

1989

MCI Telecommunications Corp. v. Public Service Commission of Utah; Brian T. Stewart, James M. Byrne, Steven F. Mecham : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *MCI Telecommunications Corp. v. Public Service Commission of Utah*; Brian T. Stewart, James M. Byrne, Steven F. Mecham, No. 890251.00 (Utah Supreme Court, 1989).
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BRIEF

IS9

DOCKET NO.

890252

IN THE SUPREME COURT OF THE STATE OF UTAH

MCI TELECOMMUNICATIONS CORP.

Petitioner and Appellant,

vs.

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

Respondents.

Consolidated Case
Nos. 890251 and
890252

TEL-AMERICA OF SALT LAKE CITY, INC.,

Petitioner and Appellant,

vs.

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JAMES M. BYRNE, COMMISSIONER,
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Respondents.

BRIEF OF APPELLANT,
TEL-AMERICA OF SALT LAKE CITY, INC.

APPEAL FROM THE PUBLIC SERVICE COMMISSION,
STATE OF UTAH

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JURISDICTION AND NATURE OF THE PROCEEDINGS

On or about November 4, 1988, Petitioner, Tel-America of Salt Lake City, Inc. ("Tel-America"), filed with the Public Service Commission of Utah (the "Commission") an Amended Request for Agency Action in Docket No. 88-049-18, requesting that the Commission (a) initiate an investigation into the rate of return realized by U.S. West Communications ("U.S. West"), formerly known as "Mountain Bell", for the calendar years 1987 and 1988; (b) declare U.S. West to be in violation of the Commission's Order in Docket No. 85-049-02 issued December 31, 1985 (the "1985 Order"); and (c) order U.S. West to refund to all Utah ratepayers those monies which the Commission found U.S. West earned in excess of its authorized rate of return for 1987 and 1988 as fixed in Docket No. 85-049-02. (R. at 8-9) On March 30, 1989, the Commission issued its Order (the "March 30, 1989 Order") denying Tel-America's Amended Request for Agency Action (R. at 677-681), and on May 18, 1989, the Commission denied Tel-America's Petition for Review or Rehearing thereon (R. at 703-705). Tel-America's Petition for Review was filed with the clerk of the Utah Supreme Court on June 15, 1989.

The Utah Supreme Court has jurisdiction to determine the issues cited herein pursuant to Utah Code Ann. §§ 54-7-15, -17 and -18, §§ 64-46b-14, -16 and -17 and Rule 14 of the Rules of the Utah Supreme Court.

ISSUES PRESENTED ON APPEAL

1. Whether the Commission has the lawful authority to grant the relief requested by Tel-America in its Amended Request for Agency Action.

2. Whether the Commission erred in denying Tel-America's Amended Request for Agency Action.

3. Whether the Commission erred in ruling that the Utah Supreme Court's decision in Utah Department of Business Regulation v. Public Service Commission, 720 P.2d 420 (Utah 1986) controlled the Commission's decision in this case.

4. Whether the Commission erred when it ruled that the instant circumstances do not fit within any recognized exceptions to the rule that requires ratemaking occur prospectively only.

CONSTITUTIONAL PROVISIONS AND STATUTES WHOSE
INTERPRETATION IS DETERMINATIVE

Utah Code Ann. § 54-3-1:

All charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful. . . . All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.
. . . .

Utah Code Ann. § 54-4-4(1):

Whenever the commission shall find after a hearing that the rates, fares, tolls, rentals, charges or classifications, or any of them demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, . . . rates, fares, tolls, rentals, charges or classifications, . . . are unjust, unreasonable, discriminatory or preferential, or in anywise in violation of any provisions of law, or that such rates, fares, tolls, rentals, charges or classifications are insufficient, the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

Utah Code Ann. § 54-7-20(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 with interest from the date of collection. . . .

