ONLY WITH THE MANNER AND MEANS OF PROVIDING TELEPHONE SERVICE, THE ARIZONA EQUIVALENT OF THE PSC HAS PRIMARY JURISDICTION. THE CAMPBELL COURT HELD THAT THE PSC DOES NOT HAVE EXCLUSIVE

JURISDICTION WHEN THE CASE “DOES NOT INVOLVE THE QUESTION OF WHETHER [THE TELEPHONE COMPANY IS] ADEQUATELY PROVIDING TELEPHONE SERVICE TO THE PUBLIC . . . [OR] SEEKING INJUNCTIVE RELIEF TO ESTABLISH BROAD PUBLIC DOCTRINES, OR RIGHTS TO SERVICE OR LEVELS OF SERVICE.  THIS COURT HAS HELD THAT

[P]UBLIC UTILITIES HAVE NO WHOLESAL IMMUNITY FROM THE DUTIES IMPOSED BY TORT LAW GENERALLY. A UTILITIES’ ACTIONS WHICH GIVE RISE TO TORTIOUS OR CONTRACTUAL LIABILITY AND **WHICH DO NOT CALL IN QUESTION THE VALIDITY OF ORDERS OF THE PSC** OR TRENCH UPON ITS DELEGATED POWERS ARE SUBJECT TO THE JURISDICTION OF THE DISTRICT COURT.

THE COUNTIES REITERATE THAT THEY DO NOT CHALLENGE IN ANY WAY THE VALIDITY OF THE ORDERS OF THE PSC; THE COUNTIES ASSERT EQUITABLE OWNERSHIP OF THE SETTLEMENT FUND ON BEHALF OF THEMSELVES, AND OTHER MEMBERS OF THE PUTATIVE CLASS. WHILE THE COUNTIES ACKNOWLEDGE THAT THE RATE-MAKING FUNCTION OF THE PSC IS A COMPLICATED AND TIME-CONSUMING PROCEDURE, THAT FUNCTION WAS IN FACT EXERCISED BY THE PSC LONG AGO. THE PSC THEN ALLOWED A RATE STRUCTURE TO COLLECT AD VALOREM TAXES FROM RATEPAYERS. US WEST DID THAT AND PAID THOSE TAXES. NOWHERE DID THE PSC ALLOW US WEST TO BOTH COLLECT TAXES FROM RATEPAYERS AND THEN LATER HOLD THE WINDFALL OF A REFUND FROM THE TAX COMMISSION. THE EXPERTISE OF THE PSC IS SIMPLY NOT NECESSARY IN THIS INSTANCE, BECAUSE THE CLASS ACTION SUIT DEALS SOLELY WITH THE REFUND THROUGH THE TAX COMMISSION, NOT THE RATES SET BY THE PSC. IN LOWELL GAS COMPANY V. ATTORNEY GENERAL,  THE COURT ADDRESSED A SIMILAR ISSUE:

WHILE IT IS UNDISPUTED THAT SUITS DIRECTLY CHALLENGING PUBLIC UTILITY RATES AS DETERMINED BY THE DEPARTMENT [OF PUBLIC UTILITIES] MAY NOT BE BROUGHT IN THE SUPERIOR COURT [CITATION AND FOOTNOTE OMITTED], WE FIND THIS PRINCIPLE INAPPOSITE HERE. INDEED, OUR VIEW OF THE ESSENTIAL CHARACTER OF THIS CASE DIFFERS MARKEDLY FROM THAT PROPOUNDED BY THE COMPANIES. THE ATTORNEY GENERAL IN HIS COMPLAINTS DOES NOT ATTACK THE VALIDITY OF RATES AS SET FORTH BY THE DEPARTMENT. RATHER, HE CHALLENGES WHAT HE ALLEGES TO BE UNFAIR, DECEPTIVE (COUNT 1), AND FRAUDULENT (COUNT 2) PRACTICES BY THE COMPANY VIS-A-VIS BOTH THEIR CUSTOMERS AND THE DEPARTMENT. HE ALLEGES FURTHER THAT SUCH PRACTICES WERE NEITHER PERMITTED NOR APPROVED BY THE DEPARTMENT. [FOOTNOTE OMITTED.]

AS ONE COURT NOTED, “NO FIXED FORMULA EXISTS FOR APPLYING THE DOCTRINE OF PRIMARY JURISDICTION.”

HOWEVER, WHERE RESOLUTION OF AN ISSUE DOES NOT REQUIRE THE SPECIAL COMPETENCE OF AN AGENCY ESTABLISHED TO IMPLEMENT A REGULATORY SCHEME, PRIMARY JURISDICTION RESTS WITH COURTS OF ORIGINAL JURISDICTION. HERE, THE PREMISE OF THE COUNTIES’ CASE IS QUITE SIMPLE -- THE COUNTIES AND OTHER MEMBERS OF THE PUTATIVE CLASS HAVE PAID THE CHARGES US WEST WAS PERMITTED BY THE PSC TO CHARGE THROUGH THEIR PAYMENT TO US WEST FOR SERVICES. THOSE

COSTS INCLUDED THE TAXES WHICH ARE NOW REPRESENTED BY THE SETTLEMENT FUND. US WEST HAS ALREADY RECEIVED REIMBURSEMENT FOR ITS TAX LIABILITY AND, IF THE COUNTIES' CLAIMS ARE NOT HEARD, THE SETTLEMENT FUND REPRESENTS A SECOND REIMBURSEMENT FOR THE SAME EXPENSES. THE ISSUE IS ONE OF EQUITY, NOT ONE REQUIRING THE COMPLICATED RATE-MAKING EXPERTISE OF THE PSC.

**D. IF THE COURT DETERMINES THE COUNTIES' CLASS CLAIMS CANNOT BE HEARD BY THE DISTRICT COURT, THE COURT SHOULD REMAND THE MATTER TO THE PSC FOR FURTHER PROCEEDINGS.**

US WEST ARGUED TO THE DISTRICT COURT THAT IT LACKED SUBJECT MATTER JURISDICTION TO HEAR AND RULE ON THIS CONTROVERSY AND ASSERTED THAT THE PSC HAD "EXCLUSIVE AUTHORITY OVER RATE MAKING ISSUES AND . . . THE COURTS HAVE NO AUTHORITY TO ENGAGE IN RATE MAKING OR RATE ADJUSTMENT."  THE COUNTIES ARGUED THAT THE RES OF THE ACTION -- THE BOND WHICH WAS POSTED BY US WEST AS A SUBSTITUTE FOR THE ORIGINAL RES OF \$16.9 MILLION -- HAD NOTHING TO DO WITH RATE-MAKING; RATHER, IT WAS A QUESTION OF DETERMINING WHO WAS RIGHTFULLY ENTITLED TO THOSE SPECIFIC AD VALOREM PROPERTY TAX REFUND MONIES. THE TRIAL COURT AGREED WITH US WEST AND RULED THAT ONLY THE PSC, AND NOT THE COURT, HAD SUBJECT MATTER JURISDICTION OVER THE ISSUE, YET PARADOXICALLY ERRONEOUSLY PROCEEDED TO DISMISS THE CASE WITH PREJUDICE.

BECAUSE THE STATUTES ARE NOT CLEAR, THE COUNTIES ALSO FILED A PETITION WITH THE PSC FOR FORMAL ADJUDICATION SEEKING THE SAME RELIEF FOR A PUTATIVE CLASS. THE PSC SIMPLY TOOK NO ACTION ON THAT PETITION AND IT WAS THEREFORE DEEMED DENIED. US WEST THEN ARGUED, IN SUPPORT OF ITS MOTION TO DISMISS THE APPEAL TO THIS COURT, THAT THE PSC IS "STATUTORILY PROHIBITED FROM GRANTING THE COUNTIES' REQUEST."

US WEST ARGUED TO THE THIRD DISTRICT COURT THAT ONLY THE PSC HAS JURISDICTION TO RESOLVE THE ISSUE PRESENTED BY THE COUNTIES, YET ALSO ARGUES THAT THE PSC IS "STATUTORILY PROHIBITED" FROM CONSIDERING THE ISSUES RAISED BY THE COUNTIES BECAUSE US WEST "NEVER CONSENTED TO A DETERMINATION OF THE ISSUES RAISED BY THE REQUEST IN A DECLARATORY PROCEEDING."  IN OTHER WORDS, THE POSITION OF US WEST IS THAT THE DETERMINATION OF THE RIGHTFUL OWNER OF THE \$16.9 MILLION AT ISSUE -- US WEST OR THE RATEPAYER CLASS -- CAN BE DETERMINED ONLY BY THE PSC, BUT ONLY IF US WEST FIRST CONSENTS TO HAVE THE ISSUE CONSIDERED BY THE PSC. US WEST'S ARGUMENTS ARE

INCONSISTENT AND, EVIDENTLY, AIMED AT ATTEMPTING PRECLUDE **ANY** AUTHORITY FROM FULLY HEARING AND RESOLVING THE **COUNTIES'** CLAIMS. **SUCH** ATTEMPTED WHIPSAWING SHOULD BE DEALT WITH NOW, TO PREVENT FUTURE APPEALS ON ISSUES NOW BEFORE THIS **COURT**.

TO PREVENT **US WEST** FROM SUCCEEDING IN THWARTING THE **COUNTIES'** ATTEMPTS TO BE HEARD, IF THIS **COURT** DETERMINES THAT THE DISTRICT COURT DOES LACK SUBJECT MATTER JURISDICTION, THIS **COURT** SHOULD REMAND TO THE **PSC** BASED ON THIS **COURT'S** DETERMINATION THAT THE **PSC** IN FACT IS NOT "STATUTORILY PROHIBITED" AS **US WEST** ARGUES, IS NOT IMPEDED BY THE **THIRD DISTRICT COURT'S** IMPROPER "WITH PREJUDICE" DETERMINATION, AND MUST PROCEED.

