
In the Matter of the Investigation Into the)	<u>DOCKET NO. 88-049-18</u>
Reasonableness of the Rates and Charges)	<u>ORDER ON U S WEST</u>
of MOUNTAIN STATES TELEPHONE)	<u>COMMUNICATIONS INC.'S MOTION IN</u>
AND TELEGRAPH COMPANY.)	<u>LIMINE ON PROOF REQUIRED FOR</u>
	<u>UTILITY MISCONDUCT</u>

ISSUED: August 31, 1998

By the Commission:

The above-entitled matter having come on regularly for hearing before the Public Service Commission (Commission) on Thursday, August 13, 1998, at the hour of 9:00 a.m. on U S West Communications, Inc.'s (U S West) Motion in Limine on Proof Required for Utility Misconduct, U S West appearing through counsel, David J. Jordan and Gregory B. Monson, the Utah Division of Public Utilities (Division) appearing through counsel Michael Ginsberg, Assistant Attorney General, and the Committee of Consumer Services (Committee) appearing through counsel, Kent Walgren, Assistant Attorney General, and no other parties appearing in person or through counsel, and the Commission having reviewed the pleadings on file, and heard the arguments of counsel, and being fully advised in the premises, hereby makes its decision:

U S West filed its Motion in Limine asking the Commission to rule that proof of intent to mislead regulators as to material facts is the required finding by the Commission to invoke the "utility misconduct" exception to the rule against retroactive ratemaking. Based upon the language of the Utah Supreme Court in the MCI Telecommunications v. Public Service Commission, 840 P.2d 765 (Utah 1992), and the policy behind the rule against retroactive ratemaking in the utility misconduct exception as stated by the Court in MCI, U S West's Motion is denied.

This case stems from a challenge to the rates charged by U S West's predecessor in interest pursuant to a 1985 general rate proceeding. After rates were established in the 1985 case, a number of events occurred which prompted various customers and ratepayers to petition the Commission for a review of the rates and a refund of excess earnings by U S West during the period of the 1985 rate order. The Commission denied the review and any relief on the basis that such would constitute retroactive ratemaking which is prohibited. That ruling was appealed to the Utah Supreme Court. The Court in MCI reversed, holding that "utility misconduct" constituted an exception to the rule against retroactive ratemaking and directed the Commission to hold a factual hearing on that issue.

As stated by the Court:

A utility that misleads or fails to disclose information pertinent to whether a ratemaking proceeding should be initiated or to the proper resolution of such a proceeding cannot invoke the rule against retroactive ratemaking to avoid refunding rates improperly collected. The rule against retroactive ratemaking was not intended to permit a utility to subvert the integrity of ratemaking proceedings. If a utility misleads the Commission or the Division by withholding relevant ratemaking information, the rates fixed by the Commission cannot be based on reasonable projections of the utility's revenues and expenses. The rule against retroactive ratemaking was designed to ensure the integrity of the ratemaking process, not to shelter a utility's improperly obtained revenues. (Citation omitted).

The Court did not, by its terms, indicate or require that the misleading or the failing to disclose information needed to be done with an intent to mislead the regulators. Further, in its elucidation of the lack of findings made by the Commission, and the findings that are required to be made on remand, the Court not only did not reference any such intent but appeared to assume that such was not needed. In addressing the lack of findings, the Court stated, MCI, 840 P.2d at 775:

That finding, however, does not address whether U S West acted forthrightly and made timely and accurate information available to the Division, the Commission, and the Committee so that each could accurately analyze U S West's actual and projected earnings.

In referencing the minimum findings required on remand, the Court indicated, as applicable here, 840 P.2d at 774:

(5) whether U S West was cooperative, accurate, and forthright in the information provided and representations made to the Committee, the Division, and the Commission.

The ratemaking process is designed to allow the Commission to set rates that are reasonable and just. The Court in MCI quoted from Utah Department of Business Regulation v. Public Service Commission, 614 P.2d 1242 (Utah 1980), stating, 840 P.2d at 773:

A state regulatory commission, whose powers have been invoked to fix a reasonable rate, is entitled to know and before it can act advisably must be informed of all relevant facts.

Since those rates must be based upon an analysis of the utility's revenues and expenses, a utility has the duty to provide necessary information pertinent to what the rate should be. See also Salt Lake Citizens Congress v. Mountain States Telephone and Telegraph Company, 846 P.2d 1245 (Utah 1992). Based upon the recognition of such a duty, it is unlikely that the Court would also require, in addition to a failure to comply with that duty, an intent to mislead the regulators, especially in the areas so affected with the public interest as the setting of utility rates where a monopoly has been granted.

The general ratemaking process is to set rates prospectively. An analysis of the utility's revenues and expenses is conducted, an appropriate rate of return on equity is established, and rates are set to allow the utility the opportunity to earn that rate of return. The rule against retroactive ratemaking is designed to ensure the integrity of that system and to provide utilities with the incentive to operate efficiently - additional earnings due to utility efficiencies are allowed to be retained by the utility. Exceptions to the rule against retroactive ratemaking exist where there is a breakdown in that system, such that this rationale does not apply, and where otherwise there would be a subversion or undermining of the purposes for the rule.

Thus, retroactive ratemaking is allowed when there are extraordinary and unforeseeable expenses or revenues. This is because by definition the extraordinary and unforeseeable expenses or revenues cannot be taken into account in the ratemaking process and "justice and equity require that adjustments be made for unforeseen windfalls or disasters not caused by the utility." MCI, 840 P.2d at 772. Retroactive ratemaking is also allowed when there is utility misconduct. As indicated in the quote in MCI above, when the Commission is misled or does not have the relevant ratemaking information because of actions by the utility, the rates it fixes are not based upon reasonable estimates of the utility's revenues and expenses and there has thus been a breakdown in the process, justifying the exception to the rule against retroactive ratemaking. That express reason by the Court for the utility misconduct exception is not dependent upon whether there is an intent to mislead by the utility. If the information that is provided by the utility misleads the

Commission, or if there is the withholding of relevant ratemaking information, whether intended by the utility to mislead or subvert the process or not, it has the effect of making rates not based upon reasonable projections of the utility's revenues and expenses and calls into question the integrity of the ratemaking process. The Court therefore held that should the conduct by the utility occur, the utility "cannot invoke the rule against retroactive ratemaking to avoid refunding rates improperly collected".

Therefore, based upon the Court's decision in MCI, including its language and its statement of the purposes for the utility misconduct exception to the rule against retroactive ratemaking, U S West's motion to require proof of an intent to mislead by the utility is denied.

IT IS SO ORDERED.

DATED at Salt Lake City, Utah, this 31st day of August, 1998.

/s/ Stephen F. Mecham, Chairman

(SEAL) /s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard

Commission Secretary