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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of the Complaint of:)))))))))))))))))))))))))))) BEAVER COUNTY, BOX ELDER COUNTY, CACHE COUNTY, CARBON COUNTY, DAVIS COUNTY, DUCHESNE COUNTY, EMERY COUNTY, GARFIELD COUNTY, GRAND COUNTY, IRON COUNTY, JUAB COUNTY, KANE COUNTY, MORGAN COUNTY, PIUTE COUNTY, RICH COUNTY, SALT LAKE COUNTY, MILLARD COUNTY, SAN PETE COUNTY, SEVIER COUNTY, SUMMIT COUNTY, TOOELE COUNTY, UINTAH COUNTY, UTAH COUNTY, WASATCH COUNTY, WASHINGTON COUNTY, WAYNE COUNTY, WEBER COUNTIES, AND ALL OTHER PERSONS OR ENTITIES SIMILARLY SITUATED, 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 TO DISMISS

Qwest Corporation hereby moves to dismiss the Complaint filed by the Complainant Counties for the reasons set forth hereafter.

Factual Background

In each of the nine years from 1988 through 1996, Qwest Corporation ("Qwest") appealed its centrally-assessed property tax assessments to the Utah State Tax Commission, claiming that its valuation was excessive, thus

resulting in an overpayment of property taxes. The Counties intervened in those proceedings, maintaining that their economic interests would be affected by the resolution of those proceedings. In October 1998, the Tax Commission issued a supplemental order, pursuant to stipulation between the Counties and Qwest, resolving these individual appeals on a consolidated basis. The settlement required the Counties to refund $16.9 million of property tax overpayments to Qwest.

But instead of refunding the money, the Counties immediately filed a putative class action complaint against Qwest's parent, claiming that they and the Qwest customers they purported to represent were entitled to rate refunds in the amount of the refund. The district court dismissed the Counties' suit, holding that the remedies sought by the Counties required rate making or adjustment of rates and thus must be brought before the Public Service Commission ("Commission"). *Beaver County v. Qwest, Inc.*, 2001 UT 81 ¶ 4. On appeal to the Utah Supreme Court, the Counties argued that dismissal was wrong because equitable claims–not

a refund of rates–were the essence of their complaint:

> The Counties emphasize that equitable rights, rather than the rate making function and duties of the PSC, govern this case, and therefore the district court failed to properly exercise jurisdiction. They contend that the only issue this court should consider is whether the specific sum awarded Qwest by the Tax Commission should be returned to the taxpayers under a constructive trust or unjust enrichment principle.

Id. ¶ 13. The Utah Supreme Court considered and explicitly rejected the Counties' argument that the equitable principles of unjust enrichment and restitution form the basis of their claim:

> Essentially, the Counties allege that equity requires the return of the ratepayers funds to the ratepayers because the ratepayers initially overpaid telephone rates that were based on estimates of costs provided by Qwest to substantiate its rates to the PSC. Overpayment alleged by the Counties is necessarily premised on an unjustifiable, changed, or otherwise incorrect initial rate.

Id. ¶ 15. The court further stated that "[s]imple labeling of the issue in an envelope of equity" did not "mandate our opening of a discussion of the same." *Id.* The court affirmed that the Commission was the proper forum for the Counties' complaint because the "relief they seek involves rate making and rate adjustment," rather than the equitable claims put forth by the Counties. *Id.*

The Counties then filed the complaint in this case with the Commission, once again alleging unjust enrichment

and asking for imposition of a constructive trust. Qwest brings this Motion to Dismiss on the following grounds:

1. The Commission lacks subject matter jurisdiction over the claim pled by the Counties,
2. The Counties' claim is preempted and precluded by the Public Utilities Code, Utah Code §§ 54-1-1 *et seq*.
3. The Counties have failed to state a claim upon which relief can be granted.
4. Even though the prior grounds are completely dispositive, the Counties' claims for the years 1988 and 1989 are also barred because the Commission ordered a release of any and all claims for those years relating to the reasonableness of Qwest's established rate.
5. The Commission does not have the statutory authority to certify a class in this action.

