Robert C. Brown
Qwest Services Corporation
1801 California, Suite 4900
Denver, CO 80202
(303) 672-5839
(303) 295-7069 (fax)
Robert.Brown@qwest.com

Gregory B. Monson (2294)
Ted D. Smith (3017)
David L. Elmont (9640)
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111
(801) 328-3131
(801) 578-6999 (fax)
gbmonson@stoel.com
tsmith@stoel.com
dlelmont@stoel.com

Attorneys for Qwest Corporation

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 **QWEST'S NOTICE OF REQUEST FOR FURTHER CONSIDERATION OF MOTIONS TO DISMISS**

Qwest Corporation ("Qwest"), pursuant to the Scheduling Order issued by the Commission on July 6, 2004, hereby provides notice to the Commission and the parties

that it seeks further consideration by the Commission of the Motion to Dismiss filed by Qwest on October 17, 2001 ("2001 Motion") and the Motion to Dismiss filed by Qwest on August 8, 2002 ("2002 Motion")[1] (collectively "Motions").

I. BACKGROUND

A. QWEST'S PROPERTY TAX APPEALS

In each of the years 1988 through 1996, Qwest appealed the assessed valuation of its property subject to property tax in Utah. As a public utility, Qwest is centrally assessed by the Property Tax Division of the Utah State Tax Commission using the unitary method. The central assessment is then allocated to the counties in which Qwest has property and operations, Beaver County, et al. ("Counties"). The Counties and taxing entities within the Counties then apply their various tax rates to the assessed value allocated to them. The Counties have the right to initiate and participate in valuation appeals. They either support the assessment of the Property Tax Division or seek a higher valuation.

Although several issues were raised in the valuation appeals, the major issue involved the inclusion of intangible assets in the assessment, through several alternative valuation approaches. Although Utah law is clear that intangible assets are not to be taxed, the Property Tax Division had successfully argued before the State Tax Commission that valuation using the unitary method required valuation of the entire business, which Qwest argued necessarily involved the taxation of intangible assets.

[1] Although the 2002 Motion did not oppose amendment of the Counties' complaint to include a second cause of action, and included a section answering the Amended Complaint, Qwest sought dismissal of the entire Amended Complaint "on the grounds set forth in the above defenses, as well as the grounds set forth in Qwest's [2001 Motion]." 2002 Motion at 8.

A hearing was held in 1994 on the appeal of the 1988 assessment and the State Tax Commission issued a decision in November 1995, slightly reducing the assessment. Qwest appealed that decision to the Utah Tax Court. While the appeal was pending, the State Tax Commission issued a decision in *WilTel Inc. v. Beaver County, et al. v. Property Tax Division*, Appeal Nos. 95-0789 and 95-0824 (April 21, 1997), holding that intangible assets could not be included in assessments. With that issue resolved, the Property Tax Division and Counties entered into negotiations with Qwest to resolve the 1988-1996 appeals. In March 1998, the parties entered into a stipulation in which they compromised their positions on assessed value for each year in question and established the basis for a refund based on the revised valuations. By signing the stipulation, the Counties agreed that Qwest would be entitled to a refund. At no time did the Counties disclose any intention to seek to avoid making the refund payment based on the claims they have asserted in this docket. The Tax Commission approved the stipulation and entered a supplemental order on October 2, 1998, finding that the Counties should refund $16.9 million to Qwest by December 31, 1998. The $16.9 million total was comprised of $11.5 million in principal and $5.4 million in interest.

B. THE COUNTIES' INITIAL EFFORTS TO SEEK REFUNDS

On December 31, 1998, even before they made the refunds pursuant to the stipulation, the Counties filed a complaint in state district court seeking appointment as representatives of a class composed of all Utah ratepayers covering the period 1988 through 1996. The Counties sought class recovery of the $16.9 million stipulated property tax refund to Qwest. The Counties argued that the rates charged by Qwest during the years covered by the refund were based on the property taxes originally assessed and that equity required the refund be paid to the ratepayers in order to avoid a

double recovery by Qwest. The Counties deposited their refund payments with the district court at the time they filed the complaint.[2]

Coincident with the district court complaint, the Counties filed a petition for a declaratory order with the Commission seeking a determination that the $16.9 million belonged to ratepayers or, alternatively, that rates should be reduced on a going-forward basis to account for the alleged double recovery. The Commission took no action on the petition within 60 days, which under the statute[3] caused the declaratory order petition to be denied. Following the 60-day period, the Division of Public Utilities ("Division") recommended to the Commission that it consider the Counties' claim. However, before the Commission could act, the Counties appealed the Commission's statutory denial of the petition to the Utah Supreme Court and were granted a stay of the appeal pending the completion of the district court action.

