

1991

Justin C. Stewart, George L. Gigi, A. Earl Cox,  
Barbra Toomer, Ronald Turpin, and Pat Coryell v.  
Utah Public Service Commission and U.S. West  
Communications, Inc. : Unknown

Utah Supreme Court

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Unknown.

James L. Barker, Jr.; John J. Flynn; Attorneys for Petitioners.

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BRIEF

DOCKET NO. \_\_\_\_\_

IN THE UTAH SUPREME COURT

Justin C. Stewart, George L.	)	
Gigi, A. Earl Cox, Barbara	)	APPELLANTS' MOTION
Toomer, Ronald Turpin and Pat	)	TO AMEND BRIEF ON
Coryell,	)	APPEAL CORRECTING
Appellants	)	CITATIONS TO RECORD

Utah Public Service Commission,	)	Case No. 910405
U.S. West Communications, Inc.	)	
and Division of Public Utilities)	)	
Respondents	)	

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MOTION TO AMEND APPELLANTS' BRIEF ON APPEAL  
CORRECTING CITATIONS TO RECORD  
BY APPELLANTS  
JUSTIN C. STEWART, GEORGE L. GIGI, A. EARL COX  
BARBARA TOOMER, RONALD TURPIN AND PAT CORYELL

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### BASIS FOR THE MOTION

In this case, Appellants were faced with a dilemma in determining the time within which to file their brief on appeal after filing the docketing statement in this appeal. After waiting more than the 40 days explicitly mandated and prescribed by this Court's rules for the Commission to file the record in this case <sup>1</sup> (the record was only filed over 100 days after it was due to be filed) and after repeated inquiries as to when the record would be filed by the Commission, Appellants decided as a matter of prudence to file their Brief on Appeal last November and within the time limits specified by this Court's rules for appeals from lower court decisions. Given the past manipulation of procedural standards by the Commission to Appellants' prejudice, prudence required that the brief be filed even though the Appellate Rules governing review of orders of administrative agencies does not specify a time for the filing of briefs. <sup>2</sup> Appellants filed their Brief on Appeal with the assurance that the record pagination from the daily transcript they relied upon in drafting their brief would not be changed. <sup>3</sup>

Appellants also filed their brief prior to the formal filing of the record because their brief necessarily exceeded the page

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<sup>1</sup> Utah Rules of Appellate Procedure, Rule 16: "The agency shall file the record with the clerk of the appellate court within 40 days after service upon it of the petition for review."

<sup>2</sup> Utah Rules of Appellate Procedure, Title III, Rules 14 - 18.

<sup>3</sup> Appellants. in their Reply Memorandum to Respondents' Joint Motion to Dismiss and Strike Appeal, filed with this Court on December 30, 1991, expressly reserved the right to seek costs and attorneys fees from the Commission should the Commission's assurances prove untrustworthy.

limitations upon briefs and appellants needed this Court's permission to file a brief in excess of forty pages. A denial of the right to file a brief in excess of the page limit would necessarily have required considerable effort and time by counsel for Appellants to shoe-horn their arguments into a shorter brief, assuming that was possible. Counsel therefore determined to file their brief last November to avoid the risk of further procedural gambits being played to deny Appellants a fair hearing and to be assured of sufficient time to rewrite their brief if required and if possible.

A further procedural ambiguity also confronted Appellants in deciding when to file their brief on appeal. No time is clearly established for when an Appellant must file a brief in cases of appeals from administrative orders under this Court's Rule 14. Rule 26 requires that the "appellant shall serve and file a brief within 40 days after date of notice from the clerk of the appellate court pursuant to Rule 13 . . . ." (Emphasis added) <sup>4</sup> Appellants

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<sup>4</sup> Respondents Motion to Dismiss this appeal, filed with this Court on December 20, 1991, sought to have Appellants' brief stricken for violation of this rule. Respondents' Memorandum of Points and Authorities In Support of Motion To Dismiss and Motion to Strike, pp. 21 - 22. Respondents neglected to quote that portion of the Rule clearly limiting the time for filing briefs required by Rule 26 to notice of the clerk of the appellate court "pursuant to Rule 13." Rule 13 applies to trial court appeals, not appeals under Rule 14. Moreover, Rule 18 makes Rule 13 inapplicable to reviews of agency "decisions or orders." Consequently, the time for filing briefs from agency decisions is ambiguous and not governed by Rule 26. In view of the Commission's cavalier approach to procedural issues in this case, Appellants sought to avoid any further attempts to ignore or deny them clearly established procedural guarantees by filing their brief even though the Commission's continual failure to comply with the express requirements of Rule 16 requiring the Commission to file the record

are not appealing pursuant to Rule 13. Appellants are appealing pursuant to Rule 14, the special rules applicable to appeals from administrative agency orders or decisions and a Rule expressly exempted from the requirements of Rule 26 by the language the Respondents' neglected to quote from Rule 26 ("pursuant to Rule 13") in their December 20, 1991 memorandum to dismiss Appellants' appeal <sup>5</sup> and by the language of Rule 18 expressly making Rule 13 not applicable to Rule 14 appeals. <sup>6</sup>

