12-16-1986

# Colorado Municipal League v. Mountain States Tel. and Tel. Co.

COLORADO SUPREME COURT

Case No. 86 SA 347

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OPENING BRIEF OF PETITIONER-APPELLANT, COLORADO MUNICIPAL LEAGUE

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Appeal from the District Court, City and County of Denver
Case No. 85 CV 13192

COLORADO MUNICIPAL LEAGUE,

Petitioner-Appellant,

v.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY; THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO: COMMISSIONERS EDYTHE S. MILLER, ANDRA SCHMIDT AND RONALD D. LEHR,

Respondents-Appellees.

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1. Whether the Public Utilities Commission ("Commission") followed the remand instructions of the Colorado Supreme Court contained in the Decision of October 24, 1984, in Colorado Municipal League v. Colorado Public Utilities Commission, et al., _____ Colo. _____, 687 P.2d 416 (1984), in regard to evidence, or lack of it in the record, to support a factual finding by the Commission as to offsetting of labor productivity during a test year wherein the Commission allowed Mountain Bell an annualized artificial increase of $5,703,000 in labor cost to be reflected as a pro forma adjustment to operating expense.

2. Whether the Commission's determination to republish, nunc pro tunc, its original September 16, 1980 opinion, that had been found fatally flawed by the Supreme Court, constituted grievous error that so tainted the remand proceedings as to vitiate it?

3. Whether procedural defects and deficiencies of the Commission in a remand proceedings conducted without hearings are errors of law, fully reviewable on judicial appeal, or are these improprieties to be dismissed as "harmless error" because of the presumed validity of acts of a regulatory agency with assumed expertise on factual issues?

B. Errors of the Trial Court.

1. Whether the Trial Court committed error in not permitting the deposition to be taken of Commission Chairman Ronald Lehr in light of the Affidavits filed with the Motion to take his deposition:

a. Was the record filed by the Commission in the remand proceedings incomplete?

b. Were issues sufficiently presented by Motion and Affidavit to take Chairman Lehr's deposition as to whether the Commission reviewed, and limited itself to, the original record on remand?

c. Should the Trial Court have forbidden the League to take Chairman Lehr's deposition to ascertain procedural facts?

2. On a second judicial review of a Commission order, does the Trial Court have retained jurisdiction under the Supreme Court's original directive, or its inherent and retained authority, to remand erroneous proceedings to the Commission?

## II. STATEMENT OF THE CASE

The origin of these proceedings can be traced to the filing by Mountain Bell of Advice Letter No. 1570 accompanied by approximately 1,053 tariff sheets on or about January 21, 1980, seeking authority for a multi-million-dollar increase from the Commission. The advice letter and accompanying tariffs were suspended. The Colorado Municipal League ("League") intervened as did other parties. Hearings were held.

Approximately thirteen volumes of reporter's transcript containing thousands of pages reflecting the testimony, as well as nine volumes of pleadings were presented to the Commission and forwarded in three boxes as the record in the old (original) hearing. Two additional volumes (X and XI) constitute the record of the Commission in the 1985 remand case. One brown volume (I) is the record before the Trial Court in 1986. Reference to the record volumes is by Roman numeral and page number (V. I to XI, p. ____) and to Appendices by capital letter and page number (Appendix A to E, p. ____).

The Commission found in the original case that the Company was not entitled to any revenue increase. In fact, the Company was receiving annually $506,000 in excess revenues. The $506,000 in excess revenues was found to exist even though for the test year the Company was permitted to make a pro forma adjustment reflecting an artificial increase in actual operating expenses by annualizing three in-period wage increases that increased the actual operating expenses by the (hypothetical) pro forma adjustment of over $5,703,000.

The Commission Order of September 16, 1980 was duly appealed. In a unanimous decision written by Judge Lohr (copy attached as Appendix A), the Supreme Court found the Commission had committed error that required the Commission's decision (September 16, 1980) to be affirmed only in part and to be reversed in part. The Supreme Court remanded the proceedings to

the District Court and ultimately to the Commission to comply with the opinion of the Supreme Court.

The Supreme Court described the errors of the Commission as to the annualization issue (allowing a wage increase adjustment without proper findings as to offsetting increased labor productivity). The $506,000 excess annual revenue issue dismissed by the Commission as "de minimus" was also held by the Supreme Court to be subject to consideration for modification on remand.

> "We reverse on the annualization issue, because the PUC has abused its discretion and failed to pursue its authority regularly, in that it has selectively annualized in-period wage increases, failed to make adequate explanatory findings of fact, and as a result failed to establish a basis upon which it can be determined whether the rates are just and reasonable. We affirm on the de minimus issue, subject to modification on remand."

(Colorado Municipal League v. PUC, et al., ____ Colo. ____, 687 P.2d 416, 419 (1984), Appendix A, p. 419.)

Two orders of remand were entered by Judge Brooks, a detailed order on December 4, 1984, containing a reservation of jurisdiction and a very brief and general Order of April 11, 1985 without such a reservation. The second order is improperly dated according to the District Court docket. Copies of both orders are attached as Appendices B and C.

In the remand proceeding before the Commission a Statement of Position was filed by Eugene Cavaliere as Deputy

Attorney General (who appeared on behalf of the Commission on the first appeal). He advised the Commission in his statement (V. XI, pages 142 to 149, copy attached to this Brief as Appendix E).

The Court might well want to refer to his entire statement. In addition to the comments quoted, he states that there is ample evidence that there should be an offset as described by witness Mr. Madan (Exhibit Q) (V. XI, p. 148). Also, Mr. Cavaliere sets forth three alternatives for the Commission, none of which did the Commission select. (V. XI, p. 148-9).

> There is no evidence in the record in I & S Docket No. 1400 which would support findings of fact that an adjustment to the income statement for in-period wage and salary increases should be allowed without an offset for productivity, which would comply with the mandate of the court. [emphasis supplied.] (V. XI, p. 146.)

In spite of unequivocal language by its legal counsel, the Commission, issued an Order designated, "Supplemental Decision," that republished, nunc pro tunc, the original Decision of September 16, 1980 (copy attached as Appendix D). The Commission stated its legal conclusion that the $506,000 annual excessive revenues issue was moot.

Pursuant to statute (Section 40-6-115(5), 17 C.R.S. (1973), the League requested a separate judicial review of the Commission's "Supplemental Decision." That case was assigned to Judge Robert Fullerton. Motions to Consolidate were filed in the

"old" proceedings before Judge Brooks and the "new" case before Judge Fullerton. Neither motion was heard.

As no hearing was held by the Commission, and its discussions prior to the decision were reported only in abbreviated form in the minutes of two open meetings (V. I, pp. 53 and 54), a notice and a separate motion to take the deposition of Chairman Lehr were filed by the League in the Trial Court (V. I, pp. 46 to 57). The motion was supported by affidavits of two employees of counsel for the League. These employees attended open hearings, at which the remanded decision was discussed by the Commissioners. Both the notice to take a deposition and a subsequent motion to take the deposition of Chairman Lehr were quashed by Judge Fullerton.

Judge Fullerton issued his decision affirming the Commission's Order of August 20, 1985 (V. I, pp. 58 to 59). A Motion to Alter and Amend (V. I, pp. 58 to 59) was filed by the League as were responses by Mountain Bell. None were acted upon by the Trial Court. This appeal ensued.

## III. SUMMARY OF ARGUMENTS

The errors of the Commission were:

(1) Failure of the Commission to follow the rationale in the opinion of this Court and its remand directions.

In the first judicial review of the September 16, 1980 Order of the Commission, all allowances were made, and deference given, to the Commission by the Supreme Court. In spite of that deference

to the Commission, the Supreme Court found the original decision of the Commission of September 16, 1980, flawed, fatally defective, partially reversed.

The "Supplemental Decision" (Appendix D) of the Commission does not constitute remedial action by the Commission pursuant to a remand order of a fatally defective original Order of September 16, 1980. The republication of that flawed original order nunc pro tunc, fatally taints and thus invalidates, the Commission's Supplemental Decision of August 20, 1985 under judicial review by this Court.

(2) Procedural deficiencies were created by the Commission in the remand procedures.

The remand proceedings before the Commission reveal the desire of the Commission to vindicate its authority and by inference a righteous reiteration of its belief in the validity of its original order, which the Commission republished, and reissued, nunc pro tunc although it has been declared fatally flawed by this Court.

To achieve vindication of its authority and affirm its original wisdom, it appears by inference that the Commission may not have limited its review only to the original full record; that two members of the Commission who did not hear the original case may not have considered any record, but relied solely upon the Commissioner and the administrative staff who participated in the original proceedings.

Additionally, the Commission apparently went beyond the original record in the remand case as there are references to evidence, discussions and a decision in proceedings two years after the original final decision had been entered.

The errors of the Trial Court were:

(a) In prohibiting the taking of a deposition of Chairman Lehr.

(b) In presuming the validity of the Commission's Supplemental Decision on the erroneous belief that such deference was required. However, the failures of the Commission were errors of law, fully reviewable by the Court without any presumption of validity.

## IV. ARGUMENT

### A. The Express Language of the Supreme Court.

An analysis of the record in this appeal and comparison of that record with the Supreme Court's remand directive warrants a direct order by this Court to refund to the ratepayers excessive revenues or to remand the proceedings with a Supplemental Decision to the Commission to require it to comply with the rationale underlying the Supreme Court's original decision in this matter. A series of excerpts from the Court's opinion will demonstrate adequate grounds for reversal or remand of the Commission's Supplemental Decision.

After discussing the relationship, or matching, of expenses and revenues for a test period, Justice Lohr, writing for the Supreme Court in Colorado Municipal League v. PUC, et

al., ____ Colo. ____, 687 P.2d 416, 424 (1984) stated:

> "It is true that annualization of wage increases has sometimes been allowed when the regulatory authority found that the increases were not offset by other changes in the test period,[5] when those other changes were explicitly found to be unmeasurable,[6] or when other key figures were also annualized, converting the test period data from average to year-end.[7] None of these cases support the action of the PUC in the present case." [Underlining supplied.] (Appendix A, p. 424.)

As then stated by this Court, there was no support for the Commission's original order, nor is there any additional support for this identical fatally-defective order as republished nunc pro tunc in the Supplemental Decision. None of the remedial findings described by this Court in its opinion were made by the Commission. The Commission did not make any of the following findings:

(1) That this increase was not offset by other changes in the test year;

(2) That other changes were specifically unmeasurable;

(3) That other key figures (such as revenues), were annualized to convert the test period data from average to year-end. (Parenthetical comment inserted.)

As this Court observed in its original Colorado Municipal League opinion, supra:

> "The majority of regulatory authorities facing this issue have either rejected annualization of wage increases,[8] or adjusted the annualiz-

> ation to reflect other test period changes.[9] An annualization of wage increases put forth by Mountain Bell itself was rejected in Montana." (Appendix A, p. 424.)

The Colorado Commission in its Supplemental Order made neither of these remedial findings. It did not reject the labor cost increase annualization. The Commission did not adjust the annualization. It undertook to vindicate its original order, wisdom and its interpretation of its authority.

Judge Lohr cited in footnote 13, page 425, another California authority (its Supreme Court):

> "[The California PUC] may adjust all figures, revenue, expense, and investment for anticipated changes but it may not adjust one side or part of the equation without adjusting the other unless there is a finding that the particular expenditure is extraordinary." (Appendix A, p. 425, footnote 13.)

For another time the Commission on remand did not adopt a remedial action described in the Court's opinion. There is no finding by the Commission that the particular expenditure was extraordinary.

As above set forth, there are several remedial findings referred to by the Court in its opinion. None of these remedial findings were made by the Commission on remand.

Justice Lohr states in the Colorado Municipal League opinion, supra at page 419 (Appendix A):

> "The critical defect in the PUC's order is the absence of adequate findings supporting its decision to annualize in-period wage increases without annualizing other components of

> expense and revenue. The question of whether the order of the PUC is supported by adequate findings of fact is a question of law. See PUC v. Northwest Water Corp., 168 Colo. 154, 169-70, 451 P.2d 266, 273-74 (1969)."

At the bottom of page 425 and top of page 426 of Justice Lohr's opinion appears the most devastating criticism of evidence on its increased wage adjustment without offsetting increased labor productivity:

> "Mountain Bell's district staff manager testified that Mountain Bell had not annualized productivity gains as an offset to annualization of test period wage increases 'because all of the productivity that would have been experienced has been experienced in the test year.' Record of May 21, 1980, hearing at 272.
>
> Mountain Bell's argument rests primarily on this statement by the district staff manager. In context, it becomes apparent that this is more an estimation of the legal effect of our holding in Mountain States Tel. & Tel. Co. v. PUC, 182 Colo. 269, 513 P.2d 721 (1973), that productivity gains generally must be offset against out-of-period wage increases, than a statement of fact or an expert opinion.[11]" (Appendix A, p. 426 and footnote 11.)

Inexplicably the Commission repeated the rationale of Mountain Bell's witness, Mr. Shriver, in paragraph 6 of its Supplemental Decision in spite of the Supreme Court's specific rejection of the doctrine "as more an estimation of the legal effect of our holding...than a statement of fact or an expert opinion." (emphasis supplied).

In its original form, the Commission's order was found fatally flawed under the Court's analysis above stated. The Supplemental Decision is equally defective, and reversible, in its reissued, republished nunc pro tunc form. This Court should so find and remand.

B. An Admission That the Original Record Did Not Contain Evidence Acceptable to the Supreme Court to Justify Productivity Offset.

A member of the Attorney General's staff, Eugene Cavaliere, who represented the Commission from the origin of the appellate proceedings in 1980, filed a written statement with the Commission in the remand proceeding describing the lack of evidence in the record and containing pertinent legal advice to the Commission. The words of the Commission's lawyer are:

> "There is no direct testimony by Mr. Shriver on the subject of the annualization of the three in-period wage and salary increases on in-period productivity." (V. XI, p. 143).