**II. THE CLAIMS OF THE COUNTIES ARE EQUITABLE IN NATURE, DO NOT RELATE TO RATE-MAKING, AND DO NOT CHALLENGE THE LEGALITY OR PROPRIETY OF RATES CHARGED BY U S WEST, AS SET BY THE PSC.**

THE TRIAL COURT FOUND THAT THE "ALTERNATIVE REMEDIES SOUGHT BY [THE **COUNTIES**] ARE RATE-MAKING, AN ADJUSTMENT OF RATES PREVIOUSLY SET BY THE **PUBLIC SERVICE COMMISSION** OR A PARTIAL REFUND OF THOSE RATES, WHICH [ ] ARE WITHIN THE EXCLUSIVE JURISDICTION OF THE **PUBLIC SERVICE COMMISSION**."  IF THIS **COURT** DETERMINES THE TRIAL COURT'S FINDING IS INCORRECT, AS IT MUST BE FOUND, THE TRIAL COURT'S DISMISSAL OF THE **COUNTIES'** CLAIMS IS ERRONEOUS AND SHOULD BE REVERSED.

THE TRIAL COURT MISUNDERSTOOD THE FUNDAMENTAL NATURE OF THE **COUNTIES'** CLAIMS AND, BECAUSE IT MISUNDERSTOOD THE FUNDAMENTAL NATURE OF THE **COUNTIES'** CLAIMS, IT RULED IT DID NOT HAVE JURISDICTION TO ENTERTAIN THE **COUNTIES** REQUEST FOR IMPOSITION OF A CONSTRUCTIVE TRUST ON THE **SETTLEMENT FUND**. THE **COUNTIES** CLAIM THAT **US WEST** IS NOT ENTITLED TO RETAIN THE **SETTLEMENT FUND** AND THAT THE **FUNDS** SHOULD BE PAID OVER TO THE **COUNTIES**, AND OTHER CUSTOMERS OF **US WEST** BECAUSE **US WEST** HAS **ALREADY** BEEN REIMBURSED THROUGH ITS COLLECTED AND PROPER CHARGES FOR THE REFUNDED TAXES IN AN AMOUNT EQUAL TO THE AMOUNT OF THE **SETTLEMENT FUND**. **US WEST** HAS RECEIVED REIMBURSEMENT FOR THE TAXES **PAID** FROM ITS CUSTOMERS THROUGH PAYMENTS IT RECEIVED BASED ON RATES WHICH **INCLUDED** AN AMOUNT FOR THE TAXES WHICH THE **SETTLEMENT FUND** REPRESENTS. THE **COUNTIES** **DO NOT** CHALLENGE THE FAIRNESS OF THE RATES WHICH THE **PSC**, IN THE PROPER EXERCISE OF ITS DUTIES, DETERMINED **US WEST** WAS ENTITLED TO CHARGE ITS CUSTOMERS. THEY CHALLENGE ONLY THE FUNDAMENTAL UNFAIRNESS OF **US WEST** KEEPING **BOTH** MONIES PAID UNDER ITS RATE

STRUCTURE AND A TAX REFUND OVER WHICH THE PSC HAS NO JURISDICTION.

**A. THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT BECAUSE THE COUNTIES ADEQUATELY STATED EQUITABLE CLAIMS.**

THE CONFUSION OF THE TRIAL COURT MAY HAVE ARISEN AS A RESULT OF THE DESCRIPTION OF THE PUTATIVE CLASS AS “RATEPAYERS.” THAT THE PARTIES SEEKING TO IMPOSE THE CONSTRUCTIVE TRUST ARE DEFINED WHO PAID THE RATES PREVIOUSLY CHARGED BY US WEST FOR SERVICES RENDERED DOES NOT TRANSLATE TO A CHALLENGE TO THE APPROPRIATENESS, FAIRNESS, AND/OR REASONABLENESS OF THE RATES, THEMSELVES, AND, INDEED, THE COUNTIES HAVE MADE NO SUCH CHALLENGE.

IN RULING ON US WEST’S MOTION TO DISMISS, THE TRIAL COURT WAS REQUIRED TO ACCEPT ALL WELL-PLEADED FACTUAL ALLEGATIONS OF THE COUNTIES’ AMENDED COMPLAINT  AS TRUE.  THE MOTION TO DISMISS FILED BY U S WEST WAS BASED ON US WEST’S ARGUMENT THAT THE COUNTIES’ CLAIMS NECESSITATED RETROACTIVE RATE-MAKING, THAT THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION, AND THAT EXCLUSIVE JURISDICTION TO HEAR THOSE CLAIMS LAY WITH THE PSC.  IF THE COUNTIES’ COMPLAINT EFFECTIVELY PLEADS EQUITABLE CLAIMS, THE TRIAL COURT HAS SUBJECT MATTER JURISDICTION OVER THOSE CLAIMS.

THE COUNTIES SEEK IMPOSITION OF A CONSTRUCTIVE TRUST ON THE SETTLEMENT FUND FOR THE BENEFIT OF THEMSELVES AND OTHER QUALIFIED CUSTOMERS OF US WEST. TO ESTABLISH ENTITLEMENT TO A CONSTRUCTIVE TRUST, THE COUNTIES MUST DEMONSTRATE THAT THEY, AND OTHERS SIMILARLY SITUATED, HAVE CONFERRED A BENEFIT UPON US WEST; THAT US WEST IS AWARE IT HAS RECEIVED THAT BENEFIT; AND THAT IT WOULD BE INEQUITABLE FOR US WEST TO BE ALLOWED TO RETAIN THE BENEFIT.

“THE DOCTRINE [OF UNJUST ENRICHMENT] IS DESIGNED TO PROVIDE AN EQUITABLE REMEDY WHERE ONE DOES NOT EXIST AT LAW.”  SO, TOO, IS A CONSTRUCTIVE TRUST AN EQUITABLE REMEDY, DESIGNED TO “PREVENT UNJUST ENRICHMENT IN THE ABSENCE OF ANY EXPRESS OR IMPLIED INTENTION TO FORM A TRUST.”  A COURT “IS BOUND BY NO UNYIELDING FORMULA [IN IMPOSING A CONSTRUCTIVE TRUST], BUT IS FREE TO EFFECT JUSTICE ACCORDING TO THE EQUITIES PECULIAR TO EACH TRANSACTION WHEREVER A FAILURE TO PERFORM A DUTY TO CONVEY PROPERTY WOULD RESULT IN UNJUST ENRICHMENT.”

IN THIS CASE, THE PROPERTY WHICH THE COUNTIES SEEK TO RECOVER IS REPRESENTED BY THE SETTLEMENT FUND. RESOLUTION OF THE CONTROVERSY NEED ADDRESS ONLY THE EQUITABLE REMEDIES WHICH THE COUNTIES SEEK TO AVOID THE

UNJUST ENRICHMENT OF US WEST.

**B. THE COUNTIES DO NOT CHALLENGE EITHER THE AUTHORITY OF THE PSC OR ANY OF ITS ORDERS.**

BEFORE THE TRIAL COURT, US WEST ARGUED THAT THE COUNTIES SOUGHT "A REFUND OF RATES PAID DURING THE YEARS 1988 THROUGH 1996 BY U S WEST'S CUSTOMERS." THAT IS NOT, IN FACT, THE RELIEF THE PROPOSED CLASS ACTION COMPLAINT REQUESTS. THE COMPLAINT SEEKS A DETERMINATION THAT THE COUNTIES, AND OTHER CUSTOMERS OF US WEST SIMILARLY SITUATED, ARE THE PROPER PARTIES TO RECEIVE DISTRIBUTION OF THE **SETTLEMENT FUND**, NOT A REFUND OF RATES PAID. THE COUNTIES DO NOT CHALLENGE THE RATES SET BY THE PSC AND DO NOT ALLEGE THAT US WEST CHARGED RATES OTHER THAN AS AUTHORIZED BY THE PSC.

THE COUNTIES DO NOT SEEK A REFUND FROM US WEST ON THE BASIS THAT THE RATES WERE ERRONEOUSLY OR IMPROVIDENTLY SET BY THE PSC. IN FACT, THE COUNTIES DO NOT SEEK A REFUND FROM US WEST AT ALL. INSTEAD, THE COUNTIES ASSERT THAT THE **SETTLEMENT FUND** IS PROPERLY THE PROPERTY OF THE CUSTOMERS WHO ACTUALLY PAID THE PROPERLY DETERMINED RATES DURING THE YEARS IN QUESTION, WHICH RATES INCLUDED AND WERE USED TO PAY PROPERTY TAX EXPENSES. THOSE WHO ACTUALLY **PAID** THE TAXES HAVE AN EQUITABLE INTEREST IN THE FUNDS.  BECAUSE THE CUSTOMERS WHO ACTUALLY PAID THE EXPENSE FOR WHICH US WEST RECEIVED REIMBURSEMENT ARE READILY IDENTIFIABLE, AS IS THE **SETTLEMENT FUND**, ITSELF, FURTHER PROCEEDINGS BEFORE THE PSC TO ADJUST RATES FOR ALL CUSTOMERS WOULD SIMPLY BROADEN THE RANGE OF PARTIES WHO WOULD BE UNJUSTLY ENRICHED AND UNNECESSARILY COMPLICATE THE CONTROVERSY.

