

1989

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

Utah Supreme Court

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BRIEF

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

MCI TELECOMMUNICATION CORP.

Petitioner,

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,

vs.

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

Respondents.

Priority No. 9

BRIEF OF RESPONDENTS

PUBLIC SERVICE COMMISSION OF UTAH, DIVISION OF PUBLIC UTILITIES AND
 THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

ON PETITION FOR REVIEW FROM THE
 PUBLIC SERVICE COMMISSION OF UTAH

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FILED
 Feb 21 1990
 Clerk, Supreme Court, Utah

LIST OF PARTIES

The principal parties to the proceeding below included the Division of Public Utilities, Committee of Consumer Services, The Mountain States Telephone and Telegraph Company, Tel-America of Salt Lake City, Inc., and MCI Telecommunication Corp.

The Request for Agency Action was signed by petitioners and 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	Georgia Peterson	PST Vans, Inc.
Senator Jack Bangerter	Joe Duke-Rosati	Ann L. Lazerus
Senator Omar Bunnell	Barbara Toomer	Amfac Electrical Supply
Senator Wilford Black	Bill Walsh	Monica E. Gornik
Senator Darrell Renstrom	Jerry Dyer	G T Sales
Representative Kim Burningham	Bruce Lybbert	Louis C. Kunde
Representative Stan Smedley	Harold Paulos	Amtel Corporation
Committee of Consumer Services	Robert Benson	Lawrence S. Fowers
Salt Lake Citizens' Congress	Sherry L. Hansen	Access Long Distance
Utah Telephone Answering Services Association	Donald W. Mortenson	Ronald Haggin
Evan Twede Advertising	Michael L. Meyers	David Irvine
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JURISDICTION AND PROCEEDINGS BELOW

The Court has jurisdiction to hear MCI Telecommunication Corp.'s ("MCI") and Tel-America of Salt Lake City, Inc.'s ("Tel-America") (collectively "Resellers") petitions for review pursuant to Utah Code Ann. §§ 63-46b-16 (1989) and 78-2-2(3)(e)(i) (Supp. 1989) and Rule 14 of the Rules of the Utah Supreme Court.

This review arises from Public Service Commission of Utah ("Commission") Docket No. 88-049-18 entitled In the Matter of the Investigation into the Reasonableness of the Rates and Charges of MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY.¹

ISSUES PRESENTED FOR REVIEW

1. Are the Commission's decisions on mixed questions of law and fact and interpretations of the operative provisions of statutes it is empowered to administer ("special laws") entitled to deference?
2. Are Resellers' claims that the Commission erred in not making findings or taking evidence of Mountain Bell's conduct and actions barred by their failure to raise them on rehearing?
3. Would requiring a refund of rates found just and reasonable in final rate orders constitute prohibited retroactive rate making?

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¹Prior to July of 1988, The Mountain States Telephone and Telegraph Company did business as Mountain Bell. Since then, it has done business as U S WEST Communications. Both names are used in the record. The company will be referred to as Mountain Bell in this brief.

4. Can the Commission order reparations of rates found just and reasonable in final rate orders where the rates were collected prior to any finding that they had become unjust and unreasonable?

5. Is the Commission's conclusion that none of the exceptions to the rule against retroactive rate making apply in this case within the tolerable limits of reason?

DETERMINATIVE STATUTES

The following statutes are determinative of the issues presented by this review: Utah Code Ann. §§ 54-4-4(1)(1986), 54-7-15(2)(b)(Supp. 1989) and 54-7-20(1)(1986). They are reproduced in full in Appendix 1.

STATEMENT OF THE CASE

On September 15, 1988, a Request for Agency Action was filed with the Commission during the course of hearings in Docket No. 88-049-07 (a Mountain Bell general rate case). It requested that the Commission order Mountain Bell to refund all earnings during 1987 and 1988 in excess of the rate of return utilized by the Commission in setting rates in the prior general rate case order issued December 31, 1985 in Case No. 85-049-02 ("1985 Rate Order"). Resellers and others joined in the request.

The Commission determined that the request did not comply with Utah Code Ann. § 54-7-9(3)(b) (Supp. 1989). The Commission, without objection, ordered that Resellers would have until November 2, 1988 to file a request that complied with the statute, that the request should be filed in a new proceeding (Docket No. 88-049-18), and that the case

should initially proceed with argument on the issue of whether the Commission had the authority to grant the relief sought. (R. at 2-4) On November 2, 1988, Resellers and others filed an Amended Request for Agency Action ("Complaint"). The Complaint sought an investigation of the rate of return realized by Mountain Bell in 1987 and 1988 and a refund of earnings in those years in excess of the rate of return on equity found reasonable in the last general rate case. The Complaint did not seek an investigation of Mountain Bell's conduct or actions in connection with the investigation by the Division of Public Utilities ("Division") of the impact of the Tax Reform Act of 1986 (Pub. L. No. 95-514, §§ 1 et seq., 100 Stat. 2096 (1987)) ("TRA-86") on the earnings of Mountain Bell and other utilities nor did it allege that Mountain Bell had misled regulators regarding its earnings. (R. at 8-18)

The parties submitted extensive briefs and oral argument on the issues presented. These included lengthy arguments on the inferences to be drawn from the undisputed facts. Despite these arguments, no party claimed that it was necessary for the Commission to investigate or take evidence of Mountain Bell's conduct or claimed that Mountain Bell had misled the Commission.

Following oral argument, the Commission issued its March 30, 1989 Order on Amended Request for Agency Action ("Order") dismissing the Complaint. The Commission found that the Division made a good faith effort in the investigation and concluded in the Order that it did not have authority to grant the relief sought by the Complaint. (R. at 677-81 [Appendix 2]) Resellers filed petitions for review or rehearing.

The petitions alleged that the Order was in error because it did not accept Resellers' arguments; however, they did not assert that the Order was in error because: (1) Mountain Bell had misled regulators, (2) the Commission had failed to make a finding of fact regarding Mountain Bell's conduct in the TRA-86 investigation or (3) the Commission needed to take evidence of Mountain Bell's conduct before it could enter the Order. (R. at 685-96; [Tel-America Appendix 3; MCI Appendix 4]) The petitions for review or rehearing were denied by the Commission on May 18, 1989, on the grounds that the relief requested in the Complaint was not authorized under Utah Code Ann. § 54-7-20 and that it would constitute retroactive rate making. (R. at 703-05 [Appendix 5])

STATEMENT OF FACTS

1. 1985 General Rate Case. During 1985, rate hearings were conducted in which the rates and charges of Mountain Bell were extensively reviewed based upon a 1985 test year. On December 31, 1985, the Commission issued the 1985 Rate Order finding certain rates just and reasonable and ordering Mountain Bell to implement them immediately. No party challenged or appealed the 1985 Rate Order, and the rates established by it were implemented immediately.

One of several factors considered by the Commission in the 1985 Rate Order was Mountain Bell's cost of equity capital. The Commission found that a rate of return on equity in the range of 14.0 to 14.5 percent was reasonable and that 14.2 percent was the cost of equity capital that should be applied in determining rates in the case.

2. 1986 Earnings. Not surprisingly, the precise test-year revenues and costs that had been the basis of the rates found just and reasonable by the Commission in the 1985 Rate Order were not realized by Mountain Bell in 1986. Some of the differences were the result of many small deviations; others resulted from more significant occurrences which were not known and measurable in 1985.² The net effect of these changes was that Mountain Bell's 1986 revenues were approximately \$12.7 million less than the amount that would have been necessary to achieve the rate of return found reasonable in the 1985 Rate Order.³

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²For example, in 1986 Mountain Bell adopted an early retirement enhancement program. Implementation of the program resulted in decreases in salary and employee benefit expenses and increases in pension expenses. There were also salary and wage increases in 1986 which resulted in an increase in operating expenses. Increased competition in intrastate long distance resulted in a decrease in toll revenues and a smaller increase in access revenues. (R. at 470) The shift of expenses from the interstate to intrastate jurisdiction as a result of separations changes mandated by the Federal Communications Commission ("FCC") resulted in increased expenses. TRA-86 eliminated investment tax credits effective January 1, 1986, resulting in an increase in Mountain Bell's 1986 tax expense. (R. at 530-31 [Appendix 6], 536-44 [Appendix 7])

³It is not unusual for earnings to vary from those found reasonable in rate orders. From 1980 through 1986, Mountain Bell experienced the following returns on equity compared with the rates of return found reasonable by the Commission with a resulting revenue shortfall over the seven-year period of \$91,414,000:

<u>Year</u>	<u>Regulatory R.O.E.</u>	<u>Commission Found R.O.E.</u>	<u>Revenue Shortfall (000)</u>
1980	11.45%	13.00%	\$ 6,104
1981	10.81%	14.50%	\$ 18,404
1982	10.12%	14.50%	\$ 24,423
1983	11.55%	14.50%	\$ 16,746
1984	14.81%	14.75%	\$ (325)
1985	12.34%	14.75%	\$ 13,346
1986	11.95%	14.20%	\$ 12,716

(R. at 469) A slightly different view of these numbers was presented below by the Division. (R. at 603) It reaches the same general conclusion as did these numbers provided by Mountain Bell.

3. TRA-86 Investigation. Following passage of TRA-86, Utah regulators acted promptly to assess its impact on utility earnings. On December 9, 1986, the Commission wrote a letter to Mountain Bell requesting that it provide an analysis to the Division of the impact of TRA-86 on its earnings and revenue requirement. (R. at 528-29 [Appendix 8]) Mountain Bell responded to this letter on December 31, 1986 with an analysis of the impact of the various components of TRA-86 and other significant changes since the 1985 test year on its earnings.⁴ (R. at 530-34 [Appendix 6])

On February 20, 1987, more than four months before the federal tax rate would change, the Division filed a report with the Commission. The Division believed it inappropriate to consider the impact of the post-test year change in tax expense without also considering changes in other ratemaking components.⁵ Based upon actual earnings through eleven months of 1986 and projected earnings for December of 1986 and considering all significant potential changes, the Division concluded that the expense reduction resulting from TRA-86 would be offset by a combination of other rate base, revenue and expense changes. It projected that the 1987 return on equity would be only 10.94 percent. The Division, therefore, concluded that rates did not need to be reduced

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⁴TRA-86 made extensive changes in the tax laws. The most significant in terms of Mountain Bell's earnings were elimination of investment tax credits effective in 1986, elimination of various deductions effective January 1, 1987 and reduction of corporate tax rates from 46 to 34 percent effective July 1, 1987. The effective federal income tax rate for the entire year of 1987 was 39.95%. This rate was reflected in the monthly financial reports filed by Mountain Bell and utilized by the Division in its investigation starting with the January 1987 report. (R. at 537-39 [Appendix 7])

⁵This Division policy was rooted in Utah Dep't of Business Reg. v. Public Serv. Comm'n, 614 P.2d 1242 (Utah 1980) (reversing a Commission order increasing rates of Mountain Fuel Supply solely on the basis of across-the-board wage increases implemented less than one year after the last general rate case).

at that time, but stated that it would continue to monitor the earnings of Mountain Bell on a monthly basis to determine if significant changes occurred.⁶ (R. at 536-44 [Appendix 7])

On June 5, 1987, the Division submitted an updated report to the Commission on the earnings of the three major utilities. Based upon an analysis of actual data for 1986 and final budget data for 1987, the Division concluded that the savings that would result from TRA-86 were offset by other changes. The Division stated that it would continue to monitor earnings on a monthly basis. (R. at 545-53 [Appendix 9])

On September 1, 1987, the Division filed a third report with the Commission regarding the effect of TRA-86 on the earnings of Mountain Bell. Based upon five months of actual data for 1987 and seven months of budgeted data, the Division concluded that other changes since the 1985 Rate Order had largely offset the savings that were expected from TRA-86, but indicated that it would continue to monitor Mountain Bell's earnings on a monthly basis. (R. at 554-55 [Appendix 10])

On September 28, 1987, after it had received the July 1987 monthly financial report, the Commission wrote a letter to the Division noting that monthly reports for the period July 1986 through July 1987 indicated that Mountain Bell was close to earning in excess of its authorized rate of return for a 12-month period. The letter requested the Division to investigate Mountain Bell's financial returns to evaluate whether there was a need for

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⁶The Division's investigation of the impact of TRA-86 was based principally upon the financial reports routinely filed by the utilities on a monthly, annual and budget basis. However, the Commission and the Division requested, and Mountain Bell supplied, additional information, such as the December 31, 1986 letter and schedules (Appendix 6), to assist in the investigation.

a rate case.⁷ The Division was specifically directed to evaluate not only the impact of TRA-86, but also other factors such as changes in capital markets, depreciation, early retirement programs and rate base offsets along with other relevant factors. (R. at 564 [Appendix 11])

The Division informally obtained additional information from Mountain Bell and continued to monitor monthly reports. When actual data through August of 1987 became available in October 1987, it appeared to the Division and Mountain Bell that, if rates were not reduced, current earnings would likely be in excess of the 14.2 percent rate of return found reasonable in the 1985 Rate Order. Accordingly, both parties immediately commenced meetings regarding rate reductions that would, based upon the data then available, reduce earnings, on a going forward basis, to levels below a 14.2 percent return on equity. These meetings were not secret; no one else participated in them because there were no other parties to the investigation. As directed by the Commission, the Division and Mountain Bell considered factors in addition to TRA-86 which could have a significant impact on Mountain Bell's revenue requirement.⁸

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⁷MCI mischaracterizes this letter in stating that the Commission said "Mountain Bell was exceeding its authorized rate of return." MCI also implies that this investigation was of a different character than the investigation launched in December 1986. (MCI Br. at 8) Both were informal investigations.

⁸For example, in January 1987, the Financial Accounting Standards Board issued Technical Bulletin No. 87-a proposing that the cost of post retirement health care and life insurance benefits be accrued during periods employees rendered service rather than expensed as incurred. It was not known when or how this change would be implemented. However, in late 1987, Mountain Bell estimated its potential liability associated with this change to be in excess of \$4 million annually. In 1986, the Federal Communications Commission ("FCC") ordered revisions to the Uniform System of Accounts effective January 1, 1988. The extensive changes resulting from these revisions were estimated by Mountain Bell in late 1987 to increase its expenses by approximately \$4 million annually. (R. at 542 [Appendix 7], 547 [Appendix 9])

The meetings between the Division and Mountain Bell resulted in a tariff filing by Mountain Bell on December 7, 1987 proposing a rate reduction of \$9.02 million to be effective on December 22, 1987. On December 10, 1987, the Commission issued an order approving the rate reduction. No party challenged or appealed that order. At a hearing on December 22, 1987, Resellers and others stipulated to the rate reduction. [Appendix 12]

4. Committee Petitions and Motions. In January 1987, the Committee of Consumer Services ("Committee") petitioned the Commission to investigate the effects of TRA-86 on each of the major utilities in the state. PSCU Case No. 87-999-01. The Division's investigation pursuant to the Commission's December 9, 1986 letter was already under way; therefore, no specific action was taken in response to the Committee's petition.

On June 1, 1987, the Committee made a motion in Case No. 87-999-01 that the rates of all the major utilities be made temporary or that refundable reserve accounts for tax expense savings be established pending the conclusion of the Division's investigation. The Committee stated that it was seeking this relief because otherwise the Commission would not be able to order refunds (such as those sought by the Complaint) if it ultimately concluded that rate reductions were warranted as a result of TRA-86. (R. at 557-59) The utilities opposed the motion in writing and at a hearing on June 30, 1987. They questioned the Commission's authority to declare rates interim without holding an evidentiary hearing which established that existing rates were unjust or unreasonable and noted that, if rates

were interim, they could be adjusted up as well as down. The Division reaffirmed that it was generally opposed as a matter of policy to single item rate cases.

At the conclusion of the hearing, the Commission ruled that it had no evidentiary basis to declare rates interim, and, therefore, denied the Committee's motion. The decision was not challenged on rehearing or appeal.

On August 11, 1987, the Committee served data requests on Mountain Bell seeking information of the type and volume normally sought in a general rate case. Mountain Bell objected on the ground that the Committee had no authority to seek discovery during the course of an informal investigation by the Division. Following a hearing on the Committee's motion to compel, the Commission ruled that the motion should be held in abeyance pending the conclusion of the investigation, but directed the Division to provide the data it had utilized in reaching its conclusions to the Committee. (R. at 560-63) The Commission's decision on this discovery motion was not challenged.⁹

In January 1988, the Committee requested information from the Division regarding the December 1987 rate decrease. No formal request was ever made of Mountain Bell for this information.

5. 1988 General Rate Case. Mountain Bell continued to file monthly financial reports with the Commission and the Division. It also provided its 1988 budget to the Commission and the Division as soon as it was completed. The 1988 budget and the

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⁹The basis for MCI's argument that Mountain Bell refused to provide information (MCI Br. at 43-44) was Mountain Bell's response to this Committee discovery request. (R. at 399, 655) In making this argument, MCI is improperly collaterally attacking the Commission's order. Utah Code Ann. § 54-7-14 (1986).

monthly financial reports for the initial months of 1988 were delayed by the implementation of the FCC's Uniform System of Accounts Rewrite. The budget was not completed until April 1988, and the intrastate financial reports for January and February were not completed until May along with the March report.¹⁰

After the Division had an opportunity to review the 1988 budget and the results for the first three months of 1988, it concluded that earnings under the new rates, adjusted for items it believed were justified, would result in earnings in excess of returns it believed were reasonable.¹¹ On June 2, 1988, the Division filed a petition with the Commission requesting that a formal investigation into the reasonableness of Mountain Bell's rates be commenced. It was assigned Docket No. 88-049-07.

On June 9, 1988, the Committee filed a petition in the same docket that the Commission immediately declare Mountain Bell's rates interim and hold a hearing to order an interim reduction in rates. Again, the Committee explained that, unless the Commission took this action, ratepayers would not be able to benefit from reduced rates until new rates were established at the conclusion of the proceeding. (R. at 565-67)

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¹⁰Before monthly reports can be completed, revenues and costs must be separated between the interstate and intrastate jurisdictions. This is a complex process which normally results in monthly reports being completed one to two months following the conclusion of the month in question. The extensive changes in the Uniform System of Accounts effective January 1, 1988 rendered the prior separations procedures useless and required the development of a new system to be used on the 1988 budget and the 1988 monthly reports. (R. at 476-77, 577-78)

¹¹TRA-86 was only one of many factors resulting in increased earnings. Among the factors contributing were continued cost cutting efforts by Mountain Bell, a reduction in pension expenses, a rate base that began declining in 1987 and unexpected increases in toll and access revenues. (R. at 477)

At a procedural hearing on July 5, 1988, the Commission decided to commence a general rate case, set a schedule for further proceedings and asked the parties to file legal memoranda on the authority of the Commission to grant the interim relief sought by the Committee. Memoranda were filed and a hearing was held on July 22, 1988. The Commission issued its order on August 2, 1988 denying the Committee's petition¹² but establishing a rebuttable presumption that all earnings from August 1, 1988 forward in excess of 14.2 percent were unjust and unreasonable and subject to refund. (R. at 893-94) Mountain Bell applied for reconsideration of that order, but no other party challenged it.

During the pendency of the foregoing matters, the Division and the Committee continued discovery and, with Mountain Bell, commenced negotiations to settle the revenue requirement aspect of the rate case. All parties recognized that the current rates of Mountain Bell would likely result in annualized earnings in excess of the 14.2 percent rate of return found reasonable in the 1985 Rate Order, and all parties desired to reduce rates as quickly as possible if agreement could be reached on a reasonable level of reduction. The parties were able to reach agreement and, on August 22, 1988, presented their stipulation to the Commission for approval. The stipulation provided for a \$20 million rate reduction effective September 1, 1988 and an additional \$11 million reduction effective

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¹²Since this argument and decision, and, in part, in response to it, the legislature amended Utah Code Ann. § 54-7-12(3) (Supp. 1989) to authorize the Commission to make interim decreases in rates as well as interim increases. The amendment provides that interim changes can be made only after an evidentiary hearing at which a prima facie showing is made justifying the change. Incidentally, the fact that the legislature amended the statute to allow interim decreases is an indication that the Commission does not have the authority to grant the refund Resellers seek; otherwise interim decreases would be unnecessary.

January 1, 1989. Resellers opposed the stipulation. On September 22, 1988, the Commission issued its order rejecting the stipulation and ordering Mountain Bell to reduce its rates on an interim basis by \$16 million retroactively to August 1, 1988 and by a further \$11 million on January 1, 1989.

In order to avoid compliance with orders which it believed were unlawful, but at the same time to effect the rate reductions it had agreed to, Mountain Bell made a proposal to the Commission on September 27, 1988 to convene a settlement conference. It proposed voluntarily to reduce its rates on a permanent basis by \$16 million effective September 22, 1988, and by a further \$10 million effective January 1, 1989, if the Commission would vacate its orders of August 2, 1988 and September 22, 1988 and if the parties would agree that there would be no other permanent or interim rate decreases during the course of the rate case. The parties (including Resellers) agreed, and the Commission approved the settlement on October 3, 1988. A formal stipulation was signed, and the Commission issued its order on October 13, 1988 approving the stipulation and finding the rates as reduced September 22, 1988 just and reasonable. No party challenged or appealed that order.

Following completion of several weeks of evidentiary hearings in 1989, the Commission issued its Report and Order on October 18, 1989, ordering a further rate reduction of \$21.85 million which was made effective on November 15, 1989. In total, rate reductions from December 1987 through November 1989 amounted to \$56.87 million.

6. Rates Charged in 1987 and 1988. During 1987 and 1988, Mountain Bell charged only rates found just and reasonable and approved by the Commission in final orders. The Commission did not enter any final order finding those rates unjust and unreasonable prior to the time they were charged. The Commission did not at anytime declare the rates collected by Mountain Bell as interim or subject to refund in any final order.¹³

SUMMARY OF ARGUMENT

In seeking a refund of rates previously approved by the Commission on the ground that those rates resulted in earnings in excess of the rate of return found reasonable by the Commission in the last general rate case, Resellers have asked the Commission to engage in a classic example of retroactive rate making. The reparations statute must be read consistently with the rate making statute, which forms the basis for the rule against retroactive rate making. So interpreted, the reparations statute does not permit a refund of rates collected which were found just and reasonable by the Commission and were collected prior to any finding by the Commission that they had become unjust and unreasonable. This appeal affords the Court the opportunity to reaffirm its strong and

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¹³On February 11, 1988, the Commission entered an order in Case No. 83-999-11, which is the proceeding on remand of Telecommunications Resellers of Utah v. Public Serv. Comm'n, 747 P.2d 1029 (Utah 1987), approving a stipulation of the parties, including Resellers, Mountain Bell and the Division, that the rates approved by the Commission in December 1987 would be interim as to Resellers until a final order was entered in that case. Subsequently, a further stipulation was entered into and approved by the Commission that the access rates paid by Resellers from December 22, 1987 would be interim and subject to refund based upon the access rates finally found just and reasonable by the Commission in the general rate case, PSCU Docket No. 88-049-07. The Commission's Report and Order of October 18, 1989 constituted that order which was not appealed and is now final. If Resellers' argument that rates may be subject to refund if found unjust and unreasonable after the fact is correct, these stipulations would have been unnecessary.

clear precedent on these issues which gives appropriate finality to public utility rates and Commission rate orders.

1. In reviewing the Order, the Court should grant deference to the Commission's conclusion that none of the exceptions to the rule against retroactive rate making applied in this case because the issue is a mixed question of law and fact. The Court should also give considerable weight to the Commission's interpretation of the operative provisions of Utah Code Ann. §§ 54-4-4(1) and 54-7-20(1) because they are statutes the Commission is empowered to administer ("special laws"). This is particularly true here because the Commission relied upon and followed prior decisions of the Court interpreting those statutes.

2. Resellers' claims that the Commission erred in not making findings or taking evidence of Mountain Bell's conduct in the TRA-86 investigation and that such conduct is a basis for an exception to the rule against retroactive rate making are barred by Utah Code Ann. § 54-7-15(2)(b). Resellers did not contend below that Mountain Bell's conduct needed to be investigated or that the Commission needed to take evidence on that conduct. More significantly, in their petitions for rehearing, Resellers did not contend that the Order was in error because the Commission's conclusion on exceptions to the rule against retroactive rate making was not supported by a finding on Mountain Bell's conduct or any evidence on such conduct or that the Commission was required to investigate Mountain Bell's conduct prior to making a decision on the Complaint.

3. Utah Code Ann. § 54-4-4(1) as interpreted by Utah Dep't of Business Reg. v. Public Serv. Comm'n, 720 P.2d 420 (Utah 1986) [the "EBA Case"] provides that all rate making must be prospective in nature. The rule against retroactive rate making is violated when rates are set or a surcharge or refund is ordered to allow a utility to recover past underearnings or to require it to disgorge past overearnings resulting from rates lawfully collected in the past. The rates collected by Mountain Bell in 1987 and 1988 were permanent rates found just and reasonable and approved by the Commission in final orders. In 1986, the rates resulted in underearnings. In 1987 and 1988, they resulted in earnings in excess of the rate of return on equity found reasonable by the Commission in the 1985 Rate Order. It would be no more proper to grant Resellers a refund of overearnings in 1987 and 1988 than to grant Mountain Bell a surcharge for underearnings in 1986. Section 54-4-4(1) and the rule against retroactive rate making bar the relief sought in the Complaint.