As to Mr. Shriver's testimony explicitly discussed by the Supreme Court above referenced, the second admission by the lawyer for the Commission was:

> "Thus, the record, in I&S Docket No. 1400, contains no evidence by Mountain Bell acceptable to the Supreme Court explaining why a productivity offset was not warranted when in-period wage and salary increases were annualized."(V. XI, p. 146).

The conclusion of the Commission's prior legal counsel as to the record before the Commission was unequivocal:

> "Thus, the state of the record in I&S Docket No. 1400 is that there is no evidence that would support findings of fact that an adjustment to the income statement for in-period wage and salary increases should be allowed without an offset for productivity, which would comply with the mandate of the Court." (V. XI, p. 146) (Emphasis supplied.)

This lucid explanation by the Commission's attorney of the status of the original record to which the Commission is limited on remand is an admission (and might well have been dispositive) as to the 1980 rate proceedings. Had this statement about the record been made in an argument by the Commission counsel to the Supreme Court in its first judicial review the Court would have then been warranted in specifically directing a refund and not merely remand. Certainly the Commission's Supplemental Decision and its action on remand ignore these unequivocal and compelling words of its lawyer about the original record.

C. Predisposition of Commission

The Commission's desire for vindication of its initial decision is revealed in the description of events and reasonable inferences in the Affidavit of Ellen R. Mitchum (V. I, pp. 51 and 52) who attended an early, and perhaps first, open meeting of the Commission after the remand order of Judge Brooks at which the remand order was considered.

Mrs. Mitchum's reports in her affidavit indicate an initial reaction of the Commission and its Staff, wherein the Commission's desire for self-vindication of the early decision was prevalent as follows:

"4. During that discussion, Commissioner Edythe Miller stated, in effect, that it was her belief that the Commission had, at the time of rendering a final decision in I&S Docket No. 1400, authority to make a finding as to wage adjustment issues; that the Commission had been consistent in its treatment of this issue in past rate cases; that the issue lies within the discretion of the Commission; that the Supreme Court appeared to misunderstand the Commission's position; and that the Commission should reissue its original (1980) decision.

5. John Archibold and Michael Homyak, counsel for the Commission and the Staff, agreed that the Commission had discretion in the area of ratemaking and had been correct in its initial determination of the wage adjustment issue.

6. Commissioners Schmidt and Lehr were in general agreement with this position, emphasizing that they had not participated in the original proceedings before the Commission." (V. I, pp. 51-52.)

Mrs. Mitchum's Affidavit shows the predisposition of the Commission to vindicate its original decision, to determine that the Commission's authority had been misconstrued by the Supreme Court, and to conclude that the Supreme Court's opinion was wrong. The obvious resultant action of the Commission was to republish its original decision. Other activity by it was window dressing.

D. <u>The Commission has Sought to Circumvent the Remand Relief as Ordered by the Supreme Court Rather Than to Implement the Supreme Court's Decision</u>.

As a part of the process of determining whether the Commission in its Supplemental Decision (attached as Appendix D) followed the remand instructions of the Supreme Court or was seeking primarily to re-assert the Commission's expertise to justify its original decision (protecting its "regulatory turf"

in the vernacular), a careful review of eleven paragraphs numbered and designated by the Commission as "Findings of Fact" is warranted. Careful analysis of the thrust of those paragraphs demonstrates the Commission failed in its Supplemental Decision to make specific findings as to offsetting increased labor productivity as directed by this Court.

The inconsistency and impropriety of the alleged findings of the Commission contained in the eleven alleged findings demonstrate that they do not comply with the directive of the Supreme Court. These eleven paragraphs also confirm that the Commission did not follow the rule restricting the Commission to the original record on remand.

Paragraph 1 of the Supplemental Decision (Appendix D) describes vacation of the original decision by Judge Brooks. Paragraph 2 directs republishing the original Decision, C80-1784, nunc pro tunc, as of September 16, 1980 even though that specific order had been partially reversed and vacated.

> "1. The amended remand order issued by the Denver District Court on April 11, 1985, set aside Decision No. C80-1784.
>
> 2. Decision No. C80-1784 is readopted and republished by the Commission nunc pro tunc as of September 16, 1980)."

What clearly happened at this point of the remand proceedings was that the Commission made a dispositive decision reiterating the supremacy and wisdom of its original opinion.

The additional nine numbered paragraphs 3 to 11, (Appendix D, pages 3 to 5) affirm that the Commission inserted these paragraphs as a means to justify its original decision and not to make independent relevant findings of fact as to offsetting increased labor productivity against the pro forma wage increase.

The Commission's deficiencies may be shown by referring to the numbered paragraphs in the Supplemental Decision (Appendix D) and the League's comment as to each paragraph:

a. Repetition in Paragraph 3 of pro forma adjustment for wage increase -- no new findings of fact.

> "3. Price level increases to Mountain Bell's monthly booked wage and salary expenses are warranted in order to properly and consistently maintain revenues, expenses, and rate base during the test year ending October 31, 1979."

b. Paragraphs 4 and 5 contain only an additional discussion of the previously completed allowance for wage increase -- no new finding of fact.

c. In paragraphs 6 and 9, the Commission reiterates Mr. Shriver's rationale specifically rejected by the Supreme Court.

> "6. To measure productivity associated with wages, total revenue is divided by weighted man hours. <u>Productivity obtained by Mountain Bell during the test period itself is inherently reflected in the revenues associated with that test period</u>. That is why the proposal by Jamshed K. Madan, who appeared on behalf

of Colorado Ski Country USA and Colorado-Wyoming Motel and Hotel Association (Ski Country), to reduce the in-period wage increase by a productivity offset, is inherently flawed. To deduct productivity that has already been included in Company revenues from the wage increase expense within the test period, the result in a double counting and a distortion of the matching relationship among revenue, expenses, and investment. To adopt the type of adjustment proposed by Ski Country witness Madan would result in a utility which had the least amount of productivity being rewarded for not being productive. The more productive utility would be penalized by having its productivity double counted against it within the test year. [Underlining supplied.] (Appendix D, p. 3.)

9. As indicated in the previous finding of fact, this Commission has allowed in-period wage adjustments for price only without a separate offset for in-period productivity since the in-period productivity is inherent in the revenues obtained by the Company." (Appendix D, p. 4.)

The most important sentence in paragraph numbered 6 has been underlined: "Productivity obtained by Mountain Bell during the test period itself is inherently reflected in the revenues associated with that test period." The flawed rationale is repeated in finding 9.

These statements are grounded on the identical rationale used by Mountain Bell witness, Mr. Shriver, and found to be specifically defective in Justice Lohr's opinion.

Such rationale, whether it be by the Commission in its original order, a Supplemental Decision or in the testimony of a witness for the Company, has been specifically found by the Colorado Supreme Court to be "more an estimation of the legal effect of our holding [citing the 1973 Mountain Bell case] than a statement of fact or an expert opinion." (Emphasis added.)

The basic erroneous premise of the Commission's Supplemental Decision is thus revealed to have been identical to its earlier opinion previously found to be fatally flawed by the specific language of the Colorado Supreme Court.

d. Paragraph 7 refers to a Staff audit -- absence of Staff recommendation and adjustments made by the Commission -- and contains non-issues to this judicial review.

The Supreme Court found the failure of the Commission to make appropriate findings regarding the offset of any prior wage adjustments by the increased labor productivity was the primary issue for remand. The repeated failure of the Commission to make such findings continues to be reversible error.

The Commission described in paragraph 7 certain offsets which were not disputed, nor presented as issues, in the appeal before the Supreme Court when it made its decision of remand. The Commission made no findings as to an offset of increased labor productivity to wage increases in its original order, nor in its Supplemental Decision. The Commission continued to ignore its legal advice from the Deputy Attorney General who represented it before the Supreme Court.

e. Paragraphs 8 and 10 are recitals of historical irrelevancies by the Commission:

Paragraphs 8 and 10 are particularly irrelevant to the issue of offsetting labor productivity as directed by this Court to be accomplished in the remand proceedings before the Commission and now back for additional judicial review.

In paragraph 8, the Commission referred to in-period annualization of wage adjustment in a number of Commission proceedings during which no evidence was offered and no issue was raised regarding the offsetting of increased labor productivity against an allowed annualized wage adjustment. Paraphrasing the Commission's rationale found in paragraph 8:

> "Because the labor productivity offset issue was not raised in Mountain Bell proceedings listed in paragraph 8 going back to 1968 and no evidence on that issue was introduced in those previous cases, the proposed productivity offset should be rejected in the current (1980) case, when it is brought before the Commission for the first time."

The reference to previous cases is neither logical nor controlling since precedent as these decisions from prior proceedings did not involve the same evidence or a similar off-set issue. The Commission appears to be influenced or controlled by its absence of previous consideration of this issue.

Paragraph 10 states that, because the Commission did not address the issue of offset in-period productivity, therefore, it was rejected. That is not a pertinent findings of fact.

f. Alleged mootness of excess annual revenues -- finding 11.

> "11. Inasmuch as the issue of the $506,000 over recovery only becomes important in accordance with the remand order of the Colorado Supreme Court in the event the Commission were to find that an in-period productivity offset is appropriate, and since we do not find that such an in-period productivity offset is appropriate, there is no need to change our previous findings, set forth in Decision No. C80-1784, with respect to the over-recovery issue." (Appendix D, p. 5.)

Paragraph 11 represents a conclusion of the Commission -- not a finding of fact -- that there is no need for the Commission to change its previous order with respect to the excess revenues issue, now euphemistically referred to for the first time as an "over recovery," (rather than "excess revenues"). The Commission declares the $506,000 issue to be moot, legally inaccurate as long as this appeal is pending and no longer refers to it as de minimus.

E. Discovery Should be Allowed.

Turning to the restriction of the Commission in conducting the remand proceedings to the original record, the Trial Court's attention was directed to the general discussion (page 2) of the Supplemental Decision wherein the Commission first gives lip service in the Court's order in a previous case restricting the Commission to the original record in a remand proceeding, Caldwell v. Public Utilities Commission, 200 Colo. 134, 613 P.2d 328 (1980).

In the words of the Commission:

> "We agree with the Staff, however, that we should first consider the evidentiary record as already made and determine whether it is sufficient for the Commission to make sufficient finding of fact to comply with the August 20, 1984, opinion of the Colorado Supreme Court, which is now reported at 687 P.2d 416 (1984)." (Appendix D, p. 2.)

The Commission concluded with a further statement on the same page:

> "The Commission has reviewed the record, and finds that it is capable of supplying the necessary findings required by the Colorado Supreme Court based upon the record as already made."

These self-serving recitals are consistent with the Supreme Court's ruling in the Caldwell case but do not reflect what the Commission did in this case.

After the Commission republished, nunc pro tunc, the fatally-flawed original decision as part of its Supplemental Decision, the League filed a Petition for Rehearing, Reargument and Reconsideration. The petition was denied at a meeting described in the Affidavit of Paula J. West (V. I, pp. 55 to 56).

> "10. The Commissioners discussed CML's statement on page 4 of its Petition that the Commission had not used the original record of I & S 1400 in their review. Commissioner Schmidt stated that the Commission had other records at its disposal, and the Commissioners agreed they did not have to refer to the official record to reach their opinion; that they had other records they could use."

In spite of the recitals of the Commission quoted on the previous pages, purporting to demonstrate that the Commission had confined itself to the record as originally made, on page 5 of the Commission's opinion the Commission refers to, and discusses, an entirely different case with different evidence, decided over two years (December 7, 1982) after the Commission's original decision of September 16, 1980. That material could not have been in the original record.

It is admitted by the League that it is the rule of law in Colorado that ordinarily a deposition of a member of a Commission can not be taken under specific decisions involving the Commission. PUC v. District Court, Arapahoe County, 163 Colo. 462; Peoples Natural Gas v. PUC, ____ Colo. ____, 626 P.2d 159 (1981). That rule is not controlling in this case because the motion to take deposition of Chairman Lehr is supported by the affidavits of Ellen R. Mitchum and Paula J. West (discussed at pp. 13, 14 and 21 above), a fact distinguishing the present appellate issue from the two opinions.

In the Trial Court, Mountain Bell argued that there is no requirement for a full record of an open meeting of the Commission. Again, there are factual differences in the pertinent records.

At the hearing on the taking of a deposition of Chairman Lehr, Mountain Bell cited to a December 1985 opinion of the Court of Appeals, Ranum v. Colorado Real Estate Commission, reported at 713 P.2d 418 (1985). The opinion states that there is no

requirement for recordation of proceedings before the Colorado Real Estate Commission when it issues an order adopting the detailed findings and conclusions of a hearing officer except for one minor point, and when the Commission then also adopts the recommended penalty by the hearing examiner of revocation.

The Court of Appeals found that the hearing officer had made detailed findings of fact as his basis for the recommended revocation which were adopted by the Commission.

The Court of Appeals did find in its opinion in the Ranum case that the absence of a transcript of a meeting adopting the hearing examiner's recommended decision did not violate the plaintiff's due process rights stating that compliance with the due process standards was demonstrated by the full record and transcript of the initial hearing before the hearing officer. At a subsequent meeting of the Real Estate Commission to review the hearing officer's detailed findings and decisions, no record was made.

In the Mountain Bell case now before this Court, the Colorado Supreme Court has already found the Commission's Order of September 16, 1980, to be fatally-defective, a clearly distinguishing fact. In contradistinction to the Ranum case, the Commission in the current case is issuing a Supplemental Decision. It is not merely adopting a recommendation of a hearing examiner with a full transcript available from the prior hearing.

