2-19-1987

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

COLORADO SUPREME COURT

Case No. 86 SA 347

ANSWER BRIEF OF RESPONDENTS-APPELLANTS, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, ANDRA SCHMIDT, AND RONALD L. LEHR.

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.

ON APPEAL FROM THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER NO. 85-CV-13192

THE HONORABLE ROBERT P. FULLERTON, DISTRICT COURT JUDGE

DUANE WOODARD
Attorney General

CHARLES B. HOWE
Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

JOHN E. ARCHIBOLD
Special Assistant Attorney General

Attorneys for the Public Utilities
Commission of the State of Colorado
State Services Building - 5th Floor
1525 Sherman Street
Denver, Colorado 80203

Reg. No. 4388
Telephone No.: 866-1388

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PRELIMINARY STATEMENT

In this Answer Brief the parties will be referred to as follows; Petitioner-Appellant, Colorado Municipal League will be referred to as "League"; Respondent-Appellee, the Public Utilities Commission of the State of Colorado, together with the individual Commissioners thereof, will be referred to as "the Commission" or "the PUC"; the Mountain States Telephone and Telegraph Company will be referred to as "Mountain Bell".

If references are made to the records certified to the District Court, it shall be done by folio number as (f.____). If references are made to the transcript of testimony, it will be cited as Tr. _____, dated _____, p._____).

LEGAL ISSUE PRESENTED FOR REVIEW

Whether or not the Denver District Court erred in its judgment affirming the Commission in its Decision No. C85-1080 dated August 20, 1985.

STATEMENT OF THE CASE

An extended statement of the case is not necessary. The history of this case is set forth in this Court's decision and opinion in Colorado Municipal League v. Public Utilities Commission of the State of Colorado, 687 P.2d 416 (1984). In an appeal of a Mountain Bell rate decision, this Court held that the Commission's original rate order was arbitrary and capricious in annualizing test period wage increases with no accompanying adjustment or offset for other changes in the absence of adequate findings of fact (p. 426). This Court also held that the Commission's characterization of $506,000. of excess revenues in the test period as de minimus was marginally acceptable and would not merit reversal for that reason alone. However, the $506,000. of excess revenues issued was remanded to the Commission to be considered together with the remanded issue of the in-period wage annualization issue. On remand, the Commission made the determination that it could issue a supplemental order setting forth its findings concerning the annualization issue and the de minimus issue without the necessity of taking additional testimony. In other words, these issues could be appropriately determined and additional findings made, on the basis of the original record in Investigation and Suspension Docket No. 1400, which was the Mountain Bell docket with respect to its 1980 rate case.

Decision No. C85-1080, dated August 20, 1985, is the Commission's supplemental decision pursuant to the remand order of this Court. Decision No. C85-1080, dated August 20, 1985, re-adopted and

republished Decision No. C80-1784 nunc pro tunc as of September 16, 1980, and, in addition, made the necessary supplemental findings of fact as to the annualization and de minimus issues. The Colorado Municipal League (League) sought judicial review of the Commission's supplemental decision (C85-1080; August 20, 1985) in the Denver District Court. The Denver District Court affirmed Commission Decision No. C85-1080. The League then appealed the Denver District Court's decision to this Court.

SUMMARY OF THE ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN ITS JUDGMENT AFFIRMING DECISION NO. C85-1080 DATED AUGUST 20, 1985;

A. Standards of Review Applicable to a Commission Decision.

1. In reviewing a Commission decision, the District Court is required to decide all relevant questions of law but may engage in only a limited review of fact findings to determine whether the decision is just and reasonable and in accordance with the evidence. Union Rural Electric Association v. Public Utilities Commission, ____Colo.____, 661 P.2d 247, 251 (Colo. 1983).

2. The orders of the PUC are presumed to be reasonable and valid. Caldwell v. Public Utilities Commission, ____Colo.____, 613 P.2d 328 (1980); Colorado Municipal League v. Public Utilities Commission, 198 Colo. 217, 597 P.2d 586 (1979); Contact Colorado Springs, Inc., v. Mobile Radio Telephone Service, Inc., 191 Colo. 180, 551 P.2d 203 (1976); Public Utilities Commission v. Northwest Water Corporation, 168 Colo. 154, 451 P.2d 266 (1969); Public Utilities Commission v. District Court, 163 Colo.462, 431 P.2d 773 (1967); and CB&Q RR Co. v. Public Utilities Commission, 68 Colo. 475, 190 P. 539 (1920).