Argument

The Counties do not allege that any rate charged by Qwest was erroneous, unjust, or unreasonable, was set based on utility misconduct, or should be viewed in light of later unforeseeable and extraordinary events. Nor do the Counties allege that they are entitled to reparations or some other remedy specifically provided for by statute or otherwise. Indeed, the Counties go out of their way to allege nothing that would explicitly or implicitly raise the ratemaking function, duties, or jurisdiction of the Commission. For that reason alone, the Counties' Complaint should be dismissed: the Commission simply does not have jurisdiction to address an unjust enrichment claim and is not authorized to grant the equitable relief the Counties seek. Moreover, the Counties' common law equitable claim for unjust enrichment must be dismissed because the Public Utilities Law supercedes and preempts such common law claims; the legislature saw fit to provide for rate refunds in limited circumstances and within a specifically limited time frame and the Counties' claim does not fit within the designated time frame; thus, they are not entitled to a refund under that law–even had they properly framed their complaint.

Regardless, the Counties have failed to state a claim on which relief can be granted. Even if the Commission did possess subject matter jurisdiction to entertain an unjust enrichment claim and that claim had not been preempted

by the Public Utilities Law, the Counties' claim must be dismissed because (1) no action for implied or quasi contract lies where ratepayers paid rates pursuant to an express contract embodied in Qwest's filed tariff; (2) ratepayers conferred no benefit on Qwest by paying Commission-established rates in return for receiving utility service; (3) at no time has Qwest had knowledge of any benefit conferred on it by ratepayers; and (4) it is not inequitable for a utility to retain rate payments even though actual expenses and costs vary from those forecast in setting the rate.

Furthermore, while the grounds described above are fully dispositive of the case, the Counties' claims for the years 1988 and 1989 are also barred because the Commission ordered a release of any and all claims for those years relating to the correctness, justness, or reasonableness of Qwest's established rate.

In any case, as this Commission has previously held, the Commission cannot certify a class action as requested by the Counties because the Commission lacks the authority to entertain a class action in a case such as this.

I. The Commission Does Not Have Authority To Address A Claim for Unjust Enrichment or To Grant the Common Law Equitable Relief Requested

Now that this case has been filed with the Commission, the Counties continue to frame their complaint as they did in the district court, alleging unjust enrichment and seeking imposition of a constructive trust. The Complaint makes no mention of any statutorily-based claim or any claim to statutorily-authorized relief. Despite the Utah Supreme Court's rejection of their characterization, the Counties nevertheless state their claim to this Commission as one based not on statutory law, but on equity. Essentially, the Counties are asking this Commission to entertain a common law claim and provide a common law remedy. The Commission clearly lacks the power to do so.

The Counties' arguments are based on a complete misunderstanding of the functions of the Commission and its source of jurisdictional authority. The Commission cannot address the common law claim and remedy sought by the Counties, because the Commission possesses no common law function or authority. *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); *Basin Flying Service v. Public Serv. Comm'n*, 531 P.2d 1303, 1305 (Utah 1975) (stating that "it is well established" that Public Service Commission "has no inherent regulatory powers"); *Kearns-Tribune Corp. v. Public Serv. Comm'n*, 682 P.2d 858, 859 (Utah 1984) (same). The Commission possesses only that authority

expressly granted by the Legislature or clearly implied as necessary to the discharge of duties imposed on it. *Basin Flying Service*, 531 P.2d at 1393; *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). To ensure that the Commission's administrative powers are not overextended, the Utah Supreme Court has held that "any reasonable doubt of the existence of any power must be resolved against the exercise thereof." *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 50 (Utah 1988); *cf.* Utah Code § 68-3-1 (adopting nonconflicting common law to be the rule of decision in the *courts* of Utah).