Qwest moved to dismiss the district court complaint on the ground that the court lacked subject matter jurisdiction over the claim. Despite the Counties' couching the claim as one in equity, Qwest argued that the real issue was whether the rates charged by Qwest during the relevant period were proper.

The district court dismissed the complaint, with prejudice, for lack of subject matter jurisdiction, and the Counties appealed the dismissal to the Utah Supreme Court. The Counties also moved to consolidate the appeal of the district court decision with the pending appeal of the Commission's statutory denial of the petition. The motion was granted.

---

[2] Qwest was able to obtain a release of the funds in January 1999 from the district court upon posting of a bond. The district court allowed the bond to be released after it granted Qwest's motion to dismiss the complaint.

[3] Utah Code Ann. § 63-46b-21.

On September 7, 2001, the Supreme Court affirmed the decision of the district court on subject matter jurisdiction.[4] The court found that even though the Counties had couched their complaint in equitable terms, the complaint really raised issues about the appropriateness of Qwest's rates during the relevant period. The court concluded that such issues were properly within the Commission's jurisdiction.[5] The court dismissed the consolidated appeal of the Commission's statutory denial of the petition for a declaratory order because the Counties failed to seek rehearing by the Commission, which is a statutory prerequisite to appeal.[6]

C. POST-APPEAL LITIGATION

Following their loss on appeal, the Counties filed a class action complaint in the Commission on September 17, 2001. The complaint was essentially identical to the complaint the Counties had filed in district court. Qwest responded to the complaint with the 2001 Motion. Following briefing and oral argument, the 2001 Motion was denied by the Commission without prejudice in a bench ruling on January 29, 2002. The basis of the denial was that the Commission did not wish to prevent the Counties receiving an opportunity to develop a record in support of their contentions. The Commission also stated that it was "not in a position to narrow precisely how we are going to go forward," and requested that "the parties meet together and discuss . . . ways to move forward."[7]

---

[4] *Beaver County v. Qwest, Inc.*, 2001 UT 81, 31 P.3d 1147.

[5] *Id.* at ¶¶ 10-17.

[6] *Id.* at ¶¶ 26-30.

[7] *See* Order Denying Motion to Dismiss Without Prejudice and Establishing a Schedule and Procedures, Docket No. 01-049-75, at 3 (July 26, 2002) (citing January 29, 2002 bench ruling).

Thereafter, the Counties made no effort to develop a record for four months. On May 24, 2002, the Counties contacted Qwest about setting up a meeting to discuss how the case might move forward. The meeting was held on June 18, 2002. At the meeting, the Counties, Qwest, the Division and the Committee of Consumer Services ("Committee") met and agreed upon a schedule for initial stages of the proceeding. They agreed that discovery could commence immediately,[8] established a schedule for the Counties to move to amend their complaint to include a count for reparations based on exceptions to the rule against retroactive ratemaking, for Qwest and others to respond to the amended complaint, and set a technical conference on October 30, 2002, at which the parties would meet to determine whether additional discovery was required and to determine whether factual stipulations could be reached. The parties reported these matters to the Commission, and, on July 26, 2002, the Commission issued its Order Denying Motion to Dismiss Without Prejudice and Establishing a Schedule and Procedures, confirming denial of the 2001 Motion without prejudice and adopting the schedule proposed by the parties.

The Division commenced discovery on June 28, 2002. The Counties filed a motion to amend and an amended complaint and a motion to consolidate their complaint in this matter with their original petition for declaratory ruling filed on December 31, 1998 in Docket No. 98-049-48 on July 19, 2002. Qwest responded to the Amended Complaint with an answer and its 2002 Motion seeking dismissal of the amended complaint on August 8, 2002. Qwest filed a memorandum in opposition to the motion to consolidate on the same date. The Committee also responded to the Counties' motions

[8] There was no reason discovery could not have commenced earlier, but the agreement made clear that it could proceed at that time.

on August 8. The parties thereafter filed further memoranda and motions related to the Counties' motions and Qwest's response. The Commission has not ruled on these motions.

