

BILL THOMAS PETERS - 2574

DAVID W. SCOFIELD - 4140

PARSONS, DAVIES, KINGHORN & PETERS, P.C.

185 South State Street, Suite 700

Salt Lake City, Utah 84111

Telephone: (801) 363-4300

Facsimile: (801) 363-4378

Attorneys for the Complainant Counties and All Other Persons
and/or Entities similarly situated

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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.

Docket No. 01-049-75

**MEMORANDUM IN SUPPORT OF
MOTION TO CONSOLIDATE AND
MOTION TO AMEND**

In the matter of the Request of:

BEAVER COUNTY, et al., FOR AN ORDER DIRECTING THAT
1988 THROUGH 1996 PROPERTY TAX REFUNDS BE
RETURNED TO THE RATE PAYERS FROM WHOM SAID
PROPERTY TAXES WERE PREVIOUSLY RECOVERED AND FOR
SIMILAR RELIEF FOR 1997, 1998 AND SUBSEQUENT
YEARS.

Petitioners.

Docket No. 98-049-48

Petitioners in Docket No. 98-049-48 and Complainants in Docket No. 01-049-75, submit the following memorandum in support of their motion for an order consolidating the two cases and allowing amendment of the petition filed herein and the filing of an amended complaint, superceding the petition and all prior

complaints.

I. THE REQUESTED AMENDMENTS SHOULD BE ALLOWED.

Utah Admin. R. 746-100-3(D) provides:

The Commission may allow pleadings to be amended or corrected at any time. Initiatory pleadings may be amended without leave of the Commission at any time before a responsive pleading has been filed or the time for filing the pleading has expired. Defects in pleadings which do not affect substantial rights of the parties shall be disregarded.

Under that rule, Complainants have the right to amend at any time before a responsive pleading has been filed. Here, Qwest has not filed a responsive pleading, and so, complainants' amended pleading should be allowed as a matter of right and should be consolidated into the earlier case, as discussed below.

Additionally, the Division of Public Utilities, in its "Response of the Division of Public Utilities to the Request for a Declaratory Ruling," dated March 15, 1999, stated:

No inference can be drawn that the Commission would not hear this proceeding as a formal adjudicative by its failure to act within 60 days. Counties should have been more clear if they wanted a declaratory proceeding or formal adjudication.

The Commission should institute this proceeding as a formal adjudicative proceeding and not let any inference be drawn that it would not proceed with this case by its failure to act within the 60 day time period for declaratory rulings.

By allowing amendment, there is no impediment to the Commission proceeding with an adjudicative proceeding. As this Commission, itself recognized in its appeal brief to the Supreme Court, "[t]he inability of the Commission to issue the requested declaratory order does not constitute 'final agency action'" Brief of the Public Service Commission, at 8 n. 2 (a copy of the brief of the Public Service Commission is attached hereto as Exhibit "A.")

II. THE TWO CASES SHOULD BE CONSOLIDATED.

Complainants have been unable to locate any Commission rule directly addressing the issue of consolidation of cases. Complainants therefore turn to the analogous Utah R. Civ. P. 42(a), which governs

consolidation in “all special statutory proceedings” Utah R. Civ. P. 81(a).

When actions involving a common question of law or fact are pending before [Commission], it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Utah R. Civ. P. 42(a). These proceedings are formal adjudicative proceedings, governed by Utah Code Ann. §§ 63-46b-0.5 to -23, the Utah Administrative Procedures Act. As such, they are special statutory proceedings and, therefore, governed by the Utah Rules of Civil Procedure.

In these two actions, the facts are identical. Complainants seeks to have over \$16 million in property tax refunds to Qwest declared to be properly the property of Qwest’s ratepayers, who have already paid Qwest for the property taxes Qwest paid. Allowing Qwest to retain the property tax refund after its ratepayers have already reimbursed it for the property taxes it paid results in an unjustifiable windfall to Qwest. The legal issues, in terms of the legal grounds upon which the relief Complainants see may be granted, is likewise identical.

A common question of law or fact “by itself is enough to permit consolidation, even if the claims arise out of independent transactions.” Charles Allen Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 2382, at 432-33 (1995). Here, there are independent transactions. Instead, the claims all derive from the tax refund pleaded. Thus, consolidation is appropriate.

The lower case number was commenced within a matter of days after the property tax refund was payable to Qwest, while the later action was commenced within days after the Utah Supreme Court ruled that the Third District Court did not have jurisdiction over the matter, but that exclusive jurisdiction lay with the Public Service Commission. Qwest has argued that the timing of the second case was such that a claim for reparations would be barred by the one-year statute of limitations. See, *e.g.*, Utah Code Ann. § 54-7-20(2). Utah Code Ann. § 78-12-40, the savings statute of limitations, provides:

If any action is commenced within due time and . . . the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, in the time limited either by law or contract for commencing the same shall have expired, the plaintiff . . . may commence a new action within one year after the reversal or failure.

Utah Code Ann. § 78-12-40. Thus, the action having been brought in the District Court timely and having failed upon final decision of the Utah Supreme Court that the decision was “otherwise than upon the merits,” and the second action before this Commission having been brought within one year of that ruling, Complainants have in any event met the limitations period. However, by consolidation and amendment, that limitations issue unquestionably goes away and need not be litigated on that ground.

CONCLUSION

In sum, amendment and consolidation will serve the purposes of allowing full exploration of the merits of all issues involved before the Commission, with the expense of such exploration being minimized, and properly resolved at least one component of the statute of limitations issue raised by Qwest on a reparations claim. The interest of justice therefore requires the granting of the motions.

DATED this _____ day of December, 2004.

PARSONS, DAVIES, KINGHORN & PETERS, P.C.

BILL THOMAS PETERS

DAVID W. SCOFIELD

Attorneys for Petitioners and Complainants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing

Memorandum was mailed, postage prepaid, this _____ day of December, 2004, to the following:

Michael L. Ginsberg
Kent Walgren
Reed Warnick

Assistant Attorneys General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, Utah 84111

Gregory B. Monson
Ted D. Smith
Stoel Rives LLP
201 South Main, Suite 1100
Salt Lake City, Utah 84111

David W. Scofield