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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 MOTION FOR PROTECTIVE ORDER ON NOTICE OF RULE 30(b)(6) DEPOSITION**

Qwest Corporation ("Qwest"), pursuant to Utah Admin. Code R746-100-1.C and R746-100-8 and Rule 26(c)(2) of the Utah Rules of Civil Procedure, hereby moves the Commission to enter a protective order not allowing Beaver County, et al. ("Counties")

to take the deposition of Qwest in accordance with the Notice of Rule 30(b)(6) Deposition of Respondent Qwest Corporation ("Notice") served on Qwest on August 20, 2004.[1] Alternatively, Qwest moves the Commission to enter a protective order limiting the scope of the deposition in accordance with the written response of Qwest sent to the Counties on August 24, 2004 ("Response")[2] and providing that the deposition will be held at times and locations mutually acceptable or that any dispute regarding the same will be resolved by the Commission..

I. RULE 26(c) CERTIFICATION

Pursuant to Utah Rule of Civil Procedure 26(c), the undersigned hereby certifies that Qwest has, in good faith, conferred with counsel for the Counties in an effort to resolve their dispute without Commission action. As described below, counsel for Qwest has communicated with counsel for the Counties, both in writing and by phone, in an attempt to resolve this dispute. As of the date of filing of this motion, the parties have been unable to reach a resolution.

II. BACKGROUND

The Counties filed their complaint in this matter on September 17, 2001, and their amended complaint on July 19, 2002. The Counties seek a refund to customers of $16.9 million in property taxes which were refunded by the Counties to Qwest in settlement of litigation regarding the property tax assessments of Qwest by the Utah State Tax Commission for the years 1988 through 1996. During the entire three-year period since the Counties filed this action, they have served only two sets of data requests on Qwest.

[1] A copy of the Notice is Attachment 1 to this motion.

[2] The written Response to the Notice is Attachment 2 to this motion.

Qwest responded to the first set on October 22, 2002 and the second set on November 19, 2003.

Faced with an absence of significant activity by the Counties to 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."[3]

On Friday, August 20, 2004, at 4:33 p.m., the Counties faxed the Notice to counsel for Qwest, setting the Rule 30(b)(6) deposition of Qwest for August 30, 2004 at 9:30 a.m. at the offices of the Counties' counsel in Salt Lake City, Utah. The Notice identified the subject matter of the deposition to include, among other things, (1) detailed information related to any property tax proceeding, in which the value of Qwest's assets, assessed on a unitary basis for ad valorem property tax purposes, was at issue and in which Qwest sought a reduction of the original assessed valuation for the period from 1985 through 2000; (2) information regarding amounts of property taxes paid or anticipated to be paid or pendency of refund proceedings reported in each and every regulatory proceeding for the period from 1985 through 2000; and (3) information regarding any and all allegations of or investigations of tax, reporting, financial or accounting irregularities, misconduct or fraud, without any time period limitation.

Qwest responded to the Notice on August 24, 2004, both orally and in writing. Qwest agreed to produce its two employees most knowledgeable about the matters

[3] 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.

identified in the Notice, each for a maximum of one seven-hour day prior to the discovery cutoff, 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 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, 2004 that they were not willing to comply with these conditions.

Based on the foregoing, Qwest seeks an order of the Commission either not allowing the deposition to take place or, alternatively, limiting the scope of the deposition consistent with the Response and providing that the times and locations of the depositions responsive to the Notice will be mutually agreeable to the parties or that the Commission will resolve any disputes regarding the times or locations the parties are unable to resolve.

III. ARGUMENT

A. THE NOTICE IS OBJECTIONABLE AND UNREASONABLE.

The Counties' Notice is objectionable and unreasonable for several reasons.

1. The Timing of the Notice Is Unreasonable.

The Notice was provided only 11 days prior to the Counties' discovery cutoff without any prior consultation between the parties. It scheduled the Rule 30(b)(6) deposition of Qwest only ten days after the date of the notice in Salt Lake City, Utah,

again without prior consultation between the parties.

Rule 30(b)(6) provides in part:

> A party may in the notice . . . name as the deponent a public or private corporation . . . and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. . . . The persons so designated shall testify as to matters known or reasonably available to the organization.

Thus, in response to the Notice, Qwest is required to identify one or more individuals with knowledge of the matters identified in the Notice and arrange to have such individuals available to testify not only as their own knowledge, but as to matters known or reasonably available to Qwest, and to appear in Salt Lake City, Utah, within ten days.

