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MCI Telecommunication Corp. v. Public Service
Commission of Utah; Brian T. Stewart, Chariman,
James M. Byrne, Commissioner, Steven F. Mechan,
Commissioner : Reply Brief of Petitioner MCI
Telecommunication Corp.

Utah Supreme Court

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David T. Stott; Counsel for Respondent, Utah Public Service Commission; Gregory B. Monson, C. Scott Brown; Watkiss and Campbell; Ted D. Smith; U.S. West Communications; Counsel for Intervenor, U.S. West Communications, Inc.

Stanley K. Stoll; Snow, Christensen and Martineau; Counsel for Petitioner, Tel-America; Randy L. Dryer, Jim Butler; Parsons, Behle and Latimer; Attorneys for Petitioner, MCI Telecommunication Corp.

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BRIEF

CKET NO. **890251** IN THE SUPREME COURT OF THE STATE OF UTAH

MCI TELECOMMUNICATION CORP.

Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH; BRIAN T. STEWART,
CHAIRMAN, JAMES M. BYRNE,
COMMISSIONER, STEVEN F. MECHAM,
COMMISSIONER,

Respondents.

TEL-AMERICA OF SALT LAKE CITY,
INC.,

Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH; BRIAN T. STEWART,
CHAIRMAN, JAMES M. BYRNE,
COMMISSIONER, STEVEN F. MECHAM,
COMMISSIONER,

Respondents.

Case No. 890251

(Consolidated with
Case No. 890252)

Priority No. 10

REPLY BRIEF OF PETITIONER
MCI TELECOMMUNICATION CORP.

ON PETITION FOR REVIEW FROM THE
UTAH PUBLIC SERVICE COMMISSION

DAVID T. STOTT
Heber M. Wells Bldg., Rm 400
Salt Lake City, UT 84145
Counsel for Respondent, Utah
Public Service Commission

GREGORY B. MONSON
C. SCOTT BROWN
WATKISS & CAMPBELL
310 South Main, Suite 1200
Salt Lake City, UT 84101

TED D. SMITH
U.S. WEST COMMUNICATIONS
250 Bell Plaza, Room 1610
Salt Lake City, UT 84125
Counsel for Intervenor, U.S.
West Communications, Inc.

STANLEY K. STOLL
SNOW, CHRISTENSEN & MARTINEAU
P.O. Box 45000
10 Exchange Place
Salt Lake City, UT 84145
Counsel for Petitioner,
Tel-America

RANDY L. DRYER (0924)
JIM BUTLER (5046)
PARSONS, BEHLE & LATIMER
185 South State St.,
Suite 700
P.O. Box 11898
Salt Lake City, UT
84147-0898
Attorneys for Petitioner, MCI
Telecommunication Corp.

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LIST OF PARTIES

The principal parties to the proceeding below included the Division of Public Utilities, U.S. West Communications, Inc., Tel America of Salt Lake City, Inc. and MCI Telecommunication Corp.

The Request for Agency Action was also signed by the following individuals, organizations and companies who are, pursuant to the requirements of Utah Code Ann. § 54-7-9, consumers of telephone service:

Senator Frances Farley
Senator Jack Bangerter
Senator Omar Bunnell
Senator Wilford Black
Senator Darrell Renstrom
Representative Kim Burningham
Representative Stan Smedley
Committee of Consumer
Services
Salt Lake Citizens' Congress
Utah Telephone Answering
Services Association
Coryell Answering Service
Evan Twede Advertising
Salt Lake Hilton
M & G Uintah Freightway
Ken-Son, Inc.
PST Vans, Inc.
Amfac Electrical Supply
G T Sales
Amtel Corporation
Access Long Distance
David Irvine

Georgia Peterson
Joe Duke-Rosati
Barbara Toomer
Bill Walsh
Jerry Dyer
Bruce Lybbert
Harold Paulos
Robert Benson
Sherry L. Hansen
Donald W. Mortenson
Michael L. Meyers
Patricia J. Bonny
Chad Bauer
James Hal Chaney
Ann L. Lazerus
Monica E. Gornik
Louis C. Kunde
Lawrence S. Fowers
Ronald Haggin
David Haggin
Mark Barandermeyer
Pat Coryell
Ron Turpin

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Summary of Argument

MCI has requested the Court remand this action to the Utah Public Service Commission (the "Commission") for an investigation into the reasonableness of the rates charged by Mountain Bell and to order a refund of those charges in excess of a just and reasonable rate pursuant to Utah Code Ann. § 54-7-20.

Initially, the Commission, the Utah Division of Public Utilities and Mountain Bell argue¹ that MCI's claim that the Commission should investigate Mountain Bell's conduct with regard to the financial impact of the Tax Reform Act of 1986 ("86 Tax Act") is barred because it was not raised on rehearing before the Commission. MCI demonstrates that that argument is without merit. The claim was raised with the Commission and is properly before the Court.

Mountain Bell also raises Constitutional objections to the claim for reparations. MCI demonstrates that, under the applicable test for Legislative action reaching past conduct, Mountain Bell has no due process claim.