**C. THE FUNDS WHICH ARE THE SUBJECT MATTER OF THIS LITIGATION ARE AN IDENTIFIABLE RES, UPON WHICH THE COUNTIES SEEK TO IMPOSE A CONSTRUCTIVE TRUST FOR THE BENEFIT OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED CUSTOMERS OF DEFENDANT.**

THE COUNTIES DO NOT ALLEGE THAT THE PSC'S RATE WAS ERRONEOUS, UNJUST, OR UNREASONABLE. NOR DO THE COUNTIES SEEK AN ADJUSTMENT OF FUTURE RATES FOR THE BENEFIT OF CUSTOMERS OF US WEST. THE PUTATIVE CLASS IS NOT COMPRISED OF **ALL** CUSTOMERS OF US WEST, BUT ONLY THOSE CUSTOMERS WHO PAID US WEST MONIES IT USED TO PAY PROPERTY TAXES. THE COUNTIES DO ALLEGE THAT THE TAX SETTLEMENT WOULD RESULT IN DEFENDANT RECEIVING MORE THAN THE PSC AUTHORIZED IT TO RECEIVE. THAT RESULT IS CAUSED BY THE TAX COMMISSION'S ORDER OF REFUND, NOT THE PSC'S

RATE ORDER. MOREOVER, THE NEED FOR FURTHER INVOLVEMENT BY THE PSC IS OBIATED BY THE SIMPLE FACT THAT THE FUNDS ARE NOT COMPRISED OF FUTURE FEES AND CHARGES TO BE PAID BY DEFENDANT'S CUSTOMERS, BUT INSTEAD ARE A SEPARATE AND IDENTIFIABLE RES. THE CONTROVERSY HERE IS, QUITE SIMPLY, WHICH PARTY OR PARTIES SHOULD RECEIVE THE BENEFIT OF THE FUNDS.

### III. THE TRIAL COURT ERRED WHEN IT RELEASED THE SURETY BOND PRIOR TO RESOLUTION OF THE COUNTIES' CLAIMS ON APPEAL.

AT THE OUTSET OF THE LITIGATION, THE COUNTIES PAID THE ACTUAL TAX REFUNDS INTO THE COURT, CONSISTENT WITH THE COUNTIES' THEORY THAT THE SETTLEMENT FUND IS A SEPARATE AND IDENTIFIABLE RES UPON WHICH THE TRIAL COURT MAY IMPOSE A CONSTRUCTIVE TRUST FOR THE BENEFIT OF THE COUNTIES AND OTHER MEMBERS OF THE PUTATIVE CLASS. FOR WHAT WERE REPRESENTED TO BE INTERNAL ACCOUNTING PURPOSES, US WEST REQUESTED THAT THE FUNDS BE RELEASED TO THEM AND THAT A SURETY BOND BE SUBSTITUTED FOR THE ACTUAL SETTLEMENT FUND. THE COUNTIES, AS AN ACCOMMODATION TO US WEST, STIPULATED TO RELEASE OF THE CASH CONSTITUTING THE SETTLEMENT FUND AND SUBSTITUTION OF THE SURETY BOND REPRESENTING THE SETTLEMENT FUND. PURSUANT TO THAT STIPULATION, THE BOND WAS TO REMAIN INTACT UNTIL "RESOLUTION OF TH[E] LITIGATION."

THE COUNTIES SPECIFICALLY OBJECTED TO THE PROPOSED ORDER SUBMITTED BY US WEST AFTER THE TRIAL COURT GRANTED THE MOTION TO DISMISS, TO THE EXTENT THAT THE ORDER ALLOWED THE SURETY BOND TO BE RELEASED:

[THE COUNTIES] ALSO OBJECT TO THE PROPOSAL IN THE FORM OF ORDER THAT "THE SURETY BOND OBTAINED BY DEFENDANT US WEST BE 'RELEASED.'" THIS CASE WILL NOT BE COMPLETED UNTIL FINAL RESOLUTION AFTER APPEAL. PLAINTIFFS INTEND TO APPEAL THE COURT'S RULING SO THAT THE SUPREME COURT CAN DETERMINE WHETHER, IN FACT, THIS COURT HAS JURISDICTION OR THE PUBLIC SERVICE COMMISSION HAS JURISDICTION. THE COURT['S RULING] DID NOT ORDER THE RELEASE OF THE SURETY BOND AND THERE IS NO JUSTIFICATION TO DO SO BEFORE THE UTAH SUPREME COURT HAS HAD AN OPPORTUNITY FOR REVIEW.

THE PURPOSE OF THE BOND WAS TO PROTECT THE INTERESTS OF THE COUNTIES AND OTHER PUTATIVE CLASS MEMBERS IN OBTAINING EITHER A JUDGMENT IN THIS COURT OR A REFUND ORDER FROM THE PUBLIC SERVICE COMMISSION, AND TO PROTECT THE SEPARATE IDENTITY OF THE RES OF THE CONSTRUCTIVE TRUST.

THE TRIAL COURT WAS ON NOTICE THAT THE COUNTIES INTENDED TO APPEAL ITS ORDER OF DISMISSAL AND, THEREFORE,

HAD NOTICE THAT THE LITIGATION HAD NOT BEEN FULLY RESOLVED. RELEASE OF THE BOND PRIOR TO FINAL RESOLUTION OF THE LITIGATION WAS ERRONEOUS,  AND US WEST SHOULD BE ORDERED TO RE-POST THE BOND, OR RE-DEPOSIT THE FUNDS WITH THE TRIAL COURT, PENDING THE ULTIMATE DETERMINATION OF THE OWNERSHIP OF THE SETTLEMENT FUND.

**IV. THE TRIAL COURT ERRED IN AWARDING US WEST COSTS FOR PREPARATION OF UNNECESSARY HEARING EXHIBITS, NOT ORDERED OR REQUESTED BY THE TRIAL COURT.**

IN ITS VERIFIED MEMORANDUM OF COSTS, US WEST SOUGHT AN AWARD OF COSTS UNDER UTAH R. CIV. P. 54(D) FOR THE EXPENSE OF PREPARING A VARIETY OF POSTER-BOARD BLOW-UPS OF STATUTES AND PLEADINGS THAT IT USED DURING ORAL ARGUMENT ON ITS MOTION TO DISMISS.  THE COUNTIES OBJECTED TO THE ALLOWANCE OF THESE COSTS ON GROUNDS THAT THE COSTS WERE NOT “NECESSARILY INCURRED IN THE ACTION,” NOR WERE THE EXHIBITS REQUIRED OR REQUESTED BY THE COURT. THE TRIAL COURT DENIED THE COUNTIES’ OBJECTION, WITHOUT EXPLANATION.

**A. IF THE TRIAL COURT LACKS JURISDICTION TO HEAR THE COUNTIES’ CLAIMS, IT LACKS JURISDICTION TO AWARD COSTS.**

THE TRIAL COURT DISMISSED THE COUNTIES’ COMPLAINT, WITH PREJUDICE, ON GROUNDS THAT IT WAS WITHOUT JURISDICTION TO HEAR THE CASE. “IT IS A WELL-SETTLED RULE THAT WHERE THERE IS NO JURISDICTION THE COURT CAN GIVE ONLY COSTS OF MOTION. . . . WHERE AN ACTION IS DISMISSED FOR WANT OF JURISDICTION IN THE COURT, WHETHER THE COURT BE OF LIMITED OR GENERAL JURISDICTION, JUDGMENT FOR COSTS CANNOT BE RENDERED AGAINST THE PLAINTIFF.”  IF, IN FACT, THE TRIAL COURT LACKED JURISDICTION TO ENTERTAIN THE COUNTIES’ CLAIMS, IT ALSO LACKED JURISDICTION TO AWARD COSTS.

**B. THE COSTS SOUGHT ARE NOT PROPERLY AVAILABLE.**

MOREOVER, THE COSTS AWARDED WAS NOT “NECESSARILY INCURRED IN THE ACTION,” AS REQUIRED BY RULE 54(D). THE EXHIBITS WERE NOT PREPARED FOR A TRIAL BEFORE A JURY, NOR DID THEY ILLUSTRATE A COMPLICATED SERIES OF EVENTS OR TRANSACTIONS. THE EXPENSE WAS INCURRED FOR PREPARATION OF POSTER-BOARD EXHIBITS DEPICTING STATUTES AND PORTIONS OF PLEADINGS FROM THE CASE COUNSEL FOR US WEST CHOSE TO USE AT THE HEARING. WHILE IT IS PERHAPS UNDERSTANDABLE THAT US WEST WOULD PREFER TO TRANSFER THESE UNNECESSARY COSTS FROM ITSELF TO ITS OPPONENT, IT CANNOT BE SERIOUSLY ARGUED THAT THE TRIAL COURT WAS NOT CAPABLE OF REVIEWING SIMPLE 8 ½” BY 11” PLAIN PAPER PHOTOCOPIES.



THAT US WEST INSTEAD CHOSE TO HAVE THESE DOCUMENTS REPRODUCED ON EXPENSIVE POSTER-BOARDS DOES NOT MAKE THEM A "NECESSARY EXPENSE."

US WEST OFFERED NO LEGAL AUTHORITY SUPPORTING THE AWARD OF SUCH AN EXPENSE AND THE COUNTIES HAVE BEEN ABLE TO FIND NONE. BUT EVEN IF THERE WERE SOME STATUTORY AUTHORIZATION FOR SUCH AN AWARD OF COSTS, THE EXCESSIVE COST CAVEAT GIVEN TO THE TRIAL COURTS BY THE UTAH SUPREME COURT WOULD AGAIN REQUIRE DISALLOWANCE. THIS COURT HAS PROVIDED GUIDANCE CONCERNING WHAT EXPENSES OF LITIGATION MAY BE TAXED AS COSTS:

THE GENERALLY ACCEPTED RULE IS THAT ["COSTS"] MEANS THOSE FEES WHICH ARE REQUIRED TO BE PAID TO THE COURT AND TO WITNESSES, AND FOR WHICH THE STATUTES AUTHORIZE TO BE INCLUDED IN THE JUDGMENT [FOOTNOTE OMITTED]. THERE IS A DISTINCTION TO BE UNDERSTOOD BETWEEN THE LEGITIMATE AND TAXABLE "COSTS" AND OTHER "EXPENSES" OF LITIGATION WHICH MAY BE EVER SO NECESSARY, BUT ARE NOT PROPERLY TAXABLE AS COSTS.