4. The reparations statute, Utah Code Ann. § 54-7-20(1), properly interpreted and applied, is completely consistent with the prospective rate making mandated by section 54-4-4(1) and the rule against retroactive rate making. As the Court stated in American Salt Co. v. W.S. Hatch Co., 748 P.2d 1060 (Utah 1987), the reparations statute does not authorize refunds of rates charged which have been found just and reasonable in final rate orders. Cases from other jurisdictions make clear that refunds of unjust and unreasonable rates are allowed where rates have been placed into effect without commission approval which are later determined to be unjust and unreasonable or where a utility continues to

collect rates found just and reasonable after a subsequent finding that the rates are unjust and unreasonable. Neither of these circumstances exists in this case; therefore, reparations are not authorized.

5. Although the Court has not recognized any exceptions to the rule against retroactive rate making, the Commission concluded that certain exceptions might apply, but concluded that "none of these examples has been suggested in this case, nor any others that we would consider reasonable." (R. at 679-80 [Appendix 2]). This decision on a mixed question of law and fact is not only well within the tolerable limits of reason and rationality, it is consistent with the authorities cited by Resellers allowing exceptions to the rule.

ARGUMENT

I. STANDARD OF REVIEW - THE COMMISSION'S DECISION ON A MIXED QUESTION OF LAW AND FACT AND INTERPRETATIONS OF SPECIAL LAWS ARE ENTITLED TO DEFERENCE.

MCI argues that the Court should grant no deference to the Commission's conclusions in this case because they are based upon interpretations of general law. MCI's argument overlooks the fact that the Order was based upon a conclusion on a mixed question of law and fact and upon interpretations of the operative provisions of statutes the Commission is empowered to administer (known as special laws).

The basis for the Commission's decision was its conclusion that it lacked authority to order a refund of rates collected pursuant to tariffs previously found just and reasonable and approved by the Commission. In rejecting Resellers' claim that the Complaint fell

under an exception to the rule against retroactive rate making, the Commission made a conclusion on a mixed question of law and fact. In relying on the EBA Case, the Commission accepted the interpretation of Utah Code Ann. § 54-4-4(1) adopted by the Court in that case: that the Commission is only entitled to change rates prospectively and that it does not have authority to make retroactive adjustments in rates based upon a utility's earnings. In rejecting Resellers' argument that the reparations statute, Utah Code Ann. § 54-7-20(1), authorized the relief requested, the Commission accepted the interpretation of the statute in American Salt Co. v. W.S. Hatch Co., 748 P.2d 1060 (Utah 1987), that reparations cannot be granted of rates found just and reasonable in final orders.

In reviewing decisions of the Commission on mixed questions of law and fact and interpreting special laws, the Court has been governed by the standards set forth in Utah Dep't of Admin. Services v. Public Serv. Comm'n, 658 P.2d 601, 607-12 (Utah 1983) ["Wexpro II"], recently reaffirmed in Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n, 754 P.2d 928, 930 (Utah 1988). The Administrative Procedures Act (Utah Code Ann. § 63-46b-1 et seq. (1988)) has not affected these particular standards. See Pro-Benefit Staffing, Inc. v. Board of Review, 775 P.2d 439, 442 (Utah Ct. App. 1989).

The appropriate standard of review on these issues is clearly stated in Wexpro II, Mountain States, and Pro-Benefit Staffing. When an administrative agency makes decisions on mixed questions of law and fact or interprets the operative provisions of statutes it is empowered to administer, the Court utilizes an intermediate standard of review. Under

this standard, the Court "uphold[s] the Commission's findings as long as they are not outside the 'tolerable limits of reason' and are not imposed arbitrarily or capriciously." Mountain States, 754 P.2d at 930 (citing Wexpro II, 658 P.2d at 612). The Court also applies the "time honored rule of law . . . that the construction of statutes by governmental agencies charged with their administration should be given considerable weight." Wexpro II, 658 P.2d at 610 (quoting McPhie v. Industrial Comm'n, 567 P.2d 153, 155 (Utah 1977)).

Contrary to MCI's argument, the Court should give deference to the Commission's decision that none of the exceptions to the rule against retroactive rate making were applicable in this case and should give considerable weight to the Commission's interpretation of Utah Code Ann. §§ 54-4-4(1) and 54-7-20(1) and should give deference to the Commission's decision that none of the exceptions to the rule against retroactive rate making were applicable in this case. The Court should only overturn the Commission's decision if it is not within the tolerable limits of reason or if it was imposed arbitrarily or capriciously.

Even if a no deference standard is applied in interpreting special laws as urged by MCI, the argument below establishes that the Commission's conclusions, including its application of the EBA Case to the facts here, are correct.

II. RESELLERS' CLAIMS THAT THE COMMISSION ERRED IN NOT MAKING FINDINGS OR TAKING EVIDENCE OF MOUNTAIN BELL'S CONDUCT AND ACTIONS ARE BARRED BY THEIR FAILURE TO RAISE THEM ON REHEARING.

MCI claims that the Court must remand this matter to the Commission with instructions to investigate Mountain Bell's conduct in the TRA-86 investigation and determine whether Mountain Bell has waived the protection of the rule against retroactive rate making as a result of such conduct. (MCI Br. at 45, 50) Resellers also claim that the Commission's conclusion of law stating that "certain exceptions to the rule [against retroactive rate making] are reasonable; for example, where it could be demonstrated that the utility had misrepresented important ratemaking information or otherwise misled regulators, [but that] none of the examples have been suggested in this case" is not supported by its factual findings. (MCI Br. at 44; Tel-America Br. at 22)

While these arguments may have superficial dramatic appeal, neither of the Resellers in their petitions for rehearing requested the Commission to conduct an investigation or hold a hearing to determine if utility misconduct had taken place; further, neither petition for rehearing challenged the Commission's conclusion of law cited above or claimed that it was not supported by findings of fact or evidence. (R. at 685-96 [Appendices 3 and 4]) Resellers' make these arguments for the first time in their briefs on this appeal.

Utah Code Ann. §54-7-15(2)(b), unequivocally provides that:

No applicant may urge or rely on any ground not set forth in the application (for rehearing) in an appeal (of a Commission order) to any court.

The Court has held repeatedly that it has no jurisdiction to hear issues not raised before the Commission. High-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); Utah Dep't of Business Reg. v. Public Serv. Comm'n, 602 P.2d 696 (Utah 1979). Accordingly, the Court cannot consider Resellers' arguments regarding lack of evidence or findings on Mountain Bell's conduct in the TRA-86 investigation and cannot reverse and remand for the purpose of conducting an investigation into that conduct.¹⁴

III. REQUIRING A REFUND OF RATES FOUND JUST AND REASONABLE IN FINAL RATE ORDERS CONSTITUTES PROHIBITED RETROACTIVE RATE MAKING.

Resellers argue that the EBA Case, and the rule against retroactive rate making as stated in that case, do not prevent the Commission from granting reparations in this case. Their argument implies that the rule against retroactive rate making and the doctrine of reparations are totally independent of one another and inconsistent, and that reparations take precedence over the rule against retroactive rate making. A brief review of the rule against retroactive rate making and reparations demonstrates the flaws in this argument and establishes that there is no conflict between the doctrines when appropriately interpreted and applied.

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¹⁴Because Resellers did not preserve these issues, the cases they cite on utility misconduct Matter of Minn. Public Util. Comm'n, 417 N.W. 2d 274 (Minn. Ct. App. 1987), cert. denied, 109 S.Ct. 130 (1988); Southwest Gas Corp. v. Public Serv. Comm'n, 614 P.2d 1080 (Nev. 1980); Southwest Gas Corp. v. Public Serv. Comm'n, 474 P.2d 379 (Nev. 1970), are inapplicable.

The rule against retroactive rate making requires that the Commission only set rates prospectively to be thereafter in force. Utah Code Ann. § 54-4-4(1); EBA Case 720 P.2d at 420. The Commission may not set rates, order refunds or implement surcharges to make up for a utility's past overearnings or underearnings.¹⁵ Reparations, on the other hand, may be exacted from a utility in three circumstances: first, when a utility charges a rate in excess of its filed tariff; second, when a utility charges a rate that unreasonably discriminates between customers in similar circumstances; and third, when a utility charges a rate never legally approved by the Commission which is later found unjust and unreasonable or continues to charge a rate previously approved but which has been subsequently found unjust and unreasonable by the Commission. Utah Code Ann. § 54-7-20(1).

This point will discuss the rule against retroactive rate making in greater detail. Point IV will focus on reparations.

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¹⁵The EBA Case specifically declares that a utility cannot be compensated in the future for past losses or forced to refund excess profits. 720 P.2d at 420-21. Further, it is generally accepted that the rule against retroactive rate making prevents a utility from being required to refund past excess profits when the utility has charged a rate approved by the Commission. See e.g. Kimberly-Clark Corp. v. Public Serv. Comm'n, 320 N.W.2d 5 (Wis. Ct. App. 1982) aff'd 329 N.W.2d 143 (Wis. 1983). See also cases cited in note 18, infra.

A. The Governing Statute Clearly Provides that Rates Are To Be Set Prospectively.

The Commission's authority to set rates (in the absence of a rate change proposed by a public utility) is set forth in Utah Code Ann. § 54-4-4(1).¹⁶

Whenever the commission shall find after a hearing that the rates . . . charged or collected by any public utility for any service or product . . . are unjust, unreasonable, discriminatory or preferential, or in anywise in violation of any provisions of law, or that such rates . . . are insufficient, the commission shall determine the just, reasonable or sufficient rates . . . to be thereafter observed and in force, and shall fix the same by order as hereinafter provided. [Emphasis added.]

This section makes it clear that the Commission can only set rates prospectively. In Utah Dep't of Business Reg. v. Public Serv. Comm'n, 614 P.2d 1242 (Utah 1980) ["Wage Case"], and the EBA Case, the Court reviewed how this statutory mandate for prospective rate making occurs in practice.

In the Wage Case, Mountain Fuel sought a rate increase to offset general wage increases granted to employees shortly after the conclusion of a general rate case. The Court reversed a Commission order approving the rate increase. The Court said that:

the basic approach in rate making is to take a test year and determine the revenues, expenses and investment for the test year. The test period results are adjusted to allow for reasonably anticipated changes in revenues, expenses, or other conditions in order that the test period results of operations will be as nearly representative of future conditions as possible. . . . [Citing City of Los Angeles v. Public Util. Comm'n, 497 P.2d 785, 797 (Cal. 1972)]

In a general rate proceeding the commission determines for a test period the expenses, the rate base, and the rate of return to be allowed. Based on those figures, the commission determines the revenue requirements, then fixes a rate

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¹⁶Rate changes may also be initiated by public utilities under Utah Code Ann. §§ 54-3-3 (1986) and 54-7-12 (Supp. 1989). Those sections, like section 54-4-4, provide that changes in rates must be prospective and are subject to refund or surcharge only if a rate change is granted on an interim basis pursuant to subsection 54-7-12(3).

to produce sufficient income to meet the revenue requirements. [Emphasis added.]

614 P.2d at 1248.

In the EBA Case, the Court considered whether the Commission could make an accounting adjustment that transferred funds from Utah Power & Light Company's ("UP&L") energy balancing account ("EBA") to its general revenue account to make up for deterioration in its earnings. The Court held that the adjustment was not authorized because it amounted to a retroactive adjustment to rates. The Court then explained the appropriate application of prospective rate making when it turns out that earnings are higher or lower than was contemplated when rates were set:

Some background discussion concerning utility rate making is necessary to a consideration of the issues presented. Following lengthy hearings, utility rates are fixed prospectively by the PSC. U.C.A., 1953, § 54-4-4(1), and § 54-7-12(1)-(2) (Repl. Vol. 6A, 1974, Supp. 1985). In determining an appropriate rate, the PSC considers the utility's historical income and cost data, as well as predictions of future costs and revenues, and arrives at a rate which is projected as being adequate to cover costs and give the utility's shareholders a fair return on equity. [Citing the Wage Case.] To provide utilities with some incentive to operate efficiently, they are generally not permitted to adjust their rates retroactively to compensate for unanticipated costs or unrealized revenues. [Citing section 54-4-4.] This process places both the utility and the consumers at risk that the rate-making procedures have not accurately predicted costs and revenues. If the utility underestimates its costs or overestimates revenues, the utility makes less money. By the same token, if a utility's revenues exceed expectations or if costs are below predictions, the utility keeps the excess. Overestimates and underestimates are then taken into account at the next general rate proceeding in an attempt to arrive at a just and reasonable future rate. [Emphasis added and citation omitted.]

720 P.2d at 420-21.

It is hard to imagine how the Court could have made it any more clear that rate making is an inexact science in which a variety of factors are considered to set rates for the future. When it turns out that the rates set are too high or too low, which inevitably occurs because of errors in projection and changes in circumstance, the only remedy is to go through the process again.¹⁷ The Court, citing section 54-4-4(1), also said that the Commission's "broad authority to regulate a utility's business . . . must be construed to harmonize with the general rules for rate making set by the legislature, to wit: all rate making must be prospective in effect . . ." *Id.* at 423. [Citation omitted and emphasis added.] Section 54-4-4(1) codifies and the EBA Case explicitly adopts the rule against retroactive rate making.

The rule against retroactive rate making is not unique to Utah. In Public Util. Comm'n v. United Fuel Gas Co., 317 U.S. 456, 464, reh'g denied, 318 U.S. 798 (1943), the United States Supreme Court considered whether the Ohio commission had authority retroactively to set rates for interstate sales of natural gas that occurred prior to the adoption of the Natural Gas Act. The Ohio statute, like section 54-4-4(1), provided that the Ohio commission could investigate a rate and, after hearing, find it unjust and unreasonable and fix a new rate "to be thereafter" collected. In reference to this language, the Court said:

The statute in terms thus gives the Commission power to prescribe such rates prospectively only. If, after notice and hearing, the Commission finds rates to be unlawful, it can then fix the just and reasonable rates "to be thereafter"

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¹⁷Note 3, *supra*, demonstrates that errors in projection and changes in circumstance have typically resulted in Mountain Bell earning less than it is allowed to the benefit of rate payers during the last decade.

charged. The establishment of new rates must be preceded by a finding that the old rates are unjust and unreasonable, and the new rates are prospective as of the date they are fixed. There is no basis in the statute for concluding that the Commission's orders can be retroactive . . . ; on the contrary, the explicit language of the statute precludes such a construction. [Emphasis added.]

The holding of United Fuel Gas Co. has been almost universally followed in interpreting ratemaking statutes that contain words such as "to be thereafter observed and in force."¹⁸ An overwhelming majority of states agree with the EBA Case, the Wage Case, and United Fuel Gas Co. and have adopted the rule against retroactive rate making.¹⁹

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¹⁸See e.g., Pacific Tel. & Tel. Co. v. Public Util. Comm'n, 401 P.2d 353, 363 (Cal. 1965); City of Miami v. Fla. Public Serv. Comm'n, 208 So.2d 249, 260 (Fla. 1968); Petition of Elizabethtown Water Co., 527 A.2d 354, 359 (N.J. 1987); Chesapeake and Potomac Tel. Co. v. Public Serv. Comm'n, 300 S.E.2d 607, 619 (W.Va. 1982); Kimberly-Clark Corp. v. Public Serv. Comm'n, 320 N.W.2d 5, 8 (Wis. Ct. App. 1982), aff'd 329 N.W.2d 143, 146 (Wis. 1983)

¹⁹See e.g., Pueblo Del Sol Water Co. v. Ariz. Corp. Comm'n, 772 P.2d 1138, 1140 (Ariz. Ct. App. 1988); Southern Cal. Edison Co. v. Public Util. Comm'n, 576 P.2d 945, 946 (Cal. 1978); City of Los Angeles v. Public Util. Comm'n, 497 P.2d 785, 803-04 (Cal. 1972); Pacific Tel. & Tel. Co. v. Public Util. Comm'n, 401 P.2d 353, 363-64 (Cal. 1965); Colo. Energy Advocacy Office v. Public Serv. Comm'n of Colo., 704 P.2d 298, 305 (Colo. 1985); Conn. Light & Power Co. v. Dept. of Public Util. Control, 516 A.2d 888, 896 (Conn. Super Ct. 1986); Public Serv. Comm'n v. Diamond State Tel. Co., 468 A.2d 1285, 1287 (Del. 1983); Westwood Lake, Inc. v. Dade County, 264 So.2d 7, 12 (Fla. 1972); Ga. Public Serv. Comm'n v. Atlanta Gas Light Co., 55 S.E.2d 618, 631 (Ga. 1949); Ind. Tel. Corp. v. Public Serv. Comm'n, 171 N.E.2d 111, 124 (Ind. Ct. App. 1960); Office of Consumer Advocate v. Iowa State Commerce Comm'n, 428 N.W.2d 302, 306 (Iowa 1988); La. Power & Light Co. v. La. Public Serv. Comm'n, 523 So.2d 850, 857 (La. 1988); Maine Public Advocate v. Public Util. Comm'n, 476 A.2d 178, 183 (Me. 1984); Metro. Dist. Comm'n v. Dept. of Public Util., 224 N.E.2d 502, 508 (Mass. 1967); General Motors Corp. v. Public Serv. Comm'n No. 2, 438 N.W.2d 616, 619 (Mich. Ct. App. 1988); Building Owners and Managers Ass'n of Metro Detroit v. Public Serv. Comm'n, 383 N.W.2d 72, 80 (Mich. 1986); Miss. Public Serv. Comm'n v. Home Tel. Co., 110 So.2d 618, 624 (Miss. 1959); State ex rel. Util. Consumers Council of Mo., Inc. v. Public Serv. Comm'n, 585 S.W.2d 41, 59 (Mo. 1979); Mont. Horse Products Co. v. Great Northern R.R., 7 P.2d 919, 925 (Mont. 1932); Southwest Gas Corp. v. Public Serv. Comm'n, 474 P.2d 379, 383 (Nev. 1970); Montana Dakota Util. Co. v. Public Serv. Comm'n, 431 N.W.2d 276, 280 (N.D. 1988); In re Granite State Elec. Co., 421 A.2d 121, 122 (N.H. 1980); Petition of Elizabethtown Water Co., 527 A.2d 354, 359 (N.J. 1987); Mountain States Tel. & Tel. Co. v. N. M. State Corp. Comm'n, 563 P.2d 588, 604 (N.M. 1977); State ex rel. Util. Comm'n v. Edmisten, 232 S.E.2d 184, 194-95 (N.C. 1977); River Gas Co. v. Public Util. Comm'n of Ohio, 433 N.E.2d 568, 571 (Ohio 1982); Parker v. S.C. Public Serv. Comm'n, 342 S.E. 2d 403, 405 (S.C. 1986); City of Norfolk v. Va. Elec. & Power Co., 90 S.E.2d 140, 145 (Va. 1955); Tariff Filing of New England Tel & Tel. Co., 505 A.2d 680, 682 (Vt. 1986); Chesapeake and Potomac Tel. Co. v. Public Serv. Comm'n, 300 S.E.2d 607, 619 (W.Va. 1982); Friends of the Earth v. Public Serv. Comm'n, 254 N.W.2d 299, 309 (Wis. 1977); MGTC, Inc., v. Public Serv.

The Complaint would have required the Commission to find rates that it once found just and reasonable following a general rate case, unjust and unreasonable at some point in time in the past. Such relief is contrary to section 54-4-4(1).

B. The Rule Against Retroactive Rate Making Is Consistent With Other Principles and Policies.

Interpreting section 54-4-4(1) to require that ratemaking occur prospectively only is consistent with the legislative nature of rate making, is constitutionally based and is sound policy.

1. Rate Making Is a Legislative Function and Can Only Operate Prospectively.

Rates for certain transactions affected with the public interest were originally established by the legislature itself. Even though rate making has now been delegated to regulatory agencies, it is still recognized that the establishment of rates is a legislative function.

In Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U.S. 370, 389 (1932), the United States Supreme Court said:

The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future it was performing a legislative function . . . . It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself.

284 U.S. at 389.²⁰

Comm'n of Wyo., 735 P.2d 103, 107 (Wyo. 1987).

²⁰See e.g. Prentiss v. Atlantic Coast Line Co., 211 U.S. 210, 266 (1908); Kearns-Tribune Corp. v. Public Serv. Comm'n, 682 P.2d 858, 860 (Utah 1984); Utah Dep't of Administrative Serv. v. Public Services Comm'n, 658 P.2d 601, 621 (Utah 1983) ["Wexpro II"]; Utah Dep't of Business Reg. v. Public Serv. Comm'n, 614 P.2d 1242, 1250 (Utah 1980) ["Wage Case"]; Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n,

For the Commission to have granted the relief Resellers seek, it would have had to alter the vested rights of parties based upon past facts. Such relief would be judicial in nature and contrary to the fundamental premise that rate making is a legislative act. The Commission acted properly in exercising its legislative ratemaking function by denying Resellers' request.

2. The Rule Against Retroactive Rate Making Is Constitutionally Based.²¹

Tel-America argues that the rule against retroactive rate making does not bar the relief sought in the Complaint because Mountain Bell had no vested right to earnings in excess of its authorized rate of return. This argument ignores the fact that the rule against retroactive rate making as outlined in the EBA Case is not simply a common law prohibition, but is firmly grounded in state and federal constitutions. In Straube v. Bowling Green Gas Co., 227 S.W.2d 666, 671 (Mo. 1950), the Missouri Supreme Court, citing Arizona Grocery, stated as follows:

When the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions.

The Missouri court reaffirmed this decision in State ex rel. Util. Consumers Council of Mo. v. Public Serv. Comm'n, 585 S.W.2d 41 (Mo. 1979). See also, State ex rel. Boynton v.

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107 Utah 502, 155 P.2d 184, 187-88, reh'g denied, 107 Utah 530, 158 P.2d 935 (1945); Utah Power & Light Co. v. Public Serv. Comm'n, 107 Utah 155, 152 P.2d 542, 546-53 (1944); Mulcahy v. Public Serv. Comm'n, 101 Utah 245, 117 P.2d 298, 302 (1941).

²¹The Commission and the Division take no position on this subpoint.

Public Serv. Comm'n, 11 P.2d 999, 1007 (Kan. 1932); State ex rel. Barvick v. Public Serv. Comm'n, 606 S.W.2d 474, 476 (Mo. Ct. App. 1980); In re Cent. Vt. Public Serv. Corp., 473 A.2d 1155, 1158 (Vt. 1984).

Mountain Bell was required to charge the rates on file with the Commission pursuant to Utah Code Ann. § 54-3-7 (1986). Furthermore, the Commission established that those rates were just and reasonable in final and non-appealed orders. Requiring Mountain Bell to refund amounts it lawfully collected pursuant to tariffs approved by the Commission would be violative of Mountain Bell's due process rights and constitute a confiscatory taking.

3. The Rule Against Retroactive Ratemaking Is Sound Policy. The prohibition against retroactive rate making is logical and sound. Without the rule, rates would never be final, and the ratemaking process would be confusing and disorderly. If retroactive rate making were allowed, both utility and customer would be subject to refunds or surcharges if rates charged were subsequently deemed too high or too low. Neither utility nor customer would have had notice that the price of a commodity or service was subject to change. See In re Cent. Vt. Public Serv. Corp., 473 A.2d 1155, 1159 (Vt. 1984). Thus, a customer, if subjected to a surcharge, would not have had an opportunity to adjust its consumption habits in response to higher rates. Likewise, a utility, if subjected to a refund, would not have had an opportunity to implement cost-cutting measures in response to lower rates.

Retroactive rate making frequently would not compensate or charge the appropriate customers. Customers are constantly being added and dropped by a utility. New customers should not be forced to pay a surcharge for services they did not receive, and they should not be permitted to obtain a refund for services for which they did not pay. See Petition of Elizabethtown Water Co., 527 A.2d 354, 361 (N.J. 1987). Likewise, customers who no longer receive service will not reap the benefit of a refund for services for which they have paid, or, would not be subject to a surcharge for services they purchased too cheaply. See State ex rel. Util. Comm'n v. Edmisten, 232 S.E.2d 184, 194-95 (N.C. 1977).

Utility shareholders invest with an anticipation that they will receive a reasonable return on their investment. If a utility is subjected to a refund for earnings realized in prior years, investors will be much less likely to risk their capital in such an uncertain venture. In Ind. Tel. Corp. v. Public Serv. Comm'n, 171 N.E.2d 111, 124 (Ind. Ct. App. 1960), the court said:

We are satisfied that no utility could attract capital for expansion or replacement of its property and facilities, or for any other purpose, if the Commission could at one time fix rates for that utility and then at some later time rescind those rates retroactively, fix lower rates retroactively and require the difference to be refunded to ratepayers. The law . . . was not designed or intended to create chaotic conditions in the market where utilities, as well as other businesses go to obtain capital for their legitimate business purposes.

In addition, a utility would never know if it could invest its earnings in capital improvements or pay dividends if its rates were subject to retroactive adjustment. See State ex rel. Standard Oil of Cal. v. Dep't of Public Works, 53 P.2d 318, 319 (Wash. 1936).

On the other hand, if a utility is allowed to make a retroactive surcharge for services many years down the road, shareholders who invest in the company in the future would receive a great windfall at the expense of shareholders in the past who underearned. Sound public policy and principles of finality demand adherence to the rule against retroactive rate making.

C. Ordering a Refund of Earnings in Excess of the Rate of Return Found Reasonable By the Commission in the 1985 Rate Order Would Constitute Prohibited Retroactive Rate Making.