STATEMENT OF THE CASE

On November 2, 1988, Tel-America filed its Amended Request for Agency Action in Docket No. 88-049-18. Tel-America requested therein that the Commission (1) initiate an investigation into the rate of return realized by U.S. West for the calendar years 1987 and 1988 and release to the public the

results of this investigation; (2) declare U.S. West to be in violation of the 1985 Order; and (3) order U.S. West to refund to all of Utah ratepayers those monies which the Commission finds U.S. West had earned in excess of its authorized rate of return for 1987 and 1988 as fixed in Docket No. 85-049-02. (R. at 8-9)

Pursuant to the 1985 Order, the Commission found that the allowable rate of return for U.S. West would be 14.2% from and after January 1, 1986. (R. at 810) U.S. West has previously submitted answers to interrogatories that acknowledged that for the calendar years 1987 and 1988 it had exceeded the allowable rate of return proscribed in the 1985 Order. (R. at 896-898, 901-903) The dollar amount by which the rate of return was exceeded is in dispute, however, it appears from evidence introduced in Dockets No. 88-049-18 and 88-049-07 that the amount could be in the range of tens of millions of dollars. (R. at 897)

Tel-America's Amended Request for Agency Action was heard by the Commission on February 24, 1989. The Commission heard arguments on the issue of whether the Commission had the legal authority to grant the relief requested. No evidence was introduced or received by the Commission except that previously submitted in briefs by the parties and in connection with Docket No. 88-049-07.

On March 30, 1989, the Commission issued its written order denying Tel-America's Amended Request for Agency Action. The Commission did find, however, that U.S. West had earned in excess of its authorized rate of return in calendar years 1987 and 1988. (R. at 678.) The Commission further found that one of the reasons for the overearning was the impact upon U.S. West of the Tax Reform Act of 1986. (R. at 678) The Commission concluded, however, that the Utah Supreme Court's decision in Utah Department of Business Regulation, supra, which mandated that ratemaking generally occur prospectively only and precluded the Commission from granting the relief sought by Tel-America. (R. at 679-680) The Commission noted, however, that certain exceptions to the rule against retroactive ratemaking exist but found that the facts of the instant case did not fall within such exceptions without any evidentiary basis upon which to support its conclusion. (R. at 680)

On April 28, 1989, Petitioner filed a Petition for Review or Rehearing requesting a rehearing pursuant to applicable statute. (R. at 684-693) By Commission Order dated May 18, 1989, the Petition for Review or Rehearing was denied. (R. at 703-705) Thereafter, on June 15, 1989, Tel-America filed its Petition for Review with the Utah Supreme Court seeking review of the Commission's March 30, 1989 denial of Petitioner's Amended Request for Agency Action, as well as the Commission's

May 18, 1989 denial of Tel-America's Petition for Review or Rehearing, both in Docket No. 88-049-18. (R. at 708-725) On June 16, 1989, MCI Telecommunications Corporation ("MCI") filed a Petition for Review of the Commission's March 30, 1989 Order denying MCI's Amended Request for Agency Action filed simultaneously with, and in the same form and substance as, Tel-America's Amended Request for Agency Action, as well as the Commission's May 18, 1989 denial of MCI's Petition for Review or Rehearing. (R. at 726-739) On September 15, 1989, MCI and Tel-America's appeals were consolidated as Case No. 890251.

SUMMARY OF ARGUMENTS

1. The Commission erred when it entered its March 30, 1989 Order in ruling that Utah Department of Business Regulation, supra, controlled its action under the instant circumstances. While the Court's decision requires that under the circumstances presented therein ratemaking occur prospectively only, the case has no applicability to the facts in this case.

2. The Commission's 1985 Order established rates which were predicated in part on the Commission's determination that the rate of return specified therein was just and reasonable. The rate of return realized by U.S. West in 1987 and 1988 substantially exceeded that authorized by the Commission in its 1985 Order. The Commission clearly has the authority to enforce

its orders and, therefore, any requirement that U.S. West refund amounts earned in excess of its authorized rate of return would be an enforcement of the Commission's 1985 Order and would not constitute retroactive ratemaking.