EVEN IF US WEST WERE SIMPLY SEEKING THE COST OF PHOTOCOPIES, THEY ARE CLEARLY NOT ALLOWABLE. "MOREOVER, PHOTOCOPYING EXPENSES HAVE BEEN HELD TO BE ORDINARY OFFICE EXPENSES THAT MAY NOT BE TAXED AS COSTS UNDER THE STATEWIDE UNIFORM GUIDELINES FOR THE TAXATION OF COSTS IN CIVIL ACTIONS."  THE TRIAL COURT'S AWARD OF COSTS INAPPROPRIATELY IGNORES THIS COURT'S GUIDELINES AND SHOULD BE REVERSED.

**V. DISMISSAL OF THE PROPOSED CLASS ACTION COMPLAINT WITH PREJUDICE WAS ERRONEOUS.**

THE TRIAL COURT'S ORDER DISMISSING THE PROPOSED CLASS ACTION COMPLAINT DISPOSED OF ALL CLAIMS, WITH PREJUDICE. AT THE HEARING ON US WEST'S MOTION TO DISMISS, THE TRIAL COURT DID NOT INDICATE A DISMISS WITH PREJUDICE, INSTEAD RULING AS FOLLOWS:

THE COURT FINDS THAT THE 12B6 [sic] -- 12B1[sic] MOTION TO DISMISS FOR THE DEFENDANTS IN THEIR FAVOR SHOULD BE IN THE SAME AS [sic] HEREIN GRANTED. THE COURT FINDS THAT IT LACKS SUBJECT MATTER JURISDICTION; AND, LIKEWISE, THE SEPARATION OF POWERS ISSUE IS SUFFICIENT THAT THIS COURT OUGHT NOT TO EXERCISE ITS JURISDICTION.

THE COUNTIES OBJECTED TO THE PROPOSED ORDER TO THE EXTENT THAT IT IMPROPERLY SOUGHT TO DISMISS THE ACTION WITH PREJUDICE. THE OBJECTION WAS OVERRULED.

UTAH R. CIV. P. 41(B) REGARDING INVOLUNTARY DISMISSAL PROVIDES:

UNLESS THE COURT IN ITS ORDER FOR DISMISSAL OTHERWISE SPECIFIES, A DISMISSAL UNDER THIS SUBDIVISION AND ANY DISMISSAL NOT PROVIDED FOR IN THIS RULE, **OTHER THAN A DISMISSAL FOR**

**LACK OF JURISDICTION** OR FOR IMPROPER VENUE OR FOR LACK OF AN INDISPENSABLE PARTY, OPERATES AS AN ADJUDICATION UPON THE MERITS. [EMPHASIS SUPPLIED.]

PROFESSOR WRIGHT EXPLAINS: “RULES 12(b)(1) THROUGH 12(b)(5) AND 12(b)(7) ESSENTIALLY ARE JURISDICTIONAL DEFENSES. THEY ARE MODERN COUNTERPARTS TO THE COMMON LAW PLEAS IN ABATEMENT AND **DO NOT GO TO THE MERITS** OF A CLAIM.” .

THE TRIAL COURT THUS CONTRADICTED ITS OWN FINDING THAT JURISDICTION OVER THE PROPOSED CLASS ACTION EXISTED ELSEWHERE,  VIZ. THE PUBLIC SERVICE COMMISSION, WHEN IT ULTIMATELY DISMISSED THE PROPOSED CLASS ACTION COMPLAINT **WITH** PREJUDICE.  IF ALLOWED TO STAND, THE DISMISSAL WOULD FORECLOSE ANY OTHER AVENUE PUTATIVE CLASS MEMBERS MAY HAVE TO PURSUE THEIR CLAIMS.  IN COBABE V. CRAWFORD,  THE UTAH COURT OF APPEALS NOTED:

ALTHOUGH OUR RESEARCH DID NOT REVEAL ANY UTAH CASES ON POINT, OTHER JURISDICTIONS HAVE HELD THAT “A DISMISSAL WITH PREJUDICE GIVES THE DEFENDANT THE FULL RELIEF TO WHICH HE [OR SHE] IS LEGALLY ENTITLED AND IS TANTAMOUNT TO A JUDGMENT ON THE MERITS. [CITATIONS OMITTED.] SINCE “[A]N ADJUDICATION IN FAVOR OF THE DEFENDANTS, BY COURT OF JURY, CAN RISE NO HIGHER THAN THIS,” [CITATION OMITTED], THE DEFENDANT IS THE PREVAILING PARTY WHERE PLAINTIFF’S COMPLAINT IS DISMISSED WITH PREJUDICE.

UTAH HAS HISTORICALLY ENFORCED RES JUDICATA PRINCIPLES BETWEEN COURTS AND AGENCIES.  IT IS CLEAR THAT THE TRIAL COURT’S ORDER OF DISMISSAL WITH PREJUDICE MUST, THEREFORE, AT THE VERY LEAST BE MODIFIED SO AS TO ELIMINATE IT PRECLUSIVE EFFECT ON THE ABILITY OF THE PROPOSED CLASS MEMBERS TO PURSUE THEIR CLAIMS ELSEWHERE, SUCH AS THE PSC.

## CONCLUSION

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE PSC HAD EXCLUSIVE JURISDICTION TO ENTERTAIN THE COUNTIES’ CLAIMS. THE SPECIAL EXPERTISE OF THE PSC IS NOT REQUIRED FOR RESOLUTION OF THE CONTROVERSY PRESENTED IN THIS ACTION, WHICH IS AN ACTION SEEKING THE EQUITABLE RELIEF IN THE FORM OF A CONSTRUCTIVE TRUST. ONLY A COURT OF GENERAL JURISDICTION MAY DETERMINE THOSE CLAIMS.  THIS COURT SHOULD VACATE THE ORDER OF DISMISSAL AND REMAND THIS CASE TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS. IN THE EVENT THE COURT DETERMINES THAT THE PSC HAS EXCLUSIVE SUBJECT MATTER JURISDICTION OVER THE CLAIMS OF THE COUNTIES, THE COURT SHOULD REVERSE THE “WITH PREJUDICE” DESIGNATION OF THE TRIAL COURT’S ORDER AND REMAND THE CASE TO THE PSC, WITH INSTRUCTIONS TO DETERMINE

THE EQUITABLE OWNERSHIP OF THE SETTLEMENT FUND AND, IF PROPER, DISTRIBUTE IT TO A CERTIFIED CLASS IN ACCORDANCE WITH THE PROVISIONS OF UTAH R. CIV. P. 23.

THE TRIAL COURT'S RELEASE OF THE SURETY BOND WAS ALSO ERRONEOUS AND SHOULD BE REVERSED. THIS LITIGATION WILL NOT BE "RESOLVED" UNTIL A FINAL DETERMINATION BY THE DISTRICT COURT OR, IF THIS COURT DETERMINES THE DISTRICT COURT DOES NOT HAVE JURISDICTION, BY THE PSC. THE COURT SHOULD ORDER US WEST TO REINSTATE THE SURETY BOND OR, IN THE ALTERNATIVE, TO REDEPOSIT THE SETTLEMENT FUNDS WITH THE COURT.

FINALLY, THE COURT SHOULD REVERSE THE TRIAL COURT'S AWARD OF COSTS. PREPARATION OF EXPENSIVE AND TOTALLY UNNECESSARY HEARING EXHIBITS IS NOT A TAXABLE COST UNDER UTAH LAW.

**RESPECTFULLY SUBMITTED** THIS \_\_\_\_\_ DAY OF JUNE, 2000.

**PARSONS, DAVIES, KINGHORN & PETERS**

---

BILL THOMAS PETERS  
DAVID W. SCOFIELD  
ATTORNEYS FOR THE APPELLANTS

**CERTIFICATE OF SERVICE**

THE UNDERSIGNED HEREBY CERTIFIES THAT TWO TRUE AND COPIES OF THE ABOVE AND FOREGOING BRIEF OF APPELLANTS WERE MAILED, POSTAGE PREPAID, THIS \_\_\_\_\_ DAY OF JUNE, 2004, TO THE FOLLOWING:

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# EXHIBIT "D"

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## IN THE UTAH SUPREME COURT

---

BEAVER, BOX ELDER, CACHE, CARBON, DAVIS, DUCHESNE,  
EMERY, GARFIELD, GRAND, IRON, JUAB, KANE, MILLARD,  
MORGAN, PIUTE, RICH, SALT LAKE, SAN PETE, SEVIER,  
SUMMIT, TOOELE, UINTAH, UTAH, WASATCH, WASHINGTON,  
WAYNE AND WEBER COUNTIES, ON BEHALF OF THEMSELVES  
AND ALL OTHER PERSONS OR ENTITIES SIMILARLY SITUATED,

PLAINTIFFS AND APPELLANTS,

-VS-

U S WEST COMMUNICATIONS,

DEFENDANT AND APPELLEE.

DOCKET No. 990268-SC  
DOCKET No. 990771-SC  
DOCKET No. 200144-SC  
[CONSOLIDATED]

PRIORITY No. 15

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### REPLY BRIEF OF APPELLANTS

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APPEAL FROM THE ORDER OF THE HONORABLE DAVID S. YOUNG, DATED  
AUGUST 6, 1999; THE PUBLIC SERVICE COMMISSION'S DENIAL OF PLAINTIFFS' PETITION  
FOR DECLARATORY JUDGMENT, DEEMED DENIED ON MARCH 1, 1999, AND THE ORDER  
OF THE HONORABLE DAVID S. YOUNG, DATED FEBRUARY 9, 2000, AWARDING COSTS

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---

**IN THE UTAH SUPREME COURT**

---

BEAVER, BOX ELDER, CACHE, CARBON, DAVIS,  
DUCHESNE, EMERY, GARFIELD, GRAND, IRON,  
JUAB, KANE, MILLARD, MORGAN, PIUTE, RICH,  
SALT LAKE, SAN PETE, SEVIER, SUMMIT, TOOELE,  
UINTAH, UTAH, WASATCH, WASHINGTON, WAYNE  
AND WEBER COUNTIES, ON BEHALF OF  
THEMSELVES AND ALL OTHER PERSONS OR  
ENTITIES SIMILARLY SITUATED,

PLAINTIFFS AND APPELLANTS,

-VS-

U S WEST COMMUNICATIONS,

DEFENDANT AND APPELLEE.