Resellers argue that the rate of return utilized in setting rates is a limit which is not guaranteed, but which cannot be exceeded. Based upon this premise, they say that Mountain Bell's earnings in excess of the rate of return found reasonable in the 1985 Rate Order were a violation of that order and that ordering a refund of excess earnings would simply amount to enforcement of the 1985 Rate Order. (MCI Br. at 46-49; Tel-America Br. at 11-12, 14-16). These arguments are contrary to Utah law, to accepted principles of rate making and to overwhelming precedent from other jurisdictions.

1. Utah Authorities Are Directly Contrary to Resellers' Argument. A review of ratemaking statutes reveals that the Commission is empowered to set rates, not rate of return. See Utah Code Ann. §§ 54-3-3, 54-3-7, 54-4-4, and 54-7-12.²²

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²²There is only one reference to "rate of return" in Title 54 of the Utah Code. That reference is in subsection 54-4a-6(4)(a) which establishes criteria to guide the work of the Division in acting in the public interest to advocate that utilities' rates be just, reasonable, and adequate.

In the Wage Case, 614 P.2d at 1248, the Court confirmed that rate of return is merely one component the Commission utilizes in setting rates:

In a general rate proceeding, the commission determines for a test period the expenses, the rate base, and the rate of return to be allowed. Based on those figures, the commission determines the revenue requirements, then fixes a rate to produce sufficient income to meet the revenue requirements.

Just as it would be improper to order a refund or surcharge in the event a utility's expenses change from those anticipated in a general rate case, it is improper to order a refund if earnings differ from those anticipated in setting rates.

If the Wage Case left any doubt on the issue, in the EBA Case, the Court stated in reference to rate making that:

This process places both the utility and the consumers at risk that the rate-making procedures have not accurately predicted costs and revenues. If the utility underestimates its costs or overestimates revenues, the utility makes less money. By the same token, if a utility's revenues exceed expectations or if costs are below predictions, the utility keeps the excess. [Emphasis added.]

720 P.2d at 420. If revenues exceed, or expenses are below, projections utilized in setting rates, the utility will earn in excess of the rate of return utilized in setting rates. The Court acknowledged that a utility would be entitled to keep the excess in such a circumstance.

2. Learned Treatises Support the Utah Authorities. Resellers have attempted to analogize the rate of return utilized by the Commission in setting rates to a fishing limit: a utility is guaranteed no level of earnings but is only permitted to earn up to a specific amount established by the Commission. Resellers cite Priest, Principles of Public Utility

Regulation 202 (1969) and Welch, Cases and Text on Public Utility Regulation 478 (Rev. Ed. 1968), and cases citing Priest and Welch, for this proposition. A closer reading of these treatises indicates that Resellers have missed the point. Priest and Welch are making the point that "utility revenues are not guaranteed," not that the rate of return sets a limit which, if exceeded, requires a refund. Priest at 202-03. Welch makes this clear when he says that "[i]t is generally well settled that a failure of a utility to earn a sufficient return in the past cannot be made the basis for giving it an extra return above a fair allowance for the present and future, anymore than the present or future return can be cut down to offset excessive earnings in the past." Welch at 501.

The leading treatise, J. Bonbright, A. Daniels and D. Kamerschen, Principles of Public Utility Rates, 201 (1988), states:

The tariff or rate schedule approved by the Commission is designed to yield a reasonable rate of return on average, over the next few years. But the revenue requirement may be missed on either side. The rate schedule, but not the total revenue level, is fixed. A firm that realizes a return that is above or below the permitted rate is not required to return the excess or be subsidized for the deficiency.

3. Applicable Authorities from Other States Support the Utah Cases. Resellers cite only one case from another state, Narragansett Elec. Co. v. Burke, 505 A.2d 1147 (R.I. 1986), supporting their argument that a utility may be required to refund earnings in excess of a rate of return utilized in setting rates. The overwhelming weight of the authority is to the contrary. A recent case from New Jersey typifies the approach of almost all courts.

In Petition of Elizabethtown Water Co., 527 A.2d 354 (N.J. 1987), the utility applied for a rate increase. At the hearing on the application, it was established that the company had charged rates that were previously set and approved in a final order of the Board of Public Utilities ("BPU"), but that, as a result of unforeseen factors beyond the control of the utility, it had experienced earnings in excess of its rate of return utilized in setting rates in the prior case. The BPU granted the rate increase, but delayed its effectiveness until the overearnings had been offset.

The New Jersey Supreme Court noted that the effect of the order deferring the rate increase found just and reasonable "until an amount equal to the prior overearnings had been offset had precisely the same effect as granting an immediate increase and ordering the company to refund [the excess earnings] to ratepayers." Id. at 358. The court determined that the Commission only had statutory authority to set rates to be observed

"thereafter" and that utility rates are accorded prospective effect only. Id. at 359.²³ The

New Jersey court held:

Based upon the statutory language, the statutory ratemaking scheme, the Legislature's very limited and specific authorization to the BPU to engage in retroactive ratemaking, and our prior decisions, we hold that retroactive ratemaking is prohibited regardless of whether such ratemaking benefits the utility or the ratepayer. When existing rates are insufficient to provide a fair rate of return, the proper remedy for the utility is to file an application for higher rates. If, through unforeseen circumstances, a utility earns profits that are deemed excessive, the proper remedy is for the BPU to initiate a proceeding to lower the rates prospectively. [Citation omitted and emphasis added.]

Id. at 364.

The facts of Elizabethtown Water Co. are strikingly similar to this case. Resellers allege that, as a result of unforeseen factors outside of its control, Mountain Bell, like Elizabethtown, has realized earnings in excess of the rate of return used by the

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²³The court noted that the New Jersey legislature granted specific authority to the Commission to order refunds under certain circumstances, but that generally refunds were not permitted. This argument applies with equal force in Utah. In four instances, the Utah legislature has provided specific mechanisms for refunds or reparations. Utah Code Ann. §§ 54-6-24(5) (1986), 54-7-12(3), and 54-7-20. Subsection 54-6-24(5), which is applicable only to motor carriers, allows the Commission to refund overcharges to or collect undercharges from shippers in certain circumstances. Subsection 54-7-12(3) provides for interim rate changes during the course of a rate case and allows the Commission, if it ultimately approves rates different than the changed rates, to order a refund or surcharge of the excess of the interim change. Section 54-7-17 provides for a refund of rates set by the Commission which are subsequently overturned by the Supreme Court on appeal under certain circumstances. Section 54-7-20 provides for reparations when a utility charges rates that differ from its approved tariffs. This section will be discussed more fully in Point IV, infra. None of these statutes is applicable here.

The fact that the cited statutes contain specific language dealing with refunds, while Section 54-4-4(1) does not, is significant in determining legislative intent. It is a well recognized maxim that "where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed." See State v. Welkos, 109 N.W.2d 889, 892 (Wis. 1961). See also Kennecott Copper Corp. v. Anderson, 30 Utah 2d 102, 514 P.2d 217 (1973). Accordingly, it can be presumed that the legislature intended the Commission to have authority to order refunds only in the specific circumstances provided.

Commission to set the rates which it charged. Resellers also requested the Commission to order Mountain Bell to disgorge all overearnings. In both states, the basic ratemaking statute provides that rates are set after hearing to be "thereafter" in effect.

California, Connecticut, Florida, Michigan, West Virginia and Wisconsin have considered possible refunds of overearnings under statutory schemes similar to Utah's and have reached the same result as New Jersey.²⁴

In Narragansett Elec. Co. v. Burke, 505 A.2d 1147 (R.I. 1986), the only court decision cited by Resellers,²⁵ the Rhode Island Supreme Court upheld an order requiring a refund of earnings in excess of the "allowed" rate of return. Id. at 1148.

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²⁴There are many cases holding that ordering a refund of earnings in excess of the rate of return used in setting rates would violate the rule against retroactive rate making. See Pacific Tel. & Tel. Co. v. Public Util. Comm'n, 401 P.2d 353 (Cal. 1965) (the commission lacked power to order refunds on amounts collected by the utility pursuant to the rates previously approved by the commission); Conn. Light & Power Co. v. Dep't of Public Util. Control, 516 A.2d 888 (Conn.Super.Ct. 1986) (holding that the department could not require a deposit in a reserve account of earnings in excess of 15.9 percent to be used as an offset to next general rate request); City of Miami v. Fla. Public Serv. Comm'n, 208 So.2d 249 (Fla. 1968) (the public service commission did not have the power to rule public utility rate reductions retroactive and order refunds); Mich. Bell Tel. Co. v. Mich. Public Serv. Comm'n, 24 N.W.2d 200 (Mich. 1946) (the public service commission did not have the power to reduce rates retroactively and order refunds); Chesapeake and Potomac Tel. Co. v. Public Serv. Comm'n, 300 S.E.2d 607 (W.Va. 1982) (holding that a retroactive disallowance from a telephone company's rate base of excess profits earned by an affiliated manufacturer on sales to the company for periods which had previously been approved constituted a misapplication of legal principles in that the rate base only could be adjusted prospectively); Kimberly-Clark Corp. v. Public Serv. Comm'n, 320 N.W.2d 5 (Wis. Ct. App. 1982), aff'd 329 N.W.2d 143 (Wis. 1983) (holding that alleged overearnings by a utility could not be disgorged retroactively inasmuch as the utility had only collected what had been properly authorized by the Wisconsin commission).

²⁵MCI cites the Rhode Island Commission below in the Narragansett case. Re Narragansett Elec. Co., 57 PUR 4th 549 (RI. Public Util. Comm'n 1984). MCI also cites another commission decision, Re So. Bell Tel. & Tel. Co., 26 PUR 4th 49 (Fla. P.S.C. 1978). In that case, the Florida commission commenced an investigation into the revenue requirements of Southern Bell and determined that it was earning in excess of the rate of return utilized in setting its rates. Instead of having a rate case to lower rates prospectively, Southern Bell voluntarily agreed to make a refund to its customers. The case does not discuss the legal basis for this action and cannot serve as authority for an exception to the rule against retroactive rate making; the utility offered the refund voluntarily.

Important distinctions exist between the Rhode Island situation and that presented here. First, the Rhode Island statute is materially different from section 54-4-4(1). It does not have a provision stating that rates will be "thereafter" in force.²⁶ The significance of the absence of the word "thereafter" is apparent from the cases cited in Point III, A, supra. Section 54-4-4(1) contains the word "thereafter" and, therefore, specifically provides that rates are to be set prospectively. Second, Rhode Island's refund statute was amended to make it more liberal immediately following a court decision which held that the commission did not have authority to order refunds.²⁷ Third, Rhode Island is a national anomaly in recognizing a wide variety of exceptions to the rule against retroactive rate making.²⁸ The Court has recognized no exceptions.

In summary, although Rhode Island allows refunds of past overearnings based upon a different statutory scheme and a unique view of the rule against retroactive rate making, California, Connecticut, Florida, Michigan, New Jersey, West Virginia and Wisconsin have

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²⁶The Rhode Island statute, R.I. Gen. Laws § 39-3-11 (Supp. 1988), provides in relevant part that:

Within ninety (90) days after the completion of any such hearing, the commission shall make such order in reference to any proposed rate, toll or charge as may be proper. Notwithstanding the provisions of this section, the commission shall periodically hold a public hearing and make investigation as to the propriety of rates when charged by any public utility and shall make such order in reference to such rate, toll, or charge as may be just.

²⁷R.I. Gen. Laws § 39-3-13.1 (1984). This refund provision was amended after the court held in Narragansett Elec. Co. v. Burke, 404 A.2d 821, 827 (R.I. 1979), cert denied, 444 U.S. 1079 (1980), that a commission order finding a rate reasonable for the future has the effect of a statute and the revenues collected pursuant to the rate were not subject to refund.

²⁸See Point V, infra.

prohibited such refunds under statutes and rules against retroactive rate making similar to Utah's.

IV. THE COMMISSION CANNOT ORDER REPARATIONS OF RATES FOUND JUST AND REASONABLE IN FINAL RATE ORDERS WHERE THE RATES WERE COLLECTED PRIOR TO ANY FINDING THAT THEY HAD BECOME UNJUST AND UNREASONABLE.

The principal argument advanced by Resellers is that Utah Code Ann. § 54-7-20 allows the Commission to award refunds of rates collected which were previously found just and reasonable if they are now determined to be unjust and unreasonable in spite of the rule against retroactive rate making. In making this argument, Resellers make three crucial mistakes. First, they have incorrectly distinguished the recent ruling of the Court in American Salt Co. v. W.S. Hatch Co., 748 P.2d 1060 (Utah 1987). Second, they have incorrectly assumed, contrary to all authority, that rates previously found just and reasonable by the Commission automatically become unjust and unreasonable if they result in earnings in excess of the rate of return used in setting them. Third, their interpretation of section 54-7-20(1) is inconsistent with, and nullifies, a portion of section 54-4-4(1).

A. The Reparations Statute Applies Only When a Utility Charges a Rate that Has Not Been Approved in a Final Commission Order.

Utah Code Ann. § 54-7-20(1) (1986) provides in pertinent part:

When complaint has been made to the commission concerning any rate . . . 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.

Resellers do not claim that Mountain Bell has charged excess or discriminatory rates. They claim the statute is applicable because the rates charged were unjust and unreasonable.

In a recent opinion, the Court defined the breadth of the reparations statute as applied to rates claimed to be unjust and unreasonable. In American Salt, Hatch agreed to haul salt for an amount less than the applicable tariff on file with, and previously approved by, the Commission. However, no approval was sought for this deviation from the tariff. A dispute developed between Hatch and American Salt which resulted in Hatch attempting to collect the filed tariff amount for the services provided. American Salt filed a complaint with the Commission claiming that the tariff was unjust and unreasonable because (1) it would result in Hatch earning a windfall profit, (2) application of the filed tariff did not make economic sense because it was higher than the retail value of the salt and three to four times the amount agreed upon and (3) the Commission had found a lower rate just and reasonable in approving a special rate for Morton Salt. Id. at 1062, 1064. The Commission dismissed the complaint on the ground that, absent prior Commission approval, Hatch was required to charge the rate previously found just and reasonable.

On appeal, the Court reviewed the requirement that rates charged must be just and reasonable. It noted that the rate Hatch sought to collect had been previously found just

and reasonable by the Commission. Id. at 1063. Quoting from the EBA Case, the Court stated that "'all rate making must be prospective in effect' in order to protect the balance of risk between utilities and consumers." Id.²⁹ The Court went on to quote with approval the Commission's order on rehearing, agreeing that the imposition of the higher filed rates was extremely harsh to American Salt. However, notwithstanding the apparent inequity, the Court said that "[t]he tariff rates must be charged and collected unless prior specific authorization from [the] Commission is obtained." Id. at 1064. [Emphasis in original.] The Court concluded its analysis of American Salt's claim that it was entitled to reparations because Hatch's rates were unjust and unreasonable, stating:

In this case, the general commodity tariff was the only tariff on file which could properly be applied to the shipments in question. The Commission could not order reparations under the statute. [Emphasis added.]

Id. at 1065.

MCI attempts to distinguish American Salt by arguing that in that case "the Commission had made a specific finding that the salt tariff was fair and reasonable" and the party seeking reparation "failed to contest that finding." (MCI Br. at 28-29) This argument is based on an incorrect reading of the case. In American Salt, the Court makes reference to a Commission finding that "[t]he Commission has found the salt tariff to be just and reasonable." The Court went on to explain that American Salt did not contest that finding. Id. at 1062. MCI interprets this language to imply that the Commission

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²⁹The Court had no trouble reconciling the rule against retroactive rate making and the reparations statute in American Salt. Just as the Commission relied on the EBA Case in determining that reparation was not available in this case, the Court relied on the EBA Case in determining that reparation was not available in American Salt. See, Point IV. C, infra.

made a finding in the case before it on American Salt's reparations complaint that the salt tariff was just and reasonable. That is not correct. The Commission found that it had previously found the salt tariff just and reasonable. See Commission Report and Order attached hereto as Appendix 13 at 3 paragraph 4. MCI also interprets the Court's language to imply that American Salt did not preserve its claim that the rate was unjust and unreasonable. Again, this interpretation is incorrect. American Salt alleged that the rate was unjust and unreasonable in its petition for rehearing and in its appeal. See American Salt's Application for Rehearing attached as Appendix 14 at 11-12, 16-21; American Salt's Docketing Statement attached as Appendix 15 at 6.

The same thing happened in this case. In the 1985 Rate Order, the Commission found that the rates charged by Mountain Bell were just and reasonable. Like American Salt, Resellers could not challenge in a subsequent case the Commission's prior finding that the rates charged were just and reasonable; the finding was an accomplished fact of which the Commission and the Court could take notice.

B. Rates Approved by the Commission in Final General Rate Case Orders Are by Definition Just and Reasonable and, Therefore, Not Subject to Reparations.

Resellers argument that a refund is justified under section 54-7-20 rests on the premise that the rates charged by Mountain Bell during 1987 and 1988 were unjust and unreasonable. Resellers assume, without citing any authority, that, if rates charged result in earnings in excess of the rate of return found reasonable by the Commission, they are unjust and unreasonable. (MCI Br. at 13; Tel-America Br. at 8) This argument ignores

the principle that American Salt found persuasive: that public utilities are obligated under Utah Code Ann. § 54-3-7 to charge the rates approved and on file with the Commission. It would be absurd for the law to require a public utility to charge rates approved by the Commission and at the same time subject it to reparations for charging those rates.

Resellers' argument also ignores overwhelming authority from throughout the country that rates approved by a regulatory commission in a final order are just and reasonable until subsequently found otherwise after hearing. For example, in Mich. Bell Tel. Co. v. Mich. Public Serv. Comm'n, 24 N.W.2d 200 (Mich. 1946), the Michigan Supreme Court held that:

[W]hen a regulatory body has prescribed a rate to be charged for the future by a public utility and subsequently decides that such prescribed rate should be reduced, it cannot penalize the utility for collecting the rate during the period elapsing between the date of the order prescribing the rate and the date of the subsequent order reducing it.

Id. at 204.

As applied to reparations statutes, this principle means that reparations cannot be awarded for a rate charged in conformity with a final rate order. The leading case is Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U.S. 370, 390 (1932), in which the Supreme Court of the United States stated the established and frequently cited rule against retroactive rate making:

Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the

Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.

Arizona Grocery disposes of Resellers' argument that the reparations statute exists independently of the rule against retroactive rate making. It is a case in which a claim for reparations was found untenable because it violated the rule against retroactive rate making.

In State ex rel. Boynton v. Public Serv. Comm'n, 11 P.2d 999 (Kan. 1932), the Kansas Supreme Court, interpreting the words "unjust and unreasonable" under its reparations statute, reached a similar holding.³⁰ The court stated:

it seems clear that when a rate has been the subject of a deliberate inquiry in which the carriers, the shippers, and the commission's own experts have participated, as well as any and all other persons who cared to take a hand in it as the statute provides and permits, any rate so prescribed by the commission and put into effect by the carriers may be confidently collected and retained by them as their very own, without misgiving that at some future time a further hearing of the commission may be had and more evidence taken and a different conclusion reached and those rates condemned as unreasonable and reparation certificates allowed for the difference between the rates which the commission did authorize and the rates which it should have authorized. Such a method of regulating public utilities has none of the earmarks of due process of law nor of the simplest notions of justice. Nor would it be worth the while of any shipper to receive such a reparation certificate, for it would not serve as a justiciable basis of recovery. That point, at least, was laid at rest by [Arizona Grocery]. [Citations omitted.]

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³⁰The Kansas statute, Kan. Stat. Ann. § 66-154a-1 (1929), paralleled Section 54-7-20 in many ways. It provided in relevant part that:

upon complaint in writing made to the public service commission that an unfair, unjust, unreasonable or unjustly discriminatory or unduly preferential rate or charge has been exacted, such commission shall investigate said complaint, and if substantial, shall make a certificate under its seal setting forth what is, and what would have been a reasonable and just rate or charge for the service rendered, which shall be prima facie evidence of the matter therein stated.

Id. at 1006-07.³¹

The law in other jurisdictions comports with that in Utah and supports the sound rule that rates set by a commission in a final general rate case order are by definition "just and reasonable" and, therefore, not subject to reparations.

C.   Reparation of Unjust and Unreasonable Rates Is Allowed Only When a Utility Continues to Charge Rates Previously Approved After Those Rates Have Been Later Found Unjust and Unreasonable or Charges Rates Never Approved.

Resellers argue that the words "unjust" and "unreasonable" in section 54-7-20 must apply to a circumstance such as the present one or they could have no application and would be effectively read out of the statute. In so arguing, they have ignored several cases which explain the proper application of the terms "unjust" and "unreasonable" in awarding reparations. Their argument also creates a conflict between sections 54-4-4(1) and 54-7-20(1) contrary to rules of statutory construction.

1.   Reparation of Unjust and Unreasonable Rates Is Permitted in Appropriate Circumstances. In the leading case, Cheltenham & Abington Sewage Co. v. Pa. Public Util. Comm'n, 25 A.2d 334, (Pa.) cert. denied, 317 U.S. 588 (1942), the Pennsylvania Supreme Court considered whether a reparation award was appropriate where a utility had earned in excess of a gross revenue figure established by the Pennsylvania commission. In 1930, the commission determined the utility's revenue requirement and ordered it to file

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³¹Many other cases state that rates established by a commission are presumed just and reasonable. See e.g. Southern Cal. Gas Co. v. Public Util. Comm'n, 591 P.2d 34, 44 (Cal. 1979); City of Moorhead v. Minn. Public Util. Comm'n, 343 N.W.2d 843, 846 (Minn. 1984); State v. Mountain States Tel. & Tel. Co., 224 P.2d 155, 166 (N.M. 1950); Atchison, T. & S. F. Ry. Co. v. State, 200 P. 232, 233 (Okla. 1921); State ex rel. Standard Oil Co. of Cal. v. Dept. of Public Works, 53 P.2d 318, 319 (Wash. 1936).

a tariff to produce that level of revenue. The utility filed a tariff which was approved by the commission to be effective on July 1, 1931. Two and one-half years later, the commission instituted an investigation into the reasonableness of the utility's rates. On August 30, 1935, after hearing, the commission issued an order finding that the rates that had been in effect since 1931 were unjust and unreasonable. The commission also found a new lower revenue requirement to be just and reasonable. The utility appealed. During the pendency of the appeal, the utility continued to charge the old rates until January 1, 1937 when it established new rates consistent with the commission's order as modified by the lower court on appeal.

A petition was filed with the commission on October 17, 1935 seeking reparations with respect to a particular rate because, when the rate had been set in 1930, the commission noted some uncertainty regarding the level of income that should be produced by the rate and noted that a rate adjustment might be necessary to ensure that the income level was appropriate. In 1934, it was determined that the rate had produced too much income. Id. at 338. The commission awarded reparation of the excess from October 17, 1933. It selected that date because it was two years prior to the date the complaint was filed and two years was the period prescribed by the statute for reparation of unjust and unreasonable rates.

On appeal to the Pennsylvania Supreme Court, the court noted the importance of placing the utility on notice that its rates would be collected subject to reparations stating:

The rates prescribed by the commission in 1931 after hearing were "commission-made" rates as that term is used in utility law. . . . The company consequently was entitled to rely upon the declaration of the commission as

to what was a lawful and reasonable rate until a change was made by the commission acting in its quasi legislative capacity.

. . . .

There were important distinctions between proceedings to fix future rates . . . and those for reparations . . . . "The object of a rate proceeding is to prevent a public wrong for the future; reparation redresses a private wrong of the past. . . . By the express provisions of the statute nothing can be done toward the redressing of the wrongs suffered through the exaction of unreasonable rates until the commission, after hearing, 'shall determine that any rates which have been collected * * * were * * * unreasonable' . . . ." [Citations omitted.] Nevertheless a commission-made rate furnishes the applicable law for the utility and its customers until a change is made by the commission. The utility was entitled to rely on the order of 1931 until August 30, 1935, but thereafter might be liable for reparations.

. . . .

When the commission on August 30, 1935, determined that the rates were unjust and unreasonable, that constituted a new enactment fixing the relative rights of the utility and its customers.

Id. at 336-38.

Cheltenham provides one answer to Resellers' question regarding the applicability of the words "unjust" and "unreasonable" in section 54-7-20. A rate may be unjust and unreasonable on a prospective basis if it has been approved previously by the commission in a final order but has later been found, after hearing, to be unjust and unreasonable. In such a case, reparations may be awarded only from the date of the new order establishing that the rate is unjust and unreasonable.

Here, there was never a finding in a final order that the rates charged by Mountain Bell were unjust and unreasonable until the Commission implicitly made that finding in its orders setting new rates. Mountain Bell did not charge the rates implicitly found unjust

and unreasonable after such orders, but charged the new rates approved by the Commission. Therefore, no reparations can be awarded in this case.

State ex rel. Boynton v. Public Serv. Comm'n, 11 P.2d 999 (Kan. 1932), also identified another circumstance under which unjust and unreasonable rates are subject to reparation. Boynton holds that reparation may be allowed where rates are filed by a utility but are not specifically approved by the regulatory body and are later found to have been unreasonable. However, Boynton must be read with State ex rel. Standard Oil Co. of Cal. v. Dep't of Public Works, 53 P.2d 318, 319 (Wash. 1936), in which the court held that reparations of rates not previously approved and later found unreasonable cannot reach rates collected prior to the date of filing the complaint. The court stated:

Without further analysis, we think that the statute law, when read and considered as a whole, leads to the view, and we must now hold, that when a rate is filed, published and permitted to become effective by the department, it is and remains, until challenged in the manner provided by statute, the lawful rate and the only lawful rate to be charged and collected. Otherwise, the carrier would never know what its lawful earnings were and could never allocate its earnings to betterments and dividends without the possibility of being embarrassed by delayed orders to make restitution. It cannot be the legislative intent that its only protection in that respect is the two year limitation contained in the statute. Therefore, when a scheduled rate is challenged, that challenge should affect the scheduled rate only from the date of the filing of the complaint.

