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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint of: BEAVER COUNTY, et al, and all other Persons or Entities Similarly Situated, Complainants, vs. QWEST CORPORATION, fka U S WEST COMMUNICATIONS, INC., fka THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, Respondent.	:	Docket No. 01-049-75 **QWEST'S REPLY TO COMMITTEE AND DIVISION**

Qwest Corporation ("Qwest") hereby replies to the Reply of the Committee of Consumer Services and the Division of Public Utilities' to Qwest's August 9, 2002 submissions ("CCS and DPU Reply").

I. INTRODUCTION

The Committee and Division chide Qwest for "seek[ing] once again to have the Complainants' cause of action dismissed prior to being heard." (CCS and DPU Reply at 2.) They also ignore Qwest's argument that the Counties' original petition in Docket No. 98-049-48

could not have been both a request for declaratory ruling and a request for adjudicatory proceeding, miss the point on the savings statute of limitations, and misunderstand Qwest's position on the Counties' pleadings in both Docket No. 98-049-48 and in this docket. Qwest submits this reply to briefly respond to these issues.[1]

II. DISCUSSION

A. Qwest Should Not Be Criticized for Attempting to Encourage Order on the Confused Morass Created by the Counties. Qwest's Position Has Been Consistent and Simply Seeks to Have the Counties State a Valid Claim and Then Have the Commission Rule on that Claim in Accordance with the Law Applicable to It.

From the beginning of this matter, when the Counties' attempted to avoid paying Qwest the $16.9 million tax refund they agreed to pay, Qwest has consistently argued that underneath the veneer of the Counties' equitable claims lay a challenge to Qwest's rates. (*See, e.g.*, Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Subject Matter Jurisdiction, *Beaver County v. U S WEST Communications*, Civ. No. 980913349 (February 9, 1999)). While the Counties vigorously opposed such a characterization, the courts upheld Qwest's interpretation of the essential nature of the Counties' claim. *See Beaver County v. Qwest*, 2001 UT 81 ¶ 15, 31 P.3d 1147, 1151 (2001) ("Overpayment alleged by the Counties is necessarily premised on an unjustifiable, changed , or otherwise incorrect initial rate.") Thus, while the Counties still resist the clear message of Qwest's pleadings and the court decisions that their only potential claim would be that Qwest's rates were unjust or unreasonable during the

[1] Qwest acknowledges that it is not typical procedure for a party to reply to a reply. However, in this instance, Qwest believes such a reply is appropriate. First, the CCS and DPU Reply addresses issues raised by Qwest's Answer and Motion to Dismiss as to which Qwest is, in effect, the moving party. Second, this is the first opportunity for Qwest to address certain arguments made by the Committee and Division on the motion to consolidate.

years in question, a claim they have previously said they are not making,[2] Qwest has never taken a different position.

All Qwest has done, then, in submitting its arguments to the Commission in the current docket is attempt to prevent the parties embarking on or proceeding with litigation based on a flawed cause of action that both exceeds the Commission's statutory authority and distracts focus from what the Counties' claims should really be about—rate reparations. When the Counties submitted their Amended Complaint, finally making at least some effort to plead a cause of action consistent with the true nature of their claims and the Commission's authority, Qwest did not oppose the amendment but rather stated that "[w]hile factually incorrect and otherwise inadequate, the new cause of action in the proposed Amended Complaint—the second cause of action—at least allows [the rate reparations] issue to now be directly addressed by the parties and ruled on by the Commission." (Qwest's Reply to Counties' Motions to Amend and Consolidate at 2.) Unfortunately, however, the Counties continued in their Amended Complaint to plead all of their legally flawed equitable claims.