Under Rule 30(b)(1) of the Utah Rules of Civil Procedure, "A party desiring to take the deposition of any person upon oral examination shall give *reasonable notice* in writing to every other party to the action." Utah R. Civ. P. 30(b)(1) (emphasis added). The rule does not establish any particular length of time that constitutes reasonable notice, but instead requires assessment of the reasonableness of the notice on a case-by-case basis. *See* Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2111 at 69 (2d ed. 1985) ("Obviously no fixed rule can be laid down because much will depend on the other circumstances of the particular case."). Ten days is simply not reasonable given the scope of the information (even the unobjectionable information) sought in the Notice, the location of the individuals most knowledgeable about the matters identified, and their already busy schedules. To exacerbate this problem, the notice was served late on a Friday afternoon, thus effectively eliminating two days of the

already unreasonable ten-day period for designation and production of witnesses.

2. The Location of the Deposition May Be Unreasonable.

Qwest is a corporation with its principal place of business in Denver, Colorado. Its tax and accounting departments are both headquartered in Denver. Although it has employees involved in regulation and regulatory accounting in other offices, none of its regulatory accounting employees are officed in Salt Lake City. Qwest has determined that the employees most knowledgeable about the matters identified in the Notice are Robert L. Barton with respect to property taxation matters and Philip E. Grate with regard to regulatory and accounting matters. Mr. Barton's office is in Denver. Mr. Grate's office is in Seattle, Washington.

Although Qwest recognizes that it must produce witnesses in Utah in connection with proceedings it initiates or investigations conducted by the Commission, the Division of Public Utilities or other governmental agencies concerning its Utah operations and to present testimony in any proceeding in Utah in which it wishes to present testimony, it did not initiate this proceeding. Therefore, it would be reasonable and appropriate for a party wishing to depose a Qwest witness in a proceeding such as this to allow Qwest the option of electing to produce the witness in Utah or to produce the witness in the jurisdiction in which the witness resides or offices.[4]

[4] *See, e.g., Bank of New York v. Meridien Biao Bank Tanzania Ltd.*, 171 F.R.D. 135, 155 (S.D.N.Y. 1997) (The deposition of a non-resident defendant is generally conducted at the defendant's place of residence.); *Snow Becker Krauss P.C. v. Proyectos e Instalaciones de Desalacion, S.A.*, 1992 WL 395598 at *3 (S.D.N.Y. 1992) (Where a corporation is involved as a party to the litigation, there is a general presumption in favor of conducting depositions of a corporation in its principal place of business.); *Farquhar v. Shelden*, 116 F.R.D. 70, 72 (E.D. Mich. 1987) ("Underlying this rule appears to be the concept that it is the plaintiffs who bring the lawsuit and who exercise the first choice as to the forum. The defendants, on the other hand, are not before the court by choice.").

3. The Notice Is Overly Broad and Unduly Burdensome and Seeks Information that Is Privileged, Publicly Available and Irrelevant.

Among other things, the Notice requests that Qwest produce a witness or witness to testify regarding:

> 1. *For each year in the period from 1985 through 2000, inclusive,* (1) the identity of *each jurisdiction* in which Qwest and its successors [sic] filed, *or participated in any proceeding* in which the valuation of *any or all* of Qwest's or its predecessor's assets, assessed on a unitary basis for ad valorem taxation purposes, was at issue, and in which Qwest or its predecessor sought a reduction of the original assessed valuation for that year: (2) the nature and *details* of the basis of the position asserted by Qwest or its predecessor as to the issues *in each such proceeding* and Qwest's knowledge of the positions asserted by any governmental entity in such proceedings; (3) the amount of the original assessment of value subject of *each such proceeding* and the property or properties encompassed within such valuation; (4) the amount of the reduction in value sought *in each such proceeding*; (5) the amount of reduction in value, if any, obtained *in each such proceeding*; (6) the amount of any refund attained through any such reduction in value *in each such proceeding*; and (7) the date on which *each* such refund was paid to Qwest or its predecessor by virtue of *each such proceeding*.
>
> 2. The name, address, telephone number, e-mail address and fax number of *each person* in the Qwest organization, or its predecessor's organization, who was *involved in any way in, or in any way was responsible for oversight of, each such tax proceeding*.
>
> 3. The *details of any and all* communications between employees in Qwest or its predecessors' tax department who were involved in any such proceeding and the employees of *any other department* who received information concerning such proceedings.
>
> 4. The *details of any and all* tax planning by which determinations were made *in each such year* by Qwest or its predecessors as to what reductions in value would be sought in which jurisdictions.
>
> . . . .

