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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.	Docket No. 01-049-75 **QWEST'S OPPOSITION TO COUNTIES' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Qwest Corporation ("Qwest") hereby respectfully submits its response in opposition to the Motion for Partial Summary Judgment ("Motion") filed by Beaver County, et al. ("Counties") on September 30, 2004.

I. INTRODUCTION

Through their Motion the Counties seek a finding that the Commission has "exclusive jurisdiction over all of the claims" asserted by the Counties, such that the Commission can award the entire $16.9 million tax refund to Utah ratepayers.[1] The Motion is without merit. Qwest fully agrees that the Commission, generically speaking,[2] has exclusive jurisdiction to address a claim for rate reparations by Utah ratepayers. But both when considered as a matter of Commission jurisdiction and when considered as a matter going to the merits of the Counties' claims, the Commission cannot grant rate reparations for rates that Utah ratepayers did not pay, nor could the Counties, as Utah ratepayers, seek to assert reparations claims for rates that Utah ratepayers did not pay. That is, only a portion of the $16.9 million could even theoretically be subject to a claim for rate reparations based on rates paid by Utah ratepayers, because only a portion of the property taxes leading to the $16.9 million refund was allocated to Qwest's Utah intrastate business and included in Qwest's Utah rates. The remaining property taxes in question were allocated to Qwest's interstate business and were not included in Utah rates. The Commission did not and does not set Qwest's interstate rates, and therefore cannot award reparations for those rates.[3] Nor could the Counties seek reparations of interstate rates before the courts of Utah.

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[1] *See* Motion at 1.

[2] The Commission, of course, cannot (in the absence of an exception to the rule against retroactive ratemaking) award relief to the Counties for claims raised after the expiration of the statute of limitations in Utah Code Ann. § 54-7-20, or award relief for claims previously released pursuant to the settlement that followed *MCI Telecommunications Corp. v. Public Serv. Comm'n*, 840 P.2d 765 (Utah 1992). These considerations preclude relief for the Counties in this case.

[3] *See, e.g., Farmers Telephone Co., Inc. v. F.C.C.*, 184 F.3d 1241, 1243 (10th Cir. 1999) ("Because the FCC regulates rates for interstate telephone service and state utility commissions regulate rates for intrastate telephone service, it is necessary to separate and allocate each company's costs among interstate and intrastate jurisdictions. The process known as

These conclusions are straightforward and inescapable. The Commission has jurisdiction to consider rate reparations of Utah rates, not interstate rates. The Counties' Motion is nothing more than an attempt to impermissibly expand the Commission's jurisdiction to grant rate reparations for interstate rates. Couching the Motion in terms of issue preclusion and judicial estoppel does nothing to overcome its fatal defects.

II. ARGUMENT

A. ISSUE PRECLUSION DOES NOT APPLY.

The Counties' first argument is based on the doctrine of issue preclusion, or collateral estoppel. Specifically, the Motion seeks a finding that "the Commission . . .. has exclusive jurisdiction . . . such that no contention may be asserted that this Commission lacks jurisdiction concerning the restitution of all, or any portion of, the tax refunds at issue."[4]

The crux of the Counties' argument is that, in the *Decision*,[5] the Utah Supreme Court determined that the Commission has jurisdiction to award reparations on the entire $16.9 million refund, regardless of whether a portion of that refund was based on interstate rates over which the Commission has no jurisdiction. Interestingly, however, neither the Counties' Motion nor their accompanying memorandum ("Memorandum") contains a

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'jurisdictional separation' determines how these costs are allocated."); *State Corp. Comm'n of Kan. v. F.C.C.*, 787 F.2d 1421, 1426-27 (10th Cir. 1986) ("The authority conferred by sections 221(c) and 410(c) [of the Communications Act] enables the FCC to carry out its basic function under the Act: to govern 'all interstate and foreign communication by radio or wire.' *See* 47 U.S.C. § 151, 152(a). As one of its specific responsibilities, the Commission superintends the rates that carriers charge for interstate telephone calls. *See id*. §§ 201-205. . . . Section 152 of the Communications Act divides regulatory prerogatives between federal and state authorities: the Act and the FCC's jurisdiction apply to 'all interstate and foreign communications,' *see* 47 U.S.C. § 152(a), but generally not to 'charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service,' *see id*. § 152(b).").

[4] Motion at 1.

[5] *See Beaver County v. Qwest, Inc.*, 2001 UT 81, 31 P.3d 1147 ("*Decision*").

single usage of the words "federal," "intrastate," or "interstate" when discussing the refund, let alone a meaningful discussion of the nature of telecommunications regulation and the limits of the Commission's jurisdiction. This is remarkable given the fact that Commission jurisdiction over interstate rates is the very matter about which the Counties now seek to argue issue preclusion. On the other hand, the Counties were perhaps wise to veil their position because when put plainly their argument is so clearly erroneous.