Given these facts, it is inexplicable that the Committee and Division should criticize Qwest for its alleged "further effort[s] to snag the Complainants' opportunity to have their cause of action appropriately heard and resolved." (CCS and DPU Reply at 2.) Perhaps the CCS and DPU Reply is attributable to the confusion caused by the way the Counties have crafted their claims. Perhaps it is attributable to the fact that Qwest has preserved its position that the Counties' first cause of action should be dismissed, on the grounds identified in Qwest's October

[2] As recently as the Counties' response to Qwest's Motion to Dismiss, the Counties stated clearly that they "are not now challenging the reasonableness of the rates and charges allowed during that time period." Complainant's Memorandum in Opposition to Qwest's Motion to Dismiss (November 5, 2001) at 10.

17, 2001 motion to dismiss.[3] Regardless, Qwest agrees with the Committee and Division—indeed, urges—that "the Commission [should] choose to further clarify the somewhat ambiguous nature of proceedings either on its own order or by directing the Complainants to more clearly define and allege their cause of action and the remedy they seek." (CCS and DPU Reply at 9.)

B. The CCS and DPU Reply Ignores Qwest's Argument on the Motion to Consolidate that the 1998 Petition Could Not Be Both a Petition for Declaratory Ruling and an Adjudicative Proceeding.

The portions of the CCS and DPU Reply addressing the Counties' motion to consolidate warrant little comment at this time because Qwest responded to them in its August 23, 2002 reply to the Committee. However, the CCS and DPU Reply completely ignores an essential component of Qwest's argument that, under the Utah Administrative Procedures Act, Docket No. 98-049-48 could not have had two "prongs." It could only have been a declaratory proceeding, not some adjudicative-declaratory hybrid.[4] That argument is dispositive of the motion to consolidate.

C. The CCS and DPU Reply Misses the Point on the Savings Statute of Limitations.

With regard to the so-called savings statute of limitations, the CCS and DPU Reply misses the salient point. (*See* CCS and DPU Reply at 5.) The Committee and Division seem to believe that the only issue for section 78-12-40 is whether an automatic denial of a request for a

[3] As Qwest made abundantly clear in its prior filings, it is not seeking a hearing on its motion to dismiss at this time, but is merely preserving its legal position that the Amended Complaint should be dismissed. Thus, Qwest is hardly attempting to "snag" this proceeding now.

[4] Qwest reminds the Commission and the parties again that it is not contending that a properly pled alternative to a petition for declaratory ruling could not have been filed. However, as previously pointed out by Qwest, the Counties did not plead in the alternative. If they had, they would have accepted, at least for the time being, the Commission's denial of their petition for a declaratory ruling and proceeded with the alternative adjudicative proceeding rather than attempting to appeal the statutory denial of their petition for a declaratory ruling. Furthermore, they would not have filed a new petition following the Supreme Court's decision that their appeal must be dismissed for lack of jurisdiction.

declaratory order, under Utah Code Ann. § 63-46b-21(7), is "procedural" or "on the merits."[5] While that is an issue, it is not the only issue. An equally important issue is *when* the request for a declaratory order failed because it is the time of failure that triggers the one-year period under section 78-12-40 (assuming the failure was only procedural and assuming the original action was commenced within due time—neither of which points Qwest concedes).

The Committee and Division argue that the Supreme Court decision in September 2001 was the moment of failure because it was the "final resolution" of the declaratory proceeding. (CCS and DPU Reply at 5.) But that argument necessarily implies that the Supreme Court had some decision-making to do in reaching a "final resolution" about whether it could proceed with the appeal. In fact, the Court's decision-making had been done for it by the statute. Utah Code Ann. § 54-7-15 assured that the denial of the Counties' request for a declaratory order could not be heard by the Court. Thus, the Supreme Court decision was not the cause of the failure of Docket No. 98-049-48. Rather, it was merely a confirmation of the failure that previously occurred when the Counties did not seek reconsideration of the denial of their petition. The Supreme Court could hardly have been more clear on this point:

> We are without jurisdiction to review administrative orders unless and until the Counties apply for review or rehearing pursuant to section 54-7-15 . . . .
>
> We have held that "[w]here the outlined procedures have not been complied with, this court is without jurisdiction over the subject matter of the dispute." . . . Under these standards, we lack jurisdiction to entertain the review because the Counties did not petition for rehearing pursuant to section 54-7-15 and thus we must dismiss the petition for review of the declaratory action.