In the present case, the actions at the open meeting of the Public Utilities Commission were an essential part of the proceedings (V. XI, pp. 180-245) leading to the Supplemental Decision by the Commission.

## V. CONCLUSION

This case is before the Court on judicial review grounded on a simple premise or question that Justice Lohr, as author of a unanimous opinion, and other members of this Court are most qualified to answer:

> Did the Public Utilities Commission's activities constitute compliance with the directives and intent of this Court's earlier opinion?

If the answer is in the affirmative, the case is over. If the answer is in the negative, relief should be granted to the ratepayers and an appropriate remedy (refund or remand) ordered.

It may have been presumptuous for the League to have quoted so extensively from Justice Lohr's opinion.

It is clearly arrogant for the Commission in its first finding in its Supplement Decision to acknowledge that its original decision had been vacated by Judge Brooks in his order of remand pursuant to a Supreme Court decision and in the next finding of the Commission to reissue and republish the fatally-flawed opinion, word for word, nunc pro tunc.

The words of the Deputy Attorney General in his statement of position to the Commission, of which he is the legal advisor, should have been controlling and conclusive on the Commission and persuasive to this Court:

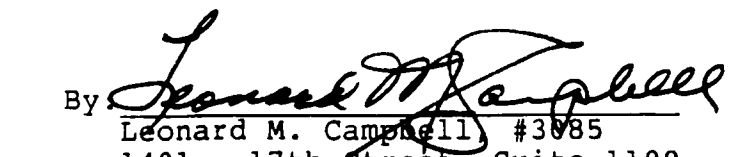
"There is no evidence in the record in I&S Docket No. 1400 which would support findings of fact that an adjustment to the income statement for in-period wage and salary increases should be allowed without an offset for productivity which would comply with the mandate of the court." (V. XI, p. 146.) (Emphasis supplied).

In the circumstances, the order of Judge Fullerton affirming the Commission's Supplemental Decision of August 20, 1985, should be reversed, the Commission's Supplemental Decision vacated as an abuse of discretion, and a refund ordered for the ratepayers in the full amount of the erroneous wage adjustment ($5,703,000) plus the excess annual revenues ($506,000) minus the actual tax impact of the refund for the years that the overcharge has been collected. If the Court grants the relief by remand rather than refund, then a direct order of remand with specific instructions to the Commission should be entered by this Court.

The rationale for this relief is found in Justice Lohr's opinion. No additional authority is necessary nor controlling.

Respectfully submitted,

GORSUCH, KIRGIS, CAMPBELL, WALKER AND GROVER

By: 

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COLORADO MUNICIPAL LEAGUE, Plaintiff-Appellant,

v.

PUBLIC UTILITIES COMMISSION OF the STATE OF COLORADO; Commissioners Edythe S. Miller, Daniel E. Muse and L. Duane Woodard; and Mountain States Telephone and Telegraph Company, Defendants-Appellees.

No. 81SA551.

Supreme Court of Colorado.

Aug. 20, 1984.

Rehearing Denied Sept. 24, 1984.

Telephone company sought revenue increase. The Public Utilities Commission denied requested increase in its entirety, and intervening group petitioned for judicial review. The District Court, City and County of Denver, John Brooks, Jr., J., summarily affirmed Commission's order, and group appealed. The Supreme court, Lohr, J., held that: (1) Commission's determination not to subtract negative working capital from rate base, based on its staff's view that it could not determine amount of negative working capital without a lead-lag study, was within its discretion; (2) Commission's order annualizing test period wage increases for purposes of determining revenue requirements without accompanying adjustments for other changes, including any productivity increases, was arbitrary and capricious in the absence of adequate findings of fact; and (3) Commission's characterization of $506,000 excess revenues in test period as "de minimis" so as not to require a rate reduction, was marginally acceptable, and thus, fell short of requiring reversal.

Affirmed in part, reversed in part and remanded.

**1. Public Utilities ⇐194**

In determining whether the Public Utilities Commission has "regularly pursued its authority" in determining whether to grant increased revenue request, Supreme court must consider whether its order is based upon evidence introduced before it, whether order is supported by findings of fact, whether Commission applied relevant legislative standards, and whether it acted within authority conferred upon it by law. C.R.S. 40–6–115(3).

See publication Words and Phrases for other judicial constructions and definitions.

**2. Public Utilities ⇐194**

Orders by the Public Utilities Commission that are arbitrary and capricious or a clear abuse of discretion must be set aside.

**3. Public Utilities ⇐123**

Standard in rate-making cases that all public utility charges must be "just and reasonable" requires balancing investor's interest in avoiding confiscation and the consumer's interest in prevention of exorbitant rates. C.R.S. 40–3–101(1).

See publication Words and Phrases for other judicial constructions and definitions.

**4. Public Utilities ⇐123**

Public Utilities Commission has primary responsibility for determining "just and reasonable" public utility charges. C.R.S. 40–3–101(1).

**5. Public Utilities ⇐194**

Findings of the Public Utilities Commission will not be set aside because evidence is conflicting, or because conflicting inferences can be drawn from evidence, but only if record lacks competent evidence to support them, nor will the Supreme Court interfere with the Commission's exercise of its discretion. C.R.S. 40–6–115(2).

**6. Telecommunications ⇐314**

Public Utilities Commission's elimination of positive working capital allowance proposed by telephone company from its rate base, without imposing a negative allowance, explained by noting that it had not considered effect of advanced billings and accrued taxes on working capital needs and that it had not conducted a "lead-lag study" identifying difference in timing be-

tween outward cash flow for expenses and inward cash flow from charges to customers, was within its discretion and was in accordance with testimony of staff, taking cognizance of all evidence in the record.

See publication Words and Phrases for other judicial constructions and definitions.

**7. Public Utilities ⇐122**

"Historical test period" establishes relationships between revenue, costs and investment for a utility, which relationships are generally constant and reliable, forming the basis for calculating fair and reasonable rates.

See publication Words and Phrases for other judicial constructions and definitions.

**8. Public Utilities ⇐129**

Rates to be charged by public utilities are determined by calculating what levels would have yielded enough revenue to cover expenses plus a reasonable return on investment, i.e., rate base, during test period.

**9. Public Utilities ⇐122**

Goal of Public Utilities Commission in selecting between averaging method of determining revenue, costs, and rate base within an annual test period and year-end method is to achieve reasonably reliable results.

**10. Public Utilities ⇐119**

Ordinarily, if adjustments anticipating increases in expenses are considered by the Public Utilities Commission, anticipated increases in revenue should also be considered.

**11. Public Utilities ⇐194**

Generally, the Supreme Court will not question the Public Utilities Commission's decision whether to use either averaging method or year-end method to ascertain test year investment, revenue and expense figures as base for calculating rates necessary to assure utilities a fair return.

**12. Public Utilities ⇐122**

Public Utilities Commission has considerable discretion in its choice of means to fix rates.

**13. Public Utilities ⇐122**

Public Utilities Commission may adjust all figures, revenue, expense and investment for anticipated changes but it may not adjust one side or part of the equation without adjusting the other unless there is a finding that the particular expenditure is extraordinary.

**14. Public Utilities ⇐194**

Question of whether order of the Public Utilities Commission is supported by adequate findings of fact is a question of law.

**15. Telecommunications ⇐313**

Public Utilities Commission's annualization of test period wage increases in order to determine revenue increase allowable to telephone company with no accompanying adjustment or offset for other changes, including any changes in productivity, was arbitrary and capricious, in absence of adequate findings of fact, and thus, was an error of law.

**16. Public Utilities ⇐194**

Public Utilities Commission's characterization of difference between revenue requirements and earnings as "de minimis" so as not to require adjustment to earnings must be examined in context of exercise of Commission's judgment in rate-making proceeding.

**17. Telecommunications ⇐316**

Claim by Public Utilities Commission that difference between telephone company's revenue requirements and earnings was de minimis, so as to not justify rate modification, would be analyzed in context of accuracy of selection of a fair return on equity, since greatest degree of judgment on part of Commission would be required in determining such return.

**18. Telecommunications ⇐316**

Public Utilities Commission's characterization of telephone company's $506,000

of excess revenue in test period as "de minimis" was marginally acceptable, falling short of compelling reversal, in light of telephone company's equity of $394 million and its claimed accuracy of no greater than one tenth of one percent in setting fair rate of return on such equity.

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Coleman M. Connolly, Denver, for defendant-appellee The Mountain States Telephone and Telegraph Company.

LOHR, Justice.

On January 21, 1980, Mountain States Telephone and Telegraph Company (Mountain Bell) filed an advice letter and tariff revisions with the Colorado Public Utilities Commission (PUC) seeking to implement a $78,628,044 revenue increase for its Colorado intrastate operations. The PUC suspended the effective date of the tariffs for 210 days, and scheduled hearings on Mountain Bell's revenue requirements. The hearing record comprises over 3000 pages of written submissions, and almost 3000 pages of transcripts spanning twelve days of testimony. On September 16, 1980, the PUC issued a 53-page order denying the requested rate increase in its entirety. *Re Mountain States Tel. & Tel. Co.*, 39 Pub. Util.Rep. 4th (PUR) [hereinafter cited as PUR] 222 (Colo. PUC 1980).

The Colorado Municipal League (League), which had intervened in the proceedings before the PUC, petitioned in Denver District Court for judicial review of the PUC's order. The League contended that the PUC should have entered an order reducing Mountain Bell's revenues. On November 12, 1981, the district court summarily affirmed the PUC's order. The League then appealed, asserting that the PUC had erred on three issues: (1) The PUC allegedly found that Mountain Bell had $9,159,000 in negative working capital, but did not subtract this from the rate base; (2) the PUC allowed a $5,703,000 adjustment to expenses, representing annualization of wage increases going into effect during the test period, without making an offsetting adjustment for annualization of productivity increases; and (3) the PUC found that Mountain Bell's test period earnings exceeded its revenue requirements by $506,000, but failed to order a rate reduction. The numerous other elements of the PUC's decision are no longer in dispute.

The PUC selected the twelve-month period ending on October 31, 1979, as the test period for the purpose of determining Mountain Bell's revenue requirement. It valued the rate base, the property dedicated to providing service to the utility's customers, at $946,269,000. It determined that a fair rate of return on Mountain Bell's common equity was 13.3%. In combination with the fixed return to the preferred stock and debt, this yielded an overall rate of return of 10.07%. Applying this rate of return to the rate base produced a revenue requirement of $95,289,000. The PUC found that Mountain Bell's net operating earnings for the test year were $95,795,000, exceeding Mountain Bell's revenue requirement. It concluded that Mountain Bell was not entitled to any revenue increase, and permanently suspended the proposed new tariffs.

**[1, 2]** Statutory authority for appellate review of the PUC's order is found in section 40–6–115(5), 17 C.R.S. (1973). The purposes of judicial review are to determine whether the PUC has regularly pursued its authority, whether it has adhered to the federal and state constitutions, whether its decision is just and reasonable, and whether its conclusions are in accordance with the evidence. § 40–6–115(3), 17 C.R.S. (1973). In determining whether the PUC has regularly pursued its authority, we must consider whether its order is based

upon evidence introduced before it, whether the order is supported by findings of fact, whether the PUC applied the relevant legislative standards, and whether it acted within the authority conferred upon it by law. *PUC v. Northwest Water Corp.*, 168 Colo. 154, 451 P.2d 266 (1969). Orders that are arbitrary and capricious or a clear abuse of discretion must be set aside. *Colo. Mun. League v. PUC*, 198 Colo. 217, 597 P.2d 586 (1979); *City of Montrose v. PUC*, 197 Colo. 119, 590 P.2d 502 (1979).

[3, 4] The fundamental legislative standard in ratemaking cases is that all public utility charges must be just and reasonable. § 40–3–101(1), 17 C.R.S. (1973). This requires balancing the investor's interest in avoiding confiscation and the consumer's interest in prevention of exorbitant rates. *Pub. Serv. Co. of Colo. v. PUC*, 644 P.2d 933 (Colo.1982); *Mountain States Tel. & Tel. Co. v. PUC*, 186 Colo. 260, 527 P.2d 524 (1974). The PUC has the primary responsibility for doing this. *PUC v. Northwest Water Corp.*, 168 Colo. 154, 451 P.2d 266 (1969).

[5] The findings of the PUC concerning disputed questions of fact are generally not subject to judicial review. § 40–6–115(2), 17 C.R.S. (1973). Findings will not be set aside because the evidence is conflicting, or because conflicting inferences can be drawn from the evidence, but only if the record lacks competent evidence to support them. *Morey v. PUC*, 629 P.2d 1061 (Colo. 1981); *Ephraim Freightways, Inc. v. PUC*, 151 Colo. 596, 380 P.2d 228 (1963). Nor will this court interfere with the PUC's exercise of its discretion. *Atchison, T. & S. F. Ry. Co. v. PUC*, 194 Colo. 263, 572 P.2d 138 (1977).

With these principles in mind, we affirm on the negative working capital issue. We reverse on the annualization issue, because the PUC has abused its discretion and failed to pursue its authority regularly, in that it has selectively annualized in-period wage increases, failed to make adequate explanatory findings of fact, and as a result failed to establish a basis upon which it can be determined whether the rates are just and reasonable. We affirm on the *de minimus* issue, subject to modification on remand.

## I.

[6] The League claims that the PUC should have subtracted $9,159,000, the amount attributable to negative working capital, from Mountain Bell's rate base, on which Mountain Bell was allowed a 10.07% rate of return. *Positive* working capital

> consists of the additional funds, provided by the investors, which may be required by the utility to meet its day-to-day operating expenses, such as maintaining an inventory of materials and supplies, meeting certain operating expenses which must be paid before the revenues associated with those expenses are received, and keeping a certain amount of cash on hand for daily operations.