The Counties initiated discovery on September 18, 2002. Qwest responded to the Counties' discovery on October 22, 2003, providing hundreds of pages of accounting documents requested. Qwest also responded to discovery of the Division and Committee.

The parties held a technical conference on October 30, 2002, as scheduled. Prior to the conference, the Commission sent a letter to the parties on September 30, 2002, asking the parties to consider whether agreement could be reached on the allocation of the property tax refund to each year, the allocation of the refund in each year to the Utah intrastate jurisdiction based on the allocation of property taxes in rate cases during the period, and the amount of property taxes included in setting rates in each rate case during the years in question.[9]

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

[9] The letter also stated that the Commission had preliminarily determined that proceeding with the matter as a class action under the rules of civil procedure was inappropriate and unnecessarily burdensome. The Commission stated that normal Commission proceedings achieved the same benefit without the unnecessary requirements. The Commission requested that any party disagreeing with its preliminary decision submit a legal memorandum explaining the disagreement. No party has done so. Thus, the Commission has effectively granted one part of Qwest's Motions.

No. 88-049-18, for which a general release applied, was excluded.[10] The Division and Qwest invited the Counties and the Committee to review and provide comments on the analysis. At a further technical conference on June 3, 2003, the Committee raised a few questions and provided comments which have resulted in minor adjustments to the analysis. The Counties have refused to accept it without providing any analysis of their own.

Qwest served data requests on the Counties on July 28, 2003. Qwest sought discovery of the factual basis for the Counties' allegations in their amended complaint. The Counties responded on September 26, 2003, stating:

> Discovery is ongoing. The Counties have submitted, or will shortly submit, data requests to the Utah State Tax Commission and the Public Service Commission requesting all filings made by Qwest or its predecessors in interest, Mountain State Telephone & Telegraph and U S West, to either agency during the years in question. . . .

Qwest does not believe the Counties ever submitted the referenced data requests.

However, apparently in response to Qwest's data requests, the Counties served a second set of data requests on Qwest on October 3, 2003, seeking discovery of all filings made by Qwest with the Utah State Tax Commission and the Commission during the years 1988 through 1996. Qwest responded on November 19, 2003, objecting to the requests for a number of reasons, but also agreeing to produce its voluminous files in

[10] Following the Utah Supreme Court's decision in *MCI Telecommunications Corp. v. Public Serv. Comm'n*, 840 P.2d 765 (Utah 1992), reversing the Commission's order denying a refund of rates paid during the period January 1, 1988 through November 15, 1989, the Commission issued an order approving a settlement agreement of the parties obligating Qwest to provide a substantial refund to its customers. The settlement agreement stated that it resolved **all** potential refunds for the period from January 1, 1988 through November 15, 1989, and provided a general release to Qwest for any claims arising with respect to rates charged during this period. The Commission's order approving the settlement included language specifically releasing Qwest from all claims for refunds during this period.

these matters for inspection and copying at a time and place mutually agreeable to the parties. The Counties have never contacted Qwest to arrange inspection of the files.

Faced with an absence of significant activity by the Counties to develop a record or prosecute their claims, the Commission held a status conference on June 28, 2004 and issued a Scheduling Order on July 6, 2004, providing that "[o]n or before August 31st, 2004, all parties shall complete their discovery on all issues which they intend to present to the Commission for resolution in this docket."[11] The only action taken by the Counties in response to this order was the service by fax on Friday, August 20, 2004, at 4:33 p.m., of a Notice of Rule 30(b)(6) Deposition of Respondent Qwest Corporation, setting the deposition for August 30, 2004 at 9:30 a.m. at the offices of the Counties' counsel in Salt Lake City, Utah. The Notice identified an immense subject matter for the deposition, including detailed information relating to property tax proceedings in all of Qwest's states from 1985 through 2000, detailed information regarding amounts of property taxes paid or anticipated to be paid or pendency of refund proceedings reported in each and every regulatory proceeding in all of Qwest's states for the same period and information regarding any and all allegations of or investigations of tax, reporting, financial or accounting irregularities, misconduct or fraud, without any time or geographic limitation. Qwest responded on August 24, agreeing to produce its two employees most knowledgeable about the matters identified in the Notice, on August 30 and August 31, if the questions were limited to the Utah property tax proceedings for the years 1988 through 1996 and to regulatory reports and proceedings in Utah for the years 1988

[11] On July 21, 2004, the Commission issued its Modified Scheduling Order on Qwest's Motion for Modification of Scheduling Order, limiting the discovery cutoff previously established to the Counties.

through 1997, to the accounting matters identified in the Notice and to alleged irregularities with respect to reports filed with the Commission for the foregoing period of time. Qwest also agreed to allow the witnesses to respond to general questions about whether procedures and practices in Utah were also used by Qwest in other states, but stated that the witnesses would not be prepared to testify regarding specific proceedings or matters in other states. The Counties informed Qwest on August 25 that they were not willing to comply with these conditions.