The principle that Utah administrative agencies lack common law powers is illustrated by *Kerans v. Industrial Comm'n*, 713 P.2d 49 (Utah 1986). The claimant in *Kerans* sought recovery from the Industrial Commission for injuries. But instead of citing statutory authority for his claim, he relied on "common law principles of restitution based upon the doctrine of unjust enrichment." *Id.* at 54. The administrative law judge rejected the claim. The Supreme Court, citing several cases from other jurisdictions, adopted the position that, in the absence of statutory authority, "it did not lie within the prerogative of the court to fashion any common law exception to the statutes." *Id.* at 55.

Thus, the Commission lacks jurisdiction to consider a common law equity claim–the Commission can exercise only those powers that have been conferred by the legislature. That statutorily-created regulatory bodies do not possess inherent equitable powers is consistent with the law in other states. *See AA Oilfield Service, Inc. B&E v. New Mexico State Corp. Comm'n*, 881 P.2d 18, 23 (N.M. 1994) (holding authority to grant equitable remedies is not encompassed in New Mexico State Corporate Commission's realm of quasi-judicial powers); *New York Edison Co. v. Maltbie*, 270 N.Y.S. 409, 415 (1934) ("The Public Service Commission has no equity jurisdiction and no powers beyond those conferred upon it by statute.").

Nowhere in the Commission's statutory authority is express or necessarily implied authority given to entertain a common law equitable claim for unjust enrichment. Thus, the Commission is without power to determine the Counties' Complaint. *See Garrity v. Board of Assessors*, 682 N.E.2d 935, 936 (Mass. App. 1997) (explaining that equitable principles do not supercede jurisdictional requirements of administrative board).

The Counties simply assert that "the Utah Supreme Court's holding in *Beaver v. Qwest Inc.*, [2001 UT 81] . . . and statutes cited therein" provide the Commission with jurisdiction. *See* Complaint at 2. Beyond that broad reference, they provide no citation, specify no particular statute, and point to no language as the source for this alleged authority. Indeed they cannot–for there is no language in the Utah Supreme Court's holding to that effect. Contrary to what the Counties claim, the court did not hold that the Counties must bring an equitable unjust enrichment claim in front of the Commission. Rather, the court held that the Counties' claim was really one for overpayment of rates–not unjust enrichment–and that the Commission, rather than the district court, had jurisdiction over such a claim. *Beaver*, 2001 UT 81 ¶¶ 15, 17.

Nor do any of the statutes cited by the court in *Beaver* provide a basis for the Commission to exercise common law equitable powers. *See* Utah Code §§ 54-4-1 (delegating to Commission authority to regulate public utilities), 54-4-2 (granting Commission authority to investigate prices, charges, fares, tolls and rentals of any public utility), 54-4-4(1) (outlining Commission's power to determine just, reasonable or sufficient rates for public utilities), 54-4-4(2) (specifically outlining ratemaking as a delegated function exclusive to the Commission), 54-7-12 (mandating procedure for Commission to increase or decrease rates), 54-8b-11 (instructing Commission to ensure provision of telecommunications services at just and reasonable rates).

The Counties, nevertheless, chose to plead their claim in the Commission as a common law equitable claim. They seek a common law equitable remedy. As the Commission has no authority to address such claims or provide such remedies, the Complaint must be dismissed for lack of subject matter jurisdiction.

II. The Public Utilities Law Specifically Preempts and Bars the Counties' Claim

A. The Counties' Claim is Essentially a Common Law Claim for Reparations

However it may be labeled, the Counties' claim is nothing more that a common law reparations claim challenging the propriety of rates set by the Commission for the years in question. *See Cummings v. Commonwealth Edison Co.*, 213 N.E. 2d 18 (Ill. App. 1966); *Alton Brick Co. v. Alton Water Co.*, 192 N.E. 2d 599 (Ill. App. 1963). The Utah Supreme Court specifically observed that the Counties' claim is "necessarily premised on an unjustifiable, changed, or otherwise incorrect initial rate." *Beaver*, 2001 UT 81 ¶ 15.