*New England Tel. & Tel. Co. v. PUC*, 390 A.2d 8, 51 (Me.1978). Positive working capital is investor-supplied. In contrast, *negative* working capital reduces the need for investor-supplied capital. It arises when the utility receives customer payments before service is rendered, or when it receives other funds before it must satisfy a corresponding liability. *See Valley Gas Co. v. Burke*, 122 R.I. 374, 406 A.2d 366 (1979).

Mountain Bell bills most local service in advance, although it does not necessarily collect on all those bills before the corresponding service is rendered. It collects funds each month which are later used for payment of property taxes and federal income taxes. It remits property taxes semi-annually, and federal income taxes on a schedule less frequent than monthly. As a result, Mountain Bell has the use of funds collected from ratepayers for various periods before these moneys must be disbursed to pay taxes. In its newly filed tariffs, Mountain Bell included $21,112,000 in its rate base for *positive* working capital. This amount was derived by calculating one-twelfth of its annual operating expenses less depreciation. In other words,

Mountain Bell postulated a one-month lag between payment of all expenses and receipt of the corresponding revenues. It stated that positive working capital allowances had been attributed to Bell telephone companies by regulatory authorities in thirty-one states, and zero or negative working capital had been attributed in eleven states. A positive working capital allowance using the same formula utilized in deriving the newly-filed Colorado tariffs had been granted to Mountain Bell in Texas and Wyoming, and denied in Montana.

Evidence of Mountain Bell's working capital requirement was also offered by a management consultant testifying on behalf of Colorado Ski Country USA and the Colorado-Wyoming Hotel and Motel Association, Inc., who reported on the results of his balance sheet analysis. Working from Mountain Bell's monthly balance sheets, he subtracted assets not recognized in the rate base from liabilities not assigned a specific cost in rate-of-return calculations. This resulted in a *negative* working capital figure of $6,216,000. In his opinion this was the proper way to calculate the working capital requirement because it included every use and source of working capital. *See, e.g., Wash. Util. & Transp. Comm'n v. Puget Sound Power & Light Co.*, 45 PUR4th 605, 612 (Wash. Util. & Transp. Comm'n 1982); *Re Determination of Rate Base and Working Capital Allowance*, 43 PUR4th 402 (Fla.Pub.Serv.Comm'n [hereinafter cited as PSC] 1981). The witness noted that Bell telephone companies in six areas used the balance sheet approach in calculating their own working capital requirements. He concluded that Mountain Bell's request for positive working capital should be denied. He characterized this recommendation as conservative, and said that the PUC could reduce the rate base by $6,126,000 for negative working capital if it were so inclined.

The PUC staff recommended to the PUC that Mountain Bell's request for an allowance for positive working capital be rejected. Utilizing data concerning Mountain Bell's average advance billings, property taxes, and federal income taxes, the staff estimated that Mountain Bell had average advance payments of $30,271,000 available for its use to offset its asserted $21,112,000 cash working capital needs. Thus, this approach yielded a *negative* working capital estimate of $9,159,000. Nevertheless, the staff did not recommend a negative working capital allowance. It explained,

> [i]nasmuch as [Mountain Bell] has not conducted a lead-lag study for this proceeding, the Staff could not determine the precise dollar amount of accrued taxes and advanced billings, and therefore hesitates to recommend a negative cash working capital allowance. Staff is aware that not all of the total amount of advanced billings are collected in advance. However, without a lead-lag study, the amount is indeterminable.

Record at 1951.

A "lead-lag study" empirically identifies the difference in timing between outward cash flow for labor, materials and supplies, inventory, and other expenses, and inward cash flow from charges to customers. *See Cent. La. Elec. Co., Inc. v. La. Pub. Serv. Comm'n*, 373 So.2d 123, 130 (La.1979). The staff called it the best justification for a working capital allowance. *See Re Pub. Serv. Elec. & Gas Co.*, 46 PUR4th 322, 328 (N.J.Bd.Pub.Util.1982).

The PUC eliminated the positive working capital allowance proposed by Mountain Bell from the rate base, without imposing a negative allowance. It explained the elimination by noting, as the staff did, that Mountain Bell had not considered the effect of advance billings and accrued taxes on working capital needs and that no lead-lag study had been conducted.[1]

1. The PUC's extensive findings were as follows:
> We agree with the staff's negative adjustment of $21,112,000 to eliminate cash working capital from Mountain Bell's rate base. Mountain Bell did not demonstrate its need for cash working capital in the rate base except simply to state that cash is required for the day-to-day operations of the business and that cash working capital funds are a property used and useful in providing service. Mountain Bell

The decision of the PUC on this issue is in accordance with the testimony of the staff and took cognizance of all the evidence in the record. The findings of fact satisfactorily support the attribution of zero working capital to Mountain Bell.

An objection to rate base based on failure to attribute negative working capital to Mountain Bell also was raised by the League in the 1968 telephone rate case, *Colo. Mun. League v. PUC*, 172 Colo. 188, 473 P.2d 960 (1970). There, the League argued that negative working capital should be recognized, but proposed that it be used to offset materials and supplies in the rate base rather than be subtracted directly. (The result is the same; the rate base would be reduced.) This court held that "the allowance of [materials and supplies without an offset for negative working capital] is within the Commission's judgment and discretion; it is beyond our purview." *Id.* 172 Colo. at 206, 473 P.2d at 968. The League asserts that the record in the present case contains more evidence of negative working capital than did the proceedings in *Colo. Mun. League v. PUC*, but the PUC adopted the staff's view that it could not determine the amount of negative working capital, if any, without a lead-lag study. It was within the PUC's discretion to reach this conclusion. Therefore, we affirm on the issue of working capital.

> proposed that an appropriate cash working capital allowance be one-twelfth of the total operating expenses (less depreciation).
> We agree that an allowance for cash working capital may be justified when it can be demonstrated that a lag exists between the outward cash flow of the utility for labor, materials and supplies, inventory, etc., and the inward cash flow from rates. The methodology normally used to demonstrate such a need for cash working capital is a lead-lag study which identifies the existing deficiency between the incurrence of expenses and collection of revenues associated with these expenses. Mountain Bell did not conduct a lead-lag study in support of its proposed cash working capital allowance of one-twelfth of the total annual operating expenses. Furthermore, Mountain Bell did not consider the benefits of the revenues that it receives from accrued taxes in developing its cash working capital allowance. There is a significant lag between the collection of the funds for accrued taxes and the payment of those taxes to the taxing authority as was demonstrated by staff witness Fleming. It should also be recognized that Mountain Bell bills its customers in advance for most local exchange services which it provides. As an example of this impact, for the six-month period from January, 1979, through June, 1979, Mountain Bell's billing averaged $19,227,000 on an intrastate basis. If the commission were to utilize the customary formula of deducting one-half of the property taxes (which one-half would be $9,388,000) and one-third of the federal income taxes (which one-third would be $1,656,000) from the requested cash working capital allowance, together with the advance billings of $19,227,000, a total deduction of $30,271,000 would exist. On these premises, we find that Mountain Bell has not justified a cash working capital allowance in its rate base and that the staff's elimination of the same is proper.
> *Re Mountain States Tel. & Tel. Co.*, 39 PUR4th at 234–35.

II.

The League points to evidence in the record that the annualization of test year wage increases, which raised Mountain Bell's test year expenses and revenue requirements by $5,703,000, was partially offset by the annualization of test year productivity increases. It claims that the PUC erred in failing to make findings justifying annualization of wage increases without annualizing productivity increases.

[7, 8] An historical test period establishes the relationships between revenue, costs and investment for a utility. These relationships are generally constant and reliable, forming the basis for calculating fair and reasonable rates. *Mountain States Tel. & Tel. Co. v. PUC*, 182 Colo. 269, 275–76, 513 P.2d 721, 724 (1973). Rates are determined by calculating what levels would have yielded enough revenue to cover expenses plus a reasonable return on investment, i.e., rate base, during the test period.

[9] There are two methods of determining revenue, costs, and rate base within an annual test period. Under the first, or averaging method, rate base is averaged throughout the year, utilizing monthly or other periodic figures, and the actual, unadjusted revenues and costs are determined.

This has the advantages of reducing the impact of seasonal and non-recurring phenomena on the relationships involved. The second, the year-end method, ascertains revenue, cost and rate base at the end of the test period and annualizes revenues and costs based on the year-end figures. It has the advantage of employing only the most recent data to determine the relationships involved. In selecting between methods, the goal is to achieve reasonably reliable results. *See Re Michigan Bell Tel. Co.*, 94 PUR3d 321, 325 (Mich. PSC 1972).

The PUC recognized this objective in explaining its use of the averaging method to determine the rate base in the 1968 telephone rate case:

> The revenues and expenses and the resulting net operating earnings for a year are, of course, accumulated month by month and are in fact average figures for the year rather than an annualization of the revenues and expenses as of the last day of the period. For proper matching of revenues, expenses, and rate base, it is then also necessary, in our view, to determine the proper rate base on a month-to-month basis and use an average figure. To use the year-end rate base would distort this relationship.

*Re Mountain States Tel. & Tel. Co.*, 76 PUR3d 481, 494 (Colo. PUC 1969).[2]

Other utility regulatory authorities have echoed the concern that juxtaposing average figures and year-end figures produces distortion. They have criticized proposed adjustments annualizing the effect of a single change within the test period, which would convert one isolated average figure to a year-end figure. "A test year is used to determine the company's financial performance during a known past period so that its future revenue requirements can be ascertained. We cannot logically adjust one element of that past performance to reflect future events, without adjusting all other elements." *Re Potomac Electric Power Co.*, 64 PUR3d 364, 369 (D.C. PSC 1966).

> Although it is sometimes said that the test-year results should be adjusted for "known" changes, this is a superficial statement of the basis for adjustment.... [W]e "know" that expenses will increase in each year. We also "know," however, that revenues will increase each year and that net earnings will increase in each year. An adjustment is called for, therefore, only when we "know" that a change has occurred that is different from the change which has occasioned increases in all of these quantities on an annual basis. In other words, an adjustment is called for when the change is in the relative patterns of growth of expenses, revenue, and plant.

*Re New England Tel. & Tel. Co.*, 84 PUR3d 130, 163–64 (Mass.Dept.Pub.Util. [hereinafter DPU] 1970). *See also Re Southwestern Bell Tel. Co.*, 27 PUR4th 493, 512 (Ark. PSC 1979) (" '[A] mismatching of ratemaking components occurs if expenses are not used in combination with revenues from the same time period....' To obtain an accurate picture ... we must use revenues and expenses from a contemporaneous period of time.") (quoting earlier Commission order).

**[10]** Courts reviewing the orders of utility regulatory authorities have also expressed solicitude for preserving the integrity of the test period data against one-sided adjustments. "It is fundamental to a proper test year that costs (both investment and operating) and revenues match, i.e., that they be consistent with each other. Unless there is a matching of costs and revenues, the test year is not a proper one for fixing just and reasonable rates." *Davenport Water Co. v. Iowa State Commerce Comm'n*, 190 N.W.2d 583, 605 (Iowa 1971) (quoting Commission order with approval). Ordinarily, if adjustments anticipating increases in expenses are considered by the PUC, anticipated increases in reve-

2. In citing this earlier PUC order, we note that the PUC is not bound by the doctrine of *stare decisis;* the mere fact that a prior order may appear inconsistent does not in itself render the present one arbitrary or capricious. *B & M Service, Inc. v. PUC*, 163 Colo. 228, 429 P.2d 293 (1967).

nue should also be considered. *Gen. Tel. Co. v. Mich. Pub. Serv. Comm'n*, 78 Mich. App. 528, 539, 260 N.W.2d 874, 879 (1977).

In the present case, the rates requested by Mountain Bell reflected annualization of all wage increases occurring during the test year.[3] This adjustment raised expenses, and therefore revenue requirements, by $5,703,000.

[11] This court has approved the use of the historical relationship between test year investments, revenues and expenses as a basis for calculating the rates necessary to assure utilities a fair rate of return. We have also recognized that adjustments to the test period data, including annualization of known changes occurring during the test period which *affect the relationships* between investment, revenues and expenses must sometimes be made. *Mountain States Tel. & Tel. Co. v. PUC*, 182 Colo. at 276, 513 P.2d at 724. If all changes within the test period are annualized, then the test period data are converted from average to year-end. Generally, this court will not question the PUC's decision whether to use either the averaging method or the year-end method to ascertain test year figures. *See New England Tel. & Tel. Co. v. DPU*, 360 Mass. 443, 450–53, 275 N.E.2d 493, 499–501 (1971); *cf. Colo. Ute Elec. Ass'n v. PUC*, 198 Colo. 534, 539–40, 602 P.2d 861, 864 (1979) (court will not question PUC's method of making out-of-period adjustments unless it is inherently unsound). However, we have cautioned against arbitrary distortion of test-year relationships:

> [W]age and salary increases [effective after the test period] may not exceed to any large extent the usual consequent increase in the productivity of the employees. *If* they do, which is generally the case in periods of uncontrolled inflation, then such out-of-period adjustment must be reckoned with in the rate fixing procedure.

*Mountain States Tel. & Tel. Co. v. PUC*, 182 Colo. at 276, 513 P.2d at 724 (emphasis added). This is equally true for wage increases effective during the test period, because a wage increase that is fully matched by a productivity increase, or some other change, has no effect on the relationships between investment, revenues and expenses that the test year serves to establish.

[12] In substance, what the PUC has done here is employ year-end test period figures for wages, the largest element of operating expenses, and average test period data for almost everything else.[4] This raises Mountain Bell's revenue requirement by $5,703,000 a year. We recognize that "a blind adherence ... to the relationship between costs, revenue and average investment in the historic test period without weighing the factors involved with proper in-period and out-of-period adjustments would be erroneous." *Mountain States Tel. & Tel. Co. v. PUC*, 182 Colo. at 276–77, 513 P.2d at 724–25. The PUC has considerable discretion in its choice of means to fix rates. *Colo. Ute Elec. Ass'n v. PUC*, 198 Colo. at 539, 602 P.2d at 864. However, this particular choice would appear to constitute an abuse of discretion.