On the major issue before the Court, Mountain Bell presents the same arguments that the Commission relied on to

¹ MCI will refer to the arguments made in the Brief of Respondents Public Service Commission of Utah, Division of Public Utilities and the Mountain States Telephone and Telegraph Company as those of "Mountain Bell."

reject the Request for Agency Action. Specifically, Mountain Bell argues that the rule against retroactive ratemaking, as stated in Utah Dep't of Bus. Reg. v. Public Serv. Comm'n, 720 P.2d 420 (Utah 1986) bars any order of reparations for unjust or unreasonable rates. MCI does not dispute that the rule against retroactive ratemaking has been adopted in Utah, but points to specific statutory and judicial exceptions to the rule that are applicable in these circumstances.

Utah Code Ann. § 54-7-20 creates an exception to the rule where the Commission determines that a utility has charged an unjust or unreasonable rate. Mountain Bell's argument that the Court should ignore the plain language of the statute is not consistent with applicable rules of statutory construction or a common sense application of the rule against retroactive ratemaking. Contrary to Mountain Bell's argument, American Salt Co. v. W.S. Hatch Co., 748 P.2d 1060 (Utah 1987) does not require that the Request for Agency Action be denied.

Similarly, there is a commonly recognized exception to the rule against retroactive ratemaking where significant utility profits or losses result from extraordinary and unforeseen events. This exception has been applied to allow utilities to recover unforeseen tax expenses and is equally applicable to the corporate tax cut enacted in 1986.

ARGUMENT

I. Standard of Review - The Commission's Legal Interpretation of Decisions by the Utah Supreme Court and Other Courts is Entitled to No Deference.

MCI concedes that this Court has adopted an "intermediate" standard of review for Commission conclusions on mixed questions of law and fact and upon interpretations of the operative provisions of statutes the Commission is empowered to administer. Mountain States Tel. & Tel. v. Public Serv. Comm'n, 754 P.2d 928, 930 (Utah 1988).² The Commission's decision here, and the legal arguments of the parties below, however, indicate that the heart of this appeal--the scope of the rule against retroactive ratemaking in Utah--goes beyond a simple interpretation of Utah's utility statutes.

² Apparently, however, at least some of the standards cited in Mountain States are no longer applicable. In Grace Drilling v. Bd. of Review, 776 P.2d 63, 67 (Utah Ct. App. 1989), the Court of Appeals held that "the Supreme Court's landmark pronouncements concerning judicial review of administrative proceedings in Utah Dep't of Admin. Servs. v. Public Serv. Comm'n, 658 P.2d 601, 607-12 (Utah 1983)" have been superseded by the provisions of the Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-16. See Williams v. Mountain States Tel. & Tel. Co., 763 P.2d 796, 800 n.1 (Utah 1988) (Durham, J., dissenting). Under the Administrative Procedures Act, an appellate court may grant relief if "the agency has erroneously interpreted or applied the law," or if "the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court." Id. § 63-46b-16(d) & (g). Cf. Pro-Benefit Staffing Inc. v. Bd. of Review, 775 P.2d 439, 442 (Ut. Ct. App. 1989) (intermediate standard of review applies to "mixed questions" of law and fact).

While the rule against retroactive ratemaking may arguably be based in statute, the memoranda filed with the Commission by the parties and the briefs filed with the Court demonstrate that the application of the rule (and potential exceptions) cannot be determined by reference to Utah's utility statutes alone, but must also include an analysis of common law developed by various courts applying and interpreting the rule.³ Moreover, the Commission rejected the Request for Agency Action by relying exclusively on this Court's decision in Utah Dep't of Bus. Reg. v. Public Serv. Comm'n, 720 P.2d 420 (Utah 1986) (the "EBA Case"). In establishing standards of review for Commission decisions, this Court has not expressed a willingness to defer to the Commission's interpretation of common law. Finally, deference to the Commission's decisions in this context is not required to achieve the purpose of the intermediate standard of review since interpretation of the common law associated with the rule against retroactive ratemaking does not depend on the "technical expertise or more extensive experience" of the Commission. See Utah Dep't of Admin. Serv. v. Public Serv. Comm'n, 658 P.2d 601, 611 (Utah 1983).

³ Mountain Bell has even raised a Constitutional question regarding application of the rule against retroactive ratemaking. See Mountain Bell Brief, at 28.

MCI further submits that the standard of review is not determinative of this appeal, for under either standard, the Commission's decision must be reversed. The Commission's order denying the Request for Agency Action is directly at odds with the plain language of Utah Code Ann. § 54-7-20 and is therefore outside the "tolerable limits of reason." Mountain States, 754 P.2d at 930.