Id. at 319.

2. Allowing Reparations in this Case Conflicts with Section 54-4-4(1). It is well established that a statute must be construed "so as to make it harmonious with other statutes relevant to the subject matter." Stahl v. Utah Transit Auth., 618 P.2d 480 (Utah

1980). In In re Utah Savings and Loan Ass'n, 21 Utah 2d 169, 442 P.2d 929 (1968), the Court had to interpret two statutes that appeared somewhat contradictory on their faces.

The Court set a framework for interpreting statutes stating:

They should be looked at together, in their relationship to each other, with a view to reconciling any such apparent conflict and giving each its intended effect insofar as that can be accomplished without nullifying the other. It is therefore appropriate to consider the purpose of each statute and what would be the result of the alternative interpretations contended for by the parties.

Id. at 931-32.

The Commission's interpretation of the reparations statute, section 54-7-20, is the only reasonable interpretation when that statute is read together with the ratemaking statute, section 54-4-4. Resellers' interpretation fails to read the statutes together and effectively reads the words "to be thereafter observed and in force" out of section 54-4-4(1). Under their view, every rate would be subject to retroactive adjustment if later found unjust and unreasonable.³²

V. THE COMMISSION'S CONCLUSION THAT NONE OF THE EXCEPTIONS TO THE RULE AGAINST RETROACTIVE RATE MAKING APPLY IN THIS CASE IS WITHIN THE TOLERABLE LIMITS OF REASON.

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³²Tel-America makes two arguments that deserve only passing reference. First, Tel-America cites Garkane Power Ass'n v. Public Serv. Comm'n, 681 P.2d 1196 (Utah 1984), for the proposition that reparations are appropriate when rates are made unreasonable by later increases in utility revenues. (Tel-America Br. at 19) This misstates the holding of Garkane and its relationship to the reparations statute. Garkane simply stands for the proposition that if a utility charges amounts in excess of its rate schedule, the excessive charges may be subject to reparation. It does not address the issue presented in this case. Second, Tel-America claims that the doctrine of unjust enrichment would require that earnings in excess of the rate of return found reasonable in the 1985 Rate Order be refunded in this case. (Tel-America Br. at 23-24) This argument ignores precedent that the common law right to restitution has been subsumed in reparations or stay pending appeal statutes. See Independent Voters of Ill. v. Ill. Commerce Comm'n, 510 N.E.2d 850 (Ill. 1987); Spintman v. Chesapeake and Potomac Tel. Co., of Md., 255 A.2d 304 (Md. 1969). Utah has both types of statutes which more than adequately protect rate payers in appropriate circumstances.

Resellers have cited a variety of exceptions to the rule against retroactive rate making and contend that the Commission erred in failing to find one of them applicable. (MCI Br. at 36-45; Tel-America Br. at 13-16) The Commission considered these exceptions and concluded that certain exceptions might apply including where the utility had "misrepresented important ratemaking information or otherwise misled regulators, or where a prior rate has been nullified as a result of a Supreme Court order, or possibly other situations could be suggested." However, based upon the undisputed facts, the Commission concluded that "none of these examples has been suggested in this case, nor any others that we would consider reasonable." (R. at 679-80 [Appendix 2]) This conclusion by the Commission involving a mixed question of law and fact is within the tolerable limits of reason and should not be overturned.

A. The Exceptions to the Rule Against Retroactive Rate Making for Unforeseen Events Are Not Applicable.

Resellers attempt to analogize this case to cases finding exceptions to the rule against retroactive rate making where unforeseeable events outside the control of the utility occur. (MCI Br. at 36-39; Tel-America Br. at 13) There are two problems with Resellers' argument. First, TRA-86 is not such an event. Second, the Commission and Division foresaw the potential impact of TRA-86 and acted responsibly in attempting to deal with it.

A handful of jurisdictions have allowed exceptions to the rule against retroactive rate making in response to severe storms or other unique problems. These exceptions

have involved situations in which the financial viability of the utility or utility service is severely impacted by an unforeseen event which occurs before the utility and regulators have an opportunity to investigate and make appropriate prospective rate changes.³³

TRA-86 is not similar in any way to these unforeseen events. Although TRA-86 was unforeseen in the 1985 test year, it was not unforeseen before it occurred, and it did not occur before the utility and regulators had an opportunity to adjust rates prospectively to deal with it. There was a tremendous national debate on tax reform prior to enactment of TRA-86. The Act became law on October 22, 1986. The only provisions of the Act effective retroactively prior to that date repealed investment tax credits and diminished Mountain Bell's earnings. The provision which Resellers cite as resulting in an unforeseen windfall to Mountain Bell, the reduction in corporate tax rate, was not effective for more than eight months after TRA-86 became law.

The fact that TRA-86 was foreseeable is demonstrated by MCI's argument that many states took action to ensure that the benefits from it inured to rate payers. However, contrary to MCI's assertion that, "[w]hile the Utah Commission and Division were waiting for Mountain Bell to produce the earnings and budget data to demonstrate the financial impact of the 86 Tax Act, other states and utilities were acting in overwhelming numbers to reverse the benefits of tax cuts for utility rate payers" (MCI Br.

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³³See Office of Consumer Advocate v. Iowa State Commerce Comm'n, 428 N.W.2d 302 (Iowa 1988); State ex rel. Pittman v. Public Serv. Comm'n, 520 So.2d 1355 (Miss. 1987); Blackstone Valley Elec. Co. v. Public Util. Comm'n, 542 A.2d 242 (R.I. 1988); Narragansett Elec. Co. v. Burke, 475 A.2d 1379 (R.I. 1984); Providence Gas Co. v. Burke, 475 A.2d 193 (R.I. 1984); Narragansett Elec. Co. v. Burke, 415 A.2d 177 (R.I. 1980); Petition of Green Mountain Power Corp., 519 A.2d 595 (Vt. 1986); Wisconsin's Environ. Decade, Inc. v. Public Serv. Comm'n, 298 N.W.2d 205 (Wis. Ct. App. 1980).

at 22), the Commission and Division took prompt action to investigate the effects of the Act on earnings and took appropriate action based upon the information received. It makes no sense to claim that TRA-86 was an unforeseen event under these circumstances.

Resellers' real objection is not that TRA-86 was unforeseen or that Utah regulators did not respond to it, but that Resellers are not satisfied with the Utah response. This objection is incorrect because it ignores the circumstances in 1986 and 1987 including the fact that information then available did not indicate that overearnings would occur, that the Wage Case discouraged single issue rate cases, and that section 54-7-12(3), as it then existed, did not authorize the Commission to order interim rate reductions. Based upon these facts, the Commission found that the Division acted in good faith (R. 679 [Appendix 2]) However, even if this finding is ignored and Resellers' objection is assumed to be valid, this would only indicate that there was some mistake in the regulatory process. A similar claim was considered by the Court in the EBA Case and rejected. In the EBA Case, UP&L contended that, if the Commission was barred from transferring funds from the EBA to the general revenues of the company, the EBA should be found to be an invalid mechanism because it improperly included revenues and expenses that it should not have. The Court rejected that argument, stating unequivocally:

In determining the validity of the order here under review, the fact that the PSC's motive was to correct some untoward effects of a faultily constructed EBA would be irrelevant. The bar on retroactive rate making has no exception for missteps made in the rate-making process. Corrective action can be taken, but it must be prospective only. [Emphasis added.]

720 P.2d at 424.

B. MCI's Reliance on Fuel Cost Pass-Through Cases and Similar Cases Is Misplaced.

In an effort to overcome the obvious bar of the rule against retroactive rate making to the Complaint, MCI has cited numerous cases allowing refunds of rates established pursuant to fuel adjustment or other flow-through mechanisms. The premise of this argument is that ordering a refund is not rate making. (MCI Br. at 34-35) This premise is incorrect. See Petition of Elizabethtown Water Co., 527 A.2d 354, 358 (N.J. 1987); Spintman v. Chesapeake and Potomac Tel. Co. of Md., 255 A.2d 304, 307 (Md. 1969). In any event, a quick review of MCI's cases demonstrates that they are not applicable to the facts of this case and that they are not inconsistent with the general prohibition against retroactive rate making.

1. Fuel Cost Pass-Through Cases Are Readily Distinguishable. River Gas Co. v. Public Util. Comm'n, 433 N.E. 2d 568 (Ohio 1982), is cited for the proposition that the rule against retroactive rate making was inapplicable to a refund ordered by the Ohio Public Utilities Commission under a purchase gas adjustment clause because the application of the clause did not constitute rate making in its usual and customary sense.

River Gas distinguishes itself from our case. The Ohio court stated:

At the outset, a distinction must be recognized between the statutory rate-making process involved in establishing fixed rate schedules, and the statutory procedure governing variable rate schedules under the fuel cost adjustment procedure. . . .

[T]he fuel cost adjustment provisions . . . represent a statutory plan which authorizes a utility to pass variable fuel costs directly to consumers. Rates are thereby varied without prior approval of the commission, and independently from the formal rate-making process . . . .

Id. at 571.

Resellers also cite Southern Cal. Edison Co. v. Public Util. Comm'n, 576 P.2d 945 (Cal. 1978). It is another case in which a court recognized that rate adjustments attributable to automatic fuel cost pass-throughs are not traditional rate making and are, therefore, not subject to the ban on retroactive rate making. Again, the court distinguished fuel cost pass-through cases from normal ratemaking such as occurred in our case and demonstrated why a refund cannot be granted under facts such as those present in our case. The Court said:

Pacific Tel. & Tel. [Co. v. Public Util. Comm'n 401 P.2d 353 (Cal. 1965)] was precisely such a general ratemaking case. There the commission conducted an extensive investigation of the rates charged by the utility in question, found them to be unreasonably high, and fixed new lower rates. In addition, however, the commission ordered the utility to refund to its customers all charges collected in excess of the new rate level since the beginning of the investigation. The order, of course, resulted in the new general rate structure taking effect retroactively, a disposition which we ruled beyond the statutory power of the commission.

. . . .

We question neither the rule stated in the foregoing decisions nor its application to the facts there presented. But this is not such a case. At the risk of belaboring the obvious, we observe that before there can be retroactive ratemaking, there must be ratemaking . . . . [Emphasis in original.]

Id. at 946. MCI has cited several other fuel cost pass-through cases.³⁴ None of these authorities supports their argument.

The 1985 Rate Order, in which the rates Mountain Bell charged in 1987 and 1988 were set, is the type of rate making which Resellers' authorities recognize is subject to the rule against retroactive ratemaking. Resellers' attempt to analogize the Complaint to fuel adjustment cases is inconsistent with the cases they cite and is clearly erroneous.

2. Federal Income Tax Expenses Are Not Flowed-Through to Rate Payers. MCI argues that because rates are set to cover expenses and federal income tax expense is one of those expenses, federal income taxes are simply a flow-through item like fuel costs. MCI's argument continues that since tax expenses were reduced by TRA-86, dollars paid by ratepayers in excess of the reduced expense never legitimately belonged to Mountain Bell and can be refunded without violating fundamental ratemaking principles. (MCI Br. at 32-34).

The primary case cited by MCI is Chesapeake and Potomac Tel. Co. v. Public Serv. Comm'n, 514 A.2d 1159 (D.C. 1986).³⁵ In that case, the District of Columbia court upheld

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³⁴Other cases involving fuel adjustment clauses and their relationship to the rule against retroactive rate making cited by MCI include: Re Chesapeake and Potomac Tel. Co., 84 PUR 4th 364 (D.C. P.S.C. 1987); Gulf Power Co. v. Public Serv. Comm'n, 487 So.2d 1036 (Fla. 1986); Business & Prof. People v. Commerce Comm'n, 525 N.E.2d 1053 (Ill. App. Ct. 1988); Util. Comm'n v. C F Industries, Inc., 263 S.E.2d 559 (N.C. 1980); Public Serv. Comm'n v. Delmarva Power & Light, 400 A.2d 1147 (Md. 1979); Blackstone Valley Elec. Co. v. Public Util. Comm'n, 542 A.2d 242 (R.I. 1988).

³⁵MCI has cited other cases involving mechanisms similar to fuel adjustment clauses or specific statutes that authorize after-the-fact adjustments in rates. See Re Alascom, Inc., 81 PUR 4th 320 (Alaska P.U.C. 1986); Cal. Mfrs. Ass'n v. Public Serv. Comm'n, 595 P.2d 98 (Cal. 1979); Citizens v. Public Serv. Comm'n, 448 So.2d 1024 (Fla. 1984); Citizens v. Public Serv. Comm'n, 415 So.2d 1268 (Fla. 1982); Roberts v. Narragansett Elec. Co., 470 A.2d 215 (R.I. 1984). Such cases are not relevant to the issues presented in this case.

an order of the commission requiring Chesapeake and Potomac to refund to ratepayers an FCC ordered reimbursement from AT&T of a fund specifically collected and earmarked for a particular purpose.

Our case is readily distinguishable. First, TRA-86 did not result in any refund to Mountain Bell of funds previously paid like the AT&T refund did. Second, Mountain Bell's federal tax expense is not a fixed amount specifically earmarked for a particular purpose. The level of income taxes varies with income. Income is projected in setting rates. However, it is a function of numerous factors which will vary in unforeseeable ways from the levels used in setting rates. Third, to a minor extent, federal tax expense is within the control of Mountain Bell based upon various tax planning alternatives. Fourth, Mountain Bell does not act as a conduit for federal income taxes anymore than it acts as a conduit for its employees' salaries or its suppliers' charges.³⁶ It is possible to determine what portion of the revenue requirement established in any given general rate case is attributable to any one of Mountain Bell's actual or projected test-year expenses. However, this does not mean that if specific expense items vary up or down following the rate case, rate payers will receive a refund or be surcharged for the deviation from projected levels. Certainly, the Commission has never established a flow-through account for federal income taxes with an automatic rate adjustment mechanism, up or down,

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³⁶See Utah Dep't of Business Reg. v. Public Serv. Comm'n, 614 P.2d 1242 (Utah 1980) ["Wage Case"].

depending on the taxes actually paid. To do so would violate the fundamental principles of rate making affirmed in the EBA Case.³⁷

C. Cases Cited by Resellers Involving TRA-86 or Other Tax Changes Do Not Support the Complaint.

MCI dedicated a large portion of its memorandum below (and cites this portion of its memorandum in a footnote to its brief) to cases from many jurisdictions in which commissions took action to pass the benefits of TRA-86 on to rate payers.³⁸ As noted above, this argument undermines Resellers' point that TRA-86 was not foreseeable. Otherwise, MCI's argument is irrelevant. The actions of other commissions have no bearing upon the appropriateness of the actions of the Utah Commission. Furthermore, the cases cited by MCI demonstrate why the Commission could not grant the refund sought in this case. In each case, commissions acted prospectively declaring rates interim or ordering rate reductions.

MCI cites several cases involving other changes in tax laws in which commissions have responded by adjusting rates. A common thread which runs through the cases cited

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³⁷MCI also cites Turpen v. Okla. Corp. Comm'n, 769 P.2d 1309 (Okla. 1988) for this proposition. Turpen involved the return of shared expenses with AT&T. Like Chesapeake, the FCC had noted that the monies in Turpen were intended as direct reimbursements to customers.

³⁸For a response to MCI's footnote see Mountain Bell's memorandum below at 52-53. (R. at 520-21) This body of case law has been expanded recently by the Hawaii Public Utilities Commission in Re Haw. Elec. Co., 102 PUR 4th 157 (Haw. Public Util. Comm'n 1989). In October 1988, an order to show cause was issued by the Hawaii Commission asking why Hawaii Electric's 1988 rates should not be lowered to reflect savings attributable to TRA-86. The Commission concluded that a refund in 1989 of 1988 rates to reflect tax savings would constitute retroactive rate making.

by MCI is that commissions have made these adjustments prospectively, not retroactively.³⁹

CONCLUSION

Careful review and analysis of Resellers' arguments and authorities reveals that they do not provide support for Resellers' claim that the Order is in error. The Commission's conclusions are, not only within the tolerable limits of reason, they are supported by the overwhelming weight of Utah and national authority.

Mountain Bell has exclusively charged rates found just and reasonable in final Commission orders. Those rates have not been made interim or subject to refund. The Division and Commission responded appropriately to TRA-86. As soon as it became apparent that Mountain Bell was earning in excess of the rate of return found reasonable in the 1985 Rate Order, a rate reduction was made. As soon as it became apparent that the rate reduction was insufficient, a rate case was initiated which resulted in further rate

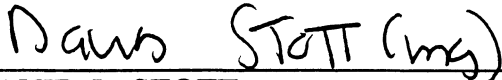
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³⁹See Reedy Creek Utilities v. Fla. Public Serv. Comm'n, 418 So.2d 249 (Fla. 1982), (the Florida commission began its investigation prior to the effective date of the federal tax legislation and declared that utilities would be subject to refund prospectively for amounts collected exceeding a fair and reasonable return on their investment; furthermore, the parties had stipulated to a specific refund mechanism for revenues attributable to changes in the tax legislation); Citizens Energy Coalition, Inc. v. Ind. and Mich. Elec. Co., 396 N.E.2d 441 (Ind. Ct. App. 1980) (the court determined prospectively that federal tax expense which would not be paid in the future was not an includable expense for rate making purposes); Mich. Bell Tel. Co. v. Public Serv. Comm'n, 270 N.W.2d 546 (Mich. Ct. App. 1978) (required amortization prospectively of reserve for state tax liability which was no longer needed); Pike County Light & Power Co. v. Public Util. Comm'n, 487 A.2d 118 (Pa. Commw. Ct. 1985) (reduced rate base in connection with parent company's loss carryover prospectively); Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n, 698 P.2d 627 (Wyo. 1985) (excess deferred tax account to be amortized prospectively).

reductions. While Resellers' selective hindsight appears to show that larger or additional rate cuts might have been warranted earlier to account for the effects of TRA-86 and other changes, the law is clear that hindsight does not justify retroactive rate making.

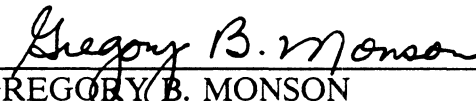
It is respectfully submitted that the Order is correct and should be affirmed.

DATED this 12th day of February, 1990.


_____
DAVID L. STOTT
Attorney for Respondent, Public Service
Commission of Utah


_____
TED D. SMITH
Mountain Bell


_____
MICHAEL L. GINSBERG
Assistant Attorney General
Attorney for Respondent, Division
of Public Utilities


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GREGORY B. MONSON


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C. SCOTT BROWN
Watkiss & Saperstein

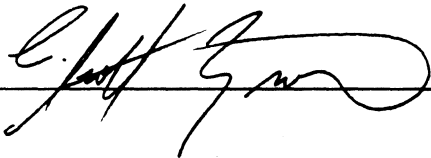
Attorneys for Respondent, The
Mountain States Telephone and
Telegraph Company

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, pursuant to Rule 26, Rules of the Utah Supreme Court, four true and correct copies of the foregoing Brief of Respondents, Public Service Commission of Utah, Division of Public Utilities and The Mountain States Telephone and Telegraph Company to the following on this 12th day of February, 1990.

Thomas M. Zarr
Stanley K. Stoll
Daniel D. Hill
Snow, Christensen & Martineau
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Salt Lake City, Utah 84111

Randy L. Dryer
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Tab 1

54-4-4. Classification and fixing of rates after hearing.

(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, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, practices or contracts, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, 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.

(2) The commission shall have power to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts and practices, or any number thereof, of any public utility, and to establish, after hearing, new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices, or schedule or schedules in lieu thereof.

(3) The commission, in its determination of just and reasonable rates, may consider recent changes in the utility's financial condition or changes reasonably expected, but not speculative, in the utility's revenues, expenses or investments and may adopt an appropriate future test period, not exceeding twelve months from the date of filing, including projections or projections together with a period of actual operations in determining the utility's test year for rate-making purposes.

History: L. 1917, ch. 47, art. 4, § 3; C.L. 1917, § 4800; R.S. 1933 & C. 1943, 76-4-4; L. 1975, ch. 166, § 1.

54-7-15. Review or rehearing by commission — Application — Procedure — Prerequisite to court action.

(1) Before seeking judicial review of the commission's action, any party, stockholder, bondholder, or other person pecuniarily interested in the public utility who is dissatisfied with an order of the commission shall meet the requirements of this section.

(2) (a) After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected may apply for rehearing of any matters determined in the action or proceeding.

(b) No applicant may urge or rely on any ground not set forth in the application in an appeal to any court.

(c) Any application for rehearing not granted by the commission within 20 days is denied.

(d) (i) If the commission grants any application for rehearing without suspending the order involved, the commission shall issue its decision on rehearing within 20 days after final submission.

(ii) If the commission fails to render its decision on rehearing within 20 days, the order involved is affirmed.

(e) Unless an order of the commission directs that an order is stayed or postponed, an application for review or rehearing does not excuse any corporation or person from complying with and obeying any order or decision of the commission.

(3) Any order or decision on rehearing that abrogates, changes, or modifies an original order or decision has the same force and effect as an original order or decision, but does not affect any right, or the enforcement of any right, arising from the original order or decision unless so ordered by the commission.

History: L. 1917, ch. 47, art. 5, § 14; C.L. 1917, § 4833; R.S. 1933 & C. 1943, 76-6-15; L. 1981, ch. 215, § 5; 1987, ch. 161, § 167.
Amendment Notes. — The 1987 amend-

ment, effective January 1, 1988, so rewrote this section as to make a detailed analysis impracticable.

54-7-20. Reparations — Courts to enforce commission's orders — Limitation of action.

(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 such charge was made, and all complaints for the enforcement of any order of the commission shall be filed in court within one year from the date of such order. The remedy in this section provided shall be cumulative and in addition to any other remedy or remedies under this title in case of failure of a public utility to obey an order or decision of the commission.

History: L. 1917, ch. 47, art. 5, § 19; C.L. 1917, § 4838; L. 1929, ch. 43, § 1; R.S. 1933 & C. 1943, 76-6-20.

Cross-References. — As to limitations of action to recover excessive charges or rates, see § 78-12-29.

Tab 2

SECRETED

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investi-)
gation into the Reasonableness)
of the Rates and Charges of)
MOUNTAIN STATES TELEPHONE AND)
TELEGRAPH COMPANY.)

DOCKET NO. 88-049-18
ORDER ON AMENDED REQUEST
FOR AGENCY ACTION

ISSUED: March 30, 1989

By the Commission:

In this matter various consumers of telephone services and resellers of telephone services filed with the Commission an Amended Request for Agency Action on October 27, 1988. Subsequently, briefs were filed by Petitioners, Respondent, Mountain States Telephone and Telegraph Company ("Mountain Bell"), and the Division of Public Utilities ("Division"). In addition, the Commission allowed the parties oral argument of their respective positions.

Petitioners seek to have the Commission declare that Mountain Bell is in violation of the Commission's Order in Docket No. 85-049-02, issued December 31, 1985, and to order Mountain Bell to refund to all Utah ratepayers those monies which the Commission finds that Mountain Bell earned in excess of its authorized rate of return for 1987 and 1988 as fixed in Docket No. 85-049-02. In particular, Petitioners argued that any over-earnings resulting from the 1986 Tax Reform Act be refunded.

The Commission being fully advised in the matter has concluded that the arguments of Petitioners must be rejected for the reasons which follow.

FINDINGS OF FACT

1. The Commission finds that Mountain Bell did earn in excess of its authorized rate of return in calendar years 1987 and 1988. One of the reasons for the over-earning was the impact upon Mountain Bell of the Tax Reform Act of 1986.

2. On December 9, 1986, the Commission sent a letter to the major utilities in the state requesting information on the anticipated impact of the Tax Reform Act of 1986. On January 20, 1987, the Commission requested that the Division provide an analysis of the utilities' responses. The Division filed such an analysis with the Commission on February 20, 1987.

3. On June 1, 1987, the Committee of Consumer Services filed a Motion for Temporary Rates which argued that the rates of the major utilities be made temporary or that refund reserve accounts be established. A hearing was held June 30, 1987. At the conclusion of the hearing the Commission ruled that it had no evidentiary basis to declare the rates interim.

4. Updated reports from the Division were filed with the Commission on June 5, 1987, and September 1, 1987. These reports did not recommend or suggest the need for any Commission action. Though positive impacts upon Mountain Bell's earnings were anticipated as a result of the 1986 Act, the Division was of the opinion that analysis would reveal off-sets to such impacts.

5. The Commission's own analysis indicated no need to initiate a proceeding prior to the end of September as stated in the Commission's September 28, 1987, letter to the Division.

6. In addition to its analysis of the Tax Reform Act of 1986, the Division undertook monthly reviews of Mountain Bell's earnings during 1987 and 1988. Such analysis was complicated during the time period in question by changes in the Mountain Bell accounting system, delays in preparation of Mountain Bell budgets, swings in monthly earning reports, etc.

7. The Division and Mountain Bell negotiated a settlement resulting in a reduction of approximately \$9,000,000.00, which reduction was approved by the Commission in December, 1987, as a result of Mountain Bell's anticipated over-earnings in calendar year 1987.