This conclusion is fortified by comparing the PUC's action to the decisions of other utility regulatory authorities on this issue. It is true that annualization of wage increases has sometimes been allowed when the regulatory authority found that the increases were not offset by other changes in the test period,[5] when those other changes were explicitly found to be unmea-

3. Management employees received a raise on January 1, 1979. Both "craft and clerical" and "supervisory and technical" employees were given raises toward the end of the test period, the former effective on August 5, 1979, the latter on October 1, 1979. The test period ran from November 1, 1978, through October 31, 1979.

4. The PUC also accepted Mountain Bell's annualization of pension and tax increases, depreciation represcription and debt cost adjustment. These amounts were much smaller than the wage increase, and were not challenged on appeal.

5. *Re Pac. Tel. & Tel. Co.*, 95 PUR3d 1, 12 (Cal. PUC 1972); *Ex Parte South Central Bell Tel. Co.*, 87 PUR3d 498, 514 (La. PSC 1971) (PSC not convinced that productivity increase sufficient to offset wage increases); *Re Appalachian Pow-*

surable,[6] or when other key figures were also annualized, converting the test period data from average to year-end.[7] None of these cases support the action of the PUC in the present case.

The majority of regulatory authorities facing this issue have either rejected annualization of wage increases,[8] or adjusted the annualization to reflect other test period changes.[9] An annualization of wage increases put forth by Mountain Bell itself was rejected in Montana. *Re Mountain States Tel. & Tel. Co.*, 23 PUR3d 233, 246 (Mont. PSC 1958), *aff'd*, 135 Mont. 170, 338 P.2d 1044 (1959). As the California Public Utilities Commission has explained,

> ... wage rates by themselves do not produce increased labor costs. The number of employees, composition of the force, salary level, and operating forces, the state of technology, extent of construction, and overtime policy, as well as other factors, acting together result in the total wage bill. It is not enough to look at only wage rates or expenses in considering test-year results of operations. Trends in earnings and trends in revenues in relation to expenses and to net plant are also important factors, among others, to consider.... We find that to [annualize test year wage increases] without at the same time giving effect to the offsetting effects resulting from growth in revenues and operating economies and efficiencies, so unbalances the revenue-expense-plant relationship in

*er Co.*, 38 PUR4th 73, 81–82 (W.Va. PSC 1980); *but see City of Los Angeles v. PUC*, 7 Cal.3d 331, 347, 497 P.2d 785, 797, 102 Cal.Rptr. 313, 325, *on remand Re Pac. Tel. & Tel. Co.*, 95 PUR3d 1 (Cal. PUC 1972).

6. *Re Niagara Mohawk Power Corp.*, 35 PUR3d 149, 164–65 (N.Y. PSC 1960); *Re New England Tel. & Tel. Co.*, 99 PUR3d 228, 230 (R.I. PUC 1973), *aff'd sub nom. R.I. Consumers' Council v. Smith*, 113 R.I. 232, 319 A.2d 643 [6 PUR4th 17] (1974) (no probative evidence); *Wash. Util. & Transp. Comm'n v. Pac. N.W. Bell Tel. Co.*, 51 PUR4th 335, 349 (Wash. Util. & Transp. Comm'n 1983); *Re Wheeling Elec. Co.*, 9 PUR4th 448, 455 (W.Va. PSC 1975); *see Re N.W. Pub. Serv. Co.*, 297 N.W.2d 462, 470–71 (S.D.1980), *rev'g* 18 PUR4th 291, 302–03 (S.D. PUC 1976); *but see Re Midstate Tel. Co.*, 10 PUR4th 88, 90–91 (N.Y. PSC 1975) ("any productivity adjustment is speculative, [but] it is equally speculative to conclude by implication that no increase in productivity can be expected").

7. *Re Pac. Gas & Elec. Co.*, 87 PUR3d 270, 290–92 (Cal. PUC 1971); *Re Cincinnati Gas & Elec. Co.*, 42 PUR4th 252, 270–73 (Ohio PUC 1981); *Pa. PUC v. Columbia Gas of Pa., Inc.*, 60 PUR3d 385, 411 (Pa. PUC 1965), *aff'd sub nom. City of Pittsburgh v. Pa. PUC*, 208 Pa.Super. 260, 274–75, 222 A.2d 395, 403 [65 PUR3d 257, 265–66] (1966); *Pa. PUC v. Gen. Tel. Co. of Pa.*, 28 PUR3d 413, 431–32 (Pa. PUC 1959); *Re Southern Bell Tel. & Tel. Co.*, 35 PUR4th 1, 33, 37 (S.C. PSC 1980) (net operating income annualized); *but see Pa. PUC v. Bell Tel. Co. of Pa.*, 52 PUR4th 85, 104–09 (Pa. PUC 1983) ("[T]he company's proposed wage annualization for the in-period wage increases has not properly reflected productivity as an offsetting factor. Consequently, the choice is to reject the company's proposed adjustment as overstated by some unquantified (but significant) amount, or alternatively to accept it, as reduced or offset by an indirect adjustment methodology." 52 PUR4th at 107–08).

8. *Re Union Elec. Co.*, 47 FPC 144, 149–51, 94 PUR3d 87, 90–92 (1972); *Re Gen. Tel. Co. of Cal.*, 80 PUR3d 2, 54–56 (Cal. PUC 1969); *Re Pac. Tel. & Tel. Co.*, 53 PUR3d 513, 570–77 (Cal. PUC 1964); *Re Potomac Elec. Power Co.*, 64 PUR3d 364, 368–69 (D.C. PSC 1966); *Re Inter-County Tel. & Tel. Co.*, 33 PUR3d 287, 292 (Fla. R.R. & PUC 1960); *Re Mountain States Tel. & Tel. Co.*, 23 PUR3d 233, 246 (Mont. PSC 1958), *aff'd*, 135 Mont. 170, 338 P.2d 1044 (1959); *Re Otter Tail Power Co.*, 21 PUR4th 254, 270–71 (S.D. PUC 1977), *rev'd on other grounds*, 291 N.W.2d 291 (S.D.1980); *Wash. PSC v. West Coast Tel. Co.*, 27 PUR3d 238, 250 (Wash. PSC 1959); *cf. Re Dayton Power & Light Co.*, 29 PUR4th 145, 165–66 (Ohio PUC 1979), *aff'd*, 61 Ohio St.2d 215, 217–18, 400 N.E.2d 396, 398 (1980) (no annualization of wage increases that are not contractually required); *contra United Gas Corp. v. Miss. PSC*, 240 Miss. 405, 127 So.2d 404, 416–17 [38 PUR3d 252, 266–67] (1961).

9. *Re New England Tel. & Tel. Co.*, 11 PUR4th 297, 304–05 (Mass. DPU 1975), *rev'd on other grounds*, 371 Mass. 67, 74–75, 354 N.E.2d 860, 865–66 (1976); *Re New England Tel. & Tel. Co.*, 84 PUR3d 130, 163–65 (Mass. DPU 1970), *aff'd in part and rev'd in part*, 360 Mass. 443, 450–53, 490–92, 275 N.E.2d 493, 499–501, 521–22 (1971); *Re Mich. Bell Tel. Co.*, 85 PUR3d 467, 478–82 (Mich. PSC 1970); *Re Mich. Consol. Gas Co.*, 36 PUR3d 289, 303 (Mich. PSC 1960); *Re N.J. Bell Tel. Co.*, 78 PUR NS 97, 103–05 (N.J. PUC 1949); *Re Midstate Tel. Co.*, 10 PUR4th 88, 90–91 (N.Y. PSC 1975); *Re Narragansett Elec. Co.*, 93 PUR3d 417, 442 (R.I. PUC 1972).

> the test-year results of operations as to render [Pacific Bell's] adjusted test-year results of operations meaningless for rate-fixing purposes.

*Re Pac. Tel. & Tel. Co.*, 53 PUR3d 513, 572, 576–77 (Cal. PUC 1964), *aff'd on this issue and partially annulled on other grounds*, 62 Cal.2d 634, 674, 44 Cal.Rptr. 1, 26, 401 P.2d 353, 378 (1965) (footnote omitted). *Accord Re Gen. Tel. Co. of Cal.*, 80 PUR3d 2, 56 (Cal. PUC 1969) ("The staff argues that if one expense increase is annualized, then all increases in revenue, expenses, and rate base should also be annualized. The staff argument is sound. One expense should not be considered without also considering effects of all other items comprising revenues and expenses.") The California PUC reaffirmed this view more recently in *Re Pac. Tel. & Tel. Co.*, 83 Cal. PUC 149 (1977).

[13] We conclude that annualization of test period wage increases alone strongly suggests that the PUC has abused its discretion, rather than regularly pursuing its authority. We must, however, compare what the PUC has said to what it has done to ascertain whether it has made findings justifying this irregular action. The only indication in its order that the PUC impliedly adopted the annualization of wage increases and impliedly rejected any productivity offset is the incorporation by reference of Mountain Bell's income statement. There is no finding whether the wage increases unbalanced the relationships between investment, revenues and expenses. This is insufficient. As the California Supreme Court has held, "[the California PUC] may adjust all figures, revenue, expense, and investment for anticipated changes but it may not adjust one side or part of the equation without adjusting the other *unless there is a finding that the particular expenditure is extraordinary.*" *City of Los Angeles v. PUC*, 7 Cal.3d 331, 347, 497 P.2d 785, 797, 102 Cal.Rptr. 313, 325 (1972) (emphasis added). *Accord Citizens of Fla. v. Hawkins*, 356 So.2d 254, 255–58 (Fla.1978); *City of Miami v. Fla. PSC*, 208 So.2d 249, 258 (Fla.1968).

[14] Mountain Bell casts this issue as turning upon the credibility and weight of testimony before the Commission. We disagree. The critical defect in the PUC's order is the absence of adequate findings supporting its decision to annualize in-period wage increases without annualizing other components of expense and revenue. The question of whether the order of the PUC is supported by adequate findings of fact is a question of law. *See PUC v. Northwest Water Corp.*, 168 Colo. 154, 169–70, 451 P.2d 266, 273–74 (1969).

[15] A review of the relevant testimony before the Commission emphasizes the need for factual findings in order to enable us to evaluate the appropriateness of the annualization of in-period increases. The Colorado Ski Country consultant calculated that annualization of historical productivity gains would offset the proposed annualization of wage increases by $3,389,000, or fifty-nine percent. He recommended that the PUC adopt this offset. Mountain Bell included a productivity offset for its proposed adjustment covering wage increases effective *after* the test period, but no offset for those effective during the test period. (The PUC rejected the post-test period wage increase adjustment.) [10]

Mountain Bell's district staff manager testified that Mountain Bell had not annualized productivity gains as an offset to annualization of test period wage increases "because all of the productivity that would have been experienced has been experienced in the test year." Record of May 21, 1980, hearing at 272. Mountain Bell's argument rests primarily on this statement by the district staff manager. In context, it becomes apparent that this is more an estimation of the legal effect of our holding in *Mountain States Tel. & Tel. Co. v. PUC*, 182 Colo. 269, 513 P.2d 721 (1973), that

10. The PUC's extensive findings on the proposed post-test period adjustment appear at 39 PUR4th at 240–41. They include the observation, with apparent agreement, that the Colorado Ski Country consultant "pointed out ... that Mountain Bell could offset completely any 1980 wage increase by productivity gains." *Id.* at 241.

productivity gains generally must be offset against out-of-period wage increases, than a statement of fact or an expert opinion.[11] A similar situation arose in *Denver & S.L. R.R. Co. v. Chicago, B. & Q. R.R. Co.*, 64 Colo. 229, 171 P. 74 (1918). There this court reviewed the record and found that:

> The conflict, if any, is in the conclusions drawn [from undisputed facts] by the witnesses, which, instead of being testimony, is simply their deductions as to the legal effect of the evidence concerning the real facts, which are not in dispute. These deductions were for the Commission to make, and are questions of law rather than of fact. We admit that there is a conflict in the deductions of these different witnesses.... Such matters were but reasons or arguments as to what they thought ought to follow.

*Id.* 64 Colo. at 237-38, 171 P. at 77. The court held that the PUC had erred as a matter of law, and reversed its order. Here too, highly selective annualization without explanatory findings of fact is an error of law, and the reasoning or argument of the Mountain Bell witness does not mitigate this error. Therefore, we must reverse the order and remand the cause.

We offer no guidance to the PUC in the resolution of this issue, except to say that its order is arbitrary and capricious in annualizing test period wage increases with no accompanying adjustment or offset for other changes in absence of adequate findings of fact.

## III.

The League asserts that the PUC erred, after finding that Mountain Bell's test period earnings exceeded its revenue requirement by $506,000, by failing to order a rate reduction. The PUC's findings were as follows:

> [O]n a test year pro forma basis Mountain Bell's earnings exceeded its revenue requirement by $506,000. In view of the fact that the test year excess earnings of $506,000 is [sic] de minimus in relation to the overall revenue requirement, the commission believes that it would be inappropriate to attempt to "spread" any revenue "reduction" of such a relatively insignificant amount. It should also be recognized that calculating a revenue requirement is not a matter of scientific precision, but the exercise of sound regulatory judgement. With the economic decline now being experienced in such sectors as housing, for example, it readily can be surmised that the economic downturn very likely will eliminate any minimal surplus revenues Mountain Bell will experience.

39 PUR4th at 257.

It appears that the PUC relied on three considerations in reaching this result. First, it found that "$506,000 is de minimus in relation to the overall revenue requirement...." Second, it believed that "it would be inappropriate to attempt to 'spread' any revenue 'reduction' of such a relatively insignificant amount"; in other words, inaction would avoid the costs associated with rate modification. Finally, it found that "the economic downturn very likely will eliminate any minimal surplus revenues."