DOCKET No. 990268-SC  
DOCKET No. 990771-SC  
DOCKET No. 200144-SC  
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PRIORITY No. 15

**REPLY BRIEF OF APPELLANTS**

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APPEAL FROM THE ORDER OF THE HONORABLE DAVID S. YOUNG, DATED  
AUGUST 6, 1999; THE PUBLIC SERVICE COMMISSION'S DENIAL OF PLAINTIFFS' PETITION FOR DECLARATORY  
JUDGMENT, DEEMED DENIED ON MARCH 1, 1999,  
AND THE ORDER OF THE HONORABLE DAVID S. YOUNG,  
DATED FEBRUARY 9, 2000, AWARDING COSTS

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APPELLANT COUNTIES, AS REPRESENTATIVES FOR THE PUTATIVE CLASS (THE "COUNTIES"), BY AND THROUGH THEIR UNDERSIGNED COUNSEL, SUBMIT THE FOLLOWING REPLY BRIEF TO THE BRIEFS OF US WEST COMMUNICATIONS, INC. ("US WEST") AND THE PUBLIC SERVICE COMMISSION OF UTAH ("PSC").

## ARGUMENT

### I. US WEST'S EFFORT TO CHARACTERIZE THE RELIEF SOUGHT BY THE COUNTIES AS RATEMAKING IS UNSUPPORTABLE.

US WEST ARGUES THAT "ANY UNANTICIPATED OVER EARNING OR EXPENSE MUST BE SUBJECTED TO THE RATE MAKING PROCESS." US WEST BRIEF AT 20. US WEST CITES AS ITS AUTHORITIES FOR THIS PROPOSITION, UTAH CODE ANN. §§ 54-4-2, -4, -7, -12, AND §§ 54-8B-9, -11. YET THOSE PROVISIONS DO NOT ADDRESS, LET ALONE SUPPORT, US WEST'S ARGUMENT. SECTION 54-4-2 SIMPLY ALLOWS THE PSC, ON ITS OWN MOTION, TO SET A TIME AND PLACE FOR HEARING OF ANY MATTER THE PSC, ITSELF, DEEMS IT SHOULD HEAR WITHIN THE SCOPE OF THAT SECTION. THE MATTER BEFORE THIS COURT INVOLVES NO SUCH INVESTIGATION OR HEARING INITIATED BY THE PSC.

SECTION 54-4-4 DEALS WITH THE SITUATION WHERE THE PSC FINDS THAT RATES "CHARGED OR COLLECTED BY ANY PUBLIC UTILITY FOR ANY SERVICE OR PRODUCT OR COMMODITY, OR IN CONNECTION THEREWITH . . . ARE UNJUST, UNREASONABLE, DISCRIMINATORY OR PREFERENTIAL, OR IN ANY WAYS IN VIOLATION OF ANY PROVISIONS OF LAW. . . ." UTAH CODE ANN. § 54-4-4(1). THE PSC IS THEN CHARGED, UNDER THAT STATUTE, TO "DETERMINE THE JUST, REASONABLE OR SUFFICIENT RATES, FAIRS, TOLLS, RENTALS, CHARGES, CLASSIFICATIONS, RULES, REGULATIONS, PRACTICES OR CONTRACTS TO BE THEREAFTER OBSERVED AND ENFORCED, AND SHALL FIX THE SAME BY ORDER AS HEREINAFTER PROVIDED." *Id.* THIS CASE DOES NOT INVOLVE ANY ALLEGATION OF "UNJUST, UNREASONABLE, DISCRIMINATORY OR PREFERENTIAL OR IN ANY WAYS IN VIOLATION OF ANY PROVISIONS OF LAW[.]" RATES, HOWEVER, AS THE COUNTIES MADE CLEAR IN THEIR OPENING BRIEF (SECTION II AT 31-37). US WEST ANTICIPATED PAYING PROPERTY

TAXES AND THOSE PROPERTY TAXES WERE INCLUDED IN THE DETERMINATION OF THE PSC FOR THE RATES ACTUALLY CHARGED IN THE YEARS IN QUESTION.

THE RATE, ITSELF, WAS PROPERLY SET AND IS NOT UNJUST OR UNREASONABLE. WHAT IS UNJUST AND UNREASONABLE IS TO ALLOW US WEST TO RETAIN, NOW, THE TAX REFUNDS ACQUIRED FOR THE TAX YEARS IN QUESTION, WHERE IT HAS ALREADY RECEIVED REIMBURSEMENT FOR THOSE TAXES. US WEST KNEW, EACH YEAR, THAT IT WOULD APPEAL ITS PROPERTY TAXES, AS IS SHOWN BY THE FACT THAT IT APPEALS EVERY YEAR. ITS RATES WERE SET BASED UPON ACTUAL PROPERTY TAX ASSESSMENTS, HOWEVER, AND SO US WEST KNEW THAT IT WOULD RECOVER ALL OF THOSE TAXES THROUGH ITS RATES. ANY REFUND, US WEST THEREFORE KNEW, WOULD BELONG TO ITS CUSTOMERS BECAUSE US WEST HAD ALREADY RECEIVED FULL REIMBURSEMENT FOR THE PROPERTY TAXES IT HAD BUDGETED AND PAID.

SECTION 54-7-12 DEALS WITH RATE INCREASES AND DECREASES, AND, BY ITS PLAIN TERMS, IS INAPPLICABLE TO THE SITUATION BEFORE THIS COURT. US WEST ESSENTIALLY ARGUES THAT THE COUNTIES SEEK SOME FORM OF RATE DECREASE. "RATE DECREASE" IS DEFINED TO MEAN, HOWEVER: "ANY DIRECT DECREASE IN A RATE, FAIR, TOLL, RENTAL OR OTHER CHARGE OF A PUBLIC UTILITY OR ANY MODIFICATION OF A CLASSIFICATION, CONTRACT, PRACTICE OR RULE THAT DECREASES A RATE, FAIR, TOLL, RENTAL OR OTHER CHARGE OF A PUBLIC UTILITY." UTAH CODE ANN. § 54-7-12(1)(B). OF PARTICULAR NOTE IS THE LEGISLATURE'S CHOICE OF THE WORD "DIRECT" TO MODIFY THE PHRASE "DECREASE IN A RATE . . . OR OTHER CHARGE OF A PUBLIC UTILITY. . . ." NOTHING IN ANY OF THE RELIEF REQUESTED BY THE COUNTIES INVOLVES A DIRECT DECREASE OF ANY RATE. INSTEAD, IT INVOLVES A SEPARATE AND IDENTIFIABLE RES IN THE FORM OF A PROPERTY TAX REFUND THAT THE PUTATIVE CLASS CLAIMS BELONGS TO IT, RATHER THAN US WEST. THE "RATES" CHARGED BY US WEST FOR 1988 THROUGH 1996, INCLUSIVE, INCLUDED ITS PROPERTY TAX PAYMENT AND US WEST HAS RECEIVED REIMBURSEMENT IN FULL FOR THOSE PROPERTY TAX PAYMENTS FROM ITS CUSTOMERS, THE PUTATIVE CLASS. NOTHING ABOUT THE RATE WAS IMPROPER, UNFAIR OR UNREASONABLE. THE REFUND PAID BY THE COUNTIES, HOWEVER, BELONGS TO THE CUSTOMERS, NOT US WEST.

SECTION 54-8B-9 DEALS WITH THE PSC'S JURISDICTION, STATING THAT NOTHING IN CHAPTER 8B "SHALL BE

CONSTRUED TO ENLARGE OR REDUCE THE COMMISSION'S JURISDICTION OVER THE SERVICES AND ACTIVITIES" CHAPTER 8B COVERS. UTAH CODE ANN. § 54-8B-9(1). THE STATUTE DOES NOT PURPORT TO GRANT EXCLUSIVE JURISDICTION OVER ALL MATTERS TO THE PSC, AS OPPOSED TO THE COURTS. IF IT DID, TORT CLAIMS AGAINST COVERED "ENTITIES" COULD PROCEED ONLY IN THE PSC.

INDEED, THIS COURT IN *ATKIN WRIGHT & MILES V. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO.*, 709 P.2D 330 (UTAH 1985), MADE CLEAR THAT THE EXCLUSIVE JURISDICTION OF THE PSC GOES ONLY TO "CLAIMS OVER MATTERS THAT ARE DELEGATED TO THE PSC BY STATUTE AND FOR WHICH THE PSC CAN GIVE APPROPRIATE RELIEF." *Id.* AT 333. THE ONLY DISTINCTION OF *ATKIN WRIGHT & MILES* OFFERED BY US WEST IS ITS UNSUPPORTED CONCLUSION THAT THIS OWNERSHIP DISPUTE ASKS THE DISTRICT COURT "TO TRENCH UPON THE COMMISSION'S DELEGATED POWERS . . . ." US WEST BRIEF AT 24. BUT THE ONLY SUPPORT FOR THE "TRENCHING" CONCLUSION IS US WEST'S STRAWMAN PREMISE THAT THE CASE DEMANDS "RATEMAKING," SOMETHING IT CLEARLY DOES NOT.

