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and/or Entities similarly situated

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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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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

**REPLY` MEMORANDUM IN FURTHER SUPPORT OF MOTION  
TO  
CONSOLIDATE AND  
MOTION TO AMEND**

In the matter of the Request of:

BEAVER COUNTY, et al., FOR AN ORDER DIRECTING THAT  
1988 THROUGH 1996 PROPERTY TAX REFUNDS BE  
RETURNED TO THE RATE PAYERS FROM WHOM SAID  
PROPERTY TAXES WERE PREVIOUSLY RECOVERED AND FOR  
SIMILAR RELIEF FOR 1997, 1998 AND SUBSEQUENT  
YEARS.

Petitioners.

Docket No. 98-049-48

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Petitioners in Docket No. 98-049-48 and Complainants in Docket No. 01-049-75 (the "Petitioners"),  
submit the following reply memorandum in further support of their motion for an order consolidating the two  
cases and allowing amendment of the petition filed herein and the filing of an amended complaint,

superceding the petition and all prior complaints.

### PRELIMINARY STATEMENT

In its response to Petitioners' Motion to Consolidate and Amend ("Qwest Resp."), Qwest states that it "does not oppose the motion to amend the complaint in Docket No. 01-049-75, [footnote omitted] but opposes the motion to consolidate." No further argument is therefore presented relative to Petitioners' Motion to Amend the Complaint in Docket No. 01-049-75. This Reply Memorandum is limited to Qwest's opposition to consolidation.

**I. QWEST MAY RAISE THE STATUTE OF LIMITATIONS AS A BAR TO PETITIONERS' CLAIMS IN DOCKET NO. 98-049-48 AS AN AFFIRMATIVE DEFENSE IN ITS RESPONSE TO THE AMENDED COMPLAINT, OR IN A SEPARATELY FILED MOTION; IT MAY NOT REQUEST THE AFFIRMATIVE RELIEF OF DISMISSAL IN RESPONSE TO PETITIONERS' MOTION TO CONSOLIDATE.**

Qwest suggests that the "[t]he only reason the Counties are even pursuing a motion to consolidate is in an effort to avoid Qwest's argument that the statute of limitations in Utah Code Ann. § 59-7-20(2)." See Qwest Resp. at 2. Petitioners' opening memorandum acknowledged that "Qwest has argued that the timing of the second case was such that a claim for reparations would be barred by the one-year statute of limitations." See Petitioners' Opening Memorandum at 4. Petitioners have summarized their argument concerning the limitations issue and quite openly argued that, with "consolidation and amendment, that limitations issue unquestionably goes away . . . ." *Id.* at 5.

Petitioners also acknowledged Qwest's position that the limitations period begins to run from the date the rates were approved by this Commission, rather than from the date upon which the refund was received by Qwest's predecessor, U. S. West. The issue is thus framed and the positions of the parties clear. Qwest may bring its own motion to dismiss on limitations grounds, but consolidation is an issue separate and apart from the timeliness of Petitioners' action.

**II. QWEST HAS REPEATEDLY ARGUED THAT ONLY THIS COMMISSION HAS JURISDICTION TO RESOLVE THE ISSUES PRESENTED IN DOCKET NO. 98-049-48, AND SHOULD NOT NOW BE PERMITTED TO REPUDIATE ITS POSITION.**

Challenging Petitioners' choice of venue relative to the action initiated in the District Court, Qwest has repeatedly asserted that only this Commission has jurisdiction to hear Petitioners' claims.  Concurrently with the filing of the complaint in the District Court, Petitioners filed their Petition for Declaratory Ruling before this Commission. The Commission did not rule on the Petition and, pursuant to the provisions of Utah Code Ann. § 63-46b-21(7) (1997), the Petition was deemed denied sixty days after it was filed.  Petitioners did not file a request for rehearing, but instead filed a petition for review with the Utah Supreme Court, which held that Petitioners' failure to request a rehearing deprived the Supreme Court of appellate jurisdiction.  Qwest would have the Commission believe that, because the Court found it lacked jurisdiction, Petitioners' claim for declaratory relief in Docket No. 98-049-48 is not pending before the Commission and, therefore, is not a proceeding "pending" before the Commission which may be consolidated with Docket No. 01-049-75. That is simply not the case.

In *Harper Investments, Inc. v. Auditing Div., Utah State Tax Comm'n*, 868 P.2d 813 (Utah 1994), the Utah Supreme Court affirmed the reasoning of the Utah Court of Appeals, which addressed the time within which an administrative agency could rule on a request pending before it. The Court of Appeals determined that the administrative agency could "choose[ ] to issue an order denying a petition for reconsideration after the twenty-day presumptive denial period, [ and] the actual date of issuance would mark the beginning of the thirty-day time period, to the time period before it was 'deemed denied' under the applicable statute." *Id.* at 816. The Supreme Court agreed, noting that, pursuant to the provisions of Utah Code Ann. § 63-46b-14(3) (a),

When the Harper Companies chose not to file their petition for review within the twenty-day period, they assumed the risk that there would be no order from the Commission. They would have missed the deadline if the Commission had never issued its final decision of June 3, 1992. However, because the Commission chose to consider the petition for reconsideration and to act on it by issuing an order, the period for seeking review did not begin to run until the date of that final opinion.

*Id.* Just as the Tax Commission chose to rule on the request for reconsideration after it was "deemed denied"

under § 63-46b-14(3)(a), so, too, can this Commission, rule on Petitioners' request for declaratory ruling. This was recognized by this Commission, itself, in its appeal brief in the consolidated appeal, where this Commission stated: "[B]ecause of the Counties' appeal, the Commission has lost the ability to conduct further Commission proceedings *until this Court remands the matter by special order or upon conclusion of the appellate process.* [Emphasis added.]" Brief of the Public Service Commission, at 7, copy attached as Exhibit "A." This Commission expressly invited the Counties to "attempt to amend their application before the Commission to conduct a normal formal adjudicative proceeding before the Commission." *Id.* at 8. Thus, this Commission has already recognized that it may proceed in precisely the manner the Counties now request. The proceeding remains pending before the Commission.

### CONCLUSION

As noted in Petitioners' opening memorandum, amendment and consolidation serve the purposes of allowing full exploration of the merits of all issues involved before the Commission and minimizing expenses for all parties. The interest of justice therefore requires the granting of the motions.

DATED this \_\_\_\_\_ day of December, 2004.

**PARSONS, DAVIES, KINGHORN & PETERS, P.C.**

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### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Reply was mailed, postage prepaid, this \_\_\_\_\_ day of December, 2004, to the following:  
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