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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint of BEAVER COUNTY, et al.,

Complainants,

v.

QWEST CORPORATION,

Respondent.

REPLY OF THE COMMITTEE OF CONSUMER SERVICES

AND

THE DIVISION OF PUBLIC UTILITIES

Docket No. 01-049-75

Docket No. 98-049-48

Pursuant to Utah Admin. Code R746-100-3(I), the Committee of Consumer Services ("the Committee") and the Division of Public Utilities ("Division") hereby respond to Qwest Corporation's (1) Reply to Counties' Motions to Amend and Consolidate and (2) Answer to Amended Complaint and Motion to Dismiss, filed with the Public Service Commission ("Commission") August 9, 2002.

REPLY TO QWEST'S OPPOSITION TO

COUNTIES' MOTIONS TO CONSOLIDATE

1. Qwest Corporation ("Qwest") does not oppose the Counties' Motion to Amend its Complaint in these proceedings, but does oppose the Motion to Consolidate Docket 98-049-48 and Docket 01-049-75; and, in a separate Answer and Motion to Dismiss, Qwest seeks once again to have the Complainants' cause of action dismissed prior to being heard.

2. Qwest argues the Counties' Motion to Consolidate is nothing more than "an effort to avoid Qwest's argument that the statute of limitations in Utah Code § 54-7-20(2) bars relief in this matter" (pp. 2-3). By the same measure, Qwest's opposition is nothing more than a further effort to snag the Complainants' opportunity to have their cause of action appropriately heard and resolved. The history of the Complainants' efforts over the past three and one-half years to institute a cause of action in a forum that would effectively address the merits of their claim, and the fact that claim has yet to be heard, show the direction the Commission needs to go in this matter. It has the statutory power, jurisdiction, and *discretion* to address this matter – even to restructure the proceedings if necessary. It has only to decide to do so.

3. Qwest's principal argument against the Motion to Consolidate is its assertion that there is no longer a "pending" earlier case to consolidate. In its view, the provisions of Utah Code § 63-46b-21, and 54-7-15 "ended" the earlier proceeding on the date the Counties failed to timely petition the Commission to review its "deemed denial" of their request for a declaratory ruling. (p. 3). To make this argument, Qwest gives the Complainants' December 31, 1998 request (hereafter "Original Filing") an unwarrantedly narrow interpretation, reading much less into it than is obviously there. While the Original Filing does ask for a declaratory ruling, it also plainly states the Complainants "anticipate" their petition "will be contested" and specifically requests the petition "be handled as a formal adjudication pursuant to Utah Code § 63-43b-3". There is nothing in the identified Commission "non-response" which necessarily or statutorily "ended" the Complainants' separate and distinct request for a formal adjudication. Therefore, whether both prongs of the earlier docket proceedings (request for declaratory order and request for formal adjudication) have "ended" is very much a question to be decided within the discretion and best judgment of the Commission, and the

Commission's guide in such a decision ought to be its fundamental duty to "supervise and regulate every public utility in this state."

4. In addition to its principal argument against consolidation – that there is no prior "pending" case – Qwest further takes issue with the Complainants' statement that the provisions of Utah Code § 78-12-40 – the "savings statute of limitations" – preserve the cause of action alleged in its Original Filing against otherwise applicable statutes of limitation.

5. Regarding the "savings statute of limitations", Qwest argues that provision can't 'save' the earlier cause of action because the second action was not commenced within the prescribed one year of the reversal or failure of the prior action. Qwest, however, misreads Utah Code § 78-12-40. It states:

> If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure. [Emphasis added, ed.]

Complainants' cause of action has yet to be heard *in any forum* on its merits. Both the action commenced in district court and the request for a Commission declaratory ruling were dismissed or denied on procedural grounds, and the Utah Supreme Court appeal was nothing more than a final resolution of those *procedural* issues. Not until such final resolution can the Complainants' cause of action, or relevant portions thereof, be said to have failed. The clear purpose of the saving statute is to prevent the very injustice which Qwest seeks here to inflict: to prevent a hearing on the merits of a cause of action which was timely commenced but failed "otherwise than upon the merits" and which the prompt filing of a new action could cure.

6. Qwest's other arguments regarding the applicability of statute of limitation provisions are similarly misplaced and based upon a misreading of the relevant statutory provisions or the Complainants' Original Filing. For example, in order to assert the Commission's "non-action" ended the earlier proceeding, Qwest first categorizes the Original Filing as a "request for a declaratory ruling". Thereafter, however, it selectively asserts that same filing to be a complaint for reparations under Utah Code § 54-7-20 and subject to the limitation on actions stated in that statutory remedy. However, the Complainants' Original Filing doesn't even mention the statutory reparation provisions of

Utah Code § 54-7-20; and Qwest's selective argument further conveniently overlooks the alternative request for rate relief in that filing, that:

> . . . the Commission enter an order requiring US West to exercise a decrease in price of service sufficient to return the 16.9 million to its Utah rate payers and file a tariff reflecting that decrease with the Public Service Commission. . .