3. Assuming, arguendo, that the relief sought by Tel-America constitutes retroactive ratemaking, the Commission erred in denying Tel-America's Amended Request for Agency Action by ruling that the instant circumstances did not fall within the recognized exceptions to the rule against retroactive ratemaking. The Commission and numerous other jurisdictions have recognized exceptions to the so-called "rule against retroactive ratemaking." One exception generally recognized is that of unforeseen and unanticipated events over which the utility has little or no control. That exception to the rule against retroactive ratemaking would apply in the instant matter where changes to the federal tax laws were enacted which resulted in U.S. West rate of return exceeding that proscribed by the Commission, an event which was clearly unforeseen and unanticipated at the time the 1985 Order was issued by the Commission and over which neither U.S. West nor the ratepayers had any control. As such, the authority of the Commission to require U.S. West to refund excess earnings falls within recognize exceptions to the rule against retroactive ratemaking.

4. The Commission has authority to require a refund through the reparations provisions of Utah Code Ann. § 54-7-20. The amounts charged to customers in 1987 and 1988 for telephone services received which resulted in earnings in excess of that amount which the Commission had determined to be just and reasonable were clearly "unjust, unreasonable and discriminatory" against Tel-America and all ratepayers in the State of Utah. Read in conjunction with Utah Code Ann. § 54-3-1 the statutes provide the Commission with the express authority to order the requested refund in reparation of unjust and unreasonable charges previously imposed upon the ratepayers.

5. The Commission erred in denying Tel-America's Amended Request for Agency Action because U.S. West should be estopped from asserting the defense of the rule against retroactive ratemaking to bar the relief sought by Tel-America. Further, the doctrine of unjust enrichment requires that U.S. West refund its excess earnings to Utah ratepayers. U.S. West, as with any other public utility, is entitled to the opportunity to earn a fair return. The Commission by its 1985 Order set the upper limit of what that fair return would be. To the extent that certain intervening events have resulted in a windfall, the windfall should inure to the benefit of ratepayers. Otherwise, U.S. West will be permitted to retain earnings in excess of that to which U.S. West was lawfully entitled or which could have been

reasonable expected by U.S. West. On the other hand, failure to order a refund will result in U.S. West ratepayers having paid more for service than what they were legally or equitably be obligated to pay.

ARGUMENT

POINT I

THE COMMISSION ERRED IN RULING THAT UTAH DEPARTMENT OF BUSINESS REGULATION, SUPRA, REQUIRED IT TO DENY PETITIONER'S AMENDED REQUEST FOR AGENCY ACTION.

In its March 30, 1989 Order, the Commission ruled that the Court's decision in Utah Department of Business Regulation, supra, controlled its action and required it to deny the Amended Request for Agency Action. (R. at 679) Tel-America submits that while ratemaking is generally of prospective application, the Supreme Court's decision in Utah Department of Business Regulation, supra, is inapplicable to the relief sought by Petitioner's in Docket No. 88-049-18. The issue before the Court in Utah Department of Business Regulation, supra, was whether the Commission was authorized to allow a diversion of funds from an energy balancing account to UP&L's general account. The Court recognized that the narrow issue before it was "whether the PSC's actions amounted to retroactive ratemaking." 720 P.2d 424. The Court concluded that the pass-through legislation authorizing the Commission to permit interim

rate changes which are necessary because of unexpected increases in certain types of costs did not grant the Commission the regulatory authority to permit a utility to have retroactive revenue adjustments in order to guaranty shareholders a rate of return. Id. at p. 423. In so holding the Court found that "the bar on retroactive ratemaking has no exception for missteps made in the ratemaking process. Id.

In the instant case, U.S. West's earnings in 1987 and 1988 in excess of those authorized by the Commission were directly attributable to changes in the federal income tax law. (R. at 678) The Commission's reliance upon Utah Department of Business Regulation, supra, proceeds from a mistaken premise. U.S. West's overearnings resulted not from regulatory error or mistakes or missteps in the regulatory process but from a congressional decision to reduce corporate taxes which, when the Commission established U.S. West's rates in 1985, were not and could not have been predicted. Thus, the overearnings were the result of intervening events occurring subsequent to the ratemaking process which were extraordinary and unforeseen rather than "missteps made in the ratemaking process." Id.

POINT II

THE COMMISSION HAS THE POWER TO ENFORCE ITS 1985 GENERAL RATE ORDER.