The facts in *Cummings* are strikingly similar to those in this case. The utility, Commonwealth Edison Co. (Edison), filed a series of civil suits for treble damages and other relief under the anti-trust laws against numerous companies from which it had purchased electrical equipment over a period of many years. *Cummings*, 213 N.E. 2d at 20. Subsequently, the plaintiff in *Cummings*, a customer of Edison, filed a class action on behalf of all the utility's customers. She sought to impound money received or to be received by Edison from the electrical equipment suppliers as part of the settlement of the antitrust actions. She claimed that, because the overpayments made by Edison to the equipment suppliers had been included in Edison's property and plant account upon which rates were based, ratepayers were entitled to a proportionate share of the settlement proceeds. *Id.* Like the Counties in this case, the plaintiff argued that her complaint did not involve the Commission's rate making functions.

The court examined whether the plaintiff was, in effect, bringing a common law action for reparations and found that she was: "It is apparent that the sole basis for plaintiff's claim, irrespective of the label she chooses to employ, is that she and other customers were charged excessive rates for which she wants reparations." *Id.* at 21. The fact that the plaintiff did not seek to upset a rate schedule or fix utility rates for the future but rather sought "an equitable trust fund" was irrelevant. *Id.* Quoting language from similar cases, the court observed: "The 'fund or 'trust fund' which petitioner seeks to conjure up is entirely illusory.'" *Id.* at 23 (internal quotation marks and citation omitted). The court explained that the only way to grant the relief requested by the plaintiff would be to "make a determination of what would have been a reasonable rate for the Edison Company to have charged during the period in question and the specific class or classes of customers entitled to a refund by reason of the company's charges in excess thereof." *Id.* at 22. Such a determination, the court held, was tantamount to a common law reparations claim.

Like the court in *Cummings*, the Utah Supreme Court found that the Counties' label of its claim was not relevant, stating that "[s]imple labeling of the issue in an envelope of equity" would not "mandate our opening of a discussion of the same." *Beaver*, 2001 UT 81 ¶ 15. The true basis of the Counties' Complaint is the contention that rates initially set for the years in issue were incorrect, unreasonable, or unjust. Such is the essence of a common law claim for reparations. The Counties' refusal to make that contention explicit does not change the nature of their

Complaint–one cannot avoid necessary legal implications through artful pleading.

B. The Utah Legislature has Specifically Preempted and Barred the Counties' Reparation Claim

The Counties' claim thus must be dismissed because the Utah Legislature has specifically preempted and barred reparations claims such as the one the Counties seek to bring here. The enactment of the Public Utilities Code, a comprehensive statutory scheme for the regulation of public utilities operating within the state, preempted all common law reparations claims. *See Gilger v. Hernandez*, 2000 UT 23 ¶ 11 (explaining that state law preempts the common law where the statute "create[s] a scheme of [statutory] regulation 'so pervasive as to make reasonable the inference that [the legislature] left no room for the [common law] to supplement it.'" (quoting *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996)); *see also Porr v. NYNEX Corp.*, 660 N.Y.S. 2d 440, 444 (1997) ("The statute creating the Public Service Commission and empowering it to supervise rates and charges was intended to cover the whole subject of rates and superseded all common law remedies.") (citation and internal quotations omitted); *Cummings*, 213 N.E. 2d at 21 (Ill. App. 1966) ("It is well established that the common law right to recover reparations for unreasonable charges by public utilities has been superseded by the Public Utilities Act."). In place of the common law claim for excessive rates and charges, the legislature determined to provide a limited statutory claim available only for a limited time after the charge is made. Utah Code § 54-7-20. The Counties' claim, however, does not meet the conditions specified by the legislature for bringing such a claim; thus the claim is barred. Moreover, the policy reflected in the careful legislative designation of time period during which a reparations claim can be brought cannot coexist with Commission imposition of broader reparations liability. Accordingly, the Commission must dismiss the Counties' Complaint.