Qwest filed a Motion for Protective Order on Notice of Rule 30(b)(6) Deposition on August 27, 2004, and the Counties filed a Motion for Modification of Scheduling Order on August 31. Following responsive filings, the Commission issued its Order Denying Motion for Modification of Scheduling Order on September 21, 2004.

II. ARGUMENT

Qwest incorporates the argument and authorities set forth in its Motions, and renews its request for Commission determinations on those Motions. In addition to the arguments set forth in Qwest's Motions, Qwest notes the following additional points in support of dismissal of the second cause of action of the Amended Complaint with prejudice.[12]

A. THE COUNTIES HAVE FAILED TO DEVELOP ANY FACTUAL INFORMATION TO SUPPORT THEIR ALLEGATIONS.

The Commission denied Qwest's 2001 Motion, which was supported by the Division, without prejudice, to allow the Counties the opportunity to develop a record in support of their allegations. Two years and eight months have passed since that ruling

[12] To the extent that issues of fact outside the pleadings may be determinative in disposing of the Counties' claims, the Commission may treat a motion to dismiss as a motion for summary judgment. *See* Utah R. Civ. P. 12(b).

and the Counties have completely failed to develop any record in support of their allegations. They have received voluminous accounting documents from Qwest. They were also given opportunities to inspect and copy Qwest's files with respect to all property tax proceedings in Utah from 1988 through 1996 and all regulatory reports and proceedings from 1988 through 1997 and to question Qwest's most knowledgeable employees regarding these matters. The Counties simply failed to take advantage of the opportunities provided to them to discover potentially relevant information.

Setting aside their claims for equitable relief based on a theory of unjust enrichment or constructive trust, which are beyond the Commission's jurisdiction and were fully discredited in the Motions, the Counties only claim for a refund is based on a claim for reparations. As noted in the Motions, that claim is barred by the statute of limitations in the reparations statute, Utah Code Ann. § 54-7-20, unless the Counties can present facts which establish an exception to the rule against retroactive ratemaking.[13] *See, e.g., MCI Telecommunications Corp. v. Public Service Comm'n*, 840 P.2d 765, 776 (Utah 1992). The Counties must show that the rates set in rate cases including property taxes from 1988 through 1996 were unjust or unreasonable because they were based on the amount of property taxes paid in those years rather than an amount unknown at the time but which would become known after a refund of property taxes that occurred in 1998. This claim would be barred by the rule against retroactive ratemaking unless the Counties can establish that Qwest misled regulators in the rate proceedings or the refund

[13] Section 54-7-20 requires that "complaints concerning unjust, unreasonable or discriminatory charges shall be filed with the commission within one year . . . from the time such charge was made." Unless an exception to the rule against retroactive ratemaking is found, the Counties' claims are time-barred. The Counties' original petition for declaratory relief was filed December 31, 1998, two years after even the very last of the charges at issue in the 1988-1996 property tax appeals were made. The Counties' complaint in this matter was filed September 17, 2001, nearly five years late for even the very last of the charges at issue.

was unforeseen and extraordinary.[14] Thus, to prevail on their claim the Counties must establish that (1) Qwest misrepresented to the Commission the amount of property taxes it was paying or covered up the fact that it was challenging those property taxes and was likely to obtain a refund of a known and measurable amount (and that had the Commission known the correct facts it would have set rates lower than they were set) or (2) the refund of property taxes in 1998 was both unforeseen and extraordinary in amount. The Counties clearly understand this, as the second cause of action is one long scurrilous allegation about Qwest's bad intent (in providing the Commission information on actual property taxes paid during the ratemaking process, while separately and nefariously seeking refunds for over-assessments), followed by a non sequitur asserting that anything short of a finding that Qwest engaged in a "willful and deliberate scheme" must result in a finding that the tax refunds were unforeseen and extraordinary.[15]

Yet despite their allegations that Qwest acted with a "knowing and fraudulent intent" when it failed to include refunds it had not yet received in its reporting to the Commission, and that it "presented differing analyses of [its] financial status" to the Tax Commission when seeking tax refunds than it presented to the Commission during the ratemaking process, the Counties have made no meaningful attempt to prosecute their case and develop facts that would support their allegations. They have not presented any evidence that would warrant a Commission determination that an exception to the rule against retroactive ratemaking applies such that a reparations claim would not be time-barred.