The Commission is clearly vested with the power to enforce its own orders pursuant to the broad grant of authority under Utah Code Ann. § 54-4-1, which authority has been read together with the specific reparation authority in Utah Code Ann. § 54-7-20 to empower it to order refunds in cases of excess earnings by utilities. Garkane Power Ass'n v. Public Service Commission, 681 P.2d 1196 (Utah 1984).

The 1985 Order authorized a rate of return of 14.2% for U.S. West. (R. at 810) The authorized rate of return is frequently characterized as a "limit" on the utility's ability to collect revenue. According to the Rhode Island Public Utilities Commission, "'the utility's return allowance might be compared with a fishing or hunting license with a limit on the catch. Such a license does not guaranty that the holder will catch anything at all; it simply makes the catch legal (up to a specified limit) provided the holder is successful in his own efforts.'" Re Narragansett Electric Co., 57 Pub. Util. Rep. 4th (PUR) 549, 555 (R.I. Pub. Util. Comm. 1984) (quoting Welch, Cases and Text on Public Utility Regulation, 478 (Rev. Ed. 1968)).

After analyzing the same question in other jurisdictions, the Rhode Island Commission concluded that:

The allowed rate of return prescribes a limit to the earnings of regulated utility. If this were not so, there would be no reason for the regulatory process and the setting of authorized rates of return would be reduced to a charade. If the regulatory process is to have credibility and if it is truly protect the interest of both the consumer and the shareholder, this commission must exercise its authority to prevent unauthorized profit margins.

Narragansett, Pub. Util. Rep. 4th (PUR) at 556.

The Commission's Order was affirmed by the Rhode Island Supreme Court. Narragansett Elec. Co. v. Burke, 505 A.2d 1147 (R.I. 1986) ("Burke II"). In the instant case, the Utah Commission faced the same situation. The Commission has the duty and the authority to enforce its 1985 Order and require U.S. West to refund excess earnings.

POINT III

THE RULE AGAINST RETROACTIVE RATEMAKING IS
NOT A BAR IN THIS ACTION.

- A. The exception to the rule against retroactive ratemaking for "unforeseen" circumstances applies in this case.

In its March 30, 1989 Order, the Commission recognized that certain exceptions to the rule against retroactive ratemaking exist. (R. at 680) The Commission cited as examples those instances where "its could be demonstrated that the utility had misrepresented important ratemaking information or otherwise mislead regulators, or where a prior rate has been nullified as a result of a Supreme Court Order, or possibly other situations

could be suggested." (R. at 680) The Commission found, however, the facts concerning the instant matter did not fall within such exceptions. The Commission arrived at its decision, however, without any evidentiary basis upon which it could predicate its conclusion. Tel-America submits that the Commission erred in that it did not, and could not with the evidentiary record before it, properly consider the exceptions to the rule against retroactive ratemaking cited by it as well as other exceptions which are well-recognized.

Many jurisdictions have recognized an exception to the rule against retroactive ratemaking where a utility experiences a loss due to extraordinary and unforeseen events. Pittman v. Public Serv. Comm., 520 S.2d 1355, 1360 (Miss. 1987); Consumer Advocate v. Commerce Comm., 428 N.W.2d 302, 306 (Iowa 1988); Wisconsin's Environmental Decade, Inc. v. Public Service Commission, 298 N.W.2d 205 (Wis. Ct. App. 1980); Narragansett Electric Co. v. Burke, 415 A.2d 177 (R.I. 1980) ("Burke I").

All exceptions to the rule against based on the premise that no rule should work to undermine its original purpose. Pittman, supra, at P. 1360; Consumer Advocate, supra, at p. 306. While decisions invoking exceptions to retroactive ratemaking for unforeseen circumstances generally benefited utilities, the same rationale must be applied to give the ratepayers the benefit of such circumstances, as in the case of U.S. West's

earnings in 1987 and 1988, when a utility encounters unexpected profits due to events which were unforeseen and over which the utility had no control.