NO STATUTE CONFERS ANY, LET ALONE EXCLUSIVE, JURISDICTION ON THE PSC TO DETERMINE A DISPUTED CLAIM OF OWNERSHIP OVER AN ASSET, SUCH AS THIS TAX REFUND, THAT (1) WAS NEVER ON ANY FINANCIAL STATEMENT OF US WEST IN ANY RATEMAKING PROCEEDING, (2) WAS NEVER TAKEN INTO ACCOUNT IN ANY RATES, OR RATEMAKING PROCEEDING, (3) NEVER CONTRIBUTED REVENUE FROM US WEST BUSINESS OPERATIONS, (4) WAS NEVER USED BY US WEST IN ANY PORTIONS OF ITS BUSINESS OPERATIONS, AND (5) WHICH US WEST ITSELF CONCEDES "DOES NOT INVOLVE ANY PRIOR ORDER OF THE COMMISSION." US WEST BRIEF AT 24. NOR DOES ANY STATUTE VEST THE PSC WITH AUTHORITY TO PROVIDE RELIEF TO A CLASS UNDER RULE 23.

SECTION 54-8B-11 SIMPLY CHARGES THE PSC WITH ENDEAVORING TO MAKE TELECOMMUNICATION SERVICES AVAILABLE AT JUST AND REASONABLE RATES FOR ALL CLASSES OF CUSTOMERS. THAT SECTION HAS NOTHING TO DO WITH THIS DISPUTE OVER WHO RIGHTFULLY OWNS THE PROPERTY TAX REFUND.

AFTER CITING THOSE STATUTES, US WEST CONCLUDES BY SIMPLY BEGGING THE REAL QUESTION OF WHETHER RATEMAKING IS INVOLVED: "THUS, ANY RATE ESTABLISHED BY THE COMMISSION AS A RESULT OF A REQUEST FOR AN

ADJUSTMENT TAKES EFFECT ON THE RATES **US WEST** CHARGES ITS CUSTOMERS IN THE FUTURE.” **US WEST** BRIEF AT 21. THAT CONCLUSION, INsofar AS IT PURPORTS TO APPLY TO THIS CASE, CANNOT BE BASED ON THE LANGUAGE OF THOSE STATUTES, HOWEVER, THAT EXPRESSLY DEALS WITH RATES, AND APPEARS TO BE BASED ONLY ON **US WEST**’S STRAWMAN PREMISE THAT THIS CASE IS A “REQUEST FOR AN ADJUSTMENT [IN RATES]” RATHER THAN A CLAIM TO OWNERSHIP OF A PROPERTY TAX REFUND.

**A. RETROACTIVE RATEMAKING IS NOT REQUIRED TO RESOLVE THE CLAIMS OF THE PUTATIVE CLASS TO THE TAX REFUND MONIES.**

THE RULE AGAINST RETROACTIVE RATEMAKING RELIED ON BY **US WEST** IS NOT IMPLICATED WHERE, AS HERE, WE ARE DEALING WITH A SEPARATE AND IDENTIFIABLE SUM OF MONEY PAID BY THE **COUNTIES** AS A TAX REFUND, AND THE QUESTION IS WHO RIGHTFULLY OWNS THAT MONEY. THE **COUNTIES** ARE NOT PAYING THE TAX REFUNDS PURSUANT TO ANY RATE ESTABLISHED BY THE **PSC** AND THE PAYMENT OF THE REFUND IS ABSOLUTELY, WHOLLY AND TOTALLY UNRELATED TO ANY RATEMAKING PROCESS OR ANY RATES CHARGED BY VIRTUE OF ANY RATEMAKING PROCESS. THE ONLY CONNECTION -- AND IT IS INDIRECT, RATHER THAN “DIRECT” AS REQUIRED BY THE STATUTE TO EVEN COME WITHIN THE UMBRELLA OF RATEMAKING -- IS THE FACT THAT CUSTOMERS **REIMBURSED US WEST** FOR PROPERTY TAX PAYMENTS IT HAD MADE IN THE PAST, BASED UPON RATES THAT WERE SET, CHARGED, AND COLLECTED FOR THE PURPOSE OF REIMBURSING THE FULL AMOUNT OF PROPERTY TAXES PAID.

**US WEST** SIMPLY IGNORES THE STATUS OF THE REFUND, WHICH WAS DEPOSITED INTO THE CUSTODY OF THE **THIRD DISTRICT COURT** TO DETERMINE WHO OWNED THE MONIES, AND WAS THEN REPLACED BY A BOND REPRESENTING THOSE FUNDS. THE MONIES DO NOT BELONG TO **US WEST** UNLESS AND UNTIL A COURT SAYS SO AND THEREFORE THE MONIES DO NOT REPRESENT **US WEST** REVENUE WHICH **US WEST** MIGHT BE REQUIRED TO REFUND THROUGH A RATEMAKING PROCEDURE. INSTEAD, THE SEPARATE AND IDENTIFIABLE SET OF FUNDS, AS REPRESENTED BY THE BOND, IS ITSELF PROPERTY AS TO WHICH RIGHTFUL OWNERSHIP HAS YET TO BE DETERMINED. **BECAUSE** THE FUNDS WILL BE PAID UNDER THE BOND TO PUTATIVE CLASS MEMBERS, THERE IS NO IMPACT FROM THOSE FUNDS CONCERNING THE FINANCIAL

STATUS OF **US WEST** UNLESS AND UNTIL THE **COURT** SAYS **US WEST** OWNS THE FUNDS.

**B. THE AUTHORITY RELIED UPON BY US WEST IS DISTINGUISHABLE AND THEREFORE NOT CONTROLLING.**

THE RETROACTIVE RATEMAKING CASES CITED BY **US WEST** INVOLVE COMPLETELY DIFFERENT FACTS THAN EXIST HERE. FOR EXAMPLE, *MCI TELECOMMUNICATIONS. CORP. V PUBLIC SERV. COMM'N*, 840 P.2D 765 (UTAH 1992), DID NOT INVOLVE A SEPARATE FUND OF MONEY GENERATED BY A LUMP SUM PROPERTY TAX REFUND PAYMENTS FROM THE **COUNTIES**. INSTEAD, IT INVOLVED THE FACT THAT **US WEST** WAS, IN ITS OPERATIONS, CONTINUOUSLY EARNING A HIGHER RATE OF RETURN THAN HAD BEEN AUTHORIZED IN ITS RATEMAKING, DUE TO THE FACT THAT THE **TAX REFORM ACT OF 1986** LOWERED THE OVERALL RATE OF TAXATION TO ALL TAXPAYERS. THE CASE WAS REMANDED TO ALLOW THE **PSC** TO DETERMINE WHETHER THE **TAX REFORM ACT OF 1986** WAS FOUND TO HAVE RESULTED IN AN UNFORESEEABLE AND EXTRAORDINARY DECREASE IN EXPENSES OR WHETHER **US WEST** HAD ENGAGED IN MISCONDUCT. IF THE **PSC** FOUND EITHER SCENARIO ON REMAND, THEN, TO THE EXTENT **US WEST** EXCEEDED ITS AUTHORIZED RATE OF RETURN ESTABLISHED IN THE **1985** GENERAL RATE CASE, THE MONIES WERE ORDERED REFUNDED TO THE RATEPAYERS. *SEE ID.* AT **776**.

WE ARE NOT DEALING HERE WITH **US WEST** EXCEEDING ITS AUTHORIZED RATE OF RETURN FOR ANY OF THE YEARS IN QUESTION FROM WHICH THE PROPERTY TAX REFUND PROCEEDS DERIVE. **S**IMPLE LOGIC REFUTES ANY SUCH INTERPRETATION. FOR EACH YEAR THAT A TAX REFUND NOW EXISTS, **US WEST** PETITIONED TO HAVE ITS RATES SET BASED ON AN ASSESSED AMOUNT OF TAXES. A RATE WAS SET BASED UPON **US WEST** PAYING THAT TAX, SUCH THAT THE TAX PAID WAS REIMBURSED TO **US WEST** BY ITS CUSTOMERS. IN SO DOING, THE **PSC** SET AN AUTHORIZED RATE OF RETURN AND NEITHER THE PAYMENT OF THE TAXES NOR THE REIMBURSEMENT BY CUSTOMERS UNDER THE SET RATE UPSET THAT AUTHORIZED RATE OF RETURN.

THE PRESENT TAX REFUNDS FROM THE **COUNTIES** WERE NOT INJECTED IN **US WEST**'S BUDGETARY PROCESS FOR THE YEARS IN QUESTION, WERE NOT PRESENTED TO THE **PSC** IN ITS RATEMAKING AND WERE NOT CONSIDERED IN

COLLECTION FROM CUSTOMERS. THESE FUNDS ARE SEPARATE AND APART FROM RATES, ARE NOT NOW REVENUES OF US WEST, AND IN EQUITY BELONG TO THE CUSTOMERS. THAT WAS NOT THE CASE IN *MCI*, BECAUSE THE EFFECT OF THE CHANGE IN TAXATION OF THE TAX REFORM ACT DID NOT RESULT IN LUMP SUM REFUNDS, BUT INSTEAD RESULTED IN A LOWERING OF TAXES PAID AND TO BE PAID FROM OPERATIONS UNDER THE TAX LAWS, OVER TIME.