II. All Issues Before the Commission Are Part of This Appeal and Are Properly Before the Court.

Mountain Bell argues that the question of Mountain Bell's actions to conceal the rate impact of the 86 Tax Act cannot be considered on appeal because it was not raised by the Resellers on rehearing before the Commission. Mountain Bell Brief, at 20. Mountain Bell is simply incorrect. In seeking rehearing of the Commission's order, Petitioner Tel-America raised the question of Mountain Bell's conduct in at least two instances. See Tel-America Petition for Rehearing, at 4 (The Commission's Order "rewards Mountain Bell for failing to immediately bring the existence of its overearnings to the attention of the Commission in order to rectify the situation.") (R. at 688); Id. at 7 ("Mountain Bell should be required to give up that which it should not have collected in the first instance and would not have collected if Mountain Bell had immediately brought the matter to the Commission's

attention.") (R. at 691). MCI joined in, and incorporated by reference, the arguments of Tel-America. See Petition of MCI Telecommunication Corp. for Review or Rehearing (R. at 695).⁴

In reality, MCI's request that this action be remanded for an investigation of Mountain Bell's rates and conduct is simply a request that the Commission be ordered to comply with Utah Code Ann. § 54-7-20. Such a request was clearly reflected in the petitions for rehearing of both parties. (R. at 690, 695).⁵ If this Court determines that the Commission has the authority to order reparations for unjust or unreasonable rates and orders the Commission to comply with the statute, then the Commission must investigate all aspects of the Request for Agency Action, including Mountain Bell's conduct.

⁴ Mountain Bell's claim that MCI and Tel-America did not raise the question of Mountain Bell's conduct before the Commission is erroneous. See e.g., Reply Memorandum of MCI In Support of Its Request for Agency Action, at 1-3, 18. (R. at 653-55, 670).

⁵ In the decisions cited by Mountain Bell, Hi-Country Homeowners Ass'n v. Public Serv. Comm'n, 779 P.2d 682 (Utah 1989), Williams v. Public Serv. Comm'n, 754 P.2d 41 (Utah 1988), and Utah Dep't of Bus. Reg. v. Public Serv. Comm'n, 602 P.2d 696 (Utah 1979), petitioners failed to comply with the requirement of Utah Code Ann. § 54-7-15(2) and filed no petition for rehearing with the Commission. In contrast, both MCI and Tel-America filed timely petitions for rehearing which asked the Commission to reconsider its decisions on all aspects of the Request for Agency Action. Accordingly, all issues before the Commission, including Mountain Bell's conduct, are properly before the Court.

III. Granting Reparations to Mountain Bell Ratepayers Will Not Violate the Rule Against Retroactive Ratemaking.

MCI does not dispute that most jurisdictions have adopted, either by statute or judicial decision, the rule against retroactive ratemaking. Nor does MCI dispute that Utah Code Ann. § 54-4-4(1) establishes, as a general principle, that utility rates must be set prospectively, or that the EBA Case recognized that the rule against retroactive ratemaking is applicable in Utah. MCI's argument is simply that the rule against retroactive ratemaking is not immutable, but is subject to a broad variety of statutory and judicial exceptions.⁶ MCI asks only that this Court apply the rule, as have many other courts, with "equity and common sense." MGTC, Inc. v. Public Serv. Comm'n, 735 P.2d 103, 107 (Wyo. 1987) (quoting Roberts v. Narragansett Elec. Co., 470 A.2d 215, 217 (R.I. 1984)).

In particular, Utah Code Ann. § 54-7-20 establishes a statutory exception to the rule against retroactive ratemaking that allows the Commission to order reparations after an investigation and finding that unjust, unreasonable or discriminatory rates have been charged. In the

⁶ Mountain Bell recently made a similar argument before the Commission in its memorandum in opposition to Tel-America's motion for immediate refund in Case No. 83-999-11, when it stated that "the rule against retroactive ratemaking has equitable exceptions and is not a fast, intractable rule." See R. at 662.

alternative, the circumstances of this Request for Agency Action justify application of one of the judicially created exceptions to the rule against retroactive ratemaking. The Commission prematurely determined, without an investigation, that no exceptions to the general rule were applicable.

A. An Order of Reparations Would Not Violate Mountain Bell's Due Process Rights or Constitute a Confiscatory Taking.

Mountain Bell argues that the rule against retroactive ratemaking is grounded in constitutional due process considerations. While there is typically a due process concern with legislative or judicial actions that upset economic expectations, Mountain Bell's argument significantly overstates the Constitutional claim by omitting the Constitutional test for legislative action. Legislative acts meet due process concerns where the retroactive action is justified by a rational legislative purpose.

It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. [L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).
See also Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,
467 U.S. 717, 730 (1984) (Due process is satisfied "simply by
showing that the retroactive application of the legislation is
justified by a rational legislative purpose.").⁷

The Utah Legislature has authorized the Commission
to order reparations where a utility has charged unjust,
unreasonable or discriminatory rates. Utah Code Ann.
§ 54-7-20. The purpose of that provision is to provide
ratepayers and the Commission a mechanism to enforce the
general requirement of Utah's utility code that all utility
charges must be just and reasonable. Utah Code Ann. § 54-3-1.
Moreover, since Utah law declares that "[e]very unjust or
unreasonable charge made, demanded or received . . . is hereby
prohibited and declared unlawful," id., Mountain Bell can
hardly be heard to claim a vested interest in the proceeds of
an unlawful rate. No utility has a vested right to exceed its
authorized rate of return or to charge excessive rates. See
In re Narragansett, 57 Pub. Util. Rep. 4th (PUR) 549, 559
(R.I. Pub. Util. Comm. 1984).