In Narragansett 57 Pub. Util. Rep. 4th 549, the Rhode Island Public Utilities Commission adopted this reasoning in ordering excess earnings returned to ratepayers when earnings significantly exceeded the rate of return authorized by the Rhode Island Commission which earnings were attributable to "unanticipated economic growth in unusual summer weather." Id. at p. 553. U.S. West's excess earnings meet all of the requirements for the application on an exception to the rule against retroactive ratemaking. Earnings in excess of those authorized by the Commission have been found to be attributable to changes in federal income tax law, an event over which U.S. West had no control and which was unforeseeable at the time of the ratemaking process.

- B. The rules against retroactive ratemaking does not preclude the granting of refunds where a utility has earned in excess of its authorized rate of return.

Courts have generally indicated that the rule against retroactive ratemaking is to ensure that "present consumers will not be required to pay for past deficits of the company"; and that it "prevents the company from employing future rates as a means of ensuring investments of its stockholders." Burke I, 415 A.2d at 178-189. Certainly application of the rule against

retroactive ratemaking in the instant case will not serve to advance the reasons for which the rule is designed. In the instant case, millions of ratepayer dollars were collected to pay U.S. West taxes which were no longer required and then retained by U.S. West as windfall profits in excess of that which the company was authorized to earn.

The rule against retroactive ratemaking is founded in the legislative nature of the Commission's ratemaking authority. Burke II , 505 A.2d 1148; Elizabeth Town Water Co. v. Board of Public Utilities, 527 A.2d 354 (N.J. 1987). Because ratemaking is recognized as legislative in nature, its retroactive application is prohibited under the same principles prohibiting retroactive application of a statute. Burke II, 505 A.2d 1148. Consistent with these legislative principles a refund order in connection with petitioner's Amended Request for Agency Action will violate the rule against retroactive ratemaking only if it denies the subject utility its constitutional rights under the due process and equal protection clauses. Id.

Because U.S. West was never lawfully entitled to earn moneys in excess of the rates of return set by the Commission, it never had a vested interest in those moneys to which any constitutional right could attach. An order requiring U.S. West to return revenues which it does not lawfully own does not violate the constitutional rights of the utility, nor does it

violate the rule against retroactive ratemaking. Id. at p. 1149.

In Burke II, the Rhode Island Supreme Court found that the utility had no vested rights to earn in excess of the authorized rate of return on equity. Furthermore, the Court noted that "the rationale behind the rule against retroactive ratemaking is that future rates may not be used to recoup past losses." 505 A.2d 1149 (citing Providence Gas Co. v. Burke, 475 A.2d 193, 196 (R.I. 1984)). The Rhode Island Supreme Court clearly stated the two basic functions of the rule against retroactive ratemaking:

To protect the public by ensuring that it will not be forced to pay past company deficits and future payments and also to prevent the company from employing future rates to insure its stockholders' investment. Concisely put, the rationale behind the rule against retroactive ratemaking is that future rates may not be used to recoup past losses.

Id., citing Providence Gas Co. v. Burke, 475 A.2d 193, 196 (R.I. 1984).

The Rhode Island Supreme Court thus held that the rule against retroactive ratemaking does not preclude the granting of refunds where a utility has earned well in excess of its authorized rate of return.

POINT IV

THE COMMISSION HAS THE EXPRESS AUTHORITY
UNDER REPARATION STATUTES TO REQUIRE U.S.
WEST TO REFUND ITS EARNINGS IN EXCESS OF
THE AMOUNT AUTHORIZED BY THE 1985 ORDER.

The rule against retroactive ratemaking does not apply to statutorily authorized reparations orders. Pursuant to Utah Code Ann. § 54-4-4, the Commission is statutorily empowered to set rates which are "just and reasonable". The rates set by the Commission are not done so in the abstract or in a vacuum but are derived from revenue requirements based on the utilities' cost to provide services and a fair return on the investment by utilities' shareholders. Both the cost of service and return on investment must be "just and reasonable" in order to produce rates that are "just and reasonable". In setting the rates the Commission necessarily determined in its 1985 Order that the rate of return which it allowed was "just and reasonable" and a fair return on investment. The result of the intervening changes in federal tax law, which changes were unforeseen at the time the 1985 Order was issued, the rate of return realized by U.S. West, even by U.S. West's own admissions, greatly exceeded that authorized by the Commission. To the extent the rate of return realized by U.S. West exceeded that found by the Commission to be "just and reasonable" in its 1985 Order, the

rates which are a derivation of the components cited above were not and could not be just and reasonable.