8. The Division requested that the Commission initiate an investigation of Mountain Bell's rates and charges in June, 1988.

9. The Commission finds that the Division made a good faith effort to accurately and correctly analyze the information provided to it by the utilities.

CONCLUSIONS OF LAW

Although there are a number of sub-issues in this case, the main and controlling issue is simply whether or not the Commission may properly adjust rates retroactively. We are persuaded that the Supreme Court's decision in the so-called "EBA" case (Utah Department of Business Regulation v. Public Service Commission, 720 P.2d 420, 1986) controls our action here. We read the EBA case to require that ratemaking occur prospectively only. We would agree that certain exceptions to the rule are reasonable; for example, where it could be demonstrated that the utility had

misrepresented important ratemaking information or otherwise misled regulators, or where a prior rate has been nullified as a result of a Supreme Court order, or possibly other situations could be suggested. However, none of those examples have been suggested in this case, nor any others that we would consider reasonable. The language in the EBA case is very clear that the rules against retroactive ratemaking exist to balance the risk between shareholder and ratepayer; if the utility makes less money than was forecast, it can't expect to recoup it retroactively, and conversely, if the utility makes more than was anticipated, it keeps the excess until the Commission, through the ratemaking process, can adjust the rates to correct the imbalance.

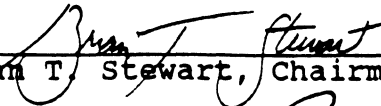
Based upon the foregoing, the Commission will now make the following:

ORDER

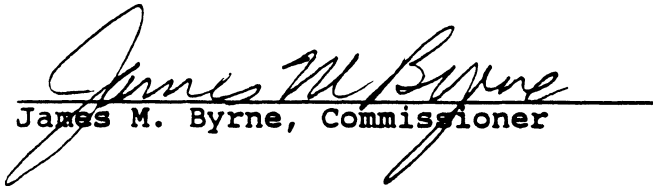
NOW, THEREFORE, IT IS HEREBY ORDERED, That the petition for a retroactive refund be and is hereby denied.

Any party, or any stockholder, bondholder, or other person pecuniarily interested in any public utility which is affected by this action, may apply for rehearing of any matter determined in this Order. The application for rehearing must be filed within 30 days after the issue date of this Order. An application for rehearing not granted by the Commission within 20 days of filing is denied. If the application for rehearing is denied, a petition seeking judicial review of any matter determined in this Order must be filed within 30 days of the date the application is denied.

DATED in Salt Lake City, Utah this 30th day of March,
1989.


Brian T. Stewart, Chairman


Brent H. Cameron
Commissioner Pro Tempore


James M. Byrne, Commissioner

Attest:


Stephen C. Hewlett, Commission Secretary

Tab 3

BRENT H. CAMERON

JAMES M. BYRNE

STANLEY K. STOLL
THOMAS M. ZARR
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Salt Lake City, Utah 84145
Telephone: (801) 521-9000

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Investi-	:	
gation into the Reasonableness	:	Docket No. 88-049-18
of the Rates and Charges of	:	
MOUNTAIN STATES TELEPHONE AND	:	PETITION FOR REVIEW
TELEGRAPH COMPANY,	:	OR REHEARING

Tel-America of Salt Lake City, Inc. ("Tel-America"), pursuant to Utah Code Ann. §§ 54-7-15 (1988) and 63-46b-12 (1988), for itself and on behalf of all Petitioners in this matter and all customers of Mountain States Telephone and Telegraph Company ("Mountain Bell"), hereby seeks, by and through its attorneys of record, Snow, Christensen & Martineau, review or rehearing of the Commission's Order issued March 30, 1989 (the "Order"), denying that the Amended Request for Agency Action filed by Petitioners, including Tel-America.

For the reasons stated below, Tel-America respectfully requests the Commission to review the Order and following such

review to enter an order approving Petitioners' Request for Agency Action or, in the alternative, to order a rehearing on the issues in Docket No. 88-049-18.

ARGUMENT

1. The Decision in Utah Department of Business Regulation v. Public Service Commission does not control the issues before the Commission in the instant matter.

In the Order the Commission held that the so-called "EBA case" (Utah Department of Business Regulation v. Public Service Commission, 720 P.2d 420 (Utah 1986) controlled and required that ratemaking occur prospectively only. As pointed out by both Tel-America and MCI Telecommunications Corporation ("MCI") the EBA case dealt only with the issue as to whether the Commission was authorized to allow a diversion of funds from the energy balancing account to UP&L's general account. The Court held that the Commission's regulatory authority does not permit "retroactive revenue adjustments in order to guarantee shareholders the rate of return initially anticipated". 720 P.2d at 423. The Court did not hold that the customers cannot be given a refund as a means of enforcing the allowed rate of return authorized by the Commission.

While the Commission indicated that it reads the EBA case to require that rate-making occur prospectively only, it does

recognize that there are certain exceptions to the rule. The Commission concludes, however, that the circumstances giving rise to Mountain Bell's over-earnings in the instant matter would not fall within the class of exceptions which the Commission would consider reasonable.

The Commission's Findings of Fact that "Mountain Bell did earn in excess of its authorized rate of return in calendar years 1987 and 1988" and that "one of the reasons for the over-earning was the impact on Mountain Bell of the Tax Reform Act of 1986" compels the Commission to conclude that the circumstances fall within that range of exceptions which the Commission recognized.

An exception to the rule against retroactive rate-making has been established for extraordinary and unforeseen events. That exception is clearly applicable in the instant case. See N. Ray Narragansett Electric Co., 57 Pub. Util. Rep. 4th (PUR) 549 (R.I. Pub. Util. Com'n 1984); Narragansett Electric Co. v. Burke, 505 A.2d 1147 (R.I. 1988). The Findings of Fact clearly demonstrate that even with the extensive analysis by the Division of Public Utilities ("Division"), the Commission and the Committee of Consumer Services ("Committee") of the ramifications of the 1986 Tax Reform Act, Mountain Bell's earnings exceeded its authorized rate of return for the calendar years 1987 and 1988. Based on information provided by

Mountain Bell and the Division it appears the magnitude of the over-earnings may exceed \$20 million. Mountain Bell's over-earnings would have been even greater except for the \$9 million revenue reduction in December of 1987, which was obviously insufficient to rectify the over earnings problem.

Clearly, the nature of changes to the tax treatment for corporations and the corresponding impact of the 1986 Tax Reform Act on Mountain Bell's earnings at the time the Commission's Order in Docket No. 85-049-02, issued December 31, 1985 (the "1985 Order") were unknown and uncertain. Further, as evidenced by the Commission's Findings, the impact on earnings continued to be uncertain, unforeseeable and unanticipated through 1987 and 1988. While there may have been a good faith effort on the part of the Division to monitor and analyze the information provided to it by Mountain Bell, the simple fact remains that Mountain Bell was permitted to earn an amount greatly in excess of that to which it was entitled under the 1985 Order.

The Order places the risk and burden of the impact of the 1986 Tax Reform Act's impact on Mountain Bell's earnings solely on the ratepayers and 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. Mountain Bell has received a windfall based on an event over

which it had absolutely no control and which ultimately proved to be to its substantial benefit. If on December 9, 1986, the date on which the Commission sent its letter to the major utilities requesting information on the anticipated impact of the 1986 Tax Reform Act, that impact could have been accurately quantified, the appropriate proceedings could have initiated, the matter resolved and the overearnings avoided.

The Order contains two clear messages--first, that the ratepayers must bear the burden of, and the utility receive the benefit from, an unanticipated and unexpected events over which the utility had no control and, second, that the ratepayers must bear the burden of the Division's inability to accurately monitor a utility's earnings and the Commission's inability to take appropriate measures to enforce the rate of return prescribed by it.

Tel-America submits that the EBA case cited by the Commission in its Order does not control in the instant matter and that the exception to the rule against retroactive rate-making should be applied in the instant case.

2. The Commission's Order is Arbitrary, Capricious and Contrary to Law.

Tel-America submits that the Commission's Order is arbitrary, capricious and contrary to law for the reasons cited in Tel-America's Memorandum of Points and Authorities in Support of Amended Request for Agency Action, dated December 20, 1988,

MCI's Memorandum in Support of its Request for Agency Action, dated December 20, 1988, Tel-America's Reply Memorandum in Support of Amended Request for Agency Action, dated February 21, 1989, and MCI's Reply Memorandum in Support of its Request for Agency Action, dated February 21, 1989. Tel-America hereby incorporates the afore-described memorandum by this reference in its Motion for Review or Rehearing for the purposes of Utah Code Ann. § 54-7-15(2)(b). Further, Tel-America respectfully requests the Commission to review the arguments set forth in said memoranda.

3. The Commission has the Authority to Require Mountain Bell to Refund its Earnings in Excess of the Amount Authorized by the 1985 Order.

Pursuant to Utah Code Ann. § 54-7-20, the Commission has the authority to order the refund requested by Petitioners in Docket No. 88-049-18 for the reparations required for unjustly and unreasonably charged ratepayers. Further, Utah Code Ann. § 54-4-1 provides the Commission with express and clearly implied authority to require Mountain Bell to refund the overearnings at issue.

Recently, the United States Supreme Court affirmed the decision of the Court of Appeals, District of Columbia Circuit, in New York Telephone and Telegraph Company v. Federal Communications Commission, 826 F.2d 1101 (D.C. Cir. 1987),

wherein the Court of Appeals found that the FCC had authority to order AT&T to refund overearnings in excess of the prescribed rate of return. The Court found that there was no retroactive ratemaking because the utility's obligations were set out prospectively when the rate of return was originally established. Further, the utility was being required merely to give up that which the utility should not have collected in light of the rate of return prescription. Id. at 1108. While the FCC's underlying statutory authority differs with respect to that of the Commission's in terms of "prescribed" rates of return, the rationale employed by the Court is applicable in the instant matter. In the instant case the Commission established an allowed rate of return pursuant to the 1985 Order. Mountain Bell has clearly violated the Commission's Order by exceeding the specified rate of return. 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. Alternatively, Mountain Bell should not be allowed to retain that which it would not have collected had the Division correctly analyzed the impact of the 1986 Tax Reform Act.

4. The Doctrine of Unjust Enrichment Requires that Mountain Bell Refund its Excess Earnings.

The Doctrine of Unjust Enrichment should be employed by the Commission to prevent a windfall which Mountain Bell insists on retaining. Mountain Bell should not be permitted to shield itself behind the rule against retroactive ratemaking arbitrarily applied in order to retain overearnings by which it has been unjustly enriched to the detriment of Utah ratepayers. The Commission should act under its equitable powers to require Mountain Bell to refund that which rightfully belongs to the ratepayers.

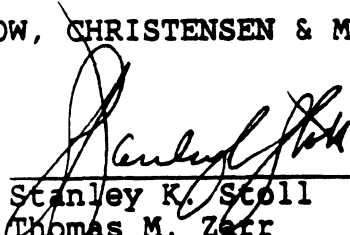
CONCLUSION

For the reasons stated upon, Tel-America respectfully requests the Commission to review or rehear its Order issued March 30, 1989, denying Petitioners' Request for Agency Action and following such review, to enter an order approving Petitioners' request, or, in the alternative, set the matter for rehearing as requested herein.

DATED this 28th day of April, 1989.

SNOW, CHRISTENSEN & MARTINEAU

By


_____
Stanley K. Stoll
Thomas M. Zarr
Attorneys for Tel-America of
Salt Lake City, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 1989, I caused true and correct copies of the foregoing Petition for Review or Rehearing to be mailed, postage prepaid to the following:

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Sandy Mooy
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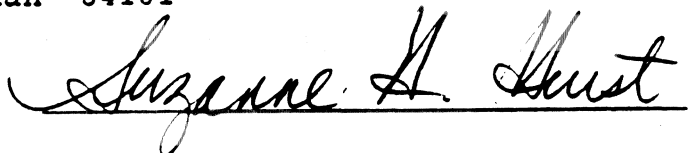
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Mountain Bell
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00693

Tab 4

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~~SECRET~~
Brent Cameron 15412 5/6/89

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Telephone: (801) 532-1234

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Investi-	:	Docket No. 88-049-18
gation into the Reasonableness	:	
of the Rates and Charges of	:	PETITION OF MCI TELE-
MOUNTAIN STATES TELEPHONE AND	:	COMMUNICATIONS FOR REVIEW
TELEGRAPH COMPANY,	:	OR REHEARING

COMES NOW MCI Telecommunications Corporation ("MCI"), pursuant to Utah Code Ann. § 54-7-15 (1988) and § 63-46b-12 (1988), for itself and on behalf of all petitioners in this matter and all customers of U.S. West, formerly known as Mountain States Telephone and Telegraph Company ("Mountain Bell"), and hereby seeks, by and through its attorneys, a review or rehearing of the Commission's Order issued March 30, 1989 (the "Order"), denying the Amended Request for Agency Action filed by Petitioners, including MCI.

This Petition for Review or Rehearing is based upon the following grounds:

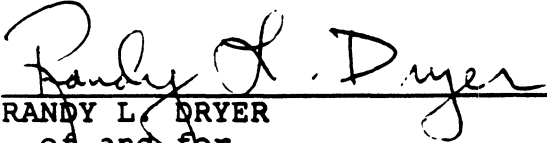
1. That the Commission erred in concluding that the case of Utah Department of Business Regulations v. Public Service Commission, 720 P.2d 420 (Utah 1986) is controlling on the legal issues before the Commission in this matter.

2. That the Commission erred in refusing to order reparations as required by Utah Code Ann. § 54-7-20; and

3. That the Commission's Order is otherwise arbitrary, capricious and contrary to law.

4. MCI also joins in and incorporates by this reference, the arguments made by Tel-America of Salt Lake City, Inc. in its Petition for Review or Rehearing filed in this matter.

DATED this 1st day of May, 1989.


_____
RANDY L. DYER
of and for
PARSONS, BEHLE & LATIMER
Attorneys for MCI

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing PETITION OF MCI TELECOMMUNICATION FOR REVIEW OR REHEARING to the following on this 1st day of May, 1989:

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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

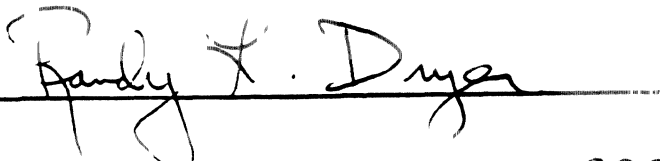
Ted D. Smith, Esq.
U.S. West Communications/
Mountain Bell
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_____

Tab 5

DOCKETED

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investigation)	
into the Reasonableness of the)	<u>DOCKET NO. 88-049-18</u>
Rates and Charges of MOUNTAIN)	
STATES TELEPHONE AND TELEGRAPH)	<u>ORDER DENYING REHEARING</u>
COMPANY.)	

ISSUED: May 18, 1989

BY THE COMMISSION:

In this matter the Commission issued its Order rejecting Petitioners' Amended Request for Agency Action on March 30, 1989. The Request sought to have the Commission declare that Mountain States Telephone and Telegraph Company ("Mountain Bell") was in violation of a prior Commission rate order by reason of its over-earning and order a refund of the amount of the overearning.

Subsequently, Petitioners filed Petitions for Review or Rehearing within the time requirements of Section 63-46b-19, Utah Code. The review Petitions were filed pursuant to Section 54-7-15, Utah Code, which requires that a party dissatisfied with a Commission order first file a request for rehearing before taking an appeal to the Utah Supreme Court.

The Petitions raise as arguments for review or rehearing essentially the following: (1) The EBA case (Utah Department of Business Regulation v. Public Service Commission, 720 P.2d 420 (Utah 1986) does not control this case and does not prevent the Commission from retroactively ordering a refund of overearnings; (2) the Commission's Order is arbitrary, capricious and contrary to law; (3) the Commission has authority to order reparations under Utah Code

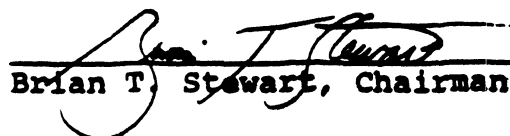
Ann. Section 54-7-20; and (4) the doctrine of unjust enrichment requires a refund.

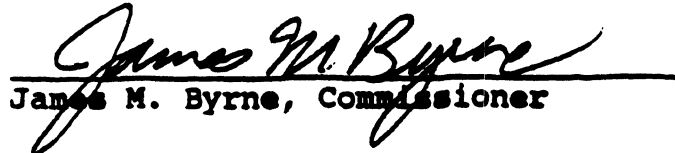
These are the same arguments raised by Petitioners previously and present nothing not already considered by the Commission in the formulation of its March 30, 1989 Order in this matter. To reiterate our position, the EBA case prohibits the use of retroactive ratemaking, save under limited circumstances which are not present in this case. The proscription of retroactive ratemaking balances risk between ratepayer and shareholder and, therefore, rests on solid policy ground. Dressing up a retroactive rate adjustment in the guise of a reparation or the avoidance of unjust enrichment makes it no less retroactive.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the request for review or rehearing be and is hereby denied. Petitioners are advised that they have thirty (30) days from the issuance of this Order within which to take an appeal to the Utah Supreme Court.

DATED in Salt Lake City, Utah this 18th day of May, 1989.


Brian T. Stewart, Chairman


James M. Byrne, Commissioner

ATTEST:

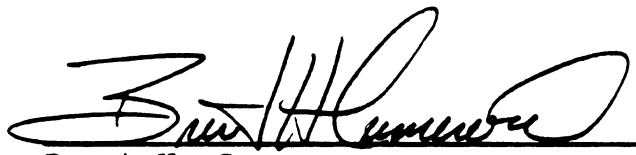

Stephen C. Hewlett
Commission Secretary

00704

CONCURRING COMMENTS OF COMMISSIONER PRO TEMPORE BRENT H. CAMERON

Ratemaking should be prospective in almost all circumstances. If this Commission were to accept the argument that the overearnings of Mountain Bell in 1987 or 1988 were nothing more than a windfall, as Petitioners suggest, I believe fundamental fairness would dictate that we undertake an analysis of prior periods of underearnings. Furthermore, there is the issue of how far back we would have to extend such analysis.

Although there are factual differences between the EBA case and the instant case, I believe a consideration of the facts of this case clearly leads to the conclusion that this is not a case which merits an exemption from the general rule against retroactive ratemaking.


Brent H. Cameron
Commissioner Pro Tempore

Tab 6

MT 100-5 00

Mountain Bell

A US WEST COMPANY

W. Mack Lawrence
Utah Vice President and
Chief Executive Officer

250 Bell Plaza
Post Office Box 30960
Salt Lake City, Utah 84130
Phone (801) 237-6291

December 31, 1986

Mr. Ted D. Stewart, Chairman
Public Service Commission
160 East 300 South
Heber Wells Building, 4th Floor
Salt Lake City, Utah 84111

Dear Ted:

We have made an analysis of the effects of the 1986 Tax Reform Act and estimated the impacts on Mountain Bell's Utah operations. Our analysis shows it will affect our cash flow and our federal income tax expense. The changes in the law relating to the cost recovery system (depreciation), the elimination of investment tax credits, and capitalization of previously expensed items will affect our tax payments, and thus our cash flow. The changes relating to capitalization of previously expensed items and tax rate reductions, including the payback of deferred taxes, affect our federal income tax expense.

The attached schedules summarize our current estimates of these changes. The impacts on federal income tax expense are based on 1986 data for Utah which includes 10 months actual results and 2 months budget. The data presents the changes due to incorporating a 40% tax rate (1987 effective rate) and a 34% rate (1988 effective rate).

The initial impacts on our cash flow will be negative while at the same time federal income tax expense will be reduced. Looking further, simply at significant and known separations changes, the tax law is a critical factor in averting rate requests. For example, as shown by the data on Attachment 2, the \$5.9 million reduction in revenue requirement due to tax changes is partially offset by the \$4.2 million increase in intrastate expenses due to separations changes. Also, you should be aware that these exhibits do not consider ongoing changes in the cost of operating our business - e.g. wage increases, certain state and local tax increases, and additional interest expense due to the loss of investment tax credits (ITC).

Public Service Commission
Page 2
December 31, 1986

Considering all of the data, I feel very good about the possibility of rate stability for our customers over the next few years. The benefits of the 1986 Tax Reform Act will go to ratepayers since they work to offset intrastate expense increases in our continuously changing industry.

If we can be of further help or assistance, we will be glad to discuss this response with you.

Wishing you and each of your staff members a Happy New Year!

Yours truly,

A handwritten signature in black ink, appearing to read "W. Mark Lawrence". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Attachments

**Issued to: Utah Public Service Commission - Chairman Ted Stewart
and Commissioners Brent Cameron and Jim Byrne**

00531

1986 TAX REFORM ACT
ATTACHMENT 1

MOUNTAIN BELL - UTAH
TOTAL STATE CASH FLOW IMPACTS

AREAS OF CHANGE:	\$ MILLIONS	1987(40%)	1988(34%)
REPEAL OF INVESTMENT TAX CREDIT (ITC)	-9.6		-10.7
TAX RATE REDUCTION			
DEPRECIATION CHANGES	+7.0		+15.5
LOSS OF MISC. BUSINESS EXPENSE DEDUCT.			
•CAPITALIZATION OF CONSTRUCTION COSTS	-4.1		- 4.1
LOSS OF RESERVE METHOD FOR BAD DEBTS	<u>- .2</u>		<u>- .2</u>
TOTAL CASH FLOW IMPACT	-6.9		+ .5

ASSUMPTIONS: THE CASH FLOW ANALYSIS REFLECTS THE TAX ACTS CHANGES LISTED ESTIMATING THE EFFECTS THEY HAVE ON THE COMPANY'S TAX PAYMENTS FOR UTAH TOTAL STATE.

• PRIOR TO 1987 AND THE TAX REFORM ACT, SOCIAL SECURITY TAXES, RELIEF AND PENSIONS AND THE DEBT PORTION OF IDC (INTEREST DURING CONSTRUCTION) WERE CAPITALIZED FOR BOOK PURPOSES BUT DEDUCTED FOR TAX PURPOSES WITH THE RESULTANT SAVINGS FLOWED THROUGH TO RATEPAYERS. UNDER TAX REFORM THESE COSTS ARE NO LONGER DEDUCTIBLE.

00532

1986 TAX REFORM ACT
ATTACHMENT 2

MOUNTAIN BELL - UTAH
INTRASTATE EXPENSE IMPACTS

NORMALIZED FEDERAL INCOME TAX EXPENSE

AREAS OF CHANGE:	\$ MILLIONS	<u>40% TAX RATE (1987)</u>
*TAX RATE REDUCTION	- 6.6	
LOSS OF MISC. BUSINESS EXPENSE DEDUCT.	+ .1	
CAPITALIZATION OF CONSTRUCTION COSTS	+ 2.9	
INVESTMENT TAX CREDIT (ITC)-DEPRECIATION	- .1	
INVESTMENT TAX CREDIT (ITC)-AMORTIZATION	<u>+ .4</u>	
TOTAL TAX EXPENSE CHANGE	- 3.3	*

1987 INTRASTATE REVENUE REQUIREMENT INCREASES
\$ MILLIONS

SPF (SUBSCRIBER PLANT FACTOR) PHASE-DOWN	+ 1.3
CPE (CUSTOMER PREMISE EQUIP.) PHASE-OUT	<u>+ 2.9</u>
TOTAL INTRASTATE REVENUE REQUIREMENT CHANGE	+ 4.2

* INCLUDES RATE CHANGE, DEFERRED TAX FLOWBACK, AND
DEPRECIATION CHANGES.

* REVENUE MULTIPLIER = 1.7750

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1986 TAX REFORM ACT
ATTACHMENT 3

MOUNTAIN BELL - UTAH
INTRASTATE EXPENSE IMPACTS

NORMALIZED FEDERAL INCOME TAX EXPENSE

AREAS OF CHANGE:	\$ MILLIONS	<u>34% TAX RATE (1988)</u>
•TAX RATE REDUCTION	-13.1	
LOSS OF MISC. BUSINESS EXPENSE DEDUCT.	+ .1	
CAPITALIZATION OF CONSTRUCTION COSTS	+ 2.9	
INVESTMENT TAX CREDIT (ITC)-DEPRECIATION	- .1	
INVESTMENT TAX CREDIT (ITC)-AMORTIZATION	<u>+ .4</u>	
TOTAL TAX EXPENSE CHANGE	- 9.8 \$	

1988 CUMULATIVE INTRASTATE REVENUE REQUIREMENT INCREASES
\$ MILLIONS

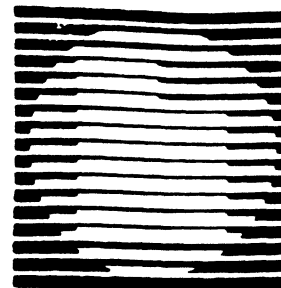
SPF (SUBSCRIBER PLANT FACTOR) PHASE-DOWN	+ 2.8
CPE (CUSTOMER PREMISE EQUIP.) PHASE-OUT	+ 4.1
••USOAR CAPITAL TO EXPENSE SHIFTS	<u>+ 3.8</u>
TOTAL INTRASTATE REVENUE REQUIREMENT CHANGE	+10.3

- INCLUDES RATE CHANGE, DEFERRED TAX FLOWBACK, AND DEPRECIATION CHANGES
- UNIFORM SYSTEM OF ACCOUNTS REWRITE EFFECTIVE 1-1-88
- \$ REVENUE MULTIPLIER = 1.6138

00534

Tab 7

MEMORANDUM



STATE OF UTAH
DEPARTMENT OF
BUSINESS REGULATION

DATE: February 20, 1987

TO: Public Service Commission

FROM: Ralph N. Creer, Director *RNC*
Division of Public Utilities

NORMAN H. BANGERTER, GOVERNOR
WILLIAM E. DUNN, EXECUTIVE DIRECTOR

RE: Case No. 87-999-01
Analysis of the Tax Reform Act of 1986 and
Investigation of the Effects on Utah Power & Light
Company, Mountain Fuel Supply Company and Mountain Bell

RECOMMENDATION

The Tax Reform Act of 1986 will generally have the effect of lowering the tax liability of utility companies and therefore the rates that consumers should pay. The Division of Public Utilities recommends that each company be treated on an individual basis to see if the lower tax liability is offset by other factors which would cause rates to consumers to rise. The Division recommends that Mountain Bell's rates not be reduced at this time for the effects of the 1986 Act, but that the Division continue to monitor the company's earnings on a monthly basis to determine if significant changes occur. The Division needs more information before it can make a recommendation for Utah Power & Light Company and Mountain Fuel Supply Company

INTRODUCTION

By letter dated December 9, 1986, the Commission requested Utah Power & Light Company, Mountain Fuel Supply Company, and Mountain Bell to provide information concerning the effects the Tax Reform Act of 1986 would have on each company. The Commission requested each company "to use calendar year 1985 as the basis for deriving company revenue requirements under old versus new tax law assumptions," and to provide the same information for 1986 as soon as it was available and to extend the report a sufficient number of years forward to fully portray the information requested. The companies were requested to respond by December 31, 1986. The Division was ordered to review the information submitted by each company, conduct its own analysis of the 1986 Act and to report the results by February 2, 1987. This date was later extended to February 20, 1987.