⁷ For example, in In re Central Vt. Public Serv. Corp., 144 Vt. 46, 473
A.2d 1155 (1984), cited by Mountain Bell Brief, at 29, the Court recited
the due process concerns raised by Mountain Bell, but held only that
"unless authorized by statute, a rate that requires consumers to pay for
past deficits of a utility or that requires a utility to refund to
consumers a portion of its previously earned profits constitutes illegal
retroactive ratemaking." Id. at 1160 (emphasis added).

B. The Commission May Order a Refund of Earnings in Excess of the Applicable Rate of Return Without Violating the Rule Against Retroactive Ratemaking.

In its opening brief, MCI argued that, in addition to the authority to order reparations under Utah Code Ann. § 54-7-20, the Commission has the authority to enforce its 1985 general rate order and limit Mountain Bell's return on equity to 14.2%. Opening Brief of Petitioner MCI Telecommunication Corp., at 46-49 ("MCI Opening Brief"). Mountain Bell responds that such an order would violate the rule against retroactive ratemaking and attempts to distinguish the authority relied on by MCI, Narraqansett Elec. Co. v. Burke, 505 A.2d 1147 (R.I. 1986).

First, Mountain Bell argues that the Rhode Island ratemaking statute considered in Narraqansett lacks a provision stating that rates will be "thereafter" in force. Mountain Bell Brief, at 37. The distinction is meaningless, however, as the Rhode Island Supreme Court has adopted the rule against retroactive ratemaking even in the absence of that statutory phrase. See New England Tel. & Tel. Co. v. Public Util. Comm'n, 116 R.I. 356, 358 A.2d 1, 20 (1976) ("A fundamental rule of ratemaking is that rates are exclusively prospective in nature."). Rhode Island, like Utah, recognizes the rule against retroactive ratemaking, but has determined that enforcement of a rate of return specified in a prior rate order does not violate the rule.

Second, Mountain Bell points to Rhode Island's "liberal" refund statute. Mountain Bell Brief, at 37. A careful analysis of the Rhode Island refund statute, however, demonstrates that it is not dramatically different from Utah's reparations statute. The Rhode Island statute provides as follows:

The division shall have the power, when deemed by it necessary to provide remedial relief from unjust, unreasonable or discriminatory acts, or from any matter, act or thing done by a public utility which [is] declared to be unlawful, to order the public utility to make restitution to any party or parties, individually or as a class, injured by said prohibited or unlawful acts, by way of a cash refund, billing credit or rate adjustment, or any other form of relief which the division may devise to do equity to the parties.

R.I. Gen. Laws § 39-3-13.1 (1984). In other words, Rhode Island utility regulators may order reparations when a utility charges an unjust, unreasonable or discriminatory rate, or engages in unlawful or prohibited behavior. The Rhode Island statute provides more discretion in fashioning a remedy, but Utah law provides the Commission with the same substantive responsibility and power.

Finally, Mountain Bell claims that Rhode Island "is a national anomaly in recognizing a wide variety of exceptions to the rule against retroactive ratemaking." Mountain Bell Brief, at 37. If Mountain Bell is saying that Rhode Island has the most decisions and the most developed reasoning on

exceptions to the rule against retroactive ratemaking, MCI agrees. But the exception for extraordinary and unforeseen events is not limited to Rhode Island. See MCI Opening Brief, at 38-41. Such an exception has been recognized in many jurisdictions, including Iowa, Mississippi, Vermont,⁸ and Wisconsin.⁹ See also Narragansett Elec. Co. v. Burke, 415 A.2d 177, 179-80 (R.I. 1980) (citing "exception" cases from Connecticut, Delaware, Florida, Kansas, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York and Pennsylvania). In fact, the vast majority of jurisdictions that have considered an exception for extraordinary and unforeseen circumstances have adopted such an exception. Far from being an anomaly, Rhode Island is squarely in the mainstream on this question. The Utah Supreme Court has not yet considered exceptions to the rule against retroactive ratemaking, and MCI believes that the better reasoned

⁸ The Vermont decision, In re Green Mountain Power Corp., 147 Vt. 509, 519 A.2d 595, 597-99 (1986) is particularly noteworthy because the Vermont Supreme Court has adopted the rule against retroactive ratemaking in very strong terms. See In re Central Vermont Public Serv. Corp., 144 Vt. 46, 473 A.2d 1155 (1984) (cited by Mountain Bell Brief, at 29). Yet the Vermont court later recognized the necessity of an exception in appropriate circumstances. See MCI Opening Brief, at 38 & n.20.

⁹ As in Vermont, courts in Wisconsin have adopted the rule against retroactive ratemaking, see Kimberly Clark Corp. v. Public Serv. Comm'n, 110 Wis.2d 455, 329 N.W.2d 143 (1983) (cited by Mountain Bell Brief, at 36 n.25) and the exception for extraordinary and unforeseen events. See Wisconsin's Environmental Decade, Inc. v. Public Serv. Comm'n, 98 Wis.2d 682, 298 N.W.2d 205, 212 (Ct. App. 1980). See MCI Opening Brief, at 37.

authority should persuade the Court to adopt an exception in this case.