3. The scope of Court review is limited to clear abuses of the Public Utilities Commission's discretion. Colorado Municipal League v. Public Utilities Commission, 197 Colo. 106, 591 P.2d 577 (1979).

4. The burden of showing the improprieties or illegality of the Commission order is upon the party attacking the order. See Public Utilities Commission v. Weicker Transportation Co., 102 Colo. 211, 78 P.2d 633 (1938).

5. Where there is competent evidence in the record as a whole to support the orders of the Commission, those orders will not be modified or set aside by the Courts, nor may any reviewing Court substitute its judgment for that of the Commission: Public Service Company v. Public Utilities Commission, et al., ____Colo.____, 644 P.2d 7 (1982); ____Colo.____, 653 P.2d 1117 (1982); Pollard Contracting Co. v. Public Utilities Commission, ____Colo.____, 644 P.2d 7 (1982); Colorado-Ute Electric Association v. Public Utilities Commission, 198 Colo. 534, 602 P.2d 861 (1979); Mobile Pre-Mix Transit v. Public Utilities Commission, ____Colo.____, 618 P.2d 663 (1980); Rocky Mountain Natural Gas Company v. Public Utilities Commission, 199 Colo. 352, 617 P.2d 1175 (1981); Sangre de Cristo Electric Association v. Public Utilities Commission, 185 Colo. 321, 524 P.2d 309 (1974); North Eastern Motor Freight, Inc., v. Public Utilities Commission, 178 Colo. 433, 498 P.2d 923 (1972); Public Utilities Commission v. Northwest Water Corporation, 168 Colo. 154, 451 P.2d 266 (1969); Airport Limousine Service, Inc., and Public Utilities Commission v. Cabs, Inc., dba Zone

Cab Company, et al., 167 Colo. 378, 447 P.2d 978 (1968); B.D.C. Corporation of Colorado v. Public Utilities Commission, 167 Colo. 472, 448 P.2d 615 (1968); Southeast Colorado Power Association v. Public Utilities Commission, 163 Colo. 92, 428 P.2d 939 (1967); Public Utilities Commission v. City of Loveland, 87 Colo. 556, 289 P. 1090 (1930)

6. A reviewing Court will not substitute its judgment for that of the Commission where there is conflicting testimony and disputed issues of fact. Caldwell v. Public Utilities Commission, ____Colo.____, 613 P.2d 328 (1980); Colorado-Ute Electric Association v. Public Utilities Commission, 198 Colo. 534, 602 P.2d 861 (1979); Contact-Colorado Springs, Inc., v. Mobile Radio Telephone Service, Inc., 191 Colo. 180, 551 P.2d 203 (1976); Answerphone, Inc., and Mobile Radio Telephone Service, Inc., v. Public Utilities Commission, et al., 185 Colo. 175, 522 P.2d 1229 (1974); North Eastern Motor Freight, Inc., v. Public Utilities Commission, 178 Colo. 433, 498 P.2d 923 (1972); and Yellow Cab, Inc., v. Public Utilities Commission, 169 Colo. 357, 455 P.2d 877 (1969); Parrish v. Public Utilities Commission, 134 Colo. 192, 301 P.2d 343 (1956).

7. The evidence in the record must be reviewed in the light most favorable to the Commission's findings and decision. Peoples Natural Gas Division of Northern Natural Gas Company v. Public Utilities Commission, 193 Colo. 421, 567 P.2d 377 (1977).

8. Certain findings of the Commission may be implied. Caldwell v. Public Utilities Commission, ____Colo.____, 613 P.2d 328, 333 (1980); Colorado Municipal League v. Public Utilities Commission, 172 Colo. 188, 197; 473 P.2d 960 (1970); City and County of Denver v. People, ex rel. Public Utilities Commission, 129 Colo. 41, 46, 226 P.2d 1105 (1954).

9. A Court may not set aside findings of fact made by the Commission and supported by substantial evidence. Public Utilities Commission v. City of Loveland, 87 Colo. 556, 289 P.1090 (1930).