III. Even if the Commission had Jurisdiction, the Counties Cannot State a Claim for Unjust Enrichment

A. The Counties' Unjust Enrichment Claim is Precluded by the Existence of Express Legal and Contractual Obligations Between the Counties and Qwest in the Form of Qwest's Tariffs on File with the Commission for the Years in Issue

Unjust enrichment is a quasi-contractual recovery theory that is available only in the absence of an enforceable legal obligation. *Wood v. Utah Farm Bureau Ins. Co.*, 2001 UT App. 35 ¶ 10 (stating recovery for unjust enrichment allowed "only when no enforceable written or oral contract exists"). For that reason, the Counties are here barred from bringing a claim for unjust enrichment. Unquestionably, rates established by the Commission and

published in Qwest's tariff for the years in question have the force of law. For every year at issue, Qwest had on file with the Commission a tariff stating the rates Qwest would charge and the Counties would pay. Those tariff provisions constitute express enforceable legal and contractual obligations between the parties. *See American Salt Co. v. W.S. Hatch Co.*, 748 P.2d 1060 (Utah 1987). The Counties thus possessed an enforceable legal contractual right to receive service from Qwest and pay only the tariff rates on file during the years at issue. Thus, they are not entitled to bring an action based on a quasi-contractual theory of recovery.

B. Even if the Facts Alleged Are True, the Counties Cannot Make Out a Sufficient Claim for Unjust Enrichment

To establish a claim of unjust enrichment against Qwest, the Counties must meet all three elements of the unjust enrichment test. First, the Counties, as ratepayers, must have conferred a benefit on Qwest. Second, Qwest must have appreciated or had knowledge of the benefit. And third, there must be the acceptance or retention by Qwest of the benefit "under such circumstances as to make it inequitable for [Qwest] to retain the benefit without payment of its value." The Counties must prove all three elements to sustain their claim for unjust enrichment. *Desert Miriah, Inc. v. B&L Auto, Inc.*, 2000 UT 83 ¶ 13 (internal quotation marks and citation omitted). The Counties' claim, therefore, must be dismissed because the Counties cannot meet the required elements of the test.

1. The Counties as ratepayers conferred no benefit on Qwest.

The only benefit the Counties as ratepayers can claim they conferred on Qwest is the actual payment of rates to Qwest. In making those payments, however, the Counties received utility service in return. Further, the payments were made at the legally-established rates set by the Commission. Thus, as a matter of utility law under the filed-rate doctrine, the value of utility service received by the Counties was equal to the amount the Counties paid pursuant to legally-established rates. No additional benefit was conferred on Qwest. Thus, the Counties as ratepayers cannot be held to have conferred any benefit on Qwest.

2. At no time has Qwest had knowledge or appreciation of any benefit conferred on it by the Counties as ratepayers.

As pointed out above, the Counties' claim must necessarily presume that the putative benefit the Counties conferred on Qwest occurred in the form of payments the Counties made to Qwest for utility service pursuant to rates

in effect during the time period at issue. Qwest, however, fully performed its duty for which the payments where made. Thus, as Qwest received those payments, it did not believe–and had no reason to believe–that the payments conferred a benefit on the company. Although Qwest was appealing its tax assessments at the time, there was no assurance that Qwest would ultimately prevail. The fact that it took nearly ten years to resolve the earliest appeal is an indication of the uncertainty of the matter. Thus, the rates established were justified, and Qwest had no reason to believe otherwise.

Ultimately Qwest did receive a benefit pursuant to settlement of its tax assessment appeals. That benefit, however, came from the taxing entities, who ultimately repaid the overcharges, not from the ratepayers. At no time has Qwest received, let alone had knowledge or appreciation of, a benefit from the ratepayers.