C. The Commission May Order Reparations of Unjust or Unreasonable Rates Without Violating the Rule Against Retroactive Ratemaking.

Mountain Bell argues that Utah's reparations statute is inapplicable to the circumstances of this case. Mountain Bell Brief, at 38-48. Mountain Bell's primary argument is that the reparations provisions of section 54-7-20 cannot be reconciled with the general language of section 54-4-4 that utility rates are "to be thereafter observed and in force." Mountain Bell Brief, at 47-48.¹⁰ Mountain Bell's argument is contrary to the established rules of statutory construction cited by both parties. See MCI Opening Brief, at 28, n.14 (citing Durfey v. Bd. of Ed. of Wayne County, 604 P.2d 480, 484 (Utah 1979)) and Mountain Bell Brief, at 48 (citing In re Utah Savings and Loan Ass'n, 21 Utah 2d 169, 442 P.2d 929 (1968)).

As MCI explained in its opening brief, section 54-4-4 establishes a general rule proscribing retroactive

¹⁰ The Court should also carefully consider the argument made by Mountain Bell at p. 48, n.32. Mountain Bell urges the Court to dismiss Tel-America's unjust enrichment claim because "the common law right to restitution has been subsumed by reparations or stay pending appeal statutes." Id. According to Mountain Bell, "Utah has both types of statutes which more than adequately protect rate payers in appropriate circumstances." Id. At the same time, however, Mountain Bell is urging the Court to effectively read the reparations statute out of existence.

ratemaking. In section 54-7-20, the Legislature adopted certain express exceptions to that general rule and procedures whereby ratepayers could invoke those exceptions. Pursuant to those provisions, a ratepayer may request that the Commission investigate utility rates that are alleged to be (1) in excess of the rates on file with the Commission, or (2) unjust, unreasonable or discriminatory. If, after investigation, the Commission finds that those allegations are substantiated, it may order reparations. The second subsection of section 54-7-20 provides a bifurcated statute of limitations: complaints concerning charges in excess of approved rates must be brought within two years, while ratepayers have only one year to file a complaint concerning unjust, unreasonable or discriminatory rates. The reconciliation of the statutory language that Mountain Bell urges would render both the reparations provision and the statute of limitations meaningless, contrary to the Court's direction in Durfey, 604 P.2d at 484. In contrast, the reading that MCI urges--that reparations for unreasonable rates are simply an exception to the general rule of prospective ratemaking--comports fully with the Court's direction in Utah Savings and Loan Ass'n. MCI's reading would "giv[e each provision] its intended effect insofar as that can be accomplished without nullifying the

other." Utah Savings and Loan Ass'n, 442 P.2d at 931-32 (footnote omitted).¹¹

Mountain Bell also relies on American Salt Co. v. W.S. Hatch Co., 748 P.2d 1060 (Utah 1987) to support its argument that the Commission has no authority to grant reparations where a utility has charged unjust or unreasonable rates. The American Salt case and this case come to the Court in very different postures. In American Salt, a complaint was filed with the Commission, the Commission investigated the complaint, concluded that the rate charged was just and reasonable and refused to order reparations.¹² In the present case, MCI and others requested that the Commission investigate the reasonableness of Mountain Bell's rates in light of the 86

¹¹ The Court's footnote omitted by Mountain Bell's quotation of Utah Savings and Loan Ass'n is significant. The Court quoted Univ. of Utah v. Richards, 59 P. 96, 97 (Utah 1899): "One act is not to be allowed to defeat another, if by reasonable construction the two can be made to stand together." At the risk of restating the obvious one more time, the only interpretation of Utah Code Ann. § 54-7-20 that allows both provisions in issue to "stand together" is the one urged by MCI.

¹² The Commission's order included two separate findings. First, the Commission concluded that the filed rate was just and reasonable. Order at 3, ¶4. Second, in response to the complaint, the Commission made a specific conclusion of law that the rate was just and reasonable as applied. Order at 5, ¶4. This process may also be explained by the Court's conclusion that whether "a general tariff is just and reasonable under title 54 turns on many factors, not on the facts surrounding a given shipment viewed in isolation." American Salt, 748 P.2d at 1063. Thus, American Salt's claim that the tariff was unfair when applied to the specific shipment at issue was not sufficient to demonstrate that the entire tariff was unjust or unreasonable. In contrast, MCI and Tel-America claim that the rates charged by Mountain Bell after the 86 Tax Act were unreasonable in all circumstances.

Tax Act. The Commission denied that request, concluding that it had no authority to order reparations, and made no explicit finding concerning Mountain Bell's rates.¹³

MCI argues that American Salt does not govern the resolution of this appeal. Nevertheless, there is strong language in the American Salt decision regarding reparations and prospective ratemaking. If the Court is persuaded by Mountain Bell that American Salt is controlling, MCI urges the Court to carefully reconsider that decision. Two specific concerns should be kept in mind when evaluating the impact of American Salt.

First, the reading of American Salt urged by Mountain Bell would read part of the reparations statute out of existence.