US WEST ALSO CITES *UTAH DEPT. OF BUS. REGULATIONS V. PUBLIC SERV. COM'N*, 720 P.2D 420 (1986), AS SOME SUPPORT FOR ITS CONTENTION THAT THIS PROPERTY TAX REFUND IS SOMEHOW INSEPARABLE FROM THE RATEMAKING PROCESS. SEE US WEST BRIEF AT 22-23. BUT AGAIN, THE FACTUAL BACKGROUND OF THAT CASE IS REMARKABLY DIFFERENT FROM THE ONE BEFORE THIS COURT. THAT CASE INVOLVED ORDINARY PROJECTIONS MADE BY CONSIDERING HISTORICAL INCOME AND COST DATA AND PREDICTIONS OF FUTURE COSTS AND REVENUES. HERE, FOR EACH OF THE TAX YEARS IN QUESTION, THE ACTUAL TAXES ASSESSED WERE USED IN SETTING RATES, AND THE CUSTOMERS PAID THOSE RATES TO REIMBURSE US WEST THAT EXACT AMOUNT OF PROPERTY TAXES. THE "FAIR RETURN ON EQUITY" WAS REACHED BECAUSE THERE WAS SIMPLY A PASSTHROUGH TO THE RATEPAYERS OF THE TAXES ACTUALLY ASSESSED. THIS IS NOT A QUESTION OF "NOT ACCURATELY PREDICT[ING] COSTS AND REVENUES." *Id.* AT 420-21.

THE COURT'S HOLDING IN *UTAH DEPT. OF BUS. REGULATIONS* WAS THAT UTAH POWER & LIGHT WOULD NOT BE ALLOWED TO TRANSFER REVENUE FROM A SPECIAL ENERGY BALANCING ACCOUNT TO COVER UNEXPECTED SHORTFALLS IN GENERAL OPERATING REVENUES. THAT ISSUE AROSE BECAUSE THE LEGISLATURE HAD RESPONDED TO RAPIDLY ESCALATING ENERGY PRICES BY PASSING A FUEL COST PASS-THROUGH STATUTE IN 1975. SEE *Id.* AT 421. THAT STATUTE WOULD NOT ALLOW RECOVERY OF SPECIFIC NONFUEL-RELATED EXPENSES, HOWEVER, THROUGH THE SEB ACCOUNT. SEE *Id.* AT 424 THE ISSUE BEFORE THE COURT IN THAT CASE WAS, THEREFORE, COMPLETELY INAPPOSITE TO THIS FACTUAL AND LEGAL SITUATION..

INDEED, THIS COURT IN *STEWART V. UTAH PUBLIC SERV. COM'N*, 885 P.2D 759 (UTAH 1994), EXPRESSLY REJECTED APPLICATION OF THE RETROACTIVE RATEMAKING RULE ARGUED BY US WEST IN CASES "WHERE JUSTICE AND EQUITY REQUIRE THAT ADJUSTMENTS BE MADE FOR UNFORESEEN WINDFALLS OR DISASTERS NOT CAUSED BY THE UTILITY."

*Id.* AT 778. HERE, THE COUNTIES DO NOT SEEK AN ADJUSTMENT IN RATES FROM AN UNFORESEEN WINDFALL. INSTEAD, THE PUTATIVE CLASS MEMBERS ASSERT EQUITABLE OWNERSHIP OF THE FUNDS PAID BY THE COUNTIES INTO COURT AS PROPERTY TAX REFUNDS, NOT ANY PORTION OF US WEST'S REVENUES THIS YEAR OR ANY OTHER YEAR THAT REQUIRES ANY RATE ADJUSTMENT.

THE CONTENTION OF US WEST THAT THE TRIAL COURT WOULD BE REQUIRED TO "EXAMINE ALL OF THE RATES PAID TO US WEST FROM 1988 TO 1986[,]" US WEST BRIEF AT 23, IS INCORRECT. US WEST ARGUES THAT THE RATES FOR THOSE YEARS "WOULD NEED TO BE MEASURED AGAINST NOT ONLY THE TAX REFUND, BUT AGAINST ALL OTHER EXPENSES IN EXCESS OF OR LESS THAN THOSE ESTIMATED." *Id.* THAT IS NOT THE CASE. US WEST PAID PROPERTY TAXES FOR THOSE YEARS IN THE AMOUNT ASSESSED AND RECOUPED THOSE PAYMENTS IN THEIR ENTIRETY FROM THEIR CUSTOMERS. THERE IS NO VARIANCE BETWEEN THE ANTICIPATED EXPENSE OR THE ACTUAL EXPENSE NOR ANY VARIANCE WITH RESPECT TO MONIES RECEIVED FROM CUSTOMERS TO RECOUP THAT PARTICULAR EXPENSE.

US WEST ARGUES THAT "IT IS POSSIBLE" THAT IT SUFFERED SOME UNFORESEEN EXPENSE IN ONE OF THOSE YEARS THAT WOULD PROPERLY BE OFFSET BY ITS RECEIPT OF THE TAX REFUND. HOWEVER, IF IN FACT US WEST HAD AN UNFORESEEN EXPENSE IN ONE OF THOSE TAX YEARS, ITS REMEDY WAS TO ADDRESS THAT UNFORESEEN EXPENSE IN THE NEXT YEAR'S RATEMAKING PROCEEDING. *SEE UTAH DEPT. OF BUS. REGULATION V. PUBLIC SERV. COM'N*, 720 P.2D AT 420-21 ("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.").

IF US WEST DID NOT ADDRESS THOSE ISSUES IN THEIR NEXT GENERAL RATE PROCEEDING, THAT WAS A DECISION THEY MADE AT THAT TIME. US WEST CANNOT NOW CLAIM TO BE ENTITLED TO THE TAX REFUND TO OFFSET "SOME UNFORESEEN EXPENSE" THAT WOULD HAVE BEEN TAKEN INTO ACCOUNT AT A PREVIOUS YEAR'S RATEMAKING HEARING AND ALREADY DECIDED. AT NO TIME DID US WEST INCLUDE THESE PROPERTY TAX REFUNDS AS PROJECTIONS IN ITS RATEMAKING APPLICATIONS AND IT WOULD BE LONG PAST THE APPROPRIATE TIME TO DO SO NOW.

**C. CONTRARY TO US WEST'S ARGUMENT, THE COUNTIES HAVE NEVER ACKNOWLEDGED THAT THEIR**

## **CLAIM INVOLVES RATEMAKING.**

AS SUPPORT FOR THE IMPLAUSIBLE ARGUMENT THAT THE COUNTIES HAVE CONCEDED ADJUDICATION OF THEIR CLAIMS REQUIRES RECOURSE TO RATEMAKING,  US WEST CITES TO THE COUNTIES' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DEPOSIT THE TAX REFUND MONIES WITH THE TRIAL COURT. US WEST BRIEF AT 19-20. THE PORTIONS EMPHASIZED BY US WEST REFER TO THE PETITION FOR DECLARATORY RELIEF FILED BY THE COUNTIES WITH THE PSC. THROUGH A PROCESS OF SELECTIVE DISREGARD, US WEST DISCOUNTS THE LANGUAGE IN THOSE SAME PARAGRAPHS WHEREIN THE COUNTIES ASSERT THAT THE TAX REFUND MONIES SIMPLY DO NOT BELONG TO US WEST, BUT BELONG INSTEAD TO THE CLASS MEMBERS.

THE COUNTIES DO, HOWEVER, AGREE WITH US WEST'S CONCESSION ON PAGE 19 OF ITS BRIEF, THAT IT IS THE ESSENTIAL NATURE OF THE RELIEF REQUESTED AND NOT A LABEL ATTACHED TO IT THAT DETERMINES WHETHER AN ACTION MUST BE COMMENCED BEFORE THE PSC OR WHETHER IT MAY PROCEED BEFORE A COURT. SEE US WEST BRIEF AT 19 (QUOTING *KLOPP V. COMMONWEALTH EDISON CO.*, 370 N.E. 2D 822, 824 (ILL. CT. APP. 1977)). IT IS US WEST, HOWEVER, WHICH IGNORES THE ESSENTIAL NATURE OF THE RELIEF REQUESTED, I.E., A DECLARATION OF WHO OWNS THE PROPERTY TAX REFUND—THE CUSTOMERS WHO ACTUALLY PAID THE TAXES OR US WEST WHICH HAS ALREADY BEEN REIMBURSED ANY AND ALL SUMS PAID FOR TAXES. US WEST'S ARGUMENT AMOUNTS TO SAYING, AGAIN AND AGAIN, WHAT IT WOULD LIKE THIS COURT TO CONCLUDE, RATHER THAN ADDRESSING THE ACTUAL RELIEF REQUESTED. CALLING THIS CASE A RATEMAKING CASE DOES NOT MAKE IT ONE AND A COMMON SENSE ANALYSIS OF THE RELIEF REQUESTED MAKES CLEAR THAT THERE IS NO IMPINGEMENT UPON PAST RATES.

## **II. US WEST'S ARGUMENTS ON THE ERRONEOUS DISMISSAL WITH PREJUDICE ARE WRONG.**

IT IS DIFFICULT TO DETERMINE WHETHER US WEST'S ARGUMENT THAT THE DISMISSAL OF THE COUNTIES COMPLAINT "WITH PREJUDICE" IS REALLY NOT A DISMISSAL OPERATING AS AN ADJUDICATION ON THE MERITS WAS OFFERED TONGUE-IN-CHEEK. SEE US WEST BRIEF AT 31-33. A DISMISSAL "WITH PREJUDICE" IS CLEARLY EQUIVALENT TO A



FINAL DECISION “ON THE MERITS.” *RINGWOOD V. THORNE AUTOWORKS, INC.*, 786 P.2D 1350, 1357 N.5 (UTAH CT. APP. 1990). *RES JUDICATA* PRINCIPLES ARE, THEREFORE, CLEARLY AND EXPRESSLY MANDATED BY SUCH A DISMISSAL.

IT IS EQUALLY IRREFUTABLE THAT THE PSC WOULD BE ACTING AS A “COURT” AND THAT PRINCIPLES OF *RES JUDICATA* APPLY TO IT. *SEE UNITED STATES V. UTAH CONSTRUCTION AND MINING Co.*, 384 U.S. 394, 422 (1966) (“WHEN AN ADMINISTRATIVE AGENCY IS ACTING IN A JUDICIAL CAPACITY AND RESOLVED DISPUTED ISSUES OF FACT PROPERLY BEFORE IT WHICH THE PARTIES HAVE HAD AN ADEQUATE OPPORTUNITY TO LITIGATE, THE COURTS HAVE NOT HESITATED TO APPLY *RES JUDICATA* TO ENFORCE REPOSE.”).