00536

DIVISION OF PUBLIC UTILITIES / RALPH N. CREER, DIRECTOR

Utah Power replied to the Commission's request by letter dated December 31, 1986. The company suggested that the data for the year 1985 was outdated and would require too many adjustments to be reflective of its current situation, that the same would be true of the year 1986, and requested leave to present the information based upon the year 1987.

Mountain Bell also replied to the Commission's request by letter dated December 31, 1986. The company's estimates of the impacts of the tax changes were based on 1986 data for Utah which included 10 months actual results and 2 months budget.

Mountain Fuel replied to the Commission's request by letter dated January 9, 1987. The company used an analysis of actual 1985 results to show the magnitude of the tax law changes.

The Committee of Consumer Services filed a petition on January 7, 1987 for an investigation to determine the effects of the 1986 Act upon the revenue requirements of utilities operating under the jurisdiction of the Commission. This petition has been designated as Case No. 87-999-01 and all of the information submitted by the companies has been included in this docket.

The Division has attempted to analyze the Tax Reform Act of 1986 as it relates to public utilities, has reviewed the information supplied by the utility companies, and has requested and reviewed additional information from the companies.

TAX REFORM ACT OF 1986

The following summary outlines some of the provisions of the Tax Reform Act of 1986 that directly affect public utility rate making.

CORPORATE TAX RATE

The 1986 Act decreases the maximum corporate income tax rate from 46 percent to 34 percent effective July 1, 1987. The effective tax rate for 1987 is 40 percent. The effect of the rate reduction is to reduce both book tax expense and tax liability:

DEFERRED TAXES

Deferred taxes arise when there are differences between the way items are treated for book purposes and the way they are treated for tax purposes. The utility usually records more taxes on its books than it actually pays. The difference between book and tax depreciation is one of the major causes for deferred taxes. The 1986 Act continues the rule that public utility property is eligible for Accelerated Cost Recovery System (ACRS) only if the tax benefits of ACRS are normalized in setting rates charged by utilities to customers and in reflecting operating results in regulated books of account. The deferred tax reserve has been building up over

write-off method. Telephone outside plant also received favorable treatment through retention of the existing 15-year/150 percent declining balance treatment. The effect of these changes is to increase the spread between book and tax depreciation thereby providing additional deferred tax reserves which partially offsets the loss of deferred tax reserves caused by the tax rate reduction.

CAPITALIZATION OF CONSTRUCTION COSTS

Interest incurred on debt used to finance construction and other construction costs must be capitalized and deducted over the tax lives of the property. In the past, such costs were immediately deductible for tax purposes and the savings were flowed through to ratepayers. The effect of this change is to increase book tax expense and tax liability.

UNBILLED REVENUES

The 1986 Act contains a provision requiring public utilities to include unbilled revenues in taxable income for the year in which the utility services are rendered to customers. This provision becomes effective for tax years beginning after December 31, 1986 and has a four year phase-in mechanism. The effect of this provision is to increase taxable income. However, Utah Power is already recognizing unbilled revenues for rate making purposes so there will be no effect on consumer rates.

CONTRIBUTIONS IN AID OF CONSTRUCTION

The 1986 Act subjects contributions in aid of construction (CIAC) received after December 31, 1986 to taxation as ordinary income in the year received. However, property purchased with these funds will be allowed to be depreciated for tax purposes under ACRS or any other applicable depreciation method. The old law permitted electric, gas, water and sewer regulated public utilities to treat CIAC as nontaxable contributions to capital, but did not allow any deductions such as depreciation or ITC to be taken with respect to CIAC. The effect of this provision is to increase taxable income but not book income.

RESERVE FOR BAD DEBTS

The 1986 Act eliminates the use of a reserve for bad debts for tax purposes. The present balance in reserve for tax purposes must be written off over a four year period.

MINIMUM TAX

The 1986 Act imposes a tax of 20 percent on alternative minimum taxable income for corporations, payable to the extent that it exceeds the taxpayer's regular tax. The alternative minimum tax takes into consideration tax preferences such as depreciation, tax exempt interest on private activity bonds, untaxed appreciation on charitable contributions, certain accounting methods, excess amortization on pollution control facilities, etc.

the years based on the tax rates in effect at the time recently at a 46% rate. Now that the tax rate is reduced percent, there is more money in the reserve than they will actually have to pay in taxes. The extra reserve is referred to as "excess deferred taxes."

The Act establishes the "average rate assumption method" as the method for flowing back to ratepayers deferred income tax reserves. This method "reduces the excess deferred tax reserve over the remaining regulatory lives of the property which gave rise to the reserve for deferred taxes." Reducing excess reserves more rapidly than ratably would effectively lower taxable income of the utility industry, thus resulting in reduced tax payments to the U. S. Treasury. Congress therefore made specific provisions to prevent regulators from returning the excess quickly. A violation of this provision will preclude the utility from utilizing accelerated tax depreciation methods on all assets and require the use of book or rate making methods of depreciation for computing tax liability. Representative Byron Dorgan, D-N.D., backed by the National Association of Regulatory Utility Commissioners (NARUC) and various consumer groups, recently introduced legislation that would allow state regulators to determine how to refund excess deferred taxes.

The lowering of the overall tax rate creates a problem for those utilities that have been using deferred taxes as a major source of internal financing. A lower tax rate results in fewer dollars flowing into the deferred tax reserve, and the ratepayers would lose the benefit of these lower capital costs.

INVESTMENT TAX CREDITS

The regular Investment Tax Credit (ITC) is repealed for property placed in service after December 31, 1985. ITC is also a source of internal financing. Existing deferred ITC balances will continue to be ratably flowed back to ratepayers over the lives of the related assets. It appears that the loss of ITC in the near term will have minimal impact on ratepayers. The primary impact is loss of cash flow to the utilities.

DEPRECIATION

The Act generally lengthens asset depreciation lives. However, certain items critical to the modernization of the public telephone network received special treatment, specifically computer based central office equipment and telephone distribution plant. It appears, from a depreciation point of view, that the telephone companies are better off under the new law. The new depreciation system favors modern computer based central office equipment over the older version of central office technology by allowing a five year life as opposed to a seven year life. It also establishes a 200 percent declining balance schedule for computer based central offices in place of the existing 150 percent declining balance

with the company's projections for 1987 operations along with supporting detail. The information was requested to be presented in a general rate case format and should reflect the data both on a total company basis and on a Utah jurisdictional basis. The company has indicated a willingness to provide the data to the Division, but if it does not the Division will request the Commission to order the company to do so.

MOUNTAIN BELL

The Division reviewed the report submitted by Mountain Bell, the supporting detail and the logic used to develop the 1987 and 1988 tax change impacts. The Division requested backup detail and held discussions with company accounting and tax personnel in Salt Lake City and Denver. Attachment 1 shows the Division's interpretation of the results. Although the numbers are estimates, Attachment 1 shows that the net reduction in taxes is partially offset by increased costs. The net effect is increased earnings of \$1,200,000 for 1987 and \$1,700,000 for 1988. The corresponding revenue effects are \$2,100,000 and \$2,700,000.

The Division reviewed the 1986 actual results and then adjusted those results by including the tax changes that will be in effect in 1987 and the potential shifts in jurisdictional costs that will occur in 1987 to determine the impact on the company's earnings and rate of return on equity. The shifts in costs are primarily related to the mandate of the Federal Communications Commission (FCC) for phase-out of customer premise equipment (CPE) and the phase down of the subscriber plant factor (SPF). The results are summarized in Table 1.

TABLE 1

MOUNTAIN BELL
UTAH INTRASTATE OPERATIONS
(Dollars in Millions)

	<u>Earnings</u>	Return on <u>Equity</u>
1986 Actual Unadjusted	\$55.8	11.77%
1986 Adjusted for 1987 Tax Changes	59.1	12.88%
1986 Adjusted for 1987 Tax Changes and Shifts in Costs	57.0	12.16%

UTAH POWER & LIGHT COMPANY

Utah Power stated in its response to the Commission's letter that the impact of the tax law changes and a potential increase in the state franchise tax rate of 1 percent, results in a Utah jurisdictional revenue requirement reduction of \$11,200,000 based on the 1987 budget. However, there are many other issues that impact the revenue requirement. The Division cannot estimate the impact of the tax law changes in combination with other revenue requirement issues based on the information supplied by the company.

By letter dated January 30, 1987, a copy of which is on the Commission's docket file, the Division requested Utah Power to provide a detailed jurisdictional allocation study similar to that used in general rate cases using the company's 1987 operating budget as a basis. The Division needs this information before it can recommend that consumer rates be reduced for the tax law changes, or if its benefits are offset by other issues. The company has not yet responded to the Division's request. If the company is unwilling to supply the Division with the company's 1987 operating budget in the form of a jurisdictional allocation study, the Division will request the Commission to order Utah Power to do so.

MOUNTAIN FUEL SUPPLY COMPANY

The letter filed by Mountain Fuel in response to the Commission's request included the company's computations of the affects of the tax law changes as applied to the results of operations for the year 1985. These computations showed a potential reduction in the Utah cost of service of approximately \$1,300,000. The Division requested and has recently received, but has not had sufficient time to analyze, the company's computation of the affects of the tax law changes as applied to 1986 operations. Preliminary indications show similar results to 1985 but at an even lower level.

The Division has examined the 1985 data available and has requested detailed supporting information for 1985 as well as automatic updates on 1986 data as it becomes available. The analysis of the 1985 data provided thus far shows that the results presented by Mountain Fuel for 1985 will probably not change materially. The Division believes that those results by themselves would not be significant enough to justify a rate case. However, a rate case would be justified if there were other adjustments of significant magnitude that also decrease the cost of service. On the other hand, Mountain Fuel has indicated that there are other changes occurring in the 1986-1987 time frame which tend to offset the potential benefits associated with lower tax rates. The company has not provided any information to elaborate or quantify such changes.

The Division has requested that Mountain Fuel provide it

of 14.2 percent. Although capital costs have declined since the last rate case, the returns shown are substantially below 14.2 percent. It is the Division's understanding that the Utah operations ranked sixth among the seven states in terms of the rate of return earned on equity for 1986.

In light of the circumstances discussed above, the Division is of the opinion that the Commission should not order Mountain Bell to reduce rates at this time for the reduction in Federal tax rates. The Division monitors Mountain Bell's earnings on a monthly basis. If significant changes occur in terms of excessive earnings, the Division will petition the Commission for an order to show cause why the company's rates should not be reduced.

Copies to:

Utah Power & Light Company
Mountain Fuel Supply Company
Mountain Bell
Committee of Consumer Services
William E. Dunn

The Division obtained the company's budget view for 1987 and performed an analysis similar to that for 1986. There are several major changes that will probably occur in 1987. The first change is for Post Retirement Medical/Dental (PRM&D) benefits. These benefits are currently accounted for on a pay as you go basis. The Financial Accounting Standards Board (FASB) will be issuing a technical bulletin adopting actuarial accounting for book purposes for these costs which is similar to pension expense accounting. It is expected that the technical bulletin will probably allow voluntary early adoption. If this is the case, it would reduce earnings by \$3,200,000 in 1987.

The second major change that will occur is in the separations procedures for Category 6 (local dial switching equipment) plant. The Federal and State Joint Board is expected soon to recommend to the FCC changes in Category 6 which will shift costs to the intrastate jurisdiction. If the FCC approves the changes and they become effective in 1987, there could be an additional decrease in 1987 earnings of \$2,300,000.

The forecast for 1987 shows that Mountain Bell's rate base has declined by \$16,000,000 over 1986. This is primarily a result of the impact of the new depreciation rates approved by the Commission and the FCC, which became effective January 1, 1986. Table 2 summarizes the results of these adjustments.

TABLE 2

MOUNTAIN BELL
UTAH INTRASTATE OPERATIONS
(Dollars in Millions)

	<u>Earnings</u>	<u>Return on Equity</u>
1987 As Budgeted	\$56.6	12.80%
1987 Adjusted for PRM&D Costs	53.4	11.72%
1987 Adjusted for PRM&D and Category 6 Costs	51.2	10.94%

The Tax Reform Act of 1986 would have the effect of lowering Mountain Bell's rates. However, the known and potential changes in costs would increase rates. The net effect does not have a significant impact on the rate of return earned on equity. The company is currently authorized a return

MOUNTAIN BELL
UTAH INTRASTATE OPERATIONS
ESTIMATED EFFECTS OF THE TAX REFORM
ACT OF 1986 AND OTHER COST CHANGES
(Dollars in Millions)

<u>Tax Changes</u>	<u>Impact on Earnings</u> <u>Increase/(Decrease)</u>	
	<u>40% Rate</u>	<u>34% Rate</u>
Tax Rate Reduction	\$ 4.3	\$ 8.8
Excess Deferred Tax Flow Back	2.3	4.4
Capitalization of Construction Costs	(2.9)	(2.9)
Loss of Portion of Business Expense Deduction	(0.1)	(0.1)
Investment Tax Credit - Depreciation	0.1	0.1
Investment Tax Credit - Amortization (Flow Back)	<u>(0.4)</u>	<u>(0.4)</u>
Net Increase in Earnings from Tax Changes	\$ <u>3.3</u>	\$ <u>9.9</u>
 <u>Cost Changes</u>		
SPF Phase Down	(0.7)	(1.4)
CPE Phase-out	(1.4)	(2.1)
Uniform System of Accounts Capital to Expense Shifts		(2.2)
Depreciation Represcription	<u> </u>	<u>(2.5)</u>
Net Decrease in Earnings from Cost Changes	\$ <u>(2.1)</u>	\$ <u>(8.2)</u>
Net Increase in Earnings	\$ <u>1.2</u>	\$ <u>1.7</u>
Net Revenue Effect of the Increased Earnings	\$ <u>2.1</u>	\$ <u>2.7</u>

Tab 8



NORMAN H. BANGERTER
GOVERNOR

Public Service Commission of Utah

4th FLOOR, HEBER M. WELLS BUILDING, 180 EAST 300 SOUTH
P.O. BOX 45585, SALT LAKE CITY, UTAH 84145
TELEPHONE: (801) 530-6716

COMMISSIONERS
BRIAN T. (TED) STEWART, CHAIRMAN
BRENT H. CAMERON
JAMES M. BYRNE
EXECUTIVE STAFF DIRECTOR
DOUGLAS C. W. KIRK
COMMISSION SECRETARY
STEPHEN C. HEWLETT

December 9, 1986

W. M. Lawrence
Vice President and
Chief Executive Officer
Mountain Bell
P.O. Box 30960
Salt Lake City, Utah 84125

Dear Mr. ^{Mark} Lawrence:

As you are aware, the Tax Reform Act of 1986 brings a number of changes that may affect a utility in ways that may not be self-evident. The new law, for example, may affect earnings and the financial condition of your company. It may decrease utility expenses, making consumer savings possible. These are things the Commission wishes to learn. Therefore we request a report from you addressing the subjects of our concern.

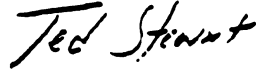
We are particularly interested in learning what changes may occur in current corporate income tax payments, in accumulated deferred tax accounts, in the new cost recovery system which modifies the Accelerated Cost Recovery System (ACRS); of the effects of the elimination of investment tax credits and all other Tax Reform Act of 1986 changes; and of resultant changes in revenue requirement. We want to know the overall effects on your company of the new law, the timing of those effects, and what you may propose as the distribution of the benefits of the new law between stockholders and ratepayers.

We would like your report to use calendar year 1985 as the basis for deriving company revenue requirement under old versus new tax law assumptions, and will expect the same for 1986 as soon as information is complete. We request that your report extend a sufficient number of years forward to fully portray the information we are requesting.

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We ask that you supply us with this report, or at minimum a detailed summary of a more extensive analysis, by December 31, 1986. We will order the Division of Public Utilities to conduct its own analysis, to review yours, and to report the results to us by February 2, 1986. Upon receipt of this information, we will determine how to proceed thereafter.

Sincerely,

A handwritten signature in cursive script that reads "Ted Stewart".

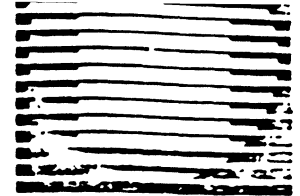
Brian T. Stewart
Chairman

BTS/bs

00529

Tab 9

MEMORANDUM



DATE: June 5, 1987

TO: Public Service Commission

STATE OF UTAH
DEPARTMENT OF
BUSINESS REGULATION

FROM: Ralph N. Creer, Director *RNC*
Division of Public Utilities

NORMAN H. BANGERTER, GOVERNOR
WILLIAM E. DUNN, EXECUTIVE DIRECTOR

RE: Case No. 87-999-01
Investigation of the Effects of the Tax Reform Act of
1986 on Mountain Bell, Utah Power & Light Company and
Mountain Fuel Supply Company

RECOMMENDATION

This is an update to the memorandum of February 20, 1987 concerning the effects of the Tax Reform Act of 1986 on Mountain Bell, Utah Power & Light Company and Mountain Fuel Supply Company. The Division of Public Utilities continues to recommend that each company be treated on an individual basis. Each company will have a lower tax liability under the new tax law. The lower tax liability is offset by other factors which would cause rates to consumers to rise. The Division has opposed one item general rate cases in the past and is not changing its position. The Division therefore recommends that the Commission not lower the rates of any of the companies just for the effects of the 1986 Tax Act. The Division will continue to monitor each company's earnings on a monthly basis to determine if significant changes occur.

INTRODUCTION

On June 1, 1987, The Committee of Consumer Services filed a petition with the Commission requesting the Commission to reserve the ability to make refunds or adjustments in rates to reflect the effects of the Tax Act. The Committee suggests the Commission could do this by designating the rates of each company currently in effect as temporary rates or by ordering each company to establish a reserve or special account for the tax savings. The Committee still maintains its original position that each company should be ordered to reduce its rates to pass through to its customers the tax savings.

While the Division has no aversion to the Commission reserving the ability to make refunds to customers of tax savings, it sees no great need to do so. Income taxes are one of the operating costs of each company and the Division does

DIVISION OF PUBLIC UTILITIES / RALPH N. CREER, DIRECTOR

HEBER M. WELLS BUILDING 160 EAST 300 SOUTH P.O. BOX 45602 SALT LAKE CITY, UTAH 84145-0602 (301) 462-1111

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not see any great need to treat taxes different than any other operating cost of a company which has increased or decreased since the last general rate case of each company. The effect of the tax changes may or may not be any more significant than other changes that have occurred. If the Commission accepts the position of the Division, there will be no need to grant the petition of the Committee.

The Division has received and analyzed additional information that it requested from Mountain Bell, Utah Power & Light Company and Mountain Fuel Supply Company concerning the effects the Tax Reform Act of 1986 would have on each company. The findings of the Division are summarized by company in the balance of this memorandum.

MOUNTAIN BELL

The Division has updated and expanded the analysis previously submitted to the Commission. The information in the first memorandum covered eleven months of actual data and one month of estimated data for 1986 and preliminary budget data for 1987. Table 1 shows the 1986 revised earnings and equity returns based on actual data for the full year. It also includes a further analysis showing the effect of certain Commission adjustments made in the 1985 rate case. The Division only included those adjustments which are still applicable. Items adjusted were directory advertising, management bonuses, cash working capital and interest synchronization. Differences in equity returns as shown in Table 1 from those previously reported are minor.

TABLE 1

MOUNTAIN BELL UTAH INTRASTATE OPERATIONS (Dollars in Millions)

	<u>Earnings</u>	Return on <u>Equity</u>
1986 Actual Unadjusted	\$56.2	11.74%
1986 Actual Adjusted for 1987 Tax Changes	59.5	12.76%
1986 Actual Adjusted for 1987 Tax and Cost Changes	57.4	12.06%
1986 Actual Adjusted for 1987 Tax and Cost Changes and Commission Rate Case Adjustments	59.1	12.58%

returns as shown in Table 2. The effects of the 1986 Tax Reform Act are already incorporated in the budget figures. The "Budgeted Unadjusted" results differ from those previously reported because of certain budget refinements. The "Budget Adjusted" results reflect the effects of the removal of inside wire and increased sales taxes. Inside wire was removed because it was deregulated on January 1, 1987. The Division also included an analysis of the effects of Commission adjustments made in the 1985 rate case. The final adjustment in the analysis shows the effect of a potential accounting change for Post Retirement Medical/Dental benefits (PRM&D) when added to the other adjustments.

TABLE 2

MOUNTAIN BELL
UTAH INTRASTATE OPERATIONS
(Dollars in Millions)

	<u>Earnings</u>	Return on <u>Equity</u>
1987 Budget Unadjusted	\$54.9	11.76%
1987 Budget Adjusted	53.3	11.22%
1987 Budget Adjusted and Commission Rate Case Adjustments	55.3	11.78%
1987 Budget Adjusted, Commission Rate Case Adjustments and PRM&D Costs	52.1	10.70%

Attachment 1 is the updated version of the schedule attached to the previous memorandum. It has been updated to reflect changes in separation procedures and depreciation rates.

The Federal Communication Commission has recently approved the Joint Board's recommended changes in separation procedures relating to central office category 6 local dial switching equipment and category 8 circuit equipment. These changes will result in a shift in costs from the interstate to the intrastate jurisdiction. The separation changes become effective on January 1, 1988.

The next regular tri-annual represcription of depreciation rates will occur in 1988. Mountain Bell estimates that its depreciation study (to be filed later this year) will show the need for additional intrastate depreciation expense in the range of \$7 to \$10 million. A conservative estimate of \$4 million was used in Attachment 1 to reflect the intrastate

impact of depreciation recapture for 1988.

Attachment 1 shows that the estimated increase in earnings for 1987 and 1988 due to the tax changes are nearly offset by various cost increases that are not currently reflected in rates. Budget information for 1988 is not available to evaluate other effects, such as changes in rate base, revenues and operating expenses.

The lower tax liability in 1987 and again in 1988 will largely offset such things as changes in separation procedures and depreciation rates that would otherwise require rate increases. Continuation of stabilized rates is better than the "yo yo" effect of a rate reduction now and a rate increase in the near future. Equity returns under the various scenarios in Tables 1 and 2 are well below the present authorized return and very likely below any level that the Division might recommend in a general rate case.

The Division recommends that the Commission not order Mountain Bell to reduce rates for the reduction in Federal tax rates. The Division monitors Mountain Bell's earnings on a monthly basis. If significant changes occur in terms of excessive earnings, the Division will petition the Commission to lower the company's rates.

UTAH POWER & LIGHT COMPANY

Utah Power answered a Division request by supplying the information shown in Attachment 2 to this memorandum. The data shows the company's estimate of the Utah jurisdictional effects of the Tax Reform Act and the increase in revenue requirement due to the increase in Utah jurisdictional rate base since the company's last general rate case.

The company calculated that the effects of the changes in the tax law would decrease Utah jurisdictional revenue requirement for 1987 by \$11.1 million. However, Utah jurisdictional rate base has increased by \$259.8 million since the last general rate case. This creates an increased revenue requirement of \$69.8 million.

There are also other cost increases and decreases which would affect the revenue requirement for 1987. For example, if the authorized return on equity were reduced from the current rate of 15.0 percent to a rate of 12.0 percent, the reduction in revenue requirement would be \$49.7 million. The Division currently believes that a reasonable return to allow on equity capital under existing market conditions would be in the range of 11.7 to 12.5 percent.

The results of the Division's examination is in basic agreement with the data supplied by the company. Rates to consumers could be reduced from \$10 to \$15 million based only on the savings from the new tax law. However, if all general rate case items were considered, the company could probably justify a rate increase.

Utah Power also supplied the financial indicator data for 1986 as shown in Table 3.