Second, in American Salt, the Court overlooked the 1929 amendment that expanded the statute to include reparations for "unjust or unreasonable" rates. The Court relied on Denver & Rio Grande Railroad v. Public Util. Comm'n, 73 Utah 139, 272 P. 939 (1928). As the Court explained,

In Denver & Rio Grande Railroad v. Public Utilities Commission, the Public Utilities Commission, relying on language substantively identical to section 54-7-20, ordered the petitioner/utility to pay reparations to a shipper. . . . [T]he

¹³ In fact, Mountain Bell concedes that the Commission "implicitly" found that the existing rates were unjust and unreasonable when it approved rate reductions and ordered new rates. Mountain Bell Brief, at 46.

Commission found the petitioner's higher tariff unreasonable and unjust and ordered the petitioner to make reparations. In reversing that order, this Court stated:

We think it plain from the language of the statute that the power of the commission to order reparations is limited to cases where charges have been made in excess of the schedules, rates, and tariffs on file with the commission, or discrimination made under such schedules. That was the view [previously] taken by the commission itself, and approved by this court.

American Salt, 748 P.2d at 1064 (footnotes omitted). In 1929, the year after Denver & Rio Grande was decided, the Legislature amended the reparations statute to provide for reparations where the public utility "has charged and unjust, unreasonable amount against the complainant." 1929 Utah Laws Ch. 43 (Attached as Exhibit A). While legislative intent is impossible to divine after sixty years, the amendment supports an argument that the Legislature added reparations for unjust or unreasonable rates to the statute in response to the ruling of Denver & Rio Grande.¹⁴ In any event, the amendment to the statute demonstrates that the Court's statement in American

¹⁴ The Legislature left the language of subsection one virtually unchanged apart from adding "unjust" and "unreasonable" charges to the list of those that could justify an order of reparations. Cf. 1917 Compiled Laws of Utah § 4838 (quoted in Denver & Rio Grande, 272 P. at 940) with 1929 Utah Laws Ch. 43.

Salt--that Denver & Rio Grande considered language "substantively identical" to section 54-7-20--was incorrect. The language is materially different with respect to the specific question at issue in this appeal: whether the statute authorizes reparations for unjust or unreasonable rates.

Mountain Bell also argues that any rates approved by the Commission are, by definition, just and reasonable and therefore not subject to reparations.¹⁵ Mountain Bell Brief, at 41-44. MCI agrees that Commission-approved rates are presumed to be just and reasonable. Nonetheless, the presumption may be overcome by a suitable factual showing, a showing Petitioners never were allowed to present because of the Commission's erroneous application of the EBA Case.

¹⁵ Mountain Bell claims that MCI assumes, without authority, that the rates charged by Mountain Bell were unjust and unreasonable. Mountain Bell Brief, at 41. Mountain Bell's statement is incorrect. MCI has demonstrated at length, with numerous citations to authority, that rates based on a 46% corporate income tax rate, when in fact the tax rate was only 34%, were per se unreasonable. MCI Opening Brief, at 22-26; see, e.g., Re Interstate Power Co., 81 Pub. Util. Rep. 4th (PUR) 471, 489 (Iowa Util. Bd. 1987) ("Failure to reflect the Congressionally determined tax rate yields an unreasonable result. The unreasonable result translates into unjust and unreasonable rates."). Mountain Bell failed to squarely address this argument or the decisions cited by MCI.

While Mountain Bell continues to resist this Request for Agency Action, ratepayers in other states continue to benefit from rate reductions and refunds. Recent decisions in Michigan and North Carolina underscore the unreasonableness of Mountain Bell's position. See Consumer's Power Co. v. Public Serv. Comm'n, 181 Mich. App. 2d 261, 448 N.W.2d 806, 808-810 (1989) (approving rate reductions and refunds); Util. Comm. v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118, 127 (1990) (approving rate reductions and refunds).

Finally, Mountain Bell urges that the Court adopt a restrictive reading of the terms "unjust or unreasonable." Relying on Cheltenham & Abington Sewage Co. v. Pa. Public Util. Comm'n, 344 Pa. 366, 25 A.2d 334, cert. denied, 317 U.S. 588 (1942), Mountain Bell argues that the reparations statute only applies if a rate "has been approved previously by the commission in a final order but has later been found, after hearing, to be unjust and unreasonable." Mountain Bell Brief, at 46. It is apparent from Cheltenham and Mountain Bell's argument that this reading of "unjust or unreasonable" has been superseded by Utah's stay pending appeal statute, Utah Code Ann. § 54-7-17.¹⁶

The cases cited by Mountain Bell demonstrate only that the rule against retroactive ratemaking may prohibit a regulatory commission from arbitrarily changing its mind as to what is "reasonable." For example, the Commission would be prohibited from making a retroactive determination that 13.0%, rather than 14.2% should have been the rate of return for

¹⁶ Similarly, neither State ex rel. Boynton v. Public Serv. Comm'n, 135 Kan. 491, 11 P.2d 999 (1932) nor State ex rel. Standard Oil Co. v. Dep't of Public Works, 185 Wash. 235, 53 P.2d 318 (1936) (cited by Mountain Bell Brief, at 46-47) require a narrow reading of section 54-7-20. In Boynton, the focus of the decision was on the Constitutional implications of a reparations statute. These arguments have been dealt with supra at 8-9. In Standard Oil, the court addressed a question of timing that is dealt with explicitly in Utah Code Ann. § 54-7-20(2) which provides a brief one-year statute of limitations for claims of reparations for unjust, unreasonable or discriminatory charges.