Instead of directly arguing that the Commission has jurisdiction over interstate rates, the Counties merely intimate that the Court so held. Further, they seek to argue that the Court made this holding, with its allegedly issue-preclusive effect, through *silence*.[6] That is, like the Counties' Motion, the *Decision* did not contain a single reference to federal versus state jurisdiction. Neither did the District Court order dismissing the Counties' case. Neither did the briefing or arguments submitted by the parties at either the trial or appellate level.[7] And yet, the Counties now seek to argue that, through silence, the Court found Commission jurisdiction over interstate rates, sufficient to meet the requirements of collateral estoppel and bind the Commission.

The Counties are wrong. The requirements of collateral estoppel, as the Counties themselves quote, are that

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[6] The Counties do not actually acknowledge the Court's silence. Instead, they seek to misattribute statements made in the context of considering Utah court versus Utah Commission jurisdiction to the completely different context of state versus federal jurisdiction. On this latter point, however, despite the Counties' failure to acknowledge as much, the Court was silent.

[7] *See contra, e.g.*, Brief of Appellants, *Beaver County v. Qwest, Inc*., at 20 ("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***.") (emphasis added); *id.* at 22 ("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.") (emphasis added); *cf. id*. at 35 ("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 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.") (emphasis added).

> First . . . the issue challenged in the case at hand is identical to the issue decided in the previous action. Second, the issue in the previous action must have been decided in a final judgment on the merits. Third, the issue in the previous action must have been competently, fully, and fairly litigated. Fourth, the opposing party in the action at hand must have been either a party or privy to the previous action.[8]

Only one of the requirements is met in this case—the parties to this matter were also parties to the previous case. As to the other three, (1) Commission jurisdiction over interstate rates was not addressed, much less being "identically" addressed, in the previous action; (2) it was not decided in a final judgment in the previous action; and (3) it was not even mentioned, let alone fully litigated, in the previous action.

What *was* litigated is the question of Utah district court versus Utah Public Service Commission jurisdiction.[9] What the Counties sought to appeal was the dismissal of their case from the Third District Court for lack of subject matter jurisdiction.[10] And what the Supreme Court upheld on appeal was that dismissal—nothing regarding federal versus state jurisdiction, for nothing of that nature was before it on appeal. The *Decision*'s references to the "exclusive jurisdiction" of the Commission, therefore, can only be read as intrastate expressions of exclusivity vis á vis the district court.[11]

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[8] *Sevy v. Security Title Co*, 902 P.2d 629, 632 (Utah 1996) (citation omitted).

[9] *See, e.g.*, Brief of Appellants, *Beaver County v. Qwest, Inc*., at 30 ("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.") (emphasis added).

[10] *See, e.g.*, Notice of Appeal, Civ. No. 980913349, at 1 ("Plaintiffs, by and through their undersigned counsel of record, hereby give notice of appeal to the Utah Supreme Court from the Order of the Honorable David Young, Third District Court Judge . . . dismissing Plaintiffs' First Amended Complaint, with prejudice.").

[11] The Court would have had no authority to give the Commission jurisdiction over interstate rates in any event, since this area of telecommunications regulation has been federally preempted. It is highly inappropriate for the Counties to interpret the Court's silence in such a way that, if accepted, would cause the Court to exceed its own authority.

Regardless of Qwest's argument (*i.e.*, whether Qwest argued that the district court had no jurisdiction because of Commission primary jurisdiction or because of federal preemption), the Court's holding would have been the same. Any discussion of federal versus state jurisdiction, therefore, would have been dicta because it would not have been necessary to support the holding the Court ultimately reached—that the district court lacked jurisdiction.[12] But such discussion did not even rise to the level of dicta in this case. The discussion never happened. The *Decision* was silent on the matter of Commission jurisdiction over interstate rates because that matter was not before the Court. Thus, the *Decision* has no preclusive effect on the Commission's determination regarding the scope of its jurisdiction (vis á vis the Federal Communications Commission) in this matter.

The Commission has no jurisdiction to order rate reparations of any portion of the tax refund that was not included in Utah rates. There is no collateral estoppel effect arising

[12] *See, e.g., Callahan v. Salt Lake City*, 125 P. 863, 864 (Utah 1912) (defining dictum as "an opinion expressed by the court, but which, not being necessarily involved in the case, lacks the force of an adjudication") (quotation omitted); Black's Law Dictionary 1100 (7th ed. 1999) (defining obiter dictum as a statement "made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential"); *Beaver County v. Home Indemnity Co*., 52 P.2d 435, 444-45 (Utah 1935) ("The expressions of the writer of that opinion can only be as broad as the question to which they relate. ***The question*** of whether the surety could limit its liability ***was not before the court. Consequently, the language could not apply to such question*** and must function only as a part of the reasoning in the arrival to a conclusion in regard to that question. Otherwise, such language would not even be dicta, but would be entirely irrelevant to the question under review. Obiter dicta is that part of an opinion which does not express any final conclusion on any legal question presented by the case for determination or any conclusion on any principle of law which it is necessary to determine as basis for a final conclusion on one or more questions to be decided by the court.") (emphasis added).