3. It is not inequitable for Qwest to retain amounts paid to it pursuant to lawfully established rates; both the rule against retroactive ratemaking and the filed rate doctrine preclude a finding otherwise.

It is not inequitable of Qwest to retain amounts paid by the Counties pursuant to rates established by the Commission, even though actual expenses varied slightly from anticipated and forecast expenses used in setting Qwest's rates. In order for the Counties to establish the third element in their claim for unjust enrichment, the Commission would have to make a finding that Qwest has a duty to adjust its rates to reflect actual costs and expenses for a given period once those actual costs and expenses are ascertained. Such a finding is not only inconsistent with the Commission's statutory mandate to establish rates on a forward-looking basis, it violates both the rule against retroactive ratemaking and the filed rate doctrine.

The rule against retroactive ratemaking provides that utilities may not "adjust their rates retroactively to compensate for unanticipated costs or unrealized revenues." *Utah Dept. of Bs. Reg. v. Public Serv. Comm'n (EBA)*, 720 P.2d 420, 420 (Utah 1986). Likewise, the Commission may not retroactively adjust public utility rates to account for costs lower or revenues higher than those anticipated. *Id.*

> This process places both the utility and the consumers at risk that the rate-making procedures have not accurately predicted costs and revenues. If the utility underestimates its costs or overestimates revenues, the utility makes less money. By the same token, if a utility's revenues exceed expectations or if costs are below predictions, the utility keeps the excess.

Id. 420-21.

The Counties in this case want the Commission to eliminate the risk that ratemaking procedures have not accurately predicted costs by declaring that ratepayers are required to pay utility rates only to the extent they reflect *actual* utility costs. But that is not the law. There are no exceptions to the rule against retroactive ratemaking "'for missteps made in the rate-making process,' even though the projections of *expenses* and revenues for the test year vary from actual experience." *MCI Telecom. Corp. v. Public Serv. Comm'n*, 840 P.2d 765, 770-71 (Utah 1992) (quoting *EBA*, 720 P.2d at 424; emphasis added). Likewise, a utility cannot seek a retroactive surcharge from customers if its expenses actually turn out to be higher than projected or if revenues come in lower than projected (a common occurrence in the 1970s and early 1980s)–except where such variations are both extraordinary and unforeseen. Accordingly, there can be no *unjust* enrichment.

Nor can the Commission imply a duty on Qwest inconsistent with Qwest's legal obligation to charge the rates approved and set by the Commission. Pursuant to Utah Code Section 54-3-7, Qwest was obligated to charge the rates set forth in its filed tariff. Had Qwest charged something other than the filed rate, it would have been in violation of both the law and Commission order and subject to penalties and enforcement action therefor. *See* Utah Code § 54-7-25; *see also American Salt Co. v. W.S. Hatch Co.*, 748 P.2d 1060 (Utah 1987) (requiring common carrier to charge filed rate despite agreement with customer to charge lower rate); *Porr v. NYNEX Corp.*, 660 N.Y.S. 2d 440, 442 (1997) ("It has repeatedly been held that a consumer's claim, however disguised, seeking relief for an injury allegedly caused by the payment of a rate on file with a regulatory commission, is viewed as an attack upon the rate approved by the regulatory commission. All such claims are barred by the 'filed rate doctrine.'").

The court in *Porr* explicitly held that "there can be no 'unjust enrichment' where a consumer has paid the filed rate." *Id.* at 448. Accordingly, any "harm" allegedly suffered by the Counties is illusory because they have merely paid the filed tariff rate that they were required to pay. In the absence of injury, the Counties "cannot sue for damages, nor may [they] seek equitable redress, 'because there is nothing to redress.'" *Porr*, 660 N.Y.S. 2d at 447-48; *see also Foshee v. General Tel. Co.*, 322 So. 2d 715, 717 (Ala. 1975) (affirming dismissal of unjust enrichment claim against utility and holding the utility was "under no legal or equitable obligation to refund any money to their subscribers since

it did only what it was required to do by statute").