10. The Court cannot make new findings in a proceeding to review a Commission decision. Public Utilities Commission v. Colorado Interstate Gas Co., 142 Colo. 361, 351 P.2d 241 (1960).

11. The Court may not overturn the Commission's decision on a disputed factual question. Eveready Freight Service, Inc., v. Public Utilities Commission, 167 Colo. 577, 449 P.2d 642 (1969); B.D.C. Corporation of Colorado v. Public Utilities Commission, 167 Colo. 472, 448 P.2d 615 (1968); Consolidated Freightways Corporation of Delaware, et al., v. Public Utilities Commission, 158 Colo. 239, 406 P.2d 83 (1965); Public Utilities Commission, et al., v. Harold E. Watson, Jr., dba Watson Transport Company, 138 Colo. 108, 330 P.2d 138 (1958); and Glenwood Light and Water Company, et al., v. City of Glenwood Springs, 98 Colo. 340, 55 P.2d 1339 (1936).

12. The credibility of the witnesses and the weight to be accorded their testimony is peculiarly within the province of the Commission and to choose from conflicting inferences which may be drawn therefrom. Morey v. Public Utilities Commission, ____Colo.____ 629 P.2d 1061 (1981); North Eastern Motor Freight, Inc., v. Public Utilities Commission, 178 Colo. 433, 498 P.2d 923 (1972); and Contact-Colorado Springs, Inc., v. Mobile Radio Telephone Service, Inc., 191 Colo. 180, 551 P.2d 203 (1976).

13. A reviewing Court must search the record for evidence favorable to the prevailing party below. North Eastern Motor Freight, Inc., v. Public Utilities Commission, 178 Colo. 433, 498 P.2d 923 (1972); Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968); Adler v. Adler, 167 Colo. 145, 445 P.2d 906 (1968).

14. A reviewing Court will defer to the expertise of the Commission in its exercise of judgment, evaluation and analysis. City of Montrose v. Public Utilities Commission, ____Colo.____, 629 P.2d 619 (1981); Morey v. Public Utilities Commission, ____Colo.____, 629 P.2d 1061 (1981); Mobile Pre-Mix Transit v. Public Utilities Commission, ____ Colo.____, 618 P.2d 663 (1980); Atchison, Topeka and Santa Fe Railway Company v. Public Utilities Commission, 194 Colo. 263, 572 P.2d 138 (1977); and Peoples Natural Gas Division of Northern Natural Gas Company v. Public Utilities Commission, 193 Colo. 421, 567 P.2d 377 (1977).

15. The Commission can take notice of other evidence in its files, annual statements, and data gathered through its own investigation. Consolidated Freightways Corporation of Delaware, et al., v. Public Utilities Commission, 158 Colo. 239, 406 P.2d 83 (1965).

16. Even though evidence presented to the Commission may not be contradicted, the Commission is not bound to believe it. Mountain States Telephone and Telegraph Company v. Public Utilities Commission, 195 Colo. 130, 576 P.2d 544, 553 (1978).

17. The Commission is not bound by one of its prior decisions, or by any doctrine similar to that of stare decisis. Colorado-Ute Electric Association v. Public Utilities Commission, 198 Colo. 534, 602 P.2d 861 (1979); Rumney v. Public Utilities Commission, 172 Colo. 314, 472 P.2d 149 (1970); B.D.C. Corporation of Colorado v. Public Utilities Commission, 167 Colo. 472, 448 P.2d 615 (1968); B&M Service, Inc., v. Public Utilities Commission, 163 Colo. 228, 429 P.2d 293 (1967).

18. Judicial review of a Commission decision is limited to the record made before the Commission and the Court is without authority to conduct a de novo hearing on evidence which was not presented to the Commission. Colorado Municipal League v. Public Utilities Commission, 197 Colo. 106, 115, 591 P.2d 577 (1979); Mountain States Telephone and Telegraph Company v. Public Utilities Commission, 182 Colo. 269, 513 P.2d 721 (1973); Eveready Freight Service, Inc., v. Public Utilities Commission, 131 Colo. 172, 280 P.2d 442 (1955).