Mountain Bell since 1985. But the rule does not prohibit the Commission from taking notice, and acting on, a fundamental and significant change in economic circumstances, e.g., a dramatic cut in federal taxes. The seemingly contradictory authority cited by Mountain Bell and MCI can be reconciled around this general principle. Where previously approved rates have been rendered unreasonable by a dramatic and unexpected change in circumstances, courts and commissions have consistently found a path around the rule against retroactive ratemaking whether by statute, judicial exception or simply characterizing their actions as "not ratemaking."

D. The Commission May Order Reparations Where Significant Utility Profits or Losses Result From "Extraordinary and Unforeseen" Events.

Mountain Bell urges that the exception for extraordinary and unforeseen events is not applicable, relying primarily on the argument that the 86 Tax Act cannot be characterized as an unforeseen event.¹⁷ Mountain Bell fails to respond to the authority cited by Mountain Bell which indicated that the dramatic tax cut was precisely the kind of "unforeseen" event for which the exception was created. MCI

¹⁷ Mountain Bell also argues that only a "handful" of jurisdictions have adopted the exception. Mountain Bell Brief, at 49. MCI has demonstrated that the exception has met with widespread approval. MCI Opening Brief, at 36-41. More significantly, Mountain Bell has failed to identify a single jurisdiction which has considered the exception and then flatly rejected it.

Opening Brief, at 38-41; see Carolina Power & Light Co. v. FERC, 860 F.2d 1097, 1102 (D.C. Cir. 1988) (tax cut was "only marginally more foreseeable than an act of God"). Nor does Mountain Bell respond to the decisions cited by MCI which have applied the exception to allow recovery of tax increases and unexpected fees. MCI Opening Brief, at 38-39.

MCI has demonstrated at length that it is unreasonable to allow Mountain Bell to collect federal taxes at a 46% rate and pay them at 34%. See supra note 15. Mountain Bell is unresponsive, except to argue that any overearnings are the result of "misstep" in the regulatory process and that recovery is barred by the rule against retroactive ratemaking. Mountain Bell concedes the fact of excessive earnings, but claims the Commission is powerless to correct the problem. Mountain Bell's argument proceeds from a mistaken premise. The Company's excessive earnings resulted not from regulatory error (nor from cost savings or management efficiencies) but from a Congressional decision to reduce income taxes. When the Commission set Mountain Bell's rates in 1985, it could not have predicted the tax cut. Thus, the overearnings are the result of an unforeseen event and the decisions considering that exception to the rule against retroactive ratemaking are directly applicable.

Mountain Bell also argues that the responses of other states to the 86 Tax Act are irrelevant because other

states acted prospectively to protect ratepayers. Mountain Bell attempts to dismiss these actions by mischaracterizing their purpose. MCI does not argue that the responses of other states to the 86 Tax Act demonstrate an exception to the rule against retroactive ratemaking. That is amply demonstrated by other authority. Instead, these actions establish two important points. First, they suggest that, in the national regulatory climate of 1986 and 1987, Mountain Bell's position before the Commission that the 86 Tax Act would not materially increase its earnings was disingenuous at best, and, at worst misleading. Second, these decisions confirm that Mountain Bell's rates--based on the 46% tax rate--were inherently unjust and unreasonable.

E. The Rule Against Retroactive Ratemaking Only Applies in General Ratemaking Proceedings.

MCI has demonstrated that the rule against retroactive ratemaking has been applied only when the regulatory authority is engaged in ratemaking. MCI Opening Brief, at 32-36. Mountain Bell does not dispute this principle, but responds by arguing that the fuel adjustment clause cases cited by MCI are distinguishable. Mountain Bell Brief, at 52-54. Mountain Bell's argument is not responsive. The fuel adjustment clauses are simply the most common application of the general principle and the reasoning of those cases is both applicable and instructive. Federal tax expenses, like fuel

costs, are recoverable by the utility. The utility is not entitled to a rate of return on those costs. See Pike County Light & Power v. Public Util. Comm'n, 87 Pa. Cmmwlth. 451, 487 A.2d 118, 120 (1985). Mountain Bell's attempts to distinguish federal tax expenses are unconvincing. Many of the commissions that acted to reduce utility rates based on the 86 Tax Act relied on the reasoning that Mountain Bell urges the Court to reject. See, e.g., Consumers Power Co., 448 N.W.2d at 809 ("The PSC . . . essentially ordered Consumers to refund money collected from its ratepayers which was in excess of what Consumers was going to pay in taxes. The money refunded in reality already belonged to the ratepayers."); Re Hawaiian Elec. Co., 102 Pub. Util. Rep. 4th (PUR) 157, 159 (Hawaii Pub. Util. Comm. 1989) ("There is no dispute that electric rates reflect the income taxes which [the utility] is required to pay and that, thus, it is the ratepayers who ultimately pay such taxes. Any benefit to be derived from the lowering of the income tax rate should, therefore, accrue to the ratepayers."); see also MCI Opening Brief, at 23-25 (citing additional cases).

