

MEMORANDUM

Date: October 5, 2001

To: Utah Public Service Commission

From: Utah Division of Public Utilities
Lowell Alt, Director
Ingo Henningsen, Manager Telecommunications
Judith Hooper, Rate Analyst

RE: Docket 01-049-75 Counties vs. Qwest

On September 17, 2001, the plaintiffs in the above referenced docket filed a complaint with the Public Service Commission. To date, Qwest has not responded. The Division, therefore, will withhold any recommendation concerning this complaint until an answer has been filed by Qwest, and an opportunity for investigation on the part of the Division has taken place.

History:

Qwest filed appeals with the Tax Commission from the Counties' assessment of its property for each year 1986 through 1998. A stipulation was reached wherein the Counties were to refund to Qwest \$16.9 million. However, the Counties simultaneously filed complaints with the district court and the Public Service Commission asserting that Qwest had recouped the taxes at issue through customer rate structure, contending double recovery and unjust enrichment. An ex parte order was granted to the Counties whereby the \$16.9 million was deposited with the district court rather than being distributed to Qwest.

Qwest then moved in the district court to dismiss the Counties' complaint claiming lack of subject matter jurisdiction, asserting that a decision would require assessment of rates thereby making the Public Service Commission the proper forum. After a hearing on the motion, the district court issued an order of dismissal with prejudice for lack of subject matter jurisdiction, holding that rate making or adjustment of rates were within the exclusive jurisdiction of the Public Service Commission, as were the legislative functions concerning rate making and rate adjustments. The surety bond in the amount of \$16.9

million was then released by the district court to Qwest. At the same time, the district court held that the Counties had a clear and adequate remedy in the form of administrative proceedings before the Public Service Commission, precluding them from invoking equity jurisdiction of the courts for the purpose of imposing a constructive trust.

The Counties then filed with the Public Service Commission a request for declaratory ruling. The Public Service Commission did not respond to the request for declaratory ruling, and therefore after 60 days, the request was deemed by the plaintiffs to be denied. Instead of filing for a review or rehearing before the Public Service Commission, the Counties then filed a petition for writ of review of the Public Service Commission “denial” of the request for declaratory ruling with the Utah Supreme Court. The Counties also filed a motion to consolidate the appeal of the district court’s dismissal with the Supreme Court petition. The Supreme Court also consolidated the appeal of the district court’s award of costs to Qwest.

Five issues were presented for review to the Supreme Court by the Counties:

1. whether the court erred in holding that the Public Service Commission had exclusive subject matter jurisdiction over this matter;
2. whether the court erred in dismissing the matter with prejudice;
3. whether the court erred in determining the \$16.9 million surety bond should be released to Qwest;
4. whether the court erred in granting Qwest’s claim for costs; and,
5. whether the Public Service Commission erred in not granting the Counties’ petition for declaratory action.

On September 7, 2001, the Utah Supreme Court handed down its findings. The Supreme Court holds that the decision regarding whether a tax refund to Qwest from the Tax Commission was considered in assessing rates charged to ratepayers is an issue “inextricably intertwined with an investigation into the makeup rates charged by Qwest,”¹ concluding that jurisdiction, therefore properly lies with the Public Service Commission.

The Supreme Court further holds that the district court’s dismissal of the Counties’ claim with prejudice was improper because a dismissal with prejudice would preclude the Counties from pursuit of their action and would bar any further claims before the Public Service Commission. Too, the Supreme Court holds that the District Court erred in dismissing the case with prejudice and has stated that under Utah Civil Procedure rules, a dismissal for lack of jurisdiction clearly does not result in an adjudication upon the merits.² If the tribunal is outside the jurisdiction of the district courts, it is still error to dismiss without prejudice when the decision has not been made on the merits of the case.³ Utah rules require:

¹ 2001 WL 1020967, *4, ¶17 (Utah).

² Id., at *5, ¶18-20 (Utah).

³ Id., at *5, ¶21 (Utah).

“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..., operates as an adjudication upon the merits.”⁴

The Supreme Court further holds that it was not error on the part of the district court to release the \$16.9 million surety bond because there was no indication that the maintaining of the bond was necessary for protecting of the Counties’ interests, and that the district court properly determined that it lacked jurisdiction to maintain the surety bond.⁵ The Supreme Court has reversed the awarding of costs for trial exhibits that had been awarded to Qwest by the district court for certain poster board trial exhibits holding that such trial exhibits were merely expenses of litigation.⁶

The Supreme Court holds that the Public Service Commission was “boxed in” because the Counties failed to plead for relief other than a declaratory ruling that could only be granted upon Qwest’s consent. The Supreme Court has stated that it is without jurisdiction to review administrative orders until the plaintiff has applied for review or rehearing before the Public Service Commission pursuant to Utah Code Ann. § 54-7-15, and that such review is required before the Public Service Commission before the jurisdiction of the Supreme Court can be invoked. The Supreme Court, therefore, dismissed the Counties’ petition for review of the declaratory action because the Counties had not sought a rehearing before the Public Service Commission.⁷

On September 17, 2001, the Counties filed a complaint as not only political subdivisions, but also as a class action complaint on behalf of Qwest rate payers against Qwest asserting that the \$16.9 million refund at issue should be returned to the customers of Qwest to avoid Qwest’s double recovery or unjust enrichment. The Counties allege that the customer rates charged by Qwest during the 1986 through 1998 periods included the ad valorem property taxes that ultimately were refunded to Qwest, even after Qwest had recovered the expense of the taxes from their customers.⁸

Cc: Michael Ginsberg, Office of the Attorney General
Sandy Mooy, Attorney for the Public Service Commission
Laura Scholl, Qwest Corporation
Gregory Monson, David Mortensen, Attorneys for Qwest

⁴ Rule 41(b), Utah Rules of Civil Procedure (regarding involuntary dismissal).

⁵ 2001 WL 1020967, *5, ¶22 (Utah).

⁶ Id., at ¶24-25.

⁷ Id., at *5-6, ¶26-30.

⁸ See PSC Complaint (Proposed Class Action) Docket No. 01-049-75, filed September 17, 2001.

Bill Thomas Peters, David W. Scofield, Attorneys for the Counties