19. When a finding of the Commission can be inferred from other findings of the Commission, it can be treated as if the Commission had made an express finding of fact. See Caldwell v. Public Utilities Commission, ___Colo.___, 613 P.2d 328 (1980); Colorado Municipal League v. Public Utilities Commission, 172 Colo. 188, 473 P.2d 960 (1970); City and County of Denver v. People, ex rel., Public Utilities Commission, 129 Colo. 41, 226 P.2d 1105 (1954).

20. The Commission has a general responsibility to protect the public interest regarding utility rates and practices. City of Montrose v. Public Utilities Commission, ___Colo.___, 629 P.2d 619 (1981); Public Utilities Commission v. District Court, 186 Colo. 278, 527 P.2d 233 (1974); Consolidated Freightways Corporation of Delaware v. Public Utilities Commission, 158 Colo. 239, 406 P.2d 83 (1965); see Section 40-3-101(2), C.R.S. In fulfilling that function in the area of utility regulation, the Commission has "broadly based authority to do whatever it deems necessary or convenient to accomplish the legislative functions delegated to it." Mountain States Telephone and Telegraph Company v. Public Utilities Commission, 195 Colo. 130, at 135, 576 P.2d 544 at 547. Also Peoples Natural Gas Division of Northern Natural Gas Company v. Public Utilities Commission, ___Colo.___, 698 P2d 255, 263 (1985).

21. It is the result reached, not the method employed, which determines whether a rate is just and reasonable. City of Montrose v.

Public Utilities Commission, ___Colo.___ 629 P.2d 619 (1981); Colorado-Ute Electric Association v. Public Utilities Commission, 198 Colo. 534, at 539, 602 P.2d 861 at 864.

B. The District Court correctly declined to substitute its judgment for that of the Commission concerning the issues remanded for consideration by the Colorado Supreme Court.

In a major rate case involving Mountain Bell, which was appealed to this Court, this Court remanded the matter to the Commission only on two issues, one of which (the de minimus $506,000 revenue requirement) was contingent upon the Commission's further consideration of the wage annualization issue. Both of these issues can be quickly disposed of by reference to what this Court said in its decision, and what this Commission did in response to this Court's decision.

On page 425 of 687 P.2nd, this Court said that 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. This Court said that, that alone was not adequate and that the matter would have to be remanded to the Commission to make adequate findings of fact. With respect to this issue, this Court specifically indicated that it was offering no guidance to the Commission in the resolution of this issue except to say that its original order was arbitrary and capricious in

annualizing test period wage increases with no accompanying adjustment or offset for other changes in the absence of adequate findings of fact. By its supplemental decision in Investigation and Suspension Docket No. 1400 set forth in Decision No. C85-1080, dated August 20, 1985, the Commission has set forth its findings of fact and rationale as to why it rejected the productivity offset proposed by the Colorado Ski Country consultant. These supplemental findings of fact, as required by this Court, may not be agreeable to the League, but the League has failed to cite any statutory or case law authority for the proposition that a reviewing court can substitute its findings and judgement for that of the Commission. The "boiler-plate" Standards of Review set forth above are all to the contrary.

The League complains that the Commission adopted the same rationale as used by Mountain Bell witness Schriver in not calculating an in-period wage adjustment offset, namely that productivity is inherent in the revenues obtained by Mountain Bell in the test year. The League contends that this Court rejected Mr. Schriver's analysis. In fact, a careful reading of this Court's decision will show this Court believed that Mr. Schriver's statement, in context, was more an estimation of the legal effect of this Court's holding in Mountain States Telephone and Telegraph Company v. PUC, 182 Colo. 269, 513 P.2nd 721 (1973), that productivity gains generally must be offset against out-of-period wage increases than a statement of fact or expert opinion. But as the findings of fact set forth in the Commission's supplemental decision clearly indicate, it did not rely exclusively upon Mr. Schriver's

statement as the Commission's justification for rejecting an in-period productivity offset. The Commission also made the additional findings that an in-period productivity offset would result in a double counting and distortion of the matching relationship among revenue, expense, and investment within the test period and also result in a utility which had the least amount of productivity being rewarded for not being productive while the more productive utility would be penalized by having its productivity double counted against it within the test year. As indicated above, the League may not like these findings of the Commission or agree with them, but it is not the province of a reviewing court to substitute its economic findings of fact for that of the Commission.