CONCLUSION

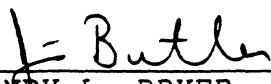
The Commission prematurely rejected the Request for Agency Action and refused to perform the investigation required by Utah law. Petitioners are entitled to an

investigation of their claim that rates charges by Mountain Bell were unjust or unreasonable as a result of the 86 Tax Act.

The rule against retroactive ratemaking is no bar to such an investigation or to an order of reparations. Utah law authorizes reparations for unjust or unreasonable charges; prolonged overcollection of federal taxes is both unjust and unreasonable. Most of the states that have adopted the rule against retroactive ratemaking have also adopted a judicial exception for unforeseen or extraordinary costs and profits. The overearnings the flowed from the 86 Tax Act were both unforeseen and extraordinary. Petitioners are also entitled to an investigation of Mountain Bell's conduct to determine if Mountain Bell should be estopped from relying on the rule in this case.

MCI asks the Court to remand the Request for Agency Action to the Commission with an order to investigate Mountain Bell's earnings and conduct during the relevant period and, if that investigation shows that the rates charged were unjust or unreasonable, to order appropriate reparations.

DATED this 10th day of April, 1990.



RANDY L. DRYER
JIM BUTLER
of and for
PARSONS, BEHLE & LATIMER
185 South State St., Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

Counsel for MCI
Telecommunication Corp.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, pursuant to Rule 26, Rules of the Utah Supreme Court, true and correct copies of the foregoing REPLY BRIEF OF PETITIONER MCI TELECOMMUNICATION CORP. to the following on this 10th day of April, 1990:

Brian T. Stewart, Chairman
James M. Byrne, Commissioner
Steven F. Mecham, Commissioner
Public Service Commission of Utah
Heber M. Wells State Office Building
160 East 400 South
Salt Lake City, Utah 84111

David T. Stott
Heber M. Wells Bldg., Rm 400
Salt Lake City, UT 84145

Ted D. Smith, Esq.
U S West Communications/Mountain Bell
250 Bell Plaza, Room 1610
Salt Lake City, Utah 84145

Gregory B. Monson
C. Scott Brown
WATKISS & CAMPBELL
310 South Main Street
Twelfth Floor
Salt Lake City, Utah 84101

Michael Ginsberg
Assistant Attorney General
Division of Public Utilities
130 State Capitol Building
Salt Lake City, Utah 84114

Sandy Mooy
Assistant Attorney General
Committee of Consumer Services
130 State Capitol Building
Salt Lake City, Utah 84114

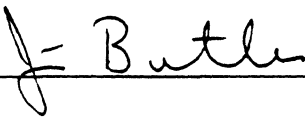
James J. Cassity, Esq.
Kirton, McConkie & Bushnell
Exchange Carriers of Utah
330 South Third East
Salt Lake City, Utah 84111

T. Larry Barnes, Esq.
William P. Eigles, Esq.
AT&T Communications
1875 Lawrence Street
Denver, Colorado 80202

John W. Horsley, Esq.
Continental Telephone Company
Moyle & Draper
15 East First South, Suite 600
Salt Lake City, Utah 84111

Seth Lubin
US Sprint Communications
One Bay Plaza, Suite 580
1350 Old Bayshore Highway
Burlingame, California 94010

Stanley K. Stoll
Snow, Christensen & Martineau
P.O. Box 45000
10 Exchange Place
Salt Lake City, Utah 84145



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Tab A

CHAPTER 43.

Senate Bill No. 47.

Passed March 14, 1929. Approved March 22, 1929. In effect May 14, 1929.)

**COMPLAINTS FOR REPARATIONS BEFORE PUBLIC UTILITIES
COMMISSION.**

An Act to amend Section 4838, Compiled Laws of Utah, 1917, relating to complaints for reparations filed before the Public Utilities Commission.

Be it enacted by the Legislature of the State of Utah:

SECTION 1. Section amended. Section 4838, Compiled Laws of Utah, 1917, is amended to read as follows:

4838. Reparation—courts to enforce order—limitations. 1. When complaint has been made to the commission concerning any rate, fare, toll, rental, or charge for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an amount for such product, commodity, or service in excess of the schedules, rates, and tariffs on file with the commission, or has charged an unjust, unreasonable, or discriminatory amount against the complainant, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection;

2. If the public utility does not comply with the order for the payment of reparation within the time specified in such order, suit may be instituted in any court of competent jurisdiction to recover the same. All complaints concerning unjust, unreasonable, or discriminatory charges shall be filed with the commission within one year, and those concerning charges in excess of the schedules, rates, and tariffs on file with the commission shall be filed with the commission within two years, from the time the cause of action accrues, and the petition for the enforcement of any order shall be filed in the court within one year from the date of the order of the commission. The remedy in this section provided shall be cumulative and in addition to any other remedy or remedies in this title in case of failure of a public utility to obey an order or decision of the commission.

Sec. 2. Not to apply to joint rates. This Act shall not apply to divisions on joint rates and charges between carriers.

Approved March 22, 1929.