Utah Code Ann. § 54-3-1 declares that "[E]very unjust and unreasonable charge made, demanded, or received for such product, commodity or service is hereby prohibited and declared unlawful." Charges for services provided by U.S. West which resulted in rate of return in excess of that found by the Commission in its 1985 Order were inherently unjust and unreasonable.

Utah Code Ann. § 54-7-20(1) provides that:

When complaint has been made to the Commission concerning any rate . . . for any product or commodity furnished or service provided 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 therefore with interest from the date of collection.

A plain reading of the above cited statute provides the Commission express authority to order such refund for the reparation required for unjustly or unreasonably charged ratepayers. Further, the authority granted pursuant to Utah Code Ann. § 54-7-20(1) includes a remedy for both charges which are in excess of the schedules, rates and tariffs on file with the Commission and for charges which are unjust, unreasonable, or discriminatory. Clearly, the Utah legislature contemplated

that the ratepayers have a remedy for charges which were unjust and unreasonable and yet in compliance with schedules, rates and tariffs on file with the Commission. This reading of the statute is reenforced by § 54-7-20(b) which establishes two different statutes of limitations for claims for reparations. Complaints concerning unjust, unreasonable or discriminatory rates must be filed within one year while those concerning charges in excess of approved rates must be filed within two years.

The reparations provision of the statutes has been used by the Commission to refund unanticipated utility revenues. In Garkane, 681 P.2d 1196, the Utah Supreme Court affirmed an order of the commission requiring Garkane Power Association ("Garkane") to refund money received from wholesale sales of electric power. Garkane received a refund from its purchases of power as a result of an order by the Federal Energy Regulatory Commission ("FERC"). The Commission ordered that the refund to Garkane be passed on to the purchaser of Garkane's power. The Utah Court found that the Commission's order was within its statutory power. Id. at 1206-07.

Admittedly, there are some differences between Garkane and this case. Specifically, the power purchases were made pursuant to a contract between Garkane and the wholesale purchaser, CP National Corporation, and the Commission found that the rate

schedules adopted by the contract were expressly subject to increases or decreases based on Garkane's purchase price. Nevertheless, the decision indicates that reparations are appropriate where rates are made unreasonable by later increases in utility revenue. The same rationale should apply where decreases in costs have rendered rates unjust and unreasonable.

In addition, the Commission has granted broad legislative, adjudicative and rule making powers which clearly authorize it to order the refund requested in this case. Utah Code Ann. § 54-4-1 provides:

The Commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to supervise all of the business of every such public utility in the state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction; . . . (emphasis added).

In Burke II, the Supreme Court of Rhode Island interpreting a statutory scheme similar to Utah's held that the Rhode Island Public Utilities Commission had the statutory authority to order ratepayers refunds. In Burke II, the utility appealed from a Rhode Island Public Utility Commission Order requiring a refund to customer for the utility had earned in excess of its authorized rate of return. The utility contended that the 19.1% rate of return (15.2% was authorized by the Commission) was due to productivity improvements, good weather, a strong economy and able management. The Rhode Island Supreme Court, in upholding

the Commission's decisions, found that the power to set rates would necessary include, by implication, the power to avoid windfalls to utilities and unjust enrichment by ordering refunds to ratepayers. Id. at p. 1148.

In the instant case, the petitioners are not asking the Commission to retroactively adjust U.S. West's authorized rate of return; they are merely requesting enforcement of that limit. If the Commission refused to required of U.S. West to refund excess profits, then the Commission will have effectively modified its 1985 Order retroactively to provide for increase to the originally authorized approved rate of return.

POINT V

U.S. WEST SHOULD BE ESTOPPED FROM ASSERTING THE DEFENSE OF THE RULE AGAINST RETROACTIVE RATEMAKING.