Appellants' Brief on Appeal relied upon the official daily transcript of proceedings in view of the failure of the Respondent Commission to file the record within the time specified by this Court's rules. Appellants finally gained access to the filed record from April 27 to May 27, 1992, some five months after filing their Brief on Appeal and six months after the record was due to be filed with this Court. Access to the filed record was given the Appellants after Respondents were given access to the filed record to prepare their brief in response to Appellants' Brief on Appeal. In the course of preparing a Reply Brief to Respondents' joint brief, Appellants checked the citations to the record in their Brief on Appeal and found they did not correspond to the record pagination of the record filed by the Respondent Commission.

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within 40 days of notice of the appeal was not then corrected, let alone explained.

<sup>5</sup> Respondents' Memorandum of Points and Authorities, p. 21.

<sup>6</sup> Utah Rules of Appellate Procedure, Rule 18, provides:  
All provisions of these rules are applicable to review of decisions or orders of agencies, except that Rules 3 through 8 and 11 through 13 are not applicable.

Appellants have prepared an errata sheet to show where the daily transcript citations in Appellants' Brief on Appeal correspond to the pagination of the record finally filed with this Court by the Commission and hereby move that it be accepted as an amendment to their Brief on Appeal.

It should be noted that in two instances the record filed with this Court does not include pages found in the daily transcript of the proceedings in this case before the Commission. No explanation is given for the daily transcript pages (pp. 1035 - 37) missing from the filed record (between pp. R. 1497 - 98).<sup>7</sup> Appellants have attached copies of those pages from the official transcript of daily proceedings as an appendix to this motion to correlate their brief with the record on file with this Court.

In the event that Appellants are not permitted to amend their Brief on Appeal in this manner and are required to file an amended brief, Appellants hereby request that this Court order the Commission to pay the costs of reprinting a corrected version of their Brief on Appeal. The Commission's unexcused failure to file the record within the 40 days specified by this Court's rules despite repeated inquiries from the Appellants and the filing of a motion with this Court that the Commission file the record with this Court after the passage of more than 100 days from the time required for filing the record is the primary reason for this

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<sup>7</sup> A scan of the filed record indicates several pages are missing. A comparison of the pagination entered by the reporter of the transcript with the record page numbers stamped on the transcript by the Commission indicates that several pages of transcript are missing from the record.

motion to amend Appellants' Brief on Appeal. If this approach is not found satisfactory to this Court, Appellants will be required to reprint their Brief on Appeal changing citations from the daily transcript so that they correspond to the record on file with this Court. Because the Commission's failure to file the record within the time specified and failure to seek leave of this Court to extend the time for filing the record is the primary cause of the need to amend Appellants' brief, it is the Commission which should be required to bear the cost of reprinting Appellants' brief should the need arise.

**CORRELATION OF DAILY TRANSCRIPT CITATIONS  
IN APPELLANTS' BRIEF WITH RECORD  
ON FILE WITH THIS COURT**

<u>Appellant's Brief</u> <u>(page &amp; footnote)</u>	<u>Cites to</u> <u>Hearings</u>	<u>Official</u> <u>Transcript</u>
p. 11, fn. 11	<u>Tr.</u> 134-39	<u>R.</u> 3722-27
p. 12, fn. 12	<u>Tr.</u> 975-76	<u>R.</u> 1432-34
p. 13, fn. 13	<u>Tr.</u> 980	<u>R.</u> 1438
p. 13, fn. 14	<u>Tr.</u> 994-95	<u>R.</u> 1452-53

p. 13, fn. 15	<u>Tr.</u> 994-95	<u>R.</u> 1452-53
p. 16, fn. 17	<u>Tr.</u> 819 & 905	<u>R.</u> 1278 & 1363
	<u>Tr.</u> 820 & 864	<u>R.</u> 1279 & 1322
	<u>Tr.</u> 904	<u>R.</u> 1362
	<u>Tr.</u> 906	<u>R.</u> 1364
p. 32, fn. 36	<u>Tr.</u> 1616	<u>R.</u> 2081
p. 32, fn. 37	<u>Tr.</u> 2692-99	<u>R.</u> 3168-75
p. 33, fn. 39	<u>Tr.</u> 1682-84	<u>R.</u> 2147-49
	<u>Tr.</u> 2031	<u>R.</u> 2499
p. 39, fn. 48	<u>Tr.</u> 1686	<u>R.</u> 2151
p. 40, fn. 51	<u>Tr.</u> 821	<u>R.</u> 1280
p. 40, fn. 53	<u>Tr.</u> 987-89	<u>R.</u> 1445-47
p. 40, fn. 54	<u>Tr.</u> 819-20	<u>R.</u> 1278-79