TABLE 3

UTAH POWER & LIGHT COMPANY
FINANCIAL INDICATORS
1986

Return on Common Equity:	
Total Company	11.99%
Total Company - Electric	9.91%
Total Utah - Electric	11.09%
Earnings Per Share:	
Before Coal Case Refund	\$2.26
Coal Case Refund	\$ .78
After Coal Case Refund	\$1.48
Times Interest Earned	2.30
Internal Generation of Cash	87.00%

The 1986 earnings per share of \$1.48 after the coal case refund were less than the annual dividend rate of \$2.32 per share. The company stated that its 1987 earnings are expected to be less than those for 1986. However, recent cost cutting measures by the company should increase the current earnings to about the 1986 level of \$2.26 before the coal case refund.

After reviewing the information supplied by Utah Power, the Division concludes that the savings resulting from the new tax law are substantially offset by increases in other costs, principally the increase in rate base. The Division will continue to monitor the earnings of Utah Power and will petition the Commission for a rate reduction if the earnings of the company become excessive based on current costs of capital.

MOUNTAIN FUEL SUPPLY COMPANY

The Division has analyzed the effects of the Tax Act on Mountain Fuel by looking at how the tax changes affect the actual results of operations of the company for 1986 and the projected results for 1987. The analysis on Attachment 3 to this memorandum shows that the company would have a spread between \$3.4 million excess and \$5.1 million deficiency in the Utah revenue requirement depending upon the year, capital structure and the return allowed.

Based upon actual 1986 operating figures, including income taxes at the 1986 tax rates and capital structure and costs of capital as authorized in Mountain Fuel's last rate case, the company had a revenue requirement deficiency of \$3.2 million. Adjusting the 1986 results of operations to reflect the effect of the Tax Act, about \$3.4 million, changes the deficiency into

on equity to 13 percent would produce an adjustment of \$3.2 million which would make a total adjusted excess for 1986 of \$3.4 million. Adjusting the capital structure and capital costs to the levels that existed in the beginning of 1987 and leaving the return on equity at 13 percent, would reduce the excess to \$2.1 million.

The company's projected 1987 plant investments and increased operating costs cause a revenue requirement deficiency of \$5.1 million based on the capital structure and costs of capital allowed in the last case. The change to a revenue requirement deficiency is caused by additional investment in rate base and increased operating expenses. The additional costs associated with the increase in rate base and operating expenses is greater than the increase in operating revenues. With the return on equity set at 13 percent the deficiency changes to \$1.8 million under the authorized capital structure and \$3.1 million under the 1987 capital structure.

Mountain Fuel's actual operations for 1986 produced a rate of return somewhat lower than authorized in the last case, and even when adjusted for the 1987 tax changes, the return is only slightly higher than authorized. The company's 1987 projections show that the forecasted rate of return on equity should decline significantly. It would take significant downward adjustments to the company's projected investment levels and operating costs and a rate of return on equity less than 13 percent to produce a disparity large enough to justify a rate decrease. The Division recommends that the Commission not reduce the company's rates. The Division will continue to monitor the company's operations in 1987 and if earnings become excessive will petition the Commission for a reduction in the company's rates. When tax rates further decrease in 1988, the company may at that time have excess earnings to warrant a show cause hearing.

Copies to:

Utah Power & Light Company
Mountain Fuel Supply Company
Mountain Bell
Committee of Consumer Services
William E. Dunn

2983W

MOUNTAIN BELL
UTAH INTRASTATE OPERATIONS
ESTIMATED EFFECTS OF THE TAX REFORM
ACT OF 1986 AND OTHER COST CHANGES
(Dollars in Millions)

<u>Tax Changes</u>	<u>Impact on Earnings</u> <u>Increase/(Decrease)</u>	
	<u>1987</u>	<u>1988</u>
	<u>40% Rate</u>	<u>34% Rate</u>
Tax Rate Reduction	\$ 4.3	\$ 8.8
Excess Deferred Tax Flow Back	2.3	4.4
Capitalization of Construction Costs	(2.9)	(2.9)
Loss of Portion of Business Expense Deduction	(0.1)	(0.1)
Investment Tax Credit - Depreciation	0.1	0.1
Investment Tax Credit - Amortization (Flow Back)	<u>(0.4)</u>	<u>(0.4)</u>
Net Increase in Earnings from Tax Changes	<u>\$ 3.3</u>	<u>\$ 9.9</u>
 <u>Cost Changes</u>		
SPF Phase down	(0.7)	(1.4)
CPE Phase-out	(1.4)	(2.1)
Uniform System of Accounts Capital to Expense Shifts		(1.8)
Depreciation Represcription		(2.5)
Central Office - Categories 6 and 8	<u> </u>	<u>(1.6)</u>
Net Decrease in Earnings from Cost Changes	<u>\$ (2.1)</u>	<u>\$ (9.4)</u>
Net Increase in Earnings	<u>\$ 1.2</u>	<u>\$ 0.5</u>

UTAH POWER & LIGHT COMPANY
 UTAH JURISDICTION
 ESTIMATED EFFECTS OF THE TAX REFORM
 ACT OF 1986 AND OTHER COST CHANGES
 12 MONTHS ENDED DECEMBER 31, 1987 - ESTIMATED
 (Dollars in Millions)

<u>Tax Changes</u>	<u>Revenue Requirement</u> <u>Increase/(Decrease)</u>	
	<u>40% Rate</u>	<u>34% Rate</u>
Expenses:		
Federal Taxes Increase	\$ 14.7	\$ 2.4
Deferred Tax Expense Decrease	(13.6)	(18.1)
Lost Investment Tax Credit	(13.7)	(12.5)
State Tax Increase	0.7	0.7
Rate Base² Impacts:		
Accumulated Deferred Taxes	<u>0.8</u>	<u>1.1</u>
Net Decrease in Revenue Requirement from Tax Changes	<u><u>\$(11.1)</u></u>	<u><u>\$(26.4)</u></u>
 <u>Cost Changes</u>		
Increase in Utah Jurisdictional Rate Base since last case filed January 9, 1984:		
Rate Base Increase	\$259.8	\$259.8
Revenue Requirement Including Depreciation (Tax effects included above)	\$ 69.8	\$ 69.8

MOUNTAIN FUEL SUPPLY COMPANY
UTAH JURISDICTION
ESTIMATED EFFECTS OF THE TAX REFORM
ACT OF 1986 AND OTHER COST CHANGES
(Dollars in Millions)

	Revenue Requirement Increase/(Decrease)	
	1986 Actual Operations	1987 Projected Operations
Based on Capital Structure Allowed in Last General Rate Case:		
Utah Non Gas Revenue Deficiency Based on Return Authorized in Last General Rate Case	\$ 3,208	\$ 5,147
Effect of Applying 1987 Tax Changes to 1986 Actual Data	<u>(3,439)</u>	<u>N.A.</u>
Net	(231)	5,147
Effect of Lowering Equity Return to 13% (reflects both return and associated income tax affects)	<u>(3,161)</u>	<u>(3,391)</u>
Net	<u><u>\$(3,392)</u></u>	<u><u>\$ 1,756</u></u>
Based on Capital Structure Existing in the Beginning of 1987:		
Utah Non Gas Revenue Deficiency Based on Return Authorized in Last General Rate Case	\$ 2,777	\$ 4,777
Effect of Applying 1987 Tax Changes to 1986 Actual Data	<u>(3,352)</u>	<u>N.A.</u>
Net	(575)	4,777
Effect of Lowering Equity Return to 13% (reflects both return and associated income tax affects)	<u>(1,525)</u>	<u>(1,634)</u>
Net	<u><u>\$(2,100)</u></u>	<u><u>\$ 3,143</u></u>

Tab 10

September 1, 1987

STATE OF UTAH
DEPARTMENT OF
BUSINESS REGULATION

NORMAN H. BANGERTE, GOVERNOR
WILLIAM E. DUNN, EXECUTIVE DIRECTOR

To: Public Service Commission

From: Ralph Creer, Director *RC*
Tom Peel, Manager *Tif*

Re: Investigation of the Effects of the
Tax Reform Act of 1986 on
Mountain Bell (Case No. 87-999-01)

This is an update to the memorandum of June 5, 1987 concerning the effects of the Tax Reform Act of 1986 on Mountain Bell earnings. In the prior memorandum, the Division stated that it would monitor earnings of the Company on a monthly basis to detect any significant change in the equity return.

The Summary Table on page 2 provides potential 1987 equity returns comparing our previous report which used 12 months budget data and this report which utilizes five months actual and seven months budget data.

DIVISION OF PUBLIC UTILITIES / RALPH N. CREER, DIRECTOR

HEBER M. WELLS BUILDING 160 EAST 300 SOUTH P.O. BOX 45832 SALT LAKE CITY, UTAH 84145-0801 (801) 530-6611

The Summary Table shows higher 1987 equity returns, utilizing different scenarios, when compared with the returns previously reported in our June 5, 1987 report to the Commission. Although the returns are higher, we still do not recommend action by the Commission at this time. The actual unadjusted return of 12.44 percent is well below the authorized return of 14.2 percent. The highest return shown in the Table of 13.43 percent we believe would fall within a range of reasonableness for Mountain Bell equity capital.

The Division will continue to monitor Mountain Bell's earnings on a monthly basis during the balance of the year and will submit another report later in the Fall. At that time we will have a better assessment of 1987 earnings and equity returns, January 1, 1988 cost shifts, and 1988 budget year data. We will then make a determination whether an adjustment to lower rates would be appropriate.

cc: William E. Dunn, Director
Mountain Bell
Committee of Consumer Services

SUMMARY TABLE
MOUNTAIN BELL
UTAH INTRASTATE OPERATIONS

<u>1987</u>	<u>Return on Equity</u>	
	As previously Reported <u>12 mos. Budget</u>	5 mos. Actual <u>7 mos. Budget</u>
(1) Actual Unadjusted (a)	N.A.	12.44%
(2) Actual/Budget Unadjusted	11.76%	13.43%
(3) Actual/Budget Adjusted	11.22%	12.88%
(4) Actual/Budget Adjusted and Commission Rate Case Adjustments	11.78%	13.22%
(5) Actual/Budget Adjusted, Commission, Rate Case Adjustments and PRM&D (b)	10.70%	12.18%

(a) Based on annualization of actual data. Excludes budget data.

(b) Post Retirement Medical/Dental benefits (PRM&D). A new Financial Accounting Standards Board (FASB) technical bulletin has been issued to provide interim guidance on changes in the method of accounting for post-retirement benefits other than pensions. The FASB final ruling on this matter is expected during 1988. Booking in 1987 appears doubtful.

00555

Tab 11



JOHN H. ANGERTER
GOVERNOR

4th FLOOR, HEBER M. WELLS BUILDING, 160 EAST 300 SOUTH
P.O. BOX 45585, SALT LAKE CITY, UTAH 84145
TELEPHONE: (801) 530-6716

COPY

September 28, 1987

COMMISSIONERS
BRIAN T. (TED) STEWART, CHAIRMAN
BRENT H. CAMERON
JAMES M. BYRNE
EXECUTIVE STAFF DIRECTOR
DOUGLAS C. W. KIRK
COMMISSION SECRETARY
STEPHEN C. HEWLETT

Ralph N. Creer, Director
Division of Public Utilities
Department of Business Regulation
Building Mail

Dear Ralph:

It has been brought to our attention by Joe Dunlop, who has been monitoring Mountain Bell's earnings, that Mountain Bell is close to earning in excess of its authorized rate of return. Mr. Dunlop's analysis, based upon data obtained from the monthly reports supplied by the Company, indicates that for the last 12 months, July 1986 to July 1987, Mountain Bell has earned 14.21 percent on equity. The trend on this moving average is still upward and indicates that Mountain Bell will continue to improve on its earnings.

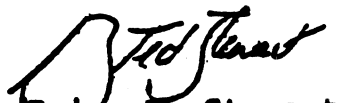
We request that the Division undertake an investigation of the financial returns of Mountain Bell to evaluate whether there is a need to initiate a rate case. Please include in your evaluation an analysis of the impact of the following:

- * Tax Reform Act of 1986
- * Changes in the capital market
- * Impact of depreciation (Current depreciation accounts as well as the Louisiana Court decision)
- * Proper accounting for the early retirement programs
- * Offsets that may impact rate base.

Please do not feel it necessary to limit your investigation to these items.

Your attention to this request will be appreciated.

Sincerely,


Brian T. Stewart
Chairman

BTS/bs

cc: Mountain Bell
Committee of Consumer Services

00564

Tab 12

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investi-)
gation of Access Charges for)
Intrastate Inter-LATA and)
Intra-LATA Telephone Services.)

CASE NO. 83-999-11

ORDER

ISSUED: February 11, 1988

Appearances:

Stanley K. Stoll Thomas M. Zarr	For	Tel-America of Salt Lake City, Inc. and Telecom- munication Resellers of Utah
A. Robert Thorup	"	U.S. Sprint Communications Company
Kenneth A. Okazaki	"	Access Long Distance
Denver C. Snuffer	"	Amtel Corporation
Milton L. Morris	"	AT&T
Randy L. Dryer	"	M.C.I.
James J. Cassity	"	Exchange Carriers of Utah
Ted D. Smith Floyd A. Jensen	"	Mountain Bell
Michael Ginsberg, Assistant Attorney General	"	Division of Public Utilities, Department of Business Regulation, State of Utah
Sandy Mooy, Assistant Attorney General	"	Committee of Consumer Services

By the Commission:

Pursuant to notice duly served, a prehearing conference and also a Motion to Approve Stipulated Interim Charges on Access Charges for Intrastate Intra-LATA and Inter-LATA Telephone Services in the above-captioned matter was held on the 22nd day of

December, 1987, before the Commission at its offices at 160 East 300 South, Salt Lake City, Utah.

This matter was previously heard by the Commission and an Order entered on October 29, 1985. A subsequent Order was entered on February 6, 1986 denying petitions for review and rehearing by clarifying certain other items as described more fully in that Order. A further Order was issued on March 7, 1986 clarifying the effective date of tariffs and related Orders were issued on May 1, 1986 and June 24, 1986 denying Petitions for Review and Rehearing and a petition to reopen the proceedings.

These various Orders were subsequently appealed under the names Telecommunication Resellers of Utah v. Public Service Commission, et al. and Tel-America of Salt Lake City, Inc. v. Public Service Commission, et al., Utah Supreme Court Case Nos. 860124, 860285 and 860400. On November 30, 1987 the Supreme Court set aside the Order of October 29, 1985, establishing the tariffs in this matter, and remanded the matter for further proceedings to determine just and reasonable access charges based upon Utah-specific cost data.

The parties met prior to the hearing on December 22, 1987 and reached a Stipulation on interim access rates for the time period from and after December 22, 1987 until a final order in this matter, and the parties have also agreed upon a schedule for further proceedings.

On December 7, 1987, Mountain States Telephone and Telegraph Company ("Mountain Bell") filed revised tariffs scheduled to become effective December 22, 1987. The Commission

approved those revised tariffs to become effective on the requested date pursuant to our "Order Approving Accelerated Effective Date for Revised Tariffs" in Case No. 87-049-T35, dated December 10, 1987; that Order and said tariffs are incorporated herein by this reference.

The Stipulation of the parties was received on the record in this matter on December 22, 1987 and provides that the rates set forth in Mountain Bell's Access Charge Tariff Rates, which became effective December 22, 1987, shall also become the Interim Rates in this matter commencing December 22, 1987 and until such time as a final Report and Order is issued in this matter; said Interim Rates shall be subject to refund.

The issues relating to the rates to be effective from the date of our Order of October 29, 1985 to December 22, 1987 and the final rates in this matter shall be issues reserved for the hearing in this matter.

The following individual members of the Exchange Carriers of Utah have concurred in the Access Charge Tariff Rates of Mountain Bell pursuant to the Stipulation:

Gunnison Telephone Company
Beehive Telephone Company
South Central Utah Telephone Association, Inc.
Central Utah Telephone, Inc.
Utah-Wyoming Telecom
Kamas Woodland Telephone Co.
Uintah Basin Telephone Association, Inc.
Skyline Telecom
Emery County Farmers Union Telephone Association, Inc.
Manti Telephone Company

The Commission takes notice of its own records in this same matter to the effect that Union Telephone Company, Inc., another member

of the Exchange Carriers of Utah, does not concur in Mountain Bell's access tariff and has, instead, filed its own P.S.C. Utah No. 3 Access Service Tariff scheduled to become effective March 1, 1988. A related Motion for Approval of Interim Tariff is pending.

The parties have also agreed upon a schedule which is set out in detail in the Order that follows.

Pursuant to the Motion and Stipulation of the parties, the Commission enters the following:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That:

1. The Stipulation of the parties in this matter is allowed and confirmed and, except as to Union Telephone Company, Inc. only, the Access Charge Tariff Rates of Mountain Bell effective December 22, 1987 are fixed as the Interim Rates in this proceeding, such Interim Rates to be subject to refund in the event that the final rates fixed by the Commission are lower than the interim rates, in which event Mountain Bell and the respective members of the Utah Exchange Carriers shall refund any difference to their respective customers for the time period commencing December 22, 1987 and ending on the effective dates of tariffs filed pursuant to the final Report and Order in this matter.

2. The Interim Rates of Union Telephone Company are reserved for further consideration pursuant to a hearing presently scheduled; Case No. 88-054-01.

3. The following schedule is adopted for this proceeding:

February 10, 1988	Mountain Bell shall prefile its prepared testimony;
March 1, 1988	The Exchange Carriers shall prefile their prepared testimony;
June 1, 1988	Other parties shall prefile their respective prepared testimony;
July 1, 1988	Rebuttal testimony shall be filed by all parties;
July 6, 1988	9:00 a.m. - Second Prehearing Conference will be held;
July 11-15, 1988	Hearing dates at the Commission offices, commencing at 10:00 a.m., July 11, 1988.

4. The response period for discovery is shortened from 30 to 20 days.

DATED in Salt Lake City, Utah this 11th day of February, 1988.

/s/ Brian T. Stewart, Chairman

(SEAL)

/s/ Brent H. Cameron, Commissioner

/s/ James M. Byrne, Commissioner

Attest:

/s/ Stephen C. Hewlett, Commission Secretary

Tab 13

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

AMERICAN SALT COMPANY, a
Delaware Corporation,
Complainant,

vs.

W. S. HATCH COMPANY, a Utah
Corporation,
Respondent.

CASE NO. 95-192-01

REPORT AND ORDER

ISSUED: September 12, 1985

Appearances:

Marlin O. Baker
Enid Greene

For W. S. Hatch Company

Charles M. Bennett
John L. Fellows

" American Salt Company

By the Commission:

The hearing on W. S. Hatch Company's ("Hatch") Motion to Dismiss the Complaint filed against it by American Salt Company ("American Salt") was heard on July 2, 1985 at 10:00 a.m. before Administrative Law Judge A. Robert Thurman, at the Commission Offices, 4th Floor, Heber M. Wells State Office Building, 160 East 300 South, Salt Lake City, Utah. Having been fully advised in the premises, the Administrative Law Judge enters the following Report containing proposed Findings of Fact, Conclusions of Law, and the Order based thereon.

INTRODUCTION

From April 16, 1984 to May 3, 1984, W. S. Hatch Company (hereafter "Hatch") hauled 406 truck loads of salt, totalling

approximately 17,702 tons, for American Salt from the Amax Magnesium Company ponds to the American Salt plant at Grantsville, Utah. Part of the haul was over a public highway of the state of Utah, a fact known by American Salt at the time the haul took place, but which Hatch did not know, mistakenly believing the entire haul to be over private roads and thus not subject to regulation by this Commission. Hatch charged less than its tariff rate for the haul because of the mistake.

After the haul ended, Hatch discovered the mistake and billed American Salt for Hatch's services according to the tariff rate then on file with and approved by this Commission. American Salt refused to pay the amount billed, basing its refusal on an alleged oral agreement of a rate lower than the published tariff rate.

Hatch filed suit in the United States District Court for the District of Utah seeking payment for its transportation services according to the tariff rate. American Salt immediately thereafter filed a Verified Complaint and Application for Relief from Excessive Charges with this Commission, claiming that Hatch's tariff rate was unreasonable and unjust under the circumstances.

The petitioner, American Salt, filed a verified petition setting forth certain facts on which it based its allegations that the published tariff rate was unjust and unreasonable under the circumstances. Hatch, in support of its Motion to Dismiss, filed supporting affidavits.

In view of the verified complaint and affidavits filed herein, and the factual admissions of the parties, the Commission, in accordance with Rule 12(b) of the Utah Rules of Civil Procedure, will consider Hatch's Motion to Dismiss as a Motion for Summary Judgment.

FINDINGS OF FACT

The Commission finds that there is no genuine issue as to the following material facts:

1. The haul performed by Hatch for American Salt was made, in part, over a public road of the state of Utah.
2. American Salt knew that part of the haul was over a public road at the time the haul took place. Hatch believed the haul to be made entirely over private roads.
3. Hatch hauled 406 loads of salt from the Amax Magnesium Company Ponds to the American Salt plant at Grantsville, Utah, averaging 43.6 tons each, totalling approximately 17,701.60 tons.
4. At the time of the haul, Hatch had a salt tariff on file that had been properly submitted to and approved by this Commission. The Public Service Commission has examined and approved Hatch's salt tariff on numerous occasions. The Commission has found the salt tariff to be just and reasonable.
5. Hatch's tariff rate for salt was \$3.35 per hundred weight at the time of the haul.

6. The cost for the services Hatch performed for American Salt, calculated according to the tariff rate, was \$123,911.20, plus applicable dead-heading charges.

7. No application was made to this Commission to change the tariff rate applicable to this haul.

8. American Salt made payments to Hatch in the total amount of \$33,667.40, leaving an unpaid balance of \$90,243.80 plus dead-heading charges.

CONCLUSIONS OF LAW

1. Utah Code Annotated § 54-6-3 (1953) specifically provides that a common motor carrier operating any motor vehicle within the state of Utah may not transport either persons or property for compensation over the public highways except in accordance with the provisions of the Utah Motor Carrier Act.

2. Utah Code Annotated § 54-3-6 (2) (1953) further provides that no common carrier shall charge, demand, collect, or receive compensation different from that specified in the tariffs filed with the Commission and in effect at the time transportation services are rendered.

3. Under the law, American Salt is charged with the knowledge that any haul over the Utah public highways is subject to the laws of the state of Utah and, therefore, to the applicable tariff provisions on file with and approved by this Commission.

4. The salt tariff on file with the Commission is fair and reasonable, and Hatch is legally required to collect the charges for transportation services as provided in said tariff.

5. Any oral or written agreements to charge a rate higher or lower than the published tariff rate, even assuming that such was agreed to by Hatch and American Salt, is void and unenforceable.

6. Any agreement or representation by Hatch that it would accept less than the applicable tariff rate in payment for its services, assuming such agreement or representation was made, is also void and unenforceable.

7. American Salt is required under the laws of the State of Utah to pay the tariff rate for the transportation services performed and other charges as set forth in said tariff. Hatch is entitled to compensation for its services in the amount of \$123,911.20 for the salt hauled, together with all other costs as provided by its applicable tariff, less the payments previously made by American Salt.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That Respondent W. S. Hatch Company's Motion to Dismiss the Verified Complaint filed against it by American Salt Company is granted and said Complaint is dismissed with prejudice.

DATED at Salt Lake City, Utah, this 11th day of September, 1985.

/s/ A. Robert Thurman
Administrative Law Judge

Approved and confirmed this 12th day of September,
1985, as the Report and Order of the Commission.

/s/ Brent H. Cameron, Chairman

(SEAL)

/s/ James M. Byrne, Commissioner .

/s/ Brian T. Stewart, Commissioner

Attest:

/s/ Georgia B. Peterson, Secretary

Tab 14

RECEIVED

'85 OCT -2 PM 12:51

CALLISTER, DUNCAN & NEBEKER
FRED W. FINLINSON
CHARLES M. BENNETT
Suite 800 - Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 530-7300

UTAH PUBLIC
SERVICE COMMISSION

Attorneys for American Salt Company

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

STATE OF UTAH

* * * * *

AMERICAN SALT COMPANY, a	)	
Delaware corporation,	)	APPLICATION FOR REHEARING
	)	
Complainant,	)	
	)	
vs.	)	
	)	
W.S. HATCH CO., a Utah	)	
corporation,	)	
	)	Case No. 85-192-01
Defendant.	)	

* * * * *

FRED W. FINLINSON and CHARLES M. BENNETT of Callister, Duncan & Nebeker, attorneys of record for American Salt Company, pursuant to Utah Code Ann. Section 54-7-15 (1981), hereby respectfully request that the Public Service Commission grant a rehearing in the above-entitled matter with regard to the Report and Order entered on the 12th day of September, 1985. American Salt Company further requests that upon rehearing, the Public Service Commission vacate the Order and

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DATED: this 1st day of October, 1985.

By Charles H. Jewell
Attorneys for American Salt
Company

- 2 -

0353

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Attorneys for American Salt Company

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

STATE OF UTAH

* * * * *

AMERICAN SALT COMPANY, a	)	
Delaware corporation,	)	MEMORANDUM IN SUPPORT OF
	)	APPLICATION FOR REHEARING
Complainant,	)	
	)	
vs.	)	
	)	
W.S. HATCH CO., a Utah	)	
corporation,	)	
	)	Case No. 85-192-01
Defendant.	)	

* * * * *

FRED W. FINLINSON and CHARLES M. BENNETT of Callister,
Duncan & Nebeker, attorneys for American Salt Company
("American Salt"), respectfully submit this Memorandum in
support of American Salt's Application for Rehearing in the
above-entitled matter.