THE ARGUMENT OF US WEST THAT DISMISSAL OF THE COMPLAINT, “WITH PREJUDICE” “SIMPLY FUNCTIONS TO PREVENT THE COUNTIES FROM ASSERTING ANY AND ALL JURISDICTIONAL ISSUES IN ANOTHER COURT,” IS PALPABLY DISINGENUOUS. “WITH PREJUDICE” MEANS THAT ALL CLAIMS ASSERTED IN THE UNDERLYING CASE BROUGHT BY THE COUNTIES HAVE BEEN ADJUDICATED BY JUDGE YOUNG AND RESOLVED AGAINST THE COUNTIES. THE PSC, WERE IT TO ENGAGE IN SOME ADJUDICATIVE ROLE IN DETERMINING THE CLAIM, WOULD BE BOUND BY JUDGE YOUNG’S FINAL DETERMINATION. THE DISMISSAL WITH PREJUDICE IS CLEARLY IMPROPER WHEN DISMISSAL IS FOR LACK OF SUBJECT MATTER JURISDICTION *SEE UTAH R. CIV. P. 41(B)* (DISMISSALS SHOULD NOT OPERATE AS ADJUDICATIONS ON THE MERITS WHEN JURISDICTIONALLY BASED); HENCE THIS DISMISSAL WITH PREJUDICE MUST BE REVERSED.

### **III. US WEST MUST KEEP ITS AGREEMENT TO HAVE A BOND POSTED; THE TRIAL COURT’S RELEASE OF THE BOND BEFORE RESOLUTION OF THE LITIGATION MUST BE REVERSED.**

US WEST ARGUES THAT THE ORDER OF THE TRIAL COURT, WHICH STATES THAT “THE PROCEEDS OF THE BOND ARE TO BE PAID TO THE PARTY OR PARTIES AS THE COURT DETERMINES UPON RESOLUTION OF THIS LITIGATION,” DOES NOT SAY ANYTHING ABOUT WHEN THE BOND COULD PROPERLY BE RELEASED. OF COURSE, AGREEING TO POST A BOND THAT COULD ARBITRARILY BE SUBJECT TO INSTANTANEOUS RELEASE WOULD BE RIDICULOUS. SINCE THE PURPOSE OF THE BOND WAS TO ASSURE PAYMENT TO THE PUTATIVE CLASS UPON DETERMINATION THAT THE FUNDS BELONG TO THE PUTATIVE CLASS MEMBERS, THERE REALLY IS ONLY ONE POSSIBLE REASONABLE INTERPRETATION OF THE LANGUAGE OF THE ORIGINAL ORDER

REQUIRING THE BOND AND ITS PREDICATE STIPULATION; THAT IS, THAT THE BOND WILL NOT BE RELEASED UNLESS AND UNTIL THERE MIGHT BE A FINAL DETERMINATION THAT **US WEST** OWNS THE TAX REFUNDS RATHER THAN THE PUTATIVE CLASS MEMBERS. THE RELEASE ORDER MUST BE REVERSED AND **US WEST** ORDERED TO REPLACE THE BOND.

**IV. THE AWARD OF COSTS IS CLEARLY IMPROPER.**

**US WEST** ARGUES “THERE IS NO REASON TO QUESTION THE COURT’S DETERMINATION THAT **US WEST**’S COSTS WERE NECESSARILY INCURRED NOR IS THERE REASON TO QUESTION THE COURT’S AWARD OF \$1,014.58 IN NECESSARY AND CLEARLY NON-EXCESSIVE COSTS ASSOCIATED WITH **US WEST**’S PREPARATIONS FOR THE HEARING ON ITS MOTION TO DISMISS.” **US WEST** BRIEF AT 30-31. THERE IS CERTAINLY REASON TO QUESTION THE COURT’S DETERMINATION WHEN NO EVIDENCE OF ANY KIND WAS PRESENTED TO SHOW HOW THE COSTS SOUGHT WERE “NECESSARILY INCURRED” AS IS REQUIRED BY **UTAH R. CIV. P. 54(d)**.

IN FACT, THERE WAS NO GOOD REASON FOR THE EXPENDITURE OF THOSE SUMS BY **US WEST** AND THEY COULD NOT HAVE BEEN “NECESSARILY INCURRED” IN THE LITIGATION. NO ORDER OR RULE REQUIRED THE EXPENDITURES. ONLY **US WEST**’S DESIRE TO SPEND MONEY ON SUPERFLUOUS EXHIBITS FOR USE AT AN ARGUMENT GOVERNED ITS DECISION TO SPEND MONEY. SUCH AN EXPENDITURE HAS NEVER BEEN RECOGNIZED IN THIS STATE AS A PROPERLY AWARDBLE COST AND THIS IS CERTAINLY NOT THE CASE TO RECOGNIZE SUCH AN EXPENDITURE AS A PROPERLY AWARDBLE COST.

**V. IF THIS COURT DETERMINES THAT THE TRIAL COURT DOES NOT HAVE JURISDICTION, THIS COURT SHOULD REMAND TO THE PSC WITH DIRECTIONS TO CONDUCT A CLASS ACTION ADJUDICATIVE PROCEEDING.**

THE BRIEF OF THE **PSC** MAKES CLEAR THAT THE **PSC** IS IMPEDED FROM PROCEEDING BY **US WEST**’S REFUSAL TO DELIVER ITS STATUTORILY-REQUIRED CONSENT.  CONSIDERING ITS OTHER ARGUMENTS MADE BEFORE THIS COURT THAT ONLY THE **PSC** MAY HEAR THE MATTER, THE BAD FAITH OF **US WEST** IN THAT REGARD IS PATENT. IT IS IRONIC THAT **US WEST** APPEARS TO ARGUE FOR DISMISSAL OF THE APPEAL OF THE **PSC** ORDER WHEN IT HAS NEVER “CONSENTED” TO BEING A PARTY IN THE **PSC** PROCEEDING. THE **PSC** AND THE COUNTIES, THE ONLY PARTIES ACTUALLY APPEARING IN THAT PROCEEDING, ARE IN AGREEMENT THAT THERE SHOULD BE A REMAND TO THE **PSC**, RATHER THAN A

DISMISSAL, IF THE DISTRICT COURT IS DETERMINED NOT TO HAVE JURISDICTION.

THE COUNTIES ARE UNCERTAIN WHETHER THE PSC COULD, INDEED, OVERSEE A CLASS ACTION UNDER UTAH R. CIV. P. 23. HOWEVER, IF THE DISTRICT COURT CANNOT HEAR THIS ACTION, THEN THE PSC WILL HAVE TO HEAR IT UNDER RULE 23 AND, RATHER THAN SIMPLY DISMISS THE PSC APPEAL, THE COURT SHOULD ENTER AN ORDER REMANDING THE CASE TO THE PSC TO PROCEED WITH AN ADJUDICATIVE PROCEEDING, AS PROPOSED BY THE PSC IN ITS BRIEF, BUT UNDER UTAH R. CIV. P. 23, IF THE DISTRICT COURT CANNOT HEAR THE CLASS CLAIM AND ENGAGE IN A CLAIMS PROCESS. THE COUNTIES, HOWEVER, BELIEVE THE CASE BELONGS IN THE DISTRICT COURT.

### CONCLUSION

BECAUSE THE TRIAL COURT'S RELEASE OF THE SURETY BOND VIOLATED THE EXPRESS TERMS OF THE PARTIES' STIPULATION AND ITS OWN ORDER MANDATING THE BOND, THE COUNTIES REQUEST THAT THE COURT REVERSE AND ORDER US WEST TO REINSTATE THE SURETY BOND OR, IN THE ALTERNATIVE, TO REDEPOSIT THE SETTLEMENT FUNDS WITH THE COURT.

THE ARGUMENTS OF US WEST FALL FAR SHORT TO ESTABLISHING THAT THE COSTS INCURRED BY US WEST TO PREPARE HEARING EXHIBITS WAS EITHER REASONABLE OR NECESSARY AS REQUIRED BY UTAH R. CIV. P. 54(D). THIS COURT SHOULD, THEREFORE, REVERSE THE TRIAL COURT'S AWARD OF COSTS.

FINALLY, THE COUNTIES RENEW AND REPEAT THEIR REQUEST THAT THIS COURT REVERSE THE ORDER OF DISMISSAL WITH PREJUDICE AND, FURTHER, REMAND THIS CASE TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS. IN THE ALTERNATIVE, THE COUNTIES REQUEST THAT THE COURT REVERSE THE "WITH PREJUDICE" ASPECT OF THE DISMISSAL AND REMAND THE CASE TO THE PSC, WITH INSTRUCTIONS TO DETERMINE THE RIGHTFUL OWNERSHIP OF THE SETTLEMENT FUND AND, IF PROPER, ORDER DISTRIBUTION OF THOSE FUNDS TO A CERTIFIED CLASS IN ACCORDANCE WITH THE PROVISIONS OF UTAH R. CIV. P. 23.

**RESPECTFULLY SUBMITTED** THIS \_\_\_\_\_ DAY OF AUGUST, 2000.

**PARSONS, DAVIES, KINGHORN & PETERS**

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**CERTIFICATE OF SERVICE**

THE UNDERSIGNED HEREBY CERTIFIES THAT TWO TRUE AND COPIES OF THE ABOVE AND FOREGOING REPLY BRIEF  
OF APPELLANTS WERE MAILED, POSTAGE PREPAID, THIS \_\_\_\_\_ DAY OF AUGUST, 2000, TO THE FOLLOWING:

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