# Transcript Correlation

	<u>Tr.</u> 864	<u>R.</u> 1322
p. 42, fn. 57	<u>Tr.</u> 1602-03	<u>R.</u> 2067-68
	<u>Tr.</u> 1619	<u>R.</u> 2084
p. 42, fn. 58	<u>Tr.</u> 1050	<u>R.</u> 1511
p. 42, fn. 59	<u>Tr.</u> 1597-98	<u>R.</u> 2062-63
	<u>Tr.</u> 1682	<u>R.</u> 2147
p. 43, fn. 61	<u>Tr.</u> 1487-93	<u>R.</u> 1952-58
	<u>Tr.</u> 1563	<u>R.</u> 2026
	<u>Tr.</u> 1535-36	<u>R.</u> 1999-2000
p. 44, fn. 62	<u>Tr.</u> 868	<u>R.</u> 1326-27
	<u>Tr.</u> 922	<u>R.</u> 1380
	<u>Tr.</u> 1014	<u>R.</u> 1483
p. 44, fn. 63	<u>Tr.</u> 869	<u>R.</u> 1327

	<u>Tr.</u> 1021	<u>R.</u> 1490
	<u>Tr.</u> 1799	<u>R.</u> 2264
p. 44, fn. 64	<u>Tr.</u> 1035-36	<u>R.</u> 1496-97*
p. 44, fn. 65	<u>Tr.</u> 1035	<u>R.</u> 1496*
p. 44, fn. 66	<u>Tr.</u> 1549	<u>R.</u> 2012
p. 44, fn. 67	<u>Tr.</u> 963-64	<u>R.</u> 1421
p. 45, fn. 70	<u>Tr.</u> 865	<u>R.</u> 1323
	<u>Tr.</u> 922	<u>R.</u> 1380
p. 45, fn. 72	<u>Tr.</u> 979	<u>R.</u> 1437
p. 46, fn. 72	<u>Tr.</u> 1204	<u>R.</u> 1666
	<u>Tr.</u> 2009	<u>R.</u> 2477
p. 46, fn. 73	<u>Tr.</u> 938	<u>R.</u> 1396
p. 46, fn. 74	<u>Tr.</u> 1172-76	<u>R.</u> 1631-35

p. 47, fn. 75	<u>Tr.</u> 1056-61	<u>R.</u> 1517-22
p. 47, fn. 77	<u>Tr.</u> 1152-53	<u>R.</u> 1611-12
p. 48, fn. 79	<u>Tr.</u> 1693-94	<u>R.</u> 2158-59
p. 49, fn. 82	<u>Tr.</u> 1696	<u>R.</u> 2161
p. 51, fn. 85	<u>Tr.</u> 1419	<u>R.</u> 1884
p. 53, fn. 90	<u>Tr.</u> 1664	<u>R.</u> 2129

\*These pages were not present in the Court's record and a copy of these pages is attached as Appendix A to this Motion, along with a copy of this correction list.

#### CONCLUSION

Appellants hereby move that this Court accept as an amendment to their Brief on Appeal the above correlation of citations from Appellants' Brief on Appeal to the Record on file with this Court in the above entitled case or, in the alternative, order the Respondent Commission to pay the costs of reprinting a corrected copy of Appellants' Brief on Appeal

