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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.

**MEMORANDUM SUPPORTING
COMPLAINANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Docket No. 01-049-75

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. In a proceeding in the Third Judicial District Court, Salt Lake County, State of Utah, Case No. 980913349, Complainants brought suit against Qwest's predecessor, U S West Communications, Inc., to recover a property tax refund in the sum of \$16.9 million. See First Amended Class Action Complaint attached to Affidavit of David W. Scofield as Exhibit "A".

2. Qwest's predecessor moved to dismiss on grounds, *inter alia*, that the Public Service Commission of Utah had exclusive jurisdiction over the claims asserted in the first amended Complaint. See Memorandum in Support of Defendant's Motion to Dismiss Plaintiff's First Amended

Complaint for Lack of Subject Matter Jurisdiction, filed February 9, 1999. Complainants request that the Commission take administrative notice of this document. *See also Beaver County v. Qwest, Inc.*, 2000 UT 81, ¶ 4, 31 P.3d 1147, 1148-49.

3. The District Court dismissed and Qwest renewed the same contention before the Utah Supreme Court, “that the PSC is the exclusive forum for resolution of this dispute.” *Id.* ¶ 9, 31 P.3d at 1149.

4. The Utah Supreme Court affirmed, holding “jurisdiction properly lies with the PSC and, therefore, the district court properly dismissed the case for lack of subject matter jurisdiction.” *Id.* at ¶ 17, 31 P.3d at 1151.

5. In this proceeding in technical conferences, Qwest has taken the position that the PSC does not have exclusive jurisdiction over “this dispute” and that instead, other agencies have jurisdiction over portions of the claims of Complainants, such that Complainants may not recover all damages sought in this proceeding, even though too much time has passed to file in any other jurisdiction.

ARGUMENT

I. STANDARDS OF SUMMARY JUDGMENT.

“Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Jackson v. Mateus*, 2003 UT 18, ¶ 6, 70 P.3d 78, 80. “[A]ll undisputed material facts [must be considered] in the light most favorable to the nonmoving party” *IHC Health Services, Inc. v. D & K Management, Inc.*, 2003 UT 5, ¶ 6, 73 P.3d 320, 323. In addition to the undisputed facts, “all reasonable inferences drawn therefrom [must be viewed] in the light most favorable to the nonmoving party.” *Alder v. Bayer Corp.*, 2002 UT 115, ¶ 25, 61 P.3d 1068, 1076.

Here, the material facts are not in dispute, and they are contained within the record of the proceedings before the Third District Court, Salt Lake County, State of Utah, Case No. 980913349, and the Utah Supreme Court file, Case Nos. 990771, 20000140, 990268, and the Utah Supreme Court decision in *Beaver County v. Qwest, Inc.*, 2001 UT 81, 31 P.3d 1147. Qwest (or its predecessor) argued the position in those proceedings, as stated by the Utah Supreme Court: “Qwest contends, and the district court agreed, that the PSC is the **exclusive forum**, for resolution of **this dispute**.” 2001 UT 81 ¶ 9, 31 P.3d at 1149 (emphasis added). “[T]his dispute is shown by the Amended Complaint that had been filed in the Third District Court and which the Third District Court had dismissed. In ruling on Qwest’s argument, the Utah Supreme Court held: “We conclude that under these circumstances, **jurisdiction properly lies with the PSC** and, therefore, the district court properly dismissed the case for lack of subject matter jurisdiction.” *Id.* ¶ 17, 31 P.3d at 1152 (emphasis added).

Both the Complainants and Qwest were parties to the Third District Court action, and both they and the Public Service Commission of Utah were parties to the Utah Supreme Court case. Since Qwest raised and fully litigated the jurisdictional issue to a successful conclusion on the merits, in accordance with its positions before the Third District Court and the Utah Supreme Court, the issue, namely, that this Commission has jurisdiction over “this dispute” as pleaded in the Third District Court, and re-pleaded before this Commission, is forever established by the doctrine of issue preclusion. Also, since the Utah Supreme Court ruled that the relief requested by the Complainants could, as argued by Qwest, could “be administered only through the PSC . . .,” *id.* ¶ 15, 31 P.3d at 1151, there is no other forum to hear Complainants’ claims. This is in marked contrast to the new-found conversion of Qwest and the Division, that this Commission does not have exclusive jurisdiction over Complainants’ claims.

II. QWEST’S NEWFOUND CLAIM THAT THE PSC LACKS JURISDICTION OVER PORTIONS OF THE DAMAGES CLAIMANTS SEEK TO OBTAIN IS BARRED BY ISSUE PRECLUSION.

Issue preclusion is a doctrine that “prevents the parties from relitigating issues resolved in a prior related action. *Sevy v. Security Title Company*, 902 P.2d 629, 632 (Utah 1995). The issue challenged must

be identical, that issue must have been decided finally on the merits, the issue must have been fully, fairly and competently litigated and the opposing party in the action at hand must have been either a party or privy in the prior action. See *id.* Each of those elements is unquestionably met here: (1) the issue of this Commission's exclusive jurisdiction over "this dispute" was precisely the issue framed by Qwest and ruled on by the Utah Supreme Court; (2) a final judgment was entered in favor of Qwest and against Complainants on that issue, which served as the basis for dismissal; (3) the issue was fully, fairly and competently litigated, having been the key issue ruled on by both the Third District Court and the Utah Supreme Court; and (4) Qwest was a party to the prior proceeding. Because all four elements are met, the issue has been decided that this Commission has exclusive jurisdiction over "this dispute" and issue preclusion must be applied. See *id.* at 633.

The exclusive jurisdiction of this Commission over "this dispute" having been finally established, Complainants are entitled to partial summary judgement in their favor, establishing that the amount recoverable if they otherwise prevail is the amount of the full refund, and not that any other forum has jurisdiction over any such amounts that have been determined to be within the exclusive jurisdiction of this Commission.

III. QWEST'S NEWFOUND POSITION IS BARRED BY JUDICIAL ESTOPPEL.

The doctrine of judicial estoppel has been stated by the Utah Supreme Court to be that "a person may not, to the prejudice of another person deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject matter, if such prior position was successfully maintained." *Tracy Loan & Trust Co. v. Openshaw Investment Co.*, 102 Utah 509, 132 P.2d 388, 390 (1942). In the prior proceeding, Qwest argued that this Commission had exclusive jurisdiction to resolve Complainants' dispute and it obtained relief on that position, with the Utah Supreme Court adopting Qwest's position. Now that Complainants' have gone to the only forum they were allowed, based on the Utah Supreme Court's adoption of Qwest's position, Qwest has performed a sudden about-face, and argues that

other agencies have jurisdiction of the claim for restitution of the tax refund money. Complainants are prejudiced by this new-found conversion of Qwest, because the time for filing for such relief outside of this Commission has passed. Therefore, Qwest is judicially estopped from claiming that Complainants may not seek the entirety of the tax refund money in this Commission, and Complainants are entitled to partial summary judgment in that regard.

CONCLUSION

For the foregoing reasons, this Commission should enter partial summary judgment in favor of Complainants, and against Qwest, ruling that this Commission is the exclusive forum for a determination of whether restitution of the entire tax refund should be made by Qwest, and that no reduction in damages may be made based on any argument that another agency, rather than this Commission, has any jurisdiction over any monies subject of Complainants' claims.

DATED this _____ day of December, 2004.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Memorandum Supporting Complainants' Motion For Partial Summary Judgment was served via e-mail transmission this _____ day of December, 2004, to the following:

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