[14] *See generally MCI*, 840 P.2d 765.

[15] *See* Amended Complaint ¶¶ 27-32.

Almost two years after the Amended Complaint was filed, Qwest sought discovery of the factual basis for the Counties' allegations in the second cause of action. In their September 26, 2003 response, the Counties effectively conceded through silence that they had no factual basis at that time, and simply claimed that discovery was ongoing. A year later, with discovery now closed, the Counties have still not developed any facts that would support an exception to the rule against retroactive ratemaking, nor (even aside from the Counties' failure to develop facts through discovery) is Qwest aware of any such facts.

On the contrary, Qwest accurately reported the amount of property taxes paid in each rate case for each of the years in question. At the time these rate cases were filed Qwest had not yet received any refund for the over-assessed property taxes; therefore, the amount of any future refund based on the appeals of property taxes in these years was not known and measurable such that it would have been considered by the Commission in setting rates.[16] Regulators were aware of the pendency of the property tax appeals,[17] and

[16] *See, e.g.*, *Re PacifiCorp*, Docket No. 97-035-01, 1999 WL 218118 (Utah P.S.C. Mar. 4, 1999) (refusing to approve depreciation expenses for a dam removal because "since no agreement to remove the dam had been signed during the test year, and the outcome of negotiations is unknown, removal of the dam is an uncertain event. We conclude that this is a post-test-year event. The costs of removal are merely estimates, presented by the Company, grounded in this uncertain future event. No economic examination of the estimates has been undertaken by all parties in this proceeding. We find that the estimates do not satisfy the known and measurable standard."). Even being "known and measurable" does not assure that a post-test-year expense will be considered. As the Commission held in the same order quoted immediately above: "[A] post-test-year adjustment presents a special and serious case of matching and information insufficiency. It is a single-item adjustment, proposed because it is 'known and measurable.' Since, by definition, it is outside the test year, it cannot be analyzed in a test-year context of matched revenues, expenses, and investments. Hence, it is akin to a single-item rate case. All the arguments against conducting single-item rate cases argue against consideration of post-test-year adjustments. The fact is, events do not occur in isolation. The utility is a complex web of economic relationships, each of which changes as the result of external and internal forces and events. This is the proper context for considering any proposed adjustment." *Id*.

when the refund became known Qwest properly reported it in its regulatory reports. Finally, although the amount of any future tax refund was not known and measurable for ratemaking purposes, a refund of some portion of property taxes paid was certainly not unforeseen and extraordinary such as to trigger any exception to the rule against retroactive ratemaking.[18]

If necessary, Qwest stands ready to submit affidavits supporting all of these facts. However, the affirmative proof of these facts should not be necessary. Rather, the Counties failure to establish contrary facts such that an exception to the rule against retroactive ratemaking might apply—given the more than ample time the Counties had to develop their case through discovery—should be determinative. As to claims for utility misconduct, the Counties claim is essentially one of fraud by Qwest. Indeed, the Amended Complaint expressly alleged "fraudulent intent" by Qwest.[19] Yet the Counties failed to include any specific facts sufficient to plead fraud with particularity.[20]

Further, in its 2002 Motion, Qwest denied the Counties allegations relevant to their reparations claim. A defending party can move, with or without affidavits, for

---

[17] The Commission can take administrative notice of the fact that Carl Mower, the chief accountant of the Division, was actually a witness in Qwest's tax appeal and of the fact that Qwest's (and other public utilities') property tax appeals were widely publicized.

[18] Under *MCI*, the event must be both unforeseeable **and** extraordinary. 840 P.2d at 765. The "extraordinary" element refers to the size of the increase or decrease in expenses, which in this case was immaterial. *See id*. at 772. As for the "unforeseen" element, "Counties must expect, as is obvious from this case, that initial property tax assessments, especially those of large utility systems, are subject to challenges. . . ." *See Beaver County v. Utah State Tax Comm'n*, 916 P.2d 344, 352 (Utah 1996).

[19] Amended Complaint at ¶ 27.