7. Having mis-characterized the nature of the Complainants' original filing as a reparations proceeding, Qwest then asserts, without any legal precedent or support, that the one-year limitation on actions in the reparations provision, Utah Code § 54-7-20, would run, in this instance, from the end of 1996, the last tax year addressed in the property tax settlement refund. In other words, according to Qwest, the Counties would have had to commence a reparations action before the Commission regarding the1998 property tax settlement refund prior to the end of tax year 1997 – that is, prior to the time a cause of action had even arisen. Had the1998 property tax settlement only covered the years 1988 through1994, Qwest's unsupported position becomes even more untenable.

8. The limitation of actions provision in Utah Code § 54-7-20 does not define the event from which its one year term begins to run. At the earliest, that event could not be prior to the April 13, 1998 Order of the Utah State Tax Commission approving the settlement and making the refund legally operative, because until the actual tax refund the Counties would not even have a cause of action. The Complainants made their original filing before the Commission December 31, 1998, well within one year of the March 1998 settlement and April 1998 tax commission order.

9. For the above reasons, it should be clear Qwest's opposition to the Motion to Consolidate is nothing more than a continuing effort to prevent the merits of the Complainants' cause of action from being heard and resolved by the Commission. The Commission possesses the jurisdiction and the discretion as an administrative agency to ensure that this matter is appropriately heard and resolved. To that end, it should grant the Complainants' Motion to Consolidate.

REPLY TO QWEST'S MOTION TO DISMISS

THE AMENDED COMPLAINT

10. Qwest does not oppose the Complainants' motion to amend its complaint. Instead, it moves for dismissal of the Amended Complaint on the grounds of Qwest's asserted affirmative defenses and also on the grounds set forth in

its October 7, 2001 Motion to Dismiss in the Docket No. 01-049-75 proceedings. Qwest's affirmative defenses, however, are only alleged. They are not supported. Nor does Qwest explain what relevance the grounds in its October 7, 2001 motion to dismiss have to the allegations in the Amended Complaint. It would therefore be premature and very arbitrary for the Commission to grant Qwest's renewed motion to dismiss at this time.

RECOMMENDATION

11. The Committee and the Division see at least three matters which require some early consideration and response by the Commission:

A. Qwest Procedural Issues. At this juncture in the proceedings the Commission needs to reject further Qwest efforts to prevent a hearing of the Complainants' cause of action on its merits, and to consolidate and structure these proceedings in a way which will allow them to go forward to a dispositive hearing on the merits.

B. Counties Class Action Request. The Commission should address the Complainants' request to have their matter heard as a class action under Rule 23 of the Utah Rules of Civil Procedure. The Committee's earlier Response indicated no initial position with regard to the Counties' request to have this matter heard as a class action. Upon further consideration, the Committee and the Division recommend that the Commission advise the parties that it will defer granting or denying the Complainants' request at this time. The results the Complainants seek, including the possibility of recovering attorneys' fees, may be achievable under the reparations statute and/or other appropriate proceeding without resort to a Rule 23 class action. Further, the additional burden on the Commission to maintain a Rule 23 class action could well exceed any benefit sought to be achieved. The names of the millions of customers of Qwest (and its predecessors) between 1988 and 1996 are presumably known. Hence, Rule 23(c)(2) may require individual notice to every customer, with a customer right to opt out of the Class. The time and administrative expense involved in attempting to locate and track every member within and without the Class could easily consume a substantial portion of any recovery, to the detriment of the interests of the ratepayers entitled to a refund. These considerations mitigate against instituting a Rule 23 proceeding – at least at this time. Rule 23(c)(1) states that "[A]n order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." The

Committee and the Division recommend that the Commission direct the parties to proceed at this time with the development of a factual record and arguments on whether reparations or other remedies are in order. If it subsequently appears to the Complainants that a Rule 23 class action is still warranted, the Commission at that time can entertain arguments on whether it has the legal authority to so proceed , and if it does, whether or not it ought to do so.

C. Nature of these Proceedings. The Commission may 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.

Respectfully submitted this _____ day of August, 2002.

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Division of Public Utilities

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY OF THE COMMITTEE OF CONSUMER SERVICES AND THE DIVISION OF PUBLIC UTILITIES** was mailed on the _____day of August , 2002 to the following:

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