Respectfully submitted,



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APPENDIX A

ERRATA TABLE AND COPIES OF MISSING PAGES FROM THE RECORD

CORRELATION OF DAILY TRANSCRIPT CITATIONS  
IN APPELLANTS' BRIEF WITH RECORD  
ON FILE WITH THIS COURT

<u>Appellant's Brief</u> <u>(page &amp; footnote)</u>	<u>Cites to</u> <u>Hearings</u>	<u>Official</u> <u>Transcript</u>
p. 11, fn. 11	<u>Tr.</u> 134-39	<u>R.</u> 3722-27
p. 12, fn. 12	<u>Tr.</u> 975-76	<u>R.</u> 1432-34
p. 13, fn. 13	<u>Tr.</u> 980	<u>R.</u> 1438
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	<u>Tr.</u> 904	<u>R.</u> 1362
	<u>Tr.</u> 906	<u>R.</u> 1364
p. 32, fn. 36	<u>Tr.</u> 1616	<u>R.</u> 2081
p. 32, fn. 37	<u>Tr.</u> 2692-99	<u>R.</u> 3168-75
p. 33, fn. 39	<u>Tr.</u> 1682-84	<u>R.</u> 2147-49
	<u>Tr.</u> 2031	<u>R.</u> 2499
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p. 40, fn. 54	<u>Tr.</u> 819-20	<u>R.</u> 1278-79
	<u>Tr.</u> 864	<u>R.</u> 1322
p. 42, fn. 57	<u>Tr.</u> 1602-03	<u>R.</u> 2067-68
	<u>Tr.</u> 1619	<u>R.</u> 2084
p. 42, fn. 58	<u>Tr.</u> 1050	<u>R.</u> 1511
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	<u>Tr.</u> 1535-36	<u>R.</u> 1999-2000
p. 44, fn. 62	<u>Tr.</u> 868	<u>R.</u> 1326-27
	<u>Tr.</u> 922	<u>R.</u> 1380
	<u>Tr.</u> 1014	<u>R.</u> 1483
p. 44, fn. 63	<u>Tr.</u> 869	<u>R.</u> 1327
	<u>Tr.</u> 1021	<u>R.</u> 1490
	<u>Tr.</u> 1799	<u>R.</u> 2264
p. 44, fn. 64	<u>Tr.</u> 1035-36	<u>R.</u> between 1497- 98*
p. 44, fn. 65	<u>Tr.</u> 1035	<u>R.</u> between 1497 - 98*
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p. 44, fn. 67	<u>Tr.</u> 963-64	<u>R.</u> 1421
p. 45, fn. 70	<u>Tr.</u> 865	<u>R.</u> 1323
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p. 45, fn. 72	<u>Tr.</u> 979	<u>R.</u> 1437
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p. 49, fn. 82	<u>Tr.</u> 1696	<u>R.</u> 2161

p. 51, fn. 85

Tr. 1419

R. 1884

p. 53, fn. 90

Tr. 1664

R. 2129

PAGES 1035 AND 1036 FROM THE  
OFFICIAL DAILY RECORD NOT INCLUDED IN THE FILED RECORD



1     though, that the Company will not opt into any plan  
2     that shares at the authorized rate of return unless  
3     the authorized rate of return is 14 percent?

4             A       I would not make as a definitive statement  
5     as you just made in terms of what we will and will not  
6     do.

7             Q       I thought you made it clear yesterday that  
8     when our proposal was that you share 40 to 80 basis  
9     points above the authorized rate of return, you said  
10    you wouldn't accept that and that we have now gotten  
11    worse. So it all depends on what the authorized rate  
12    of return is?

13            A       I think that's definitely a factor and  
14    that's consistent with my testimony.

15            Q       If the authorized rate of return is 11.8,  
16    though, you will reject the plan?

17            A       I think I have been very clear on that,  
18    yes, we will.

19            COM. BYRNE: But you don't want to go  
20    fishing here on the number you will accept?

21            THE WITNESS: Well, I would rather go in  
22    the back room and we can invite everybody in. That's  
23    the way most of these things have been done.

24            Q        (By Mr. Ginsberg) Have there been any that  
25    have been fully litigated in a hearing like here? Any

1 of your three?

2 A Fully litigated, no.

3 Q Have all of them been by some form of  
4 stipulation that you referred to?

5 A Stipulation with ongoing discussions, yes.

6 Q The sharing point then was a negotiated  
7 point?

8 A To the best of my understanding, that is  
9 true.

10 Q Have any of the --

11 A I think in the State of Minnesota the  
12 Company originally came in somewhere around in the mid  
13 14's. I'm getting into Mr. Fuehr's territory here,  
14 but the agreement that came out of the parties was  
15 13.74. The Commission then settled at 13.5 percent  
16 return on equity in the State of Minnesota.

17 I think the way they do it in Minnesota, Mr.  
18 Ginsberg, is a bit different than the way we do it  
19 here. It's more of a discussion atmosphere where  
20 parties present their positions and discuss those in a  
21 forum, but it's not the pleasant cross-examination  
22 route.

23 Q What they miss, don't they?

24 A Right.

25 Q Under the floating rate of return, if

**CERTIFICATE OF SERVICE**

I hereby certify that on the 23 day of May, 1992, that I caused a copy of the APPELLANTS' MOTION TO CORRECT CITATIONS TO RECORD to be mailed first class mail, postage prepaid, to the following:

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