[20] *See* Utah R. Civ. P. 9(b); *Coroles v. Sabey*, 2003 UT App 339, ¶ 22, 79 P.3d 974, 980 ("[R]ule 9(b) requires a complaint to recite the relevant surrounding facts with sufficient particularity to show what facts are claimed to constitute the fraud charges.") (quotations omitted).

summary judgment.[21] When that party does so, the adverse party "may not rest upon the mere allegations . . . of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."[22]

The Counties' failure to support their second cause of action with anything beyond the baseless allegations of the Amended Complaint, despite having years in which to develop a record in support of their claims, warrants dismissal of the complaint (or summary judgment against the Counties)[23] and denial of any relief.

B. THE COUNTIES' CLAIMS ARE DISINGENUOUS AND RELIEF WOULD BE CONTRARY TO PRINCIPLES OF EQUITY.

The Counties' actions throughout the long, tortured history of this case have consistently been disingenuous. From the outset, their agreement to a refund was essentially a sham—the Counties obtaining from Qwest a settlement of its claims (by which Qwest compromised on the amount of a refund to which it was entitled) and then immediately seeking to deprive Qwest of the benefit of its bargain by demanding that the refund be passed back to the Counties as ratepayers.

Then, throughout the litigation of this dispute in court, in their 2001 complaint in this docket, and even in responding to Qwest's initial attempt to dismiss this docket,[24] while Qwest sought to have the issue framed in ratemaking terms the Counties steadfastly maintained that they were not challenging Qwest's rates as being unjust or unreasonable.

---

[21] *See* Utah R. Civ. P. 56(b).

[22] Utah R. Civ. P. 56(e).

[23] *See supra note* 12.

[24] *See* Counties' Memorandum in Opposition to Qwest's Motion to Dismiss (November 5, 2001).

Not until the Counties narrowly avoided dismissal of their original complaint did they elect to allege in the Amended Complaint that reparations were due for unjust and unreasonable rates.

Doctrines such as estoppel, waiver, laches and unclean hands should bar the Counties from obtaining relief in such circumstances.[25] The Counties' overriding goal throughout this process has apparently been to make it uneconomical for utilities to appeal their property tax assessments (as any refunds obtained would simply be stripped away).[26] The Counties are entitled to oppose a utility's attempt to obtain a property tax refund. When they do so, however, they should not be allowed to agree to the refund with their right hand while their left hand seeks to take it back. They should not be allowed to deny for years that Qwest had charged unjust or unreasonable rates, only to change their preferred version of the facts at the twelfth hour, in an attempt to avoid dismissal. And they should not be allowed to maintain their case—which was already time-barred by years, not months, when filed—after letting it essentially sit idle for years as memories fade, personnel change, and facts relevant to their claims become more and more distant history.

---

[25] While the Commission lacks broad authority to grant equitable relief, it can consider a complainant's behavior in determining whether to grant the relief that complainant seeks. If not, the Commission would lack the ability to fully perform its quasi-judicial function and appropriately control the actions of non-utility parties to its proceedings. Appropriately considering a complainant's behavior in determining whether to grant that complainant relief merely supports the Commission's ultimate decision as not being "arbitrary or capricious" (*see* Utah Code Ann. § 63-46b-16(4)(h)) and is consistent with the Commission's authority to supervise the business of public utilities in the state. *See* Utah Code Ann. § 54-4-1.

[26] During oral argument before the Supreme Court in 2001, Justice Wilkins asked counsel for the Counties a telling question. He asked what incentive public utilities would have to appeal their property tax assessments if they were simply required to refund any recovery to ratepayers. This question exposed the true motives of the Counties in pursuing this matter. If the Counties are successful in requiring a refund of the amount a public utility recovers in a property tax appeal, the public utility will have no incentive to challenge its property taxes, and potentially improper tax assessments will remain unchecked.

C. DISMISSING THE COUNTIES' CLAIMS IS IN THE PUBLIC INTEREST AND CONSISTENT WITH COMMISSION PRECEDENT.

By appealing unfair property tax assessments, public utilities subject to rate of return regulation (as Qwest was during the period in question) are likely to achieve reductions in property tax expenses on a going-forward basis. Just as a homeowner who successfully appeals his or her property tax assessment is likely to obtain reduced assessments in subsequent years, successful appeals by public utilities of their central assessments by the Property Tax Division are likely to achieve reduced assessments in future years, as it makes no sense for the parties to re-litigate the same issues year after year.