11. The relevant testimony was as follows:
> Q. You would make no productivity offset in calculating that adjustment [for test period wage increases], isn't that correct?
> A. That's correct, because all of the productivity that would have been experienced has been experienced in the test year.
> Q. That's correct. Let's say that instead of that [wage increase] going into effect on October 1 [during the test period], that it went into effect on November 1, 1979 [the day after the end of the test period]. Now, you have to make an out of period adjustment, wouldn't you?
> A. That would be—yes, that would be considered, I believe by this Commission to be an out of period adjustment.
> Q. And you would, following the Commission's dictates of the past, you would make a productivity offset?
> A. [Yes.] And I would like to emphasize, "following the Commission's dictates."

"The Commission's dictates" apparently arise from the passage in *Mountain States Tel. & Tel. Co. v. PUC*, 182 Colo. at 276, 513 P.2d at 724, quoted *supra* p. 17.

The League disputes the characterization of the $506,000 difference as *de minimus*. It claims that a rate reduction of this amount is necessary to avoid unjust, unreasonable charges. It argues that general statements about the economy by the PUC cannot justify allowing Mountain Bell to retain excess earnings, and in any event these statements are unsupported by the record.

Since we have held that the PUC improperly computed Mountain Bell's revenue requirement by annualizing wage increases only, unsupported by adequate factual findings, it is possible that the difference between revenue requirement and earnings will no longer be $506,000 in the order that the PUC enters on remand. Nevertheless, the PUC will again face the choice between discounting the difference between revenue requirement and earnings, or setting in motion some procedure to modify earnings. Therefore, we elect to address this issue.

The issue of what constitutes a *de minimus* difference between revenue requirement and earnings in a rate proceeding is one of first impression for this court. We have reviewed decisions arising from PUC ratemaking in which far less was at stake without characterizing the amount as *de minimus*. *See, e.g., Colo. Ute Elec. Ass'n v. PUC*, 198 Colo. 534, 541, 602 P.2d 861, 865–866 (1979) (PUC's exclusion of $8,868 membership dues and fees from test year expenses not arbitrary or capricious). However, it apparently was not argued in those cases that the amount at stake was *de minimus*. Three other factors are material in the present case: the PUC has ruled the amount in question to be *de minimus*, the difference is the final result of the exercise of regulatory judgment rather than an intermediate stage in that process, and holding the amount in question not to be *de minimus* would require setting in motion the machinery of earnings modification. Hence, notwithstanding our past consideration of smaller amounts in question, we are free to consider afresh in the present context whether the $506,000 in excess revenues is *de minimus*.

The parties have brought to our attention authorities from other jurisdictions concerning what is considered *de minimus*. We have not found the authorities from outside the ratemaking context instructive. With regard to ratemaking, the appellees rely on *Bristol County Water Co. v. Harsch*, 120 R.I. 223, 386 A.2d 1103 (1978), where the court found that the Rhode Island PUC had made two errors in the calculation of revenue requirement and earnings, but held that "it would hardly pay the cost of the service company's cranking up its computers to include this pittance within all its bills." *Id.* at 230, 386 A.2d at 1107. The amount in question there appears to have been a one-time charge of approximately $700 spread across all the customers of a wholly-owned subsidiary whose parent company had assets valued at over $851 million. *Id.* at 224, 386 A.2d at 1104. Because of the minuscule amount involved there, the *Bristol County* case appears inapposite. *See also Watergate Improvement Associates v. PSC*, 326 A.2d 778, 791 n. 30 (D.C.1974) (difference of $517 between profits generated by new rates and those produced by old rates accepted as *de minimus*); *State ex rel. Util. Comm'n v. Va. Elec. & Power Co.*, 285 N.C. 398, 416, 206 S.E.2d 283, 296 (1974) (error in calculation of rate base reducing revenue requirement by $6200 alone would not justify rate increase, but may be taken into account in further proceedings). We note that while no party to the present proceedings has indicated what it would cost to "crank up" Mountain Bell's computers, Mountain Bell was allowed to retain $71,000 from interest accruing on a refund to offset the costs of making the refund in *Mountain States Tel. & Tel. Co. v. PUC*, 180 Colo. 74, 86, 502 P.2d 945, 951 (1972). This is far less than the $504,000 per year at issue here.

In *City of Miami v. Fla. PSC*, 208 So.2d 249 (Fla.1968), the court held *de minimus* an amount approximating the same magnitude as the amount at issue here. The court held a mathematical error of $108,356 in excess earnings, in the context of a revenue requirement of approximately $44

million, "de minimus under the 'end result' rule on the theory that it may have helped offset possible mistakes unfavorable to the Company." *Id.* at 257. *See also Minn. Power & Light Co. v. Minn. PSC*, 310 N.W.2d 686, 693 (Minn.1981) (error of two percent in tax rate on gross earnings spanning six months of test period is insufficient to require reversal).

[16, 17] While we have reservations about the reasoning of the court in *Miami*, we agree that the PUC's characterization of the difference between revenue requirement and earnings as *de minimus* must be examined in the context of the exercise of its judgment in the ratemaking proceeding. The greatest degree of judgment on the part of the PUC is required in determining the fair return on equity, because there the PUC must not merely choose between two alternatives, as it often does in making the decisions determining rate base, expenses and revenues, but rather from a range of alternatives. *See Colorado Municipal League v. PUC*, 172 Colo. 188, 210, 473 P.2d 960, 971 (1970). It is for this reason that we have held that the PUC's decision on return on equity will not be disturbed as long as it falls within a "zone of reasonableness." *Mountain States Tel. & Tel. Co. v. PUC*, 186 Colo. 260, 266, 527 P.2d 524, 527 (1974). Excess revenues ultimately accrue to shareholders. Hence we choose to analyze the *de minimus* issue in the context of the accuracy of selection of a fair return on equity.

[18] In the present case, the PUC determined that a fair rate of return on common equity was 13.3%. It was thus claiming accuracy of no greater than one-tenth of one percent in setting the rate of return on Mountain Bell equity, which constituted 41.7% of the $946,269,000 rate base, or approximately $394,000,000.[12] An error of one-tenth of one percent of this amount would be $394,000. The PUC's determination was based on testimony generally implying less exactness than one-tenth of one percent.[13]

In the context of the accuracy of the rate of return figure, we hold that the PUC's characterization of $506,000 of excess revenues in the test period as *de minimus* is marginally acceptable. While we would not characterize this as an "insignificant amount," we agree that reversal for this reason alone would impose an artificial pseudoscientific precision on the ratemaking process. *See City of Montrose v. PUC*, 629 P.2d 619 (Colo.1981).

Because we hold that the PUC's characterization of the $506,000 difference between revenue requirement and earnings falls short of compelling reversal, we need not consider whether its generalized economic observations could justify the same result. Our holding is intended to provide guidance to the PUC in acting on the difference between revenue requirement and earnings when this difference is determined on remand.

## IV.

We affirm the judgment with respect to the negative working capital and *de minimus* issues, reverse as to the annualization issue, and remand this case to the district court, which shall set aside the order of the PUC and shall direct the PUC to conduct further proceedings consistent with this opinion.

QUINN, J., does not participate.

12. 76.97% (equity share of AT & T capital) × 46.34% (AT & T share of Mountain Bell capital) + 5.99% (minority share of Mountain Bell capital) = 41.7%. *See* 39 PUR4th at 253.

13. The following ranges of fair rates of return on common equity were recommended to the PUC:
(a) Wilson (Mountain Bell)—15 to 18.5 percent
(b) Meyer (Mountain Bell)—16.2 to 18.3 percent
(c) Langsam (Gen.Serv.Admin.)—12.5 to 13.5 percent
(d) Kosh (League)—13.25 percent
(e) Karahalios (PUC staff)—12.8 to 13.8 percent
39 PUR4th at 249-50.

DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO

DIVISION 8
CIVIL ACTION NO. 80 CV 8770

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COLORADO MUNICIPAL LEAGUE,
Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO: COMMISSIONERS EDYTHE S. MILLER, DANIEL E. MUSE and L. DUANE WOODARD; and MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
Defendants,

and

THE REGENTS OF THE UNIVERSITY OF COLORADO, et al.,
Co-Defendants.

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ORDER OF REMAND

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THIS MATTER coming on to be heard in open court this 4 day of December, 1984, and the Court having considered the decision of the Colorado Supreme Court under Docket No. 81 SA 551, dated August 20, 1984, and having also considered the record before it, as well as having heard argument of counsel, thereby being fully advised in the premises,

DOTH FIND:

1. That the Court has jurisdiction in this matter, pursuant to statutory judicial review and Order of the Supreme Court.

2. That pursuant to said Order of the Supreme Court, this Court has been directed to remand the proceedings subject to judicial review to the Colorado Public Utilities Commission to conduct further proceedings consistent with said Supreme Court opinion of August 20, 1984, as follows:

> "We . . . remand this case to the District Court, which shall set aside the Order of the PUC and shall direct the PUC to conduct further proceedings consistent with this opinion."

3. That adequate and proper grounds exist for setting aside the Order of the PUC (C80-1784, dated September 16, 1980, and I & S Docket No. 1400) insofar as it is inconsistent with said decision of the Supreme Court of August 20, 1984.

4. That Commission Order is affirmed, except as therein reversed and hereby set aside.

5. That said Commission Order is specifically set aside as to revenue requirements, rates and tariffs as to the annualized wage cost adjustment period as an operating expense caused by wage increases given to craft and clerical workers, effective August 5, 1979, and supervisory and technical employees on August 17, 1979, as requested by the Company and approved by the Commission in the amount of $5,703,000 (page 16 of the Colorado Supreme Court's opinion and footnote 3 on said page).

6. That the records in I & S Docket No. 1400 certified by the Commission to this Court as forwarded to the Supreme Court and returned under remand shall be returned to the Commission to be the record for further proceedings herein ordered.

7. That the amount of $506,000 alleged by the League to be excess revenues and affirmed by the Supreme Court as a "marginally acceptable" action of the Commission, shall be considered by it as part of the proceedings in calculating the revenue requirement, rates and tariffs of the Company, as directed by the Colorado Supreme Court in its opinion at page 26, as follows:

> "Since we have held that the PUC improperly computed Mountain Bell's revenue requirement by annualizing wage increases only, it is possible that the difference between revenue requirement and earnings will no longer be $506,000 in the order that the PUC enters on remand."

8. That the appropriate period for refund in an amount to be determined by the Commission shall commence with the effective date of the Order of Commission (C80-1784, dated September 16, 1980, and I & S Docket No. 1400), and continuing until that date that the Commission finds that the ratepayers are no longer paying rates for revenue requirements that are based on the erroneous wage cost adjustment without offsetting labor productivity and the modification, if any, of the excess revenues of $506,000 in the final Order of the Commission on remand.

9. That the Supreme Court has heretofore determined in a similar 1972 case that payment to the League and its counsel for costs advanced and fees accrued is a proper charge against any refund to ratepayers before distribution thereof.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the rate proceedings shall be and are hereby remanded to the PUC for further action consistent with the opinion of the Colorado Supreme Court dated August 20, 1984.

2. That said Commission Order (C80-1784, dated September 16, 1980, and I & S Docket No. 1400) shall be and is hereby set aside as to:

A. the wage cost adjustment in the amount of $5,703,000, and the resultant calculation of revenue requirements, as well as rate design and tariffs arising therefrom.

B. As the amount, if any, of the $506,000 excess revenues that the Commission deems appropriate to be no longer declared de minimis and included as a part of the refund plan.

3. That the record, as certified by the Commission to this Court, forwarded to the Supreme Court, returned to this Court under remand, shall be, and is hereby directed to be, returned to the Commission for further action on said record without additional evidence.

4. That on said remand, the Commission is ORDERED:

A. To determine whether the wage increase annualized impact on revenue requirements of $5,703,000 should be deleted, and the rates reduced in accordance therewith; or

B. The labor productivity in the amount of $3,383,000 (59% of the wage increase) shall be offset with resultant reduction in revenue requirements and rates thereunder; and

C. Whether the $506,000 alleged excess revenues shall be included as part of the refunds in either of the above cases creating a reduction of revenue requirements of $5,703,000, plus $506,000, or a total of $6,209,000; or $3,389,000, plus $506,000, or $3,895,000 on an annualized basis, and refund to the ratepayers for the period said amounts have been for a refund period as determined by the Commission with interest at the statutory rate from the effective date of the Commission's Order (C80-1784, dated September 16, 1980).

5. That the Commission shall calculate the amount of a refund for the full time period that said rates and tariff charges have been effective in whole, or in part, as charges by the Company for its services.

6. That the Commission allow and direct payment to the League and its counsel of costs advanced or incurred in amounts found by the Commission to be reasonable to be charged against said interest on said corpus before distribution of the balance to the ratepayers.

7. That the Commission shall enter appropriate findings in accordance with the Order of the Supreme Court, including a method of refund to ratepayers for excess rates collected from a period starting with the effective date of said Order (C80-1784, dated September 16, 1980, and I & S Docket No. 1400), and continuing to the date when subsequent Order of the Commission determines that said rates inconsistent with the Supreme Court opinion are no longer being collected.

8. That the PUC is directed to proceed forthwith to conduct further proceedings consistent with the opinion of the Colorado Supreme Court of August 20, 1984 and this Order.

9. That the Court retains jurisdiction to enter further orders, and modification or clarification of this Order, as may be proper in the circumstances.

DONE AND SIGNED IN OPEN COURT the day and year first above written.

BY THE COURT:

/s/ John Brooks, Jr.
District Court Judge

City & County of Denver, State
Certified to be a full, true and correct
copy of the original in my custody.