A statement by the Court regarding federal versus state jurisdiction may also have been an alternative ground for holding that the district court did not err in dismissing the Counties' case, in which case the statement would not necessarily have been dicta. However, since the federal preemption issue was never raised on appeal, it neither became dicta nor an alternative ground for the Court's holding.

from the *Decision* or otherwise that would support a contrary conclusion. The Motion should be denied in this regard.

B. JUDICIAL ESTOPPEL DOES NOT APPLY.

The Counties' argument on judicial estoppel is also without merit. They seek a Commission finding that Qwest has performed a "sudden about-face" that has prejudiced the Counties because it is now too late to seek relief from the FCC, and therefore that the Commission should hear the Counties' claims for interstate rate relief.[13] Their argument is wholly misplaced.

The Commission's jurisdiction is limited by statute (and by federal preemption), and cannot be increased or decreased by actions of the parties.[14] Indeed, far from the Commission's jurisdiction being susceptible to enlargement by judicial estoppel or some similar equitable doctrine, if the Commission determines that it lacks jurisdiction it should dismiss a claim sua sponte.[15] Further, because of the nature of subject-matter jurisdiction a party can never waive its right to seek dismissal on this ground, and can raise the argument at *any* time.[16] Either the Commission has jurisdiction or it does not. An argument for judicial estoppel cannot increase or decrease that jurisdiction.

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[13] Memorandum at 5-6.

[14] *See, e.g., Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995) ("The P.S.C. has only the rights and powers granted to it by statute.") (citation omitted); *Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n*, 754 P.2d 928, 930 (Utah 1988) ("Explicit or clearly implied statutory authority for any regulatory action must exist.") (citations omitted); *James v. Galetka*, 965 P.2d 567, 570 (Utah Ct.App.1998) ("Jurisdiction of the subject matter is derived from the law. It can neither be waived nor conferred by consent . . . .") (citation omitted).

[15] *See, e.g., Petersen v. Utah Bd. of Pardons*, 907 P.2d 1148, 1151 (Utah 1995) ("[S]ubject matter jurisdiction is an issue that can and should be addressed sua sponte when jurisdiction is questionable.") (citations omitted).

[16] *See, e.g., Barnard v. Wasserman*, 855 P.2d 243, 248 (Utah 1983) ("This court has made clear that challenges to subject matter jurisdiction may be raised at any time and cannot be

Moreover, it is odd to hear the Counties essentially complain that Qwest failed to lead them to all the right forums to seek relief, lulling them into failure to preserve their claims. Qwest is aware of no obligation to assist the Counties in their pursuit of what Qwest considers to be meritless claims. But even aside from that, it is difficult to believe the Counties would have pursued an FCC action merely on the argument of Qwest, when the Counties have fought so strenuously against any other attempt by Qwest to focus this litigation appropriately (*e.g.*, to keep the matter out of district court where it did not belong, to eliminate inappropriate equitable claims before the Commission, and to avoid inappropriate and unnecessary attempts by the Counties to treat this matter as a class action).

The "sudden about-face" in this matter was the Counties' determination to seek to take back the refund they had agreed to provide. When Qwest sought to have the Counties' previous case dismissed from district court, it did so at the earliest stages of the litigation, without even so much as preparing an answer to the complaint. It was not focused on parsing out the components of the $16.9 million refund into federal and state jurisdiction. It was focused on eliminating an improper, expensive court action. When the Counties filed their new case before this Commission and Qwest began to investigate the details of the reparations claim, Qwest identified and raised the matter of intrastate versus interstate allocation of property taxes. It had taken no previous position on the matter, and judicial

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waived.") *James*, 965 P.2d at 570 ("Objection to the jurisdiction of the court over the subject matter may be urged at any stage of the proceedings, and the right to make such an objection is never waived."); *State v. Norris*, 2004 UT App. 267, ¶ 21, 97 P.3d 732, 741 (Orme, J., concurring) ("If [a defendant] pled guilty, and did not raise below the point that no such crime existed in Utah, he still could challenge his conviction by raising, albeit for the first time on appeal, the lack of subject matter jurisdiction. And obviously he would succeed. The trial court simply would lack the judicial power to convict the defendant of a nonexistent crime.").

estoppel would not be implicated even if the issue were not one as fundamental as the Commission's subject-matter jurisdiction.

The issue is, however, a fundamental one of Commission jurisdiction. Judicial estoppel, like collateral estoppel, provides no basis for the Counties' Motion. The Motion should therefore be denied.

III. CONCLUSION

For the foregoing reasons, the Counties' Motion should be denied.

RESPECTFULLY SUBMITTED: October 15, 2004.

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-and-

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **QWEST'S OPPOSITION TO COUNTIES' MOTION FOR PARTIAL SUMMARY JUDGMENT** was served on the following by electronic mail on October 15, 2004:

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