Thus, reductions in property taxes have the effect of achieving long-term reductions in utility rates. However, if the incentive for seeking lower taxes is reduced or removed by requiring a flow-through of any refund, public utilities are less likely to appeal and ratepayers are likely to lose the benefit of long-term property tax reductions. While a one-time refund would provide a one-time benefit to customers, allowing the utility to retain the benefit of its efforts to appeal property taxes results in a longer term benefit. As Justice Wilkins put it during oral argument of the Counties' original case: "[I]f U S WEST had no incentive to contest the amount of the property taxes, wouldn't the ratepayers ultimately come out of the short end, not the long end?" The answer is obviously yes.

In addition, the Commission has denied increased rates in circumstances where audits of utility income taxes regularly resulted in later increased tax payments—the

mirror-image of the situation presented here.[27] Instead, actual taxes paid or estimated to be paid in the test year (before audits) have been used in setting rates. This is consistent with long established principles that rates must be based on known and measurable changes in expenses and not on speculation about what might result from an audit or litigation sometime in the future.

The rule against retroactive ratemaking is based on sound principles of regulation in the public interest. It provides that utilities may not "adjust their rates retroactively to compensate for unanticipated costs or unrealized revenues."[28] Likewise, it prevents the Commission from retroactively adjusting rates to account for costs lower or revenues higher than those anticipated.[29] If it were reasonable and fair to require utilities to refund rates based on property tax refunds that occur many years after the fact, it would likewise be reasonable to apply a retroactive surcharge when taxes turn out to be higher than anticipated or other expenses exceed anticipated amounts. Awarding the Counties the relief they seek is therefore contrary to sound and well established principles of ratemaking and is contrary to the public interest.

III. CONCLUSION

This litigation, which dates back to 1998 through two different Commission

---

[27] *See Re PacifiCorp*, Docket No. 97-035-01, 1999 WL 218118 (Utah P.S.C. Mar. 4, 1999) ("PacifiCorp booked an income tax contingency of $12 million . . . because it expects the 1997 tax accrual to be different from the final tax return. The Company testifies it has been audited every year since 1970, expects to be audited each year, and expects audits to result in additional tax liabilities. . . . The Division argues for the removal of this tax adjustment on grounds that the results of future tax audits cannot be known and cannot be measured. . . . The record shows that possible future tax assessments for the 1997 tax year are unknown at this time. The record also shows that the Company pays on average approximately $10 million a year for tax assessments, but the payment history is erratic. . . . We . . . conclude that elimination of the proposed $12 million accrual is in the public interest.").

[28] *See Utah Dept. of Bus. Reg. v. Public Service Comm'n*, 720 P.2d 420, 420 (Utah 1986).

[29] *See id.*

actions, one court action, and an appeal, should finally be terminated. The Counties have fumbled from one forum to another in a continued attempt to make it uneconomic for Qwest and other public utilities to appeal their property tax assessments. The Counties' claims had no merit and were contrary to the public interest during the years when Qwest's rates were set based on rate-of-return regulation. They have even less merit in an era when Qwest is in a competitive marketplace and its rates are no longer designed to recover its costs of doing business.

The claims in the second cause of action of the Amended Complaint have not been supported by any facts despite the Counties' having years to develop those facts. The claims in the entire Amended Complaint are either beyond the jurisdiction of the Commission or barred by the reparations statute of limitations and the rule against retroactive ratemaking.

Qwest therefore respectfully submits that the Amended Complaint should be dismissed with prejudice.

RESPECTFULLY SUBMITTED: September 30, 2004.

Robert C. Brown
Qwest Services Corporation

-and-

_____

Gregory B. Monson
Ted D. Smith
David L. Elmont
STOEL RIVES LLP

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **QWEST'S NOTICE OF REQUEST FOR FURTHER CONSIDERATION OF MOTIONS TO DISMISS** was served on the following by electronic mail on September 30, 2004:

Bill Thomas Peters
David W. Scofield
PETERS SCOFIELD PRICE
111 East Broadway, Suite 340
Salt Lake City, UT 84111
btp@psplawyers.com
dws@psplawyers.com

Michael Ginsberg
Assistant Attorney General
Patricia E. Schmid
Assistant Attorney General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84114
mginsberg@utah.gov
pschmid@utah.gov

Reed T. Warnick
Assistant Attorney General
Paul H. Proctor
Assistant Attorney General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
rwarnick@utah.gov
pproctor@utah.gov

_____