OCT 11 1984

Court Seal
Clerk of the District Court
By _____
Deputy Clerk

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 80CV8770, Courtroom 18

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ORDER OF REMAND

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COLORADO MUNICIPAL LEAGUE,
Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO: COMMISSIONERS EDYTHE S. MILLER, DANIEL E. MUSE and L. DUANE WOODARD; and MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

and

THE REGENTS OF THE UNIVERSITY OF COLORADO, et al.,
Co-Defendants.

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This Matter coming on to be heard in open Court, and the Court having considered the decision of the Colorado Supreme Court under Docket No. 81SA551, dated August 20, 1984, and having also considered the record before it as well as having heard argument of counsel, thereby being fully advised in the premises,

IT IS ORDERED as follows:

(1) The Colorado Public Utilities Commission Decision No. C80-1784 is hereby set aside;

(2) This cause is remanded to the Public Utilities Commission;

(3) The Clerk of this Court is directed to return the Record in this cause to the Secretary of the Colorado Public Utilities Commission; and

(4) The Colorado Public Utilities Commission is directed to conduct further proceedings consistent with the opinion of the Colorado Supreme Court.

DONE AND SIGNED IN OPEN COURT this 11 day of February, 1985.

By the Court:

District Court Judge

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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| RE: INVESTIGATION AND SUSPENSION OF PROPOSED CHANGES IN TARIFF-- COLORADO PUC NO. 5 - TELEPHONE -- MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, DENVER, COLORADO 80202. | INVESTIGATION AND SUSPENSION DOCKET NO. 1400<br><br>SUPPLEMENTAL DECISION PURSUANT TO REMAND ORDER OF THE SUPREME COURT OF COLORADO |

- - - - - - - - - - -

August 20, 1985

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STATEMENT AND FINDINGS OF FACT

BY THE COMMISSION:

On or about January 21, 1980, the Mountain States Telephone and Telegraph Company (Mountain Bell) filed Advice Letter No. 1570, accompanied by numerous tariff revisions (1,083 tariff sheets). On January 29, 1980, by Decision No. C80-200, the Commission suspended the effective date of the tariffs filed with Advice Letter No. 1570 and set the tariffs for hearing.

On September 16, 1980, the Commission entered Decision No. C80-1784 wherein it permanently suspended the tariffs that had been filed by Mountain Bell pursuant to Advice Letter No. 1570. In Decision No. C80-1784, the Commission approved a rate base of $946,269,000. The Commission also determined that the fair rate on common equity should be 13.3 percent and the overall return on rate base should be 10.07 percent. Multiplying Mountain Bell's rate base of $946,269,000 by 10.07 percent, a revenue requirement of $95,289,000 was produced. However, the Commission found that Mountain Bell's test year pro forma earnings were $95,795,000 which means that on a test year pro forma basis Mountain Bell's earnings exceeded its then revenue requirement by $506,000. The Commission found that in view of the total company revenues the test year excess earnings of $506,000 were de minimus in relation to the overall revenue requirement, and that the attempt to "spread" any revenue "reduction" of such a relatively insignificant amount would not be appropriate.

Decision No. C80-1784 was the subject of a certiorari review proceeding in the Denver District Court initiated by the Colorado Municipal League. Decision No. C80-1784 was affirmed by the Denver District Court, and thereafter the Colorado Municipal League appealed that Denver District Court decision to the Colorado Supreme Court (Case No. 81 SA 551). The Colorado Supreme Court entered a decision on August 20, 1984, in which it affirmed the Commission in part, reversed in part, and remanded the case to the District Court with an order to set aside the order of the Public Utilities Commission and direct this Commission to conduct further proceedings consistant with the opinion of the Colorado Supreme Court.

A final order of remand was entered by District Judge John Brooks on April 11, 1985. Prior to that date, the Commission entered Decision No. C85-376 on March 19, 1985, ordering paragraph 2 of which provided as follows:

2. Each of the parties in Investigation and Suspension Docket No. 1400, within ten days after the effective date of the District Court's final order of remand shall advise the Commission by letter of the following:

(1) Agreement has been reached between the parties concerning the issues before the Commission on remand; or

(2) The Parties have not been able to agree as to what issues are before the Commission on remand.

(3) Whether the parties believe that an evidentiary hearing is necessary; or

(4) Whether the parties believe that the matter must be considered by the Commission without additional evidence; or

(5) Whether the parties agree that additional evidence may be taken by the Commission only after certain issues are decided by the Commission based solely on legal argument.

Mountain Bell, the Municipal League, and Staff have filed appropriate pleadings in response to that order.

The Colorado Supreme Court has directed this Commission to re-examine two issues: (1) the issue of the in-period productivity offset adjustment to Mountain Bell's in-period wage and salary increases during the test year and (2) whether the $506,000 of excess revenues in the test period, originally described by the Commission as de minimus, would be changed as a result of our possible adjustment of the overall revenue requirement brought about by our reconsideration of the in-period productivity offset issue.

The Colorado Supreme Court's remand order directs the Commission to "conduct further proceedings consistent with this opinion." It did not specifically confine this Commission to a reconsideration based upon the record as already made initially in this docket. We agree with the Staff, however, that we should first consider the evidentiary record as already made and determine whether it is sufficient for the Commission to make sufficient findings of fact to comply with the August 20, 1984, opinion of the Colorado Supreme Court, which is now reported at 687 P.2d 416 (1984). The Commission, of course, is not bound to accept as believable, expert witness testimony which it finds to be erroneous, incorrect, or unsupported. Mountain States Telephone and Telegraph Company v. Public Utilities Commission, 195 Colo. 130, 576 P.2d 544 (1978). If the Commission were to find the evidentiary record as already made to be insufficient for the Commission to comply with the Colorado Supreme Court's remand order, the Commission could make provision for taking new and additional evidence. Caldwell v. Public Utilities Commission, 692 P.2 1085 (Colo. 1984). The Commission has reviewed the record, and finds that it is capable of supplying the necessary findings required by the Colorado Supreme Court based upon the record as already made.

In compliance with the Supreme Court's remand order, the Commission enters the following findings of fact.

## FINDINGS OF FACT

1. The amended remand order issued by the Denver District Court on April 11, 1985, set aside Decision No. C80-1784.

2. Decision No. C80-1784 is readopted and republished by the Commission nunc pro tunc as of September 16, 1980.

3. Price level increases to Mountain Bell's monthly booked wage and salary expenses are warranted in order to properly and consistently maintain revenues, expenses, and rate base during the test year ending October 31, 1979.

4. Mountain Bell's properly adjusted wage and salary expense to reflect in period experienced wage increase of 11.4 percent for contract, craft and clerical employees effective August 5, 1979, Mountain Bell properly booked monthly salary expense to reflect changes in the management salary plan made for certain management employees on January 1, 1979, and for all other supervisory and technical employees on October 1, 1979, is proper. These adjustments are found in the exhibits of Mountain Bell witness Shriver in Exhibit 4, Appendix C, page 33. The adjustment proposed by Mountain Bell witness Shriver annualized the cost of the 1979 wage increases for price alone, using only the average number of employees during the test period.

5. The effect of the Mountain Bell adjustments as proposed by its witness Shriver, is to place salary costs into the test year as if the increases had occurred on the first day of the test period using the average number of employees during the test period.

6. To measure productivity associated with wages, total revenue is divided by weighted man hours. Productivity obtained by Mountain Bell during the test period itself is inherently reflected in the revenues associated with that test period. That is why the proposal by Jamshed K. Madan, who appeared on behalf of Colorado Ski Country USA and Colorado-Wyoming Motel and Hotel Association (Ski Country), to reduce the in-period wage increase by a productivity offset, is inherently flawed. To deduct productivity that has already been included in Company revenues from the wage increase expense within the test period, the result in a double counting and a distortion of the matching relationship among revenue, expense, and investment. To adopt the type of adjustment proposed by Ski Country witness Madan would result in a utility which had the least amount of productivity being rewarded for not being productive. The more productive utility would be penalized by having its productivity double counted against it within the test year.

7. The Commission Staff audited Mountain Bell's records and took no exceptions to the in-period wage adjustments proposed by Mountain Bell and did not recommend an offset for productivity. On page 22 of Decision No. C80-1784 the Commission stated, "With certain exceptions to be noted below, the Commission finds the net operating expenses as ultimately found by the Staff are correct." The wage increase was not the only increase made by the Commission on an annualized basis. There were also adjustments made to dues, interest charged construction, capitalized overhead, advertising, end of period debt costs and customer deposits.

8. This Commission has made in-period test year adjustments in rate cases affecting Mountain Bell for a number of years. Since 1968, in Case No. 23116 through and including I&S 668, I&S 717, Application No. 25457, I&S 642, Application No. 26465, I&S 867, I&S 930, and I&S 1108, this Commission consistently has annualization adjustments for changes in

price for wage changes during the test period. It is in this docket, I&S 1400, that the Commission has been faced with the recommendation to reduce an in-period wage adjustment by productivity for the first time. For the reasons stated above, we reject this proposed adjustment.[1]

9. As indicated in the previous finding of fact, this Commission has allowed in-period wage adjustments for price only without a separate offset for in-period productivity since the in-period productivity is inherent in the revenues obtained by the Company.

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[1] It is essential to distinguish between productivity offset for an in-period wage increase and a productivity offset for an out-of-period wage increase. As already indicated in this decision, the in-period productivity is inherently measured by the receipt of revenues in the test period. However, a wage increase which takes effect outside of the test period must have some kind of productivity offset in order to maintain a proper matching relationship. In the 1973 case before the Colorado Supreme Court, also involving Mountain Bell and this Commission, the Colorado Supreme Court said at 182 Colo. 269, 275; 513 P.2d 721, 724:

> The relationship between costs, investment, and revenues in the historic test year is generally a constant and reliable factor upon which a regulatory agency can make calculations which formulate the basis for fair and reasonable rates to be charged. These calculations obviously must take into consideration in period adjustments which involve known changes occurring during the test period which affect the relationship factor. Out of period adjustments must also be utilized for the same purpose. An out-of-period adjustment involves a change which has occurred or will occur, or is expected to occur after the close of the test year. An increase in the public utility taxes effective after the test year is a good example of such an adjustment. Wages and salary increases which have been contracted for or which will take effect after the test year must also be annualized in the process of calculations. Such wage and salary increase may not exceed to any large extent the usual consequent increase in the productivity of the employees. If they do, which is generally the case in periods of uncontrolled inflation, then such out-of-period adjustment must be reckoned with in the rate fixing procedure. These are matters which must of necessity be of substantial concern to a rate fixing regulatory agency of the government when it considers all the evidence and all the factors available to it in a rate case.

It is clear that in the 1973 case, the Colorado Supreme Court was referring to a productivity offset to wage increase which were contracted for or took effect subsequent to the test year, not wage increases taking effect within the test year.

10. On page 51 of Decision No. C80-1784, issued in this Docket on September 16, 1980, we said, "This docket has been one of the most complex proceedings before this Commission in which a number of issues have been raised by various parties. To the extent that specific issues have been raised by parties which are not addressed specifically in this decision, the Commission states and finds that the particular treatment advanced with respect thereto by one or more of the parties does not merit adoption by this Commission in this docket." Inasmuch as the Commission in Decision No. C80-1784 did not address the particular issue of an in-period productivity offset advanced by Colorado Ski witness Madan, the foregoing quoted sentence from Decision No. C80-1784 indicates that the Commission rejected that proposed adjustment.

11. Inasmuch as the issue of the $506,000 over recovery only becomes important in accordance with the remand order of the Colorado Supreme Court in the event the Commission were to find that an in-period productivity offset is appropriate, and since we do not find that such an in-period productivity offset is appropriate, there is no need to change our previous findings, set forth in Decision No. C80-1784, with respect to the over-recovery issue.

## DISCUSSION

As indicated in the foregoing findings of fact, this Commission has made in-period test year adjustments for changes in price, for wage changes during the test period in a number of dockets involving Mountain Bell going as far back as 1968. As indicated in finding of fact No. 7, it was for the first time in this docket, I&S 1400, that an intervenor witness recommended that the in-period wage adjustment be reduced by an in-period productivity adjustment. As parties who appear before this Commission are aware, the number of issues brought to the Commission's attention during a major rate case are many. All of them are considered, and most of them will receive specific regulatory response in our decisions. However, in order to preclude our decisions from becoming inordinately long and complex, we do not believe it is an appropriate use of our time and resources to specifically respond to every issue that may be raised by the numerous parties in a major utility rate case. That is the reason that this Commission makes a finding of fact to the effect that if an issue is not specifically discussed, it is our finding that the specific treatment advanced by one or more of the parties does not merit adoption in the docket concerned.

It is interesting to note, however, that in the next major rate case involving Mountain Bell, the same witness, Mr. Madan, made an identical proposal for an in-period productivity offset. In Decision No. C82-1905, issued on December 7, 1982, involving Mountain Bell, the Commission specifically discussed this issue. On pages 54 and 55 of Decision No. C82-1905, the Commission said:

> G. 1981 Wages and Benefits
>
> As with all revenue and expense changes within the test period, Mountain Bell has annualized wage increases that became effective during the test period. Following past Commission practices, neither Mountain Bell nor the Staff of the Commission proposed a productivity offset to a test year wage increase. Georgetown Group Witness Madan again proposed an offset to the in-period wage increase annualization.

The evidence reflects that certain Mountain Bell employees received wage increases in April of 1981, and others received pay increases in August of 1981. Both the Company and the Staff of the Commission "annualized" these wage increases, i.e., revised wage expenses as if the rate of pay after the increases became effective was the rate of pay on the first day of the test period. The annualization method employed was identical to other expense changes, such as the two 1981 directory advertising rate increases that caused test period revenues to be adjusted upwards.