> 6. The amounts reported *in each and every regulatory proceeding occurring in each year in the period from 1985 through 2000, inclusive, whether a rate proceeding or otherwise*, for the amount of property tax paid or anticipated to be paid, and whether, if tax refund proceedings were underway, the pendency of any such proceeding was reported to the regulators.
>
> 7. The name, address, telephone number, e-mail address and fax number of *each person* in the Qwest organization, or its predecessor's organization, who was *involved in any way in, or in any way was responsible for oversight of, each such regulatory proceeding.*
>
> . . . .
>
> 13. *Any and all* allegations of or investigation of tax, reporting, financial or accounting irregularities, misconduct or fraud, *against you or any current or former employees, by any governmental agency*, regardless of whether you agree with such allegations.

Notice at 2-4 (emphasis added).

As the Commission is well aware, Qwest does business as an incumbent local exchange carrier in 14 states, 13 of which assess property taxes on a unitary basis. The information sought is for a 16-year period, starting almost 20 years ago. Qwest cannot determine the total number of appeals filed during this period without extensive research. However, Qwest believes it or the Counties has filed an appeal of its property tax valuation in Utah every year or almost every year during this period and that it files appeals in other states less often, but still on a regular basis. The request seeks detailed information about appeals of Qwest's property tax assessments filed by others as well. Therefore, the number of appeals in all 13 states during this 16 year period is likely a very large number. Qwest files regulatory reports in all 14 of its states at least annually and in most cases, particularly during the period in question, semiannually, quarterly or monthly. Just with respect to Utah, where monthly financial reports were filed during the

period in question, the question implicates in excess of 192 reports, aside from any rate cases or other regulatory proceedings at all. When this is multiplied by 14, the number of reports and proceedings within the scope of the request is potentially astounding. Furthermore, except with respect to the most recent years, probably years after 2000, the reports and records regarding them and regulatory proceedings are not maintained in current files and are likely to be available, if at all, only in archives. Finally, with respect to allegations or investigations of tax, reporting, financial or accounting irregularities, the Notice specifies no time frame and is thus apparently applicable to the entire history of Qwest and its predecessors up until the present time. Qwest's predecessors started doing business in Utah in the late 1800s. Clearly the scope of the information sought is overly broad and unduly burdensome.

In addition, much of the information sought is likely privileged, involving attorney-client communications or attorney work product. This is particularly the case regarding the questions involving communications between Qwest personnel or seeking tax planning or strategy. Much of the information sought is also public information, as readily available to the Counties as to Qwest.

Finally, much of the information sought is irrelevant to this proceeding. In this proceeding, the Counties seek a refund to customers of $16.9 million in property taxes which were refunded to Qwest by the Counties in settlement of litigation over Qwest's property tax assessments in Utah. The basis for the claim is that Qwest allegedly already recovered the full amount of property taxes paid from its Utah customers and that, therefore, the refund should be returned to those customers. Qwest has responded to the complaint, asserting, among other things, that the claim is barred by the rule against

retroactive ratemaking. In their amended complaint, the Counties have alleged that exceptions to the rule against retroactive ratemaking apply, but have provided no facts in support of the allegation. The Utah Supreme Court has recognized two exceptions to the rule against retroactive ratemaking, unforeseen events or utility misconduct.[5] It appears that the Counties' discovery is designed to elicit information which might support an allegation of utility misconduct.

With respect to the basis for an exception to the rule against retroactive ratemaking for utility misconduct, the court said: "The rule against retroactive rate making was not intended to permit a utility to subvert the integrity of rate-making proceedings." *Id*. at 775. In other words, for utility misconduct to act as an exception to the rule against retroactive ratemaking, the misconduct must subvert the integrity of the ratemaking proceeding in which the rates at issue were set. In this case, those cases are Qwest's Utah rate cases in which rates were set based on property taxes paid from 1988 through 1996. Therefore, Qwest's behavior in other states or even in Utah in other cases, can have no bearing on whether this exception may be applicable to this case. Facts other than the conduct in the Utah rate cases in which property taxes paid in 1988 through 1996 were considered in setting rates is irrelevant to the Counties' claim.

B. QWEST'S RESPONSE REPRESENTED A REASONABLE EFFORT TO COMPLY WITH THE NOTICE AND ACCOMMODATE THE COUNTIES' DISCOVERY.

In response to the Notice, Qwest went far beyond what it was required to do. It quickly identified its employees most knowledgeable regarding the matters identified in the Notice and arranged to have them rearrange busy schedules on extremely short notice

[5] *See MCI Telecommunications Corp. v. Public Service Comm'n*, 840 P.2d 765, 772, 775 (Utah 1992).

to appear in Salt Lake City at abnormally high expense because of the shortness of time in which to make travel arrangements, essentially as requested in the Notice, on August 30 and 31, before the discovery cutoff.[6] However, it limited the examination to matters reasonably calculated to lead to discovery of evidence admissible in this proceeding. *See* Utah R. Civ. Proc. 26(b)(1). In addition, it agreed to make the witnesses each available for a deposition of one day of seven hours. *See* Utah R. Civ. Proc. 30(d)(2).