[5] Qwest does not concede that the Committee and Division are correct in categorizing such a denial as merely procedural. *See* CCS and DPU Reply at 4-5.

2001 UT 81, ¶¶ 29-30, 31 P.3d at 1153-54. Thus, the date the Counties failed to file their petition for reconsideration is the date of failure for purposes of Utah Code Ann. § 78-12-40—the date after which (assuming, again, the failure was procedural and that the original action was commenced on time) the Counties had one year to commence a new action. The Counties failed to do so and Docket No. 98-049-49 is neither pending nor otherwise susceptible to consolidation.

D. The CCS and DPU Reply Misunderstands Qwest's Position on the Counties' Pleadings.

Finally, the Committee and Division appear confused on Qwest's arguments regarding Utah Code Ann. § 54-7-20. Qwest has never "mischaracterized" the Counties' claims, nor has Qwest ever suggested that the Counties have styled their claims as being for reparations. To the contrary, Qwest has consistently pointed out that the Counties have not stated a claim under section 54-7-20. Indeed, Qwest sought to have the Counties' Complaint in this docket dismissed because the Counties failed to allege anything "that would explicitly or implicitly raise the ratemaking function, duties, or jurisdiction of the Commission." (Qwest's Motion to Dismiss at 4.) What Qwest *has* stated is that the Counties only possible *proper* claim, if any, is one for reparations. Thus, assuming the Counties ever get around to framing a proper claim, that claim will necessarily implicate section 54-7-20.

Further, unless the Counties can show that an exception to the rule against retroactive ratemaking applies, the Counties will be bound by the one-year statute of limitations in section 54-7-20(2). Contrary to the Committee and Division's contention that the statute "does not define the event from which its one year term begins to run," (CCS and DPU Reply at 6), the limitations period is expressly triggered by "unjust, unreasonable or discriminatory *charges*," which can only mean the charges paid for telephone service. Utah Code Ann. § 54-7-20 (emphasis added). Under the plain language of the statute, unless an exception to the rule against

retroactive ratemaking applies, the Counties' claims are time-barred because they were not filed within one year of the charges for service.

III. CONCLUSION

In sum, far from being "nothing more than a continuing effort to prevent the merits of the Complainants' cause of action from being heard and resolved by the Commission" (CCS and DPU Reply at 7), Qwest's filings to date simply reflect a desire to have this action proceed within the bounds of the Commission's jurisdiction and be decided based on applicable governing law.

The failure of the Counties to get to the "merits" of their claims is a self-inflicted wound. Qwest would prefer to get beyond argument about preliminary matters just as Qwest would have preferred that this matter be brought, if at all,[6] in the appropriate forum in the first instance and under a legally recognized cause of action, thus avoiding the waste of time and resources necessitated by the Counties' misguided lawsuit, appeal and filings to date in this docket. But if the Commission lets the Counties go un-checked and does not force them to frame a proper claim, the parties will likely be left pursuing needless and potentially expensive motions and discovery on extraneous matters and arguing things such as whether a proposed Rule 23 class notice satisfies due process. If the matter is not properly framed, the parties will also be prevented from presenting focused argument on the key issues surrounding the "merits" of a reparations claim based on the tax refund and the Commission will not know what law applies.

[6] Qwest, of course, believes that the Counties bringing of their claims in district court and before the Commission at all was contrary to the spirit of the settlement agreement before the State Tax Commission. Qwest substantially compromised its tax assessment claims in part to settle litigation which had been pending for many years. However, the Counties seem hell-bent to attempt to deprive Qwest and other public utilities of any incentive to question unreasonable tax assessments no matter how long it takes or how much it costs.

DATED: June 18, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **QWEST'S REPLY TO COMMITTEE AND DIVISION** was served upon the following for Docket No. 01-049-75, by U.S. Mail, postage prepaid, on June 18, 2018:

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