Likewise, there can be no unjust enrichment in this case because the Counties have merely paid the filed tariff rate they were required to pay and Qwest has merely collected the filed tariff rate it was required to collect.

IV. The Release and Settlement Approved by the Commission in the *MCI* Case is a Complete Release for 1988 and 1989. Therefore, the Counties have No Claim for Those Years

In any case, the Counties' claims for the years 1988 and 1989 are barred by the Commission order approving a release and settlement agreement dated November 13, 1998. In that Order the Commission approved the release and discharge "from any and all claims, actions, causes of action, liabilities, obligations, suits, losses, expenses, and costs, of whatever kind or nature, which now exist or which may hereafter accrue, whether known or unknown, because of, for, arising out of, or in any way connected with" the cases settled "or the subject matter of any of them." *In re Investigation into the Reasonableness of the Rates and Charges of the Mountain States Telephone and Telegraph Company*, Report and Order Approving Amended Release and Settlement Agreement, Docket No. 88-049-18 at 9 (Utah P.S.C., April 19, 1999). Included in the subject matter of those cases was the issue of whether Qwest's rates for those years had been properly determined and were just and reasonable. As that is the same issue raised by the Counties' claim, the Counties are precluded from bringing their claim for the years covered by the order–1988 and 1989.

V. The Commission Lacks the Power to Certify a Class Action

Certification of a class action is improper in the first instance because the Counties do not have standing to seek reparations for other ratepayers. Further, the Commission has previously found that there is no legislative intent to authorize the Commission to entertain a class action. *Nichols v. Utah Power and Light Co.*, Report and Order, Docket No. 97-035-09, P.U.R. Slip Copy at 3 (Utah P.S.C., Aug. 18, 1998).

The complainant in *Nichols* sought back wages as relief from alleged violations of a Commission order regarding merger of the public utility employer. She also sought back wages for other employees affected by the violations. Because there was no statutory authority for the Commission to directly affect the terms and conditions of utility employee compensation, the Commission referred to Section 54-7-20 to determine if "legislative intent to authorize the Commission to entertain what would be equivalent to a class action" existed. *Id.* The Commission

concluded that the reparations statute indicates legislative intent to limit the Commission's ability to grant relief to the complainant only: "[T]he Commission is empowered to grant reparation to the complainant only and not to persons in addition to the complainant."

Because the Counties do not have standing to bring their claim on behalf of other ratepayers, the Commission must deny the Counties' request to certify a class.

CONCLUSION

The Commission lacks subject matter to entertain the equitable relief claim the Counties have pled in their complaint. Unspoken, but forming the basis for the Counties' Complaint, is really a common law claim for reparations which must be dismissed because common law claims have been preempted by legislative enactments in the Public Utilities Code going to reparations; pursuant to the relevant statutory provision, the claim the Counties bring is specifically barred. Even if the Commission did have authority to address an unjust enrichment claim, the Counties claim must be dismissed because the Counties cannot sufficiently set out such a claim. Furthermore, the Counties' claims for the years 1988 and 1989 must be dismissed because the Commission has already ordered a release of any and all claims for those years relating to the reasonableness of Qwest's established rate. Finally, the Commission does not have statutory authority to certify the class action requested by the Counties. For the above reasons, Qwest respectfully asks the Commission to dismiss the Counties' Complaint with prejudice.

Respectfully submitted,

QWEST CORPORATION

By: _____
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ATTORNEYS FOR QWEST CORPORATION

DATED: OCTOBER 17, 2001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the QWEST'S MOTION TO DISMISS was served upon the following for Docket No. 01-049-75 by U.S. Mail, postage prepaid, on the 16th day of October, 2001,

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