Mr. Madan's adjustment focuses on the 12 months following the effective date of a wage increase. Under this adjustment, a productivity offset is applied to that portion of the 12-month period not booked by Mountain Bell during the 1981 test year. Mountain Bell submits, and we agree, that Mr. Madan has not provided any rationale supporting the need to focus on the first 12 months after a wage increase. The purpose of an annualization adjustment is to take a price level change during the test year and adjust the year as if that price were in effect on the first day of the test period. Test year volumes, therefore, remain unchanged. This annualization is necessary for both revenues and expenses. In this manner, the Commission is presented with a full 12 months of revenue-to-expense relationships more consistent with the revenue-to-expense relationships that will exist when rates authorized will be effective. Nothing in this process suggests that an annualization adjustment should somehow be modified by focusing on the first 6 months, 12 months, or 18 months that the revenue or expense level is booked by the utility.

Mountain Bell submits that all productivity increases realized by Mountain Bell in Colorado are reflected in 1981 operating results presented to the Commission as the test year in this proceeding. The Company and Staff wage annualization adjustment merely recasts the 1981 test year as if the wage levels increased during the year were effective from the first day of the year. No rationale has been presented to treat in-period wage annualizations in a manner different than other price level changes during the test year. Further, by focusing on the 12 months after a wage increase becomes effective (for whatever reason), and proposing to offset with a productivity adjustment that portion of the first 12 months not paid in the test year, Mr. Madan seeks to have productivity gains after the test period applied to wage increases annualized in the test year. This ignores the capital and other expenses attendant to productivity gains during the year 1982 and consequently we are of the opinion that Mr. Madan's adjustments would constitute a regulatory mismatch. Accordingly, we adopt the position of Mountain Bell and the Staff, consistent with our treatment in I&S

Docket No. 1400, and reject the theory that an in-period wage annualization must be offset in part by a productivity factor. As a result of our acceptance of Mountain Bell's and the Staff's position with respect to 1981 wages and benefits, the booked net operating earnings of the Company are reduced by $4,455,000.

CONCLUSIONS ON FINDINGS OF FACT

The Colorado Supreme Court in its remand order of August 1984, has instructed the Commission to make explicit its findings with respect to the in-period productivity offset issue, and if a change is to be made with respect to that issue, to reconsider the issue involving the over recovery by Mountain Bell of some $506,000 in revenues. As indicated in the above findings of fact, the Commission has found that an in-period productivity offset would distort the matching relationship and result in a disincentive, rather than an incentive, for productivity. This, of course, would be advantageous neither to Mountain Bell nor to its ratepayers. We conclude that a separate in-period productivity offset to the wage increases would result in double counting, distorting a proper matching relationship, and would be harmful both to Mountain Bell and its ratepayers. Accordingly, it is rejected. As a result of the fact that we are not making any adjustment for an in-period productivity offset to the Mountain Bell wage increase, the issue with respect to the $506,000 excess revenues also becomes moot.

THEREFORE THE COMMISSION ORDERS THAT:

1. The findings of fact and conclusions thereon, as set forth above in this decision, are adopted as the findings of fact and conclusions thereon, nunc pro tunc as of September 16, 1980, in this docket.

2. This supplemental decision and order shall be considered a final decision subject to the procedural provisions of §§ 40-6-114 and 40-6-115, C.R.S.

3. The 20-day time period provided for pursuant to § 40-6-114 (1), C.R.S., within which to file an application for rehearing, reargument, or reconsideration shall begin to run on the first day following the mailing or serving by the Commission of this decision.

This Order shall be effective forthwith.

DONE IN OPEN MEETING the 20th of August 1985.

(S E A L)

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

EDYTHE S. MILLER

RONALD L. LEHR

Commissioners

COMMISSIONER ANDRA SCHMIDT ABSENT

ATTEST: A TRUE COPY

Harry A. Galligan, Jr.
Executive Secretary

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing OPEN BRIEF OF PETITIONER-APPELLANT, COLORADO MUNICIPAL LEAGUE was deposited in the United States mail, postage prepaid, this 11th day of December, 1986, addressed as follows:

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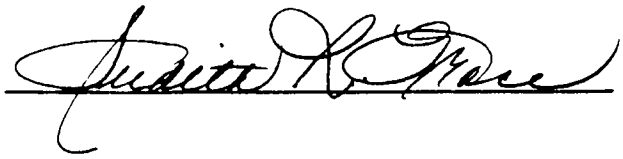

BEFORE THE PUBLIC UTILITIES COMMISSION, STATE OF COLORADO

Investigation and Suspension Docket No. 1400

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COMMENTS OF STAFF

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RE: INVESTIGATION AND SUSPENSION OF PROPOSED CHANGES IN TARIFF -- COLORADO PUC NO. 5 - TELEPHONE -- THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, DENVER, COLORADO, 80202

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This matter is before the Commission on remand by the Colorado Supreme Court in Colorado Municipal League v. Public Utilities Commission, 687, P.2d 416 (1984). In its opinion in the Colorado Municipal League case, the Supreme Court affirmed the Commission on two issues and reversed and remanded on one, that being on the annualization of in-period wage and salary increases to clerical, craft and management employees. The Supreme Court reversed because the Commission in its decision permitted the annualization of three in-period wage and salary increases without an offset for productivity and made no findings of fact explaining why no offset for productivity was warranted. The wage and salary increases during the test period consisted of the following: there was an increase in wages of 11.4% for craft and clerical employees that became effective August 5, 1979, an increase in salaries for certain management employees effective on January 1, 1979 and an increase in

salaries for other supvisory and technical employees effective October 1, 1979.

The evidence in I&S Docket No. 1400 on the issue of in-period wage and salary increases, the annualization of same and in-period productivity offset is quite sparse.

The in-period adjustment for wage and salary increases was proposed by Mountain Bell witness Monte Shriver. Mr. Shriver's testimony on direct was marked as Exhibit D (R.01437-01463). There is no direct testimony by Mr. Shriver on the subject of the annualization of the three in-period wage and salary increases or on in-period productivity. Mr. Shriver's supporting exhibit was marked as Exhibit 4(R.02193-02249). The adjustment to the income statement for in-period wage and salary increases is shown on Exhibit 4, Appendix C, page 32, Column A (R.02226), and the individual wage and salary increases making up the adjustment is explained on the following page, page 33 (R.02227). As a result of the in-period wage and salary increase annualization net operating earnings was reduced $5,703,000. Mr. Shriver was cross-examined by Tucker Trautman, attorney for the Colorado Ski Country USA and Colorado-Wyoming Hotel and Motel Association. Mr. Trautman's cross-examination of Mr. Shriver appears in the transcript of the hearing for May 21, 1980 at pages 261 through 282. The only explanation given by Mr. Shriver as to why no offset for productivity was warranted when an in-period adjustment

was made for increases in wages and salary is contained in the following exchange between Mr. Trautman and Mr. Shriver:

> Q. (By Mr. Trautman) Now, just to compare this for a moment with the out-of-period adjustments that you made. Let me take a hypothetical. Let's assume that we have -- we have got a test year that ends October 31, 1979, and let's assume that we have an in-period change in wages on October 1, 1979, the last month.
>
> You would make no productivity offset in calculating that adjustment, isn't that correct?
>
> A. That's correct, because all of the productivity that would have been experienced has been experienced in the test year.

The Supreme Court, in its opinion in the Colorado Municipal League case rejected Mr. Shriver's answer as being nothing more than an estimation of the legal effect of a prior Colorado Supreme Court opinion on out-of-period wage and salary adjustments. In its opinion in the Colorado Municipal League case, the court stated:

> In context, it becomes apparent that this is more an estimation of the legal effect of our holding in Mountain States Tel. & Tel. Co. v. PUC, 182 Colo. 269, 513 P.2d 721 (1973), that productivity gains generally must be offset against out-of-period wage increases, than a statement of fact or expert opinion.

687, P.2d at 425-426. Thus, the record in I&S Docket No. 1400

contains no evidence by Mountain Bell acceptable to the Supreme Court explaining why a productivity offset was not warranted when in-period wage and salary increases were annualized.

Since Staff in I&S Docket No. 1400 accepted Mountain Bell's adjustment for in-period wage and salary increases without an offset for productivity, there was no Staff adjustment to Mountain Bell's adjustment and thus no direct testimony by Staff on the issue. Staff witness Eric L. Jorgensen, however, was asked on cross-examination about the Staff's audit of the in-period wage and salary adjustment made by Mountain Bell as follows:

> Q. (By Mr. Hyer) Mr. Jorgensen, during the course of the audit did you have an opportunity, sir, to review 1979 and 1980 wage adjustments of the company to see whether or not they had been made by the company in a fashion consistent with previous Commission and Supreme Court orders?
>
> A. Yes, myself and a colleague did that.
>
> Q. And what did you conclude?
>
> A. We concluded that the adjustments made on the '79 wage package were proper

Transcript for July 11, 1980, at page 79. However, Mr. Jorgensen was not asked and did not testify as to the propriety or impropriety of any productivity offset to the in-period wage and salary adjustments.

Consequently, there is no evidence in I&S Docket No. 1400 to which the Commission may turn to make findings of fact as to why no productivity offset is warranted when in-period wage and salary increases are annualized.

The issue of offsetting adjustments for in-period wage and salary increases by in-period productivity was raised by Mr. Jamshed K. Madan, who was sponsored as an expert witness by the Colorado Ski Country USA and the Colorado-Wyoming Hotel and Motel Association. Mr. Madan's pre-filed direct testimony was marked as Exhibit Q (R.02052-02112) and his supporting exhibit was marked as Exhibit 84 (R.03054-03085). Mr. Madan's direct testimony on the issue appears at pages 45 through 48 of Exhibit Q (R. 02098-02101) and at schedule 9, page 1 (R.03066). On the witness stand Mr. Madan summarized his written direct testimony. His summary on this issue appears at pages 150-151 of the July 16, 1980 transcript volume. Cross-examination of Mr. Madan on the in-period wage and salary increase adjustment appears at pages 195-198 of the July 16, 1980 transcript volume.

Thus, the state of the record in I&S Docket No. 1400 is that there is no evidence that would support findings of fact that an adjustment to the income statement for in-period wage and salary increases should be allowed without an offset for productivity, which would comply with the mandate of the Supreme Court on remand. In its opinion on

this issue, the Supreme Court wrote, in part:

> We conclude that annualization of test period wage increases alone strongly suggest that the PUC has abused its discretion, rather than regularly pursuing its authority. We must, however, compare what the PUC has said to what it has done to ascertain whether it has made findings justifying this irregular action. The only indication in its order that the PUC impliedly adopted the annualization of wage increases and impliedly rejected any productivity offset is the incorporation by reference of Mountain Bell's income statement. There is no finding whether the wage increases unbalanced the relationships between investment, revenues and expenses. This is insufficient...the critical defect in the PUC's order is the absence of adequate findings supporting its decision to annualize in-period wage increases without annualizing other components of expense and revenue...
>
> A review of the relevant testimony before the Commission emphasizes the need for factual findings in order to enable us to evaluate the appropriateness of the annualization of in-period increases. The Colorado Ski Country consultant calculated that annualization of historical productivity gains would offset the proposed annualization of wage increases by $3,389,000, or fifty-nine percent. He recommended that PUC adopt this offset. Mountain Bell included a productivity offset for its proposed adjustment covering wage increases effective <u>after</u> the test period, but no offset for those effective during the test period. . . .

> We offer no guidance to the PUC in the resolution of this issue, except to say that its order is arbitrary and capricious in annualizing test period wage increases with no accompanying adjustment or offset for other changes in absence of adequate findings of fact.

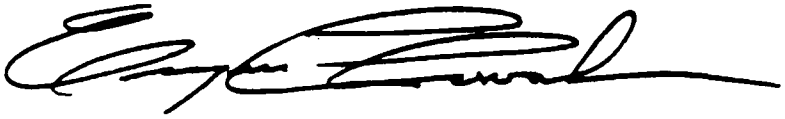
687, P.2d at 425-426.

On the other hand, there is ample evidence in the record in the form of testimony of Mr. Madan (Exhibit Q) and Exhibit 84 to support a finding that any annualization of in-period wage and salary increases should be offset by a separate productivity offset. Although the only evidence in the record on this subject was provided by Mr. Madan, the Commission is not bound to accept Mr. Madan's testimony as believable, if it concludes that such testimony is erroneous, incorrect, unsupported, etc. Mountain States Telephone and Telegraph Company v. Public Utilities Commission, 195 Colo. 130, 576 P.2d 544 (1978).

In the event the Commission does not accept Mr. Madan's testimony and methodology on this subject then the Commission is faced with several options. First, it may make findings of fact allowing the in-period wage and salary adjustments to the income statement without any offset for productivity. The Staff, however, is of the opinion that there is no evidence in the record in I&S Docket No. 1400 to support such findings of fact. A second option would be to make no findings of fact on the subject at all because of a lack of

acceptable evidence. However, Staff is of the opinion that the remand order of the Colorado Supreme Court in the Colorado Municipal League case does not leave this option to the Commission. A third option would be for the Commission to enter findings of fact rejecting the in-period wage and salary adjustment as unsupported by competent evidence in the record as to why it should be allowed in the absence of offsetting adjustments referred to by the Supreme Court in its opinion. A fourth option would be for the Commission to take additional evidence on the issue, and based upon such additional evidence enter findings of fact to resolve the issue.

FOR THE ATTORNEY GENERAL



DATED: July 12, 1985

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CERTIFICATE OF SERVICE

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I hereby certify that a true and correct copy of the foregoing OPEN BRIEF OF PETITIONER-APPELLANT, COLORADO MUNICIPAL LEAGUE was deposited in the United States mail, postage prepaid, this 16th day of December, 1986, addressed as follows:

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