STANDARD OF REVIEW

American Salt has set forth in detail in its Second Amended Verified Complaint the facts which led to this proceeding. While many of American Salt's allegations are not in dispute, some of the facts have been disputed by Hatch in these proceedings. Since the Report and Order dated September 12, 1985 (the "Report and Order") dismissed American Salt's Complaint pursuant to a motion for summary judgment, the Public Service Commission (the "Commission") is required to accept American Salt's verified allegations (and the logical inferences therefrom) as true for purposes of this proceeding. Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982).

For the convenience of the Commission, American Salt has attached a copy of each statutory reference in support of its Application as Exhibits A-1 through A-10.

FACTUAL BACKGROUND

In 1984, due to the abnormally high and rising level of the Great Salt Lake, American Salt was faced with an emergency condition. The decreasing salinity of the lake's salt water

together with the possibility of the flooding of American Salt's evaporation ponds threatened American Salt's salt supply. As a result, American Salt contracted with its neighbor Amax to purchase salt from Amax. Amax mines magnesium and other minerals from its solar evaporation ponds on the Great Salt Lake. To Amax, salt is a waste product. In order to haul the needed quantity of salt in the amount of time available, American Salt needed additional hauling capacity.

The Hatch - American Salt Hauling Contract

As a result, in April, 1984, American Salt and W.S. Hatch & Co. ("Hatch") entered into first an oral, then a written, contract (the "Contract") for the hauling of salt by Hatch from the Amax ponds to American Salt's plant at Solar, Utah. Based on competitive market conditions, the rate set forth for hauling the salt was less than 50% of Hatch's published general tariff rate. Among other matters, the Contract required Hatch to "furnish and provide all licenses and permits required by state, federal or local authorities; . . . ." Transportation Agreement, page 2. The hauling was done between April 16 and May 2, 1984. Unknown to American Salt, Hatch failed to seek or obtain Commission approval of the Contract.

Hatch Also Hauled Salt for Morton Salt

From 1980 to 1985, Hatch made at least four similar hauls of salt for Morton Salt. Each of the hauls was made from the Amax ponds to Morton Salt's plant at Solar, Utah, approximately 20 miles east of American Salt's plant. Each of the hauls was also made at less than 50% of Hatch's published general tariff rate. However, Hatch in these four cases sought and obtained Commission approval of these rates. In support of the haul which was begun in May, 1985, Hatch alleged that the haul was necessitated by emergency conditions and that the lower rate was "just, reasonable and in the public interest." Hatch's Application, dated May 6, 1985, p. 2, Case No. 85-192-02.

The Contract Dispute

After the American Salt haul was completed, Hatch and American Salt disagreed as to the amount due Hatch under the Contract. Hatch claimed a total of \$40,231.00 was due. American Salt paid \$33,667.40. Thus, the total amount in dispute under the Contract is \$6,563.60. The issue in dispute is which of the parties was responsible for delays which occurred in shipping the salt and the added costs those delays

entailed. When American Salt indicated it disagreed with what Hatch claimed was due and owing, Hatch threatened to charge American Salt under its general tariff rate unless American Salt paid the charges as demanded by Hatch. When American Salt refused, Hatch filed suit in federal court seeking an additional \$90,000 based on its general tariff rate.

Commission Proceedings

Thereafter, American Salt filed its complaint before the Commission seeking relief from the unjust, unreasonable and discriminatory actions of Hatch. A hearing was held before Administrative Law Judge A. Robert Thurman on July 2, 1985. Judge Thurman entered his Report and Order on September 12, 1985 dismissing American Salt's application for relief, and the Commission approved his Report and Order that same day.

DISPUTED FACTS

While there are several disputed facts, there is one finding of fact in the Report and Order which American Salt strenuously disputes. That finding is: "Hatch believed the haul to be made entirely over private roads." Report and Order, Finding No. 2 p. 3.

Hatch Knew a Public Road Was Involved

American Salt has uncovered additional evidence that challenges Hatch's assertion that it did not know a public road was involved. The Affidavit of Roger Peterson filed herewith includes a copy of a freight bill completed by one of Hatch's drivers which shows that Hatch's agents knew that a county road was involved no later than April 23, 1984. (The haul began on April 16 and was terminated on May 2, 1984.)

The Road is Well Known and Marked

Moreover, Hatch hauled salt over the very same road on two earlier occasions for Morton Salt. The road itself is a well known and historic public road, having been in use over one hundred years. It is the only road which grants access to Stansbury Island. Additionally, both the entrance off the public road to AMAX's property and to American Salt's property had gateways, indicating the boundary line of the respective properties and putting users on notice that private property rights were beginning. See map accompanying Affidavit of Roger Peterson, dated September 30, 1985.

Hatch Must Show None of its Agents and Officers Knew

Brad Kilpatrick filed an Affidavit, dated June 27, 1985, in which he states he assumed only private roads were involved. Affidavit of Brad Kilpatrick, p. 2. However, Hatch is charged with the knowledge of all of its agents and officers -- not just Brad Kilpatrick. Lowe v. April Industries, Inc., 531 P.2d 1297 (Utah 1974). Brad Kilpatrick states Lee Nicks and Phil McCauslin accompanied him on his initial inspection. There is no affidavit from Mr. Nicks, and Mr. McCauslin's affidavit is totally silent as to his knowledge. If any officer or agent of Hatch knew the road was a public road, that knowledge is imputed to Hatch.

Hatch is Charged with Constructive Knowledge

Finally, Utah Code Ann. Section 54-6-3 (1953) requires Hatch to charge shippers in accordance with the Code provisions when a haul is made over a "public highway." "Public highway" is a defined term which includes any public thoroughfare. Utah Code Ann. § 54-6-1 (1975). In view of the crucial importance the nature of the roadway has on Hatch's duties under the Code, Hatch, as a regulated common carrier, should be charged with

knowledge of all public highways. Therefore, Hatch is precluded from arguing its alleged mistake.

Thus, it is improper to find that Hatch did not know a public road was involved. Moreover, even though American Salt is entitled to relief if this finding were true, the finding is objectionable because of the inherent implication that Hatch acted reasonably in this matter. Any implication of propriety on Hatch's part is improper. Hatch violated both its statutory and contractual duties. Hatch's sole motivation in this matter has been greed - the possibility of an \$83,000 plus windfall. Clearly, Hatch has no concern for what is just and fair.

LEGAL ANALYSIS

I. THE COMMISSION HAS THE POWER AND THE DUTY TO GRANT RELIEF TO AMERICAN SALT IN THIS CASE.

A. The Commission's Power is Both Specific and Plenary.

The Utah legislature has enacted statutes which require a common carrier to publish tariff rates and to charge shippers pursuant to those published rates, subject to the supervision

of the Commission and certain statutory exceptions. Utah Code Ann. § 54-3-6(2) (1953); § 54-4-1 (1975); § 54-4-4 (1975); § 54-6-4 (1975); and § 54-6-10 (1953). The underlying purpose of these statutes is to insure that common carriers charge shippers just, reasonable and nondiscriminatory rates. Utah Code Ann. § 54-4-4 (1975); Hatch's Supplemental Memorandum in Support of Defendant's Motion to Dismiss, dated May 21, 1985, pp. 2, 4, 8. Thus, the Commission is given the specific authority, as well as the duty, to investigate charges, rates and practices, including general published tariff rates, to determine whether a charge, rate or practice is unjust, unreasonable or discriminatory. Utah Code Ann. § 54-3-6(2) (1953); § 54-4-4 (1975); § 54-6-4 (1975). In the event the Commission determines a rate to be unjust, unreasonable or discriminatory, the Commission is given the power to enter orders which correct the unjust, unreasonable or discriminatory charges. This power is both specific (Utah Code Ann. § 54-3-8 (1953); § 54-4-4 (1) and (2) (1975); § 54-6-4 (1975); § 54-6-10 (1953); and § 54-7-20 (1953)) and plenary (Utah Code Ann. § 54-4-1 (1975); White River Shale Oil Corp. v. Public Service Commission, 9 U.A.R. 9, at 10 (Utah 1985) ("Under the authority of U.C.A. 1953, § 54-4-1 (Supp. 1983), the PSC has the power to issue orders regarding any matter within its jurisdiction." Emphasis added.)).

B. American Salt has Alleged Facts Which Establish that Hatch's Charges, Rates and Practices are Unjust, Unreasonable and Discriminatory.

Hatch's Rates Are Discriminatory

American Salt's central contention is that the application of Hatch's general tariff rates under the facts of this case is not only unjust and unreasonable, but furthermore it is discriminatory. In analyzing this contention, American Salt's allegation that Hatch's rates are discriminatory is particularly important. The Utah Code strictly prohibits preferences. Section 54-3-8 provides in part:

No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any person, or subject any person to any prejudice or disadvantage.
. . . The Commission shall have power to determine any question of fact arising under this section.

Utah Code Ann. § 54-3-8 (1953). What makes American Salt's case compelling is that its allegation of discriminatory treatment is based on undisputed facts.

Preferences Granted To Morton Salt

In at least four recent instances Hatch has sought and received Commission approval to charge a special commodity rate for the hauling of salt for Morton Salt, a direct competitor of American Salt. In May, 1985, Hatch began hauling salt approximately 30 miles for Morton Salt at a cost of \$3.25 per ton. If Hatch is successful in imposing its general tariff rate against American Salt, American Salt will be required to pay a hauling charge of \$7.00 per ton for an 11 mile haul. The Morton Salt hauls and the American Salt haul were made from the same point of origin (the Amax Ponds), traveled the same route (until the turnoff to American Salt's property), and transported the identical product (salt). Under the Contract, Hatch offered a similar rate to American Salt, but Hatch failed to obtain the "licenses and permits" it was required to obtain for American Salt. These facts conclusively establish that the application of Hatch's general tariff rates to the American Salt haul is discriminatory.

Hatch's General Tariff Is Unjust and Unreasonable

Beyond discrimination, the facts of this case establish that the imposition of Hatch's general tariff rate is unjust

and unreasonable. Both parties agree that a dispute arose over the amount of the payments due Hatch after the haul was completed. Even if Hatch were entirely correct in its interpretation of the Contract and it were owed the additional \$6,500.00 in dispute, Hatch is now seeking to have its general tariff rates applied so that it can obtain an \$83,000.00 windfall on a \$30,000 to \$40,000 contract. The total payment would be three times larger than what Hatch claimed it was due under the Contract. While it cost American Salt only \$2.00/ton to refine the salt, the cost of transportation under Hatch's general tariff is 3-1/2 times that cost. If, in addition to this, the preferential rate granted to Morton Salt is considered, the application of Hatch's general tariff rate to this haul is clearly unjust and unreasonable.

Thus, American Salt respectfully submits that the Commission has the responsibility to act in this matter to prevent an unjust, unreasonable and discriminatory application of Hatch's general tariff rates.

C. Judge Thurman Misapplied the Law in this Case.

Judge Thurman in the Report and Order submitted the following Conclusions of Law:

1. Utah Code Annotated § 56-6-3 (1953) specifically provides that a common motor carrier operating any motor vehicle within the State of Utah may not transport either persons or property for compensation over the public highways except in accordance with the Utah Motor Carrier Act.

2. Utah Code Annotated § 54-3-6(2) (1953) further provides that no common carrier shall charge, demand, collect, or receive compensation different from that specified in the tariffs filed with the Commission and in effect at the time transportation services are rendered.

Report and Order, p. 4. Without more, these statements are not an accurate application of Utah law to the facts of this case.

Utah Code Ann. § 54-6-3 (1953) requires common carriers to comply with all provisions of the Act -- not just those provisions which require a common carrier to charge according to its published tariffs. Among other provisions, common carriers must extend uniform contracts to shippers (Utah Code Ann. §§ 54-3-6(2) (1953) and 54-3-7 (1953)) and must not subject any shipper to any prejudice or disadvantage (Utah Code Ann. § 54-3-8 (1953)). In view of the allegations of American Salt that Hatch violated its duty under these sections of the Code, the key issue is whether the Commission is powerless to prevent the unjust, unreasonable and discriminatory application of Hatch's tariff.

A Full Reading of Section 54-3-6(2) supports
American Salt's Position that the Commission has Power
to Order Relief in this Case.

Section 54-3-6(2) provides in toto:

No common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit, in any manner or by any device, any portion of the rates, fares or charges so specified, except upon order of the Commission as hereafter provided, or extend to any person any privilege or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons. (Emphasis added.)

Utah Code Ann. § 54-3-6(2) (1953). By clear statutory construction, these underlined words conclusively show that the Commission has the power to order a carrier to remit its charges even though those charges are based on schedules on file at the time the haul occurred. See also, Utah Code Ann. § 54-3-7 (1953). Indeed, without the underlined words, this section would be inconsistent with the Commission's mandate to

investigate rates, charges and practices and order appropriate relief. Utah Code Ann. § 54-4-1 (1975); § 54-3-8 (1953); § 54-4-4 (1975); § 54-6-4 (1975); and § 54-7-20 (1953).

Even though the Division of Public Utilities has been somewhat unsympathetic to American Salt's claims in this proceeding, its attorney, Brian W. Burnett, agreed that Sections 54-6-3 and 54-3-6(2) do not limit the Commission's power in this matter:

I do, however, believe that the reparation statute 54-7-20 allows the Commission to take a look at charges that have been made in certain circumstances, and in determining whether or not, in view of those circumstances, the charges were unjust, unreasonable or discriminatory.

Transcript of July 2, 1985 Hearing, p. 33.

Thus, as explained in paragraph A, pp. 9-10 above, the Commission has both plenary and specific authority to grant the relief requested.

D. The Commission Should Exercise its Authority to
Protect American Salt from Hatch's Unjust,
Unreasonable and Discriminatory Charges, Rates and
Practices.

While ignoring the gross inequities it has caused, Hatch has argued two practical reasons that no relief should be granted to American Salt:

1. Any relief would undermine tariffs; and
2. Any relief would encourage disgruntled shippers to seek Commission help after the fact, arguing that the common carrier's rate was unjust and unreasonable.

Hatch's Memorandum In Support of Defendant's Motion to Dismiss, dated April 30, 1985, p. 8; Transcript of July 2, 1985 Hearing, p. 14. Indeed with regard to this second matter, Hatch argued "anybody could come in anytime." Transcript of July 2, 1985 Hearing, p. 14.

Mr. Burnett, on behalf of the Division of Public Utilities, stated that the Division had similar concerns:

As I mentioned to you before, the only interest the state has is maintaining the sanctity of tariffs and making sure that we aren't deluged with a number of people who, after the fact, complain about their tariff being unjust and unreasonable.

Transcript of July 2, 1985 Hearing, p. 33. In effect these points acknowledge the power of the Commission to act, but question whether the Commission should grant relief because of the ruling's impact in other areas. These points should not dissuade the Commission from granting relief in this case.

Tariffs Should Not Be Sanctified

With regard to protecting tariffs, American Salt submits that the focus is wrong. It is not tariffs that need to be protected but rather the purpose for which tariffs were instituted -- to prevent unjust, unreasonable and discriminatory rates -- that needs protection. If the application of a tariff is unjust, unreasonable and discriminatory, the Commission should grant relief from that tariff. To hold otherwise, on the basis of the "sanctity of tariffs", would ignore the Commission's legislative mandate to protect the public interest by insuring that rates are just.

reasonable and nondiscriminatory. See Union Pac. R. Co. v. Public Service Commission, 135 P.2d 915, 918 (Utah 1953); Utah Code Ann. § 54-4-4 (1975).

The Commission Has a Duty to Act

As to preventing the anticipated deluge, American Salt suggests the Commission has a duty to prevent unjust, unreasonable or discriminatory rates even if other shippers might be inclined to seek similar relief. Utah Code Ann. § 54-4-4 (1975); § 54-6-4 (1975). Indeed, administrative convenience, while a legitimate concern, should not outweigh a legislative mandate to insure just, reasonable and non-discriminatory rates.

However, even if the Commission disagrees and decides to weigh the impact of an order of relief on the administration of tariffs generally, relief can still be granted by the Commission in this case in any number of narrow ways which would protect the Division of Public Utilities from the deluge of disgruntled shippers which it fears.

The Relief Granted Can Be Very Narrow

The facts of this case are extraordinary. The application of Hatch's general tariff is unjust, unreasonable and discriminatory. Moreover, Hatch had a statutory and contractual duty to take steps which would have prevented this result. Thus, relief can be granted on a narrow basis.

If the Commission decides to grant relief in a narrow way, the order of relief could, for example, require the shipper to meet a three-fold test: First, the shipper would have to show that the application of the general tariff rate under the circumstances of the case would be unjust, unreasonable or discriminatory. Second, the shipper would have to show that the carrier had a duty to obtain a statutorily permitted exception from its general tariff rate. Finally, the shipper would have to show that if the carrier had fulfilled its duty and sought the statutorily permitted exception, the statutorily permitted exception would have been granted. The order of the Commission would then be granted by enjoining the carrier to apply for the statutorily permitted exception and by having the Commission approve the application.

As can be seen, this approach would not open Pandora's box. The burden of proof under this three-fold test would prevent shippers from using this case to avoid the normal application of general tariff rates. Moreover, the ruling of the Commission under this approach would insure the "sanctity of tariffs" (assuming arguendo that tariffs deserve sanctification) because the relief granted American Salt would be made pursuant to a statutorily permitted exception and Commission approval of that exception.

II. CONCLUSION.

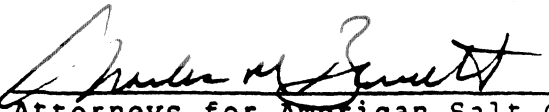
American Salt alleges facts, many of which are undisputed, which establish that the application of Hatch's general tariff rate to the facts of this case is unjust, unreasonable and, most importantly, discriminatory. To uphold the application of Hatch's general tariff rate on the basis that a statutory mandate is being fulfilled is incomprehensible. The mandate is not to strictly enforce tariffs; rather it is to protect the public interest through the use of tariff rates to insure just, reasonable and nondiscriminatory rates. Union Pac. R. Co. v. Public Service Commission, 135 P.2d 915, 918 (Utah 1953); Utah Code Ann. § 54-4-4 (1975). The number of statutory provisions which grant the Commission the authority and responsibility to

investigate charges, rates and practices which are alleged to be unjust, unreasonable or discriminatory makes the Legislature's intent crystal clear. Accordingly, when American Salt proves its case on the merits, the Commission should grant the requested relief.

American Salt respectfully requests that the Commission vacate the Report and Order and that this case proceed to an adjudication on the merits.

Dated this 1st day of October, 1985.

CALLISTER, DUNCAN & NEBEKER

By 
Attorneys for American Salt Co.

CDN2737B

Tab 15

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

AMERICAN SALT CO., a Delaware)
corporation,)

Complainant and)
Appellant,)

vs.)

W.S. HATCH CO., a Utah)
corporation; THE PUBLIC SERVICE)
COMMISSION OF UTAH; BRENT H.)
CAMERON; JAMES M. BYRNE; and)
BRIAN T. STEWART,)

Respondents.)

APPELLANT'S DOCKETING
STATEMENT

Case No. 860048

Category No. 9

* * * * *

American Salt Co. ("American Salt"), by its counsel, hereby
files the following Docketing Statement with the Court pursuant
to Rule 9 of the Utah Rules of Appellate Procedure (1985).

1. The Supreme Court's Jurisdictional Authority. The
Supreme Court has authority to hear this appeal pursuant to a
Writ of Review issued by the Supreme Court to the Public

Service Commission of Utah (the "PSC") under U.C.A. § 54-7-16 (1953).

2. Concise Statement of the Nature of the Proceeding.

This appeal is a review of an Order of the PSC dismissing the Verified Complaint of American Salt against W.S. Hatch Co. ("Hatch").

3. Dates of Order, Rehearing and Petition for Review.

The Report and Order from which this Appeal has been taken was issued by the PSC on September 12, 1985. Thereafter, a petition for rehearing was filed by American Salt on October 2, 1985. The petition for rehearing was denied pursuant to an Order entered December 24, 1985. The Petition for Review of the Report and Order of the PSC was filed with the Supreme Court on January 15, 1986.

4. Concise Statement of Material Facts. American Salt mines salt from its solar evaporation ponds next to the Great Salt Lake in Tooele County, Utah. In the spring of 1984, American Salt was faced with the potential flooding of its ponds as a result of rising water level of the Great Salt Lake. As a result, American Salt contracted with its neighbor.

Amax, to purchase salt from Amax so that American Salt could insure a continuous supply of salt for its customers.

It was necessary for American Salt to move the salt in a short period of time and American Salt did not have the hauling capacity to do this. Accordingly, American Salt entered into an oral, and then a written, contract with Hatch to help move the salt. Hatch is a common motor carrier of property, U.C.A. § 54-6-1 (1975), and is subject to regulation by the PSC. U.C.A. § 54-4-1 (1975). The contract price was between one-fourth and one-third of what the haul would have cost had it been made pursuant to Hatch's published tariff rates. As part of the contracts, Hatch agreed to obtain all necessary permits and approvals from the PSC so that the haul could be made based on the contract.

Prior to and after the time of the American Salt--Hatch haul, Hatch hauled salt for Morton Salt from the Amax pond to Morton Salt Company's plant at Saltair, Utah. These hauls were performed at between one-third and one-half of Hatch's published tariff rates. With regard to these hauls, Hatch applied for and obtained special commodity rates from the PSC.

Hatch hauled salt for American Salt in mid April through early May, 1984. Hatch did not obtain a special commodity rate before, during or after its haul. Hatch claims that it was operating under a mistake of fact, believing that it did not need to obtain a special commodity rate because the haul was being made entirely over private roads. This claim by Hatch is disputed by the allegations in American Salt's Verified Complaint and the affidavits on file in this proceeding.

After the haul was completed, a dispute arose as to how much was owed Hatch under the contract. When agreement could not be reached with Hatch, Hatch threatened to charge American Salt under its published tariff rates if it was not compensated pursuant to its view of the contract (\$40,231.00). American Salt refused to make payment based on Hatch's interpretation of the contract, but American Salt did pay Hatch based on a compromise between what Hatch was claiming and what American Salt thought was owing on the contract (\$33,667.40). Nonetheless, Hatch filed an action in the Federal District Court in the Central Division of Utah to recover under its published tariff rates (\$123,911.20 plus dead heading charges).

After the Complaint was filed by Hatch in the Federal District Court, American Salt filed a Verified Petition with the PSC seeking to have Hatch's published tariff rate declared unreasonable, unjust and discriminatory under these circumstances and asking the PSC for relief from excessive charges. Hatch moved the PSC to dismiss for lack of jurisdiction. After a hearing before Administrative Law Judge A. Robert Thurman, Judge Thurman issued a Report and Order which was adopted by the PSC on September 12, 1985 dismissing American Salt's Verified Complaint and entering Findings of Fact and Conclusions of Law. A copy of that Report and Order are attached to this Docketing Statement. This Appeal ensued.

5. Issues Presented in this Appeal. The issue presented in this case is whether the PSC erred when it dismissed American Salt's Verified Complaint where:

A. There existed a statutorily permitted exemption which would have governed the haul made by Hatch for American Salt. U.C.A. § 54-6-10 (1953).

B. Hatch knew of the exemption, contractually bound itself to obtain the exemption, and then failed to obtained the exemption.

C. Hatch, both before and after this haul, obtained the exemption for American Salt's chief competitor, Morton Salt.

D. Hatch made no attempt to obtain an exemption for American Salt before, after or during the haul.

E. Hatch demanded Forty Thousand Two Hundred Thirty-One and No/100 Dollars (\$41,231.00) based on its interpretation of the contract.

F. American Salt has paid Thirty-Three Thousand Six Hundred Sixty-Seven and 40/100 Dollars (\$33,667.40).

G. Hatch is seeking to be paid an additional Ninety Thousand Dollars (\$90,000) plus under its general tariff rate for the haul made.

H. Utah law specifically prohibits discriminatory treatment by common carriers between shippers.

I. Utah law grants specific and plenary authority to the PSC to investigate allegations of unreasonable, unjust or discriminatory rates, charges or practices, and to order appropriate remedies.

6. Statutes and Cases Determinative of the Issues Stated. American Salt relies on the following statutory provisions: Utah Code Ann. § 54-3-6(2) (1953); § 54-3-7 (1953); § 54-3-8 (1953); § 54-4-1 (1975); § 54-4-4 (1975); § 54-6-4 (1975); § 54-6-10 (1953); and § 54-7-20 (1953). American Salt also relies on White River Shale Oil Corp. v. Public Service Commission, 9 U.A.R. 9, at 10 (Utah 1985).

7. Related Appeals. There are no related appeals in this matter.

8. Attachments. Attached hereto are the following documents:

- A. PSC's Report and Order dated September 12, 1984;
- B. The PSCs's Order Denying Rehearing dated December 24, 1985;
- C. American Salt's Petition for Review of Report and Order of the PSC dated January 15, 1986.

Respectfully submitted.

CALLISTER, DUNCAN & NEBEKER
CHARLES M. BENNETT

By 
Charles M. Bennett
Attorneys for American Salt Co.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing APPELLANT'S DOCKETING STATEMENT was mailed, postage fully prepaid this 17 day of March, 1986, to the following:

Merlin D. Baker
Erid Greene
Ray, Quinney & Nebeker
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Public Service Commission
160 East 300 South
Salt Lake City, Utah 84111

Division of Public Utilities
160 East 300 South
Salt Lake City, Utah 84111


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