If the Commission's decision is affirmed by this Court, then the Commission will have conferred a windfall on U.S. West to which U.S. West is not lawfully or equitably entitled.

The Findings of Fact contained in the Commission's March 30, 1989 Order detail the extended period over which U.S. West and the Division of Public Utilities (the "Division") analyzed information concerning the impact of the federal tax legislation on U.S. West earnings. (R. at 678-679) While the Commission found that the Division made a good faith effort to accurately and correctly analyze the information provided to it by U.S.

West (R. at 679), it certainly made no finding, nor could it had have made such a finding, with respect to U.S. West's effort to provide such information, including a correct analysis of the impact of the federal tax legislation. For a period of approximately two years, U.S. West continued to accumulate overearnings pending action by the Commission. (R. at 678-679) U.S. West should not now be able to assert the rule against retroactive ratemaking to block reparations for those unreasonable charges. The ratepayers of the State of Utah should not be made to suffer the consequences of the inaction, whether calculated or not, of the Division and U.S. West in protracting the investigatory and analytical process that ultimately led to the Commission's action in reducing rates in September 1988.

When the rates set by the 1985 Order yielded earnings greatly in excess of that authorized by the Commission, U.S. West failed to promptly bring the matter to the attention of the Commission in order to establish new rates which would have resulted in earnings within legal limits imposed by the 1985 Order. Instead, U.S. West chose a course of action which, contrary to both the spirit and the letter of the 1985 Order, resulted in excess earnings which may amount to tens of millions of dollars (R. at 897) to which it was not entitled by which it would be clearly unjustly enriched.

POINT VI

THE DOCTRINE OF UNJUST ENRICHMENT REQUIRES THAT U.S. WEST REFUND ITS EXCESS EARNINGS TO UTAH RATEPAYERS.

U.S. West holds a franchise from the citizens of the State of Utah to provide telephone service pursuant to the rates established by the Commission under Utah law. In providing such service, U.S. West is entitled to an opportunity to earn a fair return. Logan City v. Public Utilities Commission, 77 Utah 442, 296 P.2d 1006 (1931). By its 1985 Order, the Commission set the upper limit of what that fair return would be. Given U.S. West's dilatory actions in bringing the impact of the changes in the federal tax law to the attention of the Commission and the time delay in implementing corrective action, U.S. West would be unjustly enriched to the detriment of ratepayers if permitted to retain the subject excess earnings.

U.S. West had no expectation that it would earn a rate in excess of that authorized by the Commission. To the extent certain intervening events have resulted in a windfall, the windfall should enure to the benefits of the ratepayers and not U.S. West. Requiring U.S. West to refund overearnings only forces U.S. West to do that which it should have done on its own initiative pursuant to the franchise granted it by the State of Utah when the Commission initiated its investigation of the

impact of the Tax Reform Act of 1986 on utilities earnings on December 9, 1986.

The requested refund would not deprive U.S. West of any earnings in excess of that to which U.S. West was lawfully entitled or could have been reasonably expected by U.S. West. On the other hand, failure to order refund will result in ratepayers having paid more for service than what they should have been legally or equitably obligated to pay.

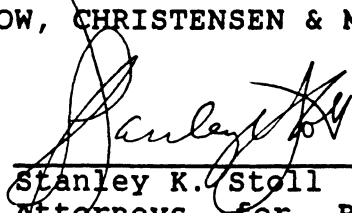
CONCLUSION

For the reasons set forth above, the Court should reverse the decision of the Commission in its March 30, 1989 and May 18, 1989 Orders and direct the Commission to grant the action sought in petitioners Amended Request for Agency Action.

DATED this 8th day of November, 1989.

SNOW, CHRISTENSEN & MARTINEAU

By



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CERTIFICATE OF SERVICE

Stanley K. Stoll, attorney for Petitioner Tel-America of Salt Lake City, Inc., hereby certifies that on the 8th day of November, 1989, he served four copies of the foregoing Brief of Appellant by first class mail, postage prepaid, to the following:

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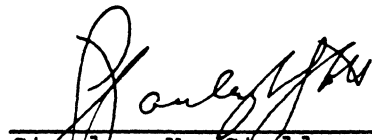
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