Qwest provided notice to the Counties that it would limit the examination with respect to taxation and regulatory matters to Utah property tax appeals and Utah regulatory filings and rate cases and only allow general questions regarding whether the practices in Utah differed from other states for two reasons. First, as noted previously, Rule 30(b)(6) anticipates that the witnesses designated by the corporation will provide testimony not only of matters of which they have personal knowledge, but also as to matters reasonably available to the corporation. Given the extreme breadth of the Notice and lack of time for the witnesses to review matters reasonably available to the corporation, it would have been impossible for the witnesses to be prepared to testify on other than Utah matters in any event. Second, as discussed above, the matters are so far beyond the scope of the issues relevant to this docket, that it would be inappropriate to inquire into them.

Qwest acknowledges that objections to relevance are normally reserved in a deposition setting. Even if relevance objections are made, the witness is typically

[6] The Notice set the deposition to start at 9:30 a.m. on Monday, August 30. Qwest agreed to provide Mr. Barton at 10:00 a.m. on that date. The reason for the half hour discrepancy was that the first time Qwest's Utah counsel could meet with the witness was Monday morning. In any event, Qwest agreed to allow the deposition to continue until 5:30 p.m., making up for this half hour later starting time.

allowed to answer the question. In cases where counsel deposing a witness goes beyond the pale of reasonable relationship to the claims in the proceeding, the witness is typically instructed not to answer the question, the deposition is then adjourned while the issue is brought before the tribunal with jurisdiction. Given the fact that the witnesses were traveling to Salt Lake City, incurring significant inconvenience and unusually high expense in doing so, that the Commission's availability to address discovery disputes on August 30 and 31 was unknown and that the Commission does not have established practices to resolve discovery disputes on short notice, it was deemed advisable to make the Counties aware of this issue before the time, expense and inconvenience associated with travel to appear at the deposition was incurred.[7]

In summary, Qwest's response provided an opportunity for the Counties to complete legitimate discovery before the discovery cutoff and was a generous accommodation given the fact that the Counties did not seek the discovery in a timely manner.

C. QWEST SHOULD NOT BE REQUIRED TO PROVIDE WITNESSES IN RESPONSE TO THE NOTICE.

Based on all of the foregoing, the Notice is unreasonable and objectionable and Qwest should not be required to provide witnesses in response to it. Furthermore, because it is now too late for the Counties to complete appropriate discovery before the discovery cutoff for the Counties ordered by the Commission, Qwest should not be required to respond to any further notice of deposition or other discovery. If the

[7] The Counties have acknowledged this issue as part of their rejection of the terms proposed and agree that issues regarding the scope of the deposition should be resolved prior to having the witnesses travel to Salt Lake City. Therefore, the parties have agreed that the deposition will not take place on August 30, 2004.

deposition is allowed to proceed, the Counties will likely seek an extension of the prehearing motion deadline established in the Scheduling Order, thus, further delaying resolution of this matter.

D. ALTERNATIVELY, THE SCOPE OF ANY DEPOSITION PERMITTED AFTER THE DISCOVERY CUTOFF PURSUANT TO THE NOTICE SHOULD BE APPROPRIATELY LIMITED AND THE TIME AND LOCATION OF THE DEPOSITION SHOULD BE SUBJECT TO REASONABLE TERMS AGREED TO BY THE PARTIES.

If the Commission concludes contrary to the foregoing to allow the Counties to proceed with the deposition, the Commission should still limit the scope of the deposition to Utah tax cases and rate cases and regulatory reports involving the matters at issue in this docket. The limitations contained in Qwest's response to the Notice, Attachment 2, achieve this objective. In addition, rather than the Counties dictating the time and location of the deposition, this should be a matter subject to reasonable agreement between the parties consistent with normal practice. If the parties are unable to reach agreement, the dispute may be submitted to the Commission for resolution.

IV. CONCLUSION

Based upon the foregoing, the Commission should issue a protective order not allowing the Counties to take the deposition of Qwest in accordance with the Notice. Alternatively, the Commission should issue a protective order limiting the scope of the deposition as provided in Qwest's response and providing that the deposition will be held at a time or times and location or locations mutually acceptable or that any dispute regarding the same will be resolved by the Commission.

RESPECTFULLY SUBMITTED: August 27, 2004.

Robert C. Brown
Qwest Services Corporation

-and-

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Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **QWEST'S MOTION FOR PROTECTIVE ORDER ON NOTICE OF RULE 30(b)(6) DEPOSITION** was served on the following by hand delivery on August 27, 2004:

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