On page 11 of its Opening Brief, the League makes reference to several statements from a member of the Attorney General's staff, Eugene Cavaliere, to the effect that there is no evidence in the docket (I & S 1400) that would support a finding 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 this Court. The League complains that the Commission's supplemental decision and its action on remand ignore the unequivocal and compelling words of its previous counsel about the status of the original record. However, it is quite clear that the Commission is not legally required to adopt the view set forth by counsel for the staff, but may make its own evaluation and judgement of the facts which is precisely what happened on remand. The Court will note from Standard of Review No. 16 above that even though evidence is presented to the Commission and

may be uncontradicted, the Commission is not bound to believe it. Mountain States Telephone and Telegraph Company v. Public Utilities Commission, 195 Colo. 130, 576 P.2nd 544, 553 (1978). If the Commission is not bound to believe uncontradicted evidence, it certainly goes without saying that it is not bound to believe contradicted argument.

II. THE DENVER DISTRICT COURT WAS CORRECT IN REFUSING TO PERMIT THE DEPOSITION OF CHAIRMAN LEHR.

During the course of litigation before the Denver District Court, the League attempted to take the deposition of Chairman Lehr. The Commission filed a motion for a protective order to prevent the League from taking Chairman Lehr's deposition, which motion was granted by the Denver District Court.

It is true that the League, in its motion to take the deposition of Chairman Lehr, appended the affidavits of two of the legal assistants employed in the law firm of counsel for the League. Nothing in these affidavits makes a clear showing of illegal or unlawful action, misconduct, bias or bad faith on the part of one or more of the Commissioners nor of a specific violation of any applicable statute. It was also interesting to note that paragraph five of the affidavit of Ellen R. Mitchum stated that John Archibold and Michael Homyak agreed on a legal matter at the Commission's open meeting on August 13, 1985. In fact, John Archibold was not in attendance at the Commission's open meeting on August 13, 1985, as he was on active military duty at Fort Carson, Colorado on that date. In any event, the District Court was quite correct in denying the League's motion to take the deposition of Chairman Lehr.

The League filed its case for judicial review in the Denver District Court pursuant to the provisions of § 40-6-115, C.R.S. Subsection 1 of § 40-6-115, C.R.S. states:

> Within thirty days after the application for a rehearing, reargument, or reconsideration is denied by the commission, the applicant may apply to the district court for a writ of certiorari or review for the purpose of having the lawfulness for the final decision inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of issuance and shall direct the commission to certify its record in the proceeding to the court. On the return day, the cause shall be heard by the district court, unless, for a good reason shown, the same be continued. No new or additional evidence may be introduced in the district court, but the cause shall be heard on the record of the commission as certified by it. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings. (emphasis supplied.)

The procedure under § 40-6-115, C.R.S., is exclusive as is indicated by a perusal of § 40-6-114(4), C.R.S., which states:

> When an application for rehearing, reargument, or reconsideration of any decision of the commission as been made and has been denied, or after rehearing, reargument, or reconsideration otherwise disposed of by the commission, a suit to enforce, enjoin, suspend, modify, or set aside such decision, in whole or in part, may be brought in a district court of the state of Colorado, as set forth in this article, but not otherwise. (emphasis supplied.)

The two above-quoted statutory provisions make clear that since the District Court's review, on the record as certified by the Commission was the League's exclusive remedy, and due to the further fact that no additional or new evidence could be introduced in the District Court, nothing could have been gained by way of a deposition of one of the party defendants, namely one the three Commissioners. Discovery, of course, is utilized prior to a trial. But since there was no trial de novo before

the Denver District Court, the utilization of one of the means of the discovery by the plaintiff would not only have been meaningless, but also inappropriate.

This court has already ruled in the case of Public Utilities Commission v. District Court, 163 Colo. 462, 431 P.2nd 773 (1967), that officials of an administrative agency cannot be compelled to testify concerning the procedure or manner in which they made their findings and rendered a decision in the case. The only exception to the rule is where an allegation has been made and there is a clear showing of illegal or unlawful action, misconduct, bias or bad faith on the part of the Commissioners or a specific violation of the applicable statute. The 1967 case just cited was a clear bar to the League's taking Chairman Lehr's deposition.

In the relatively recent case of Peoples Natural Gas v. the Public Utilities Commission, 626 P.2d 159 (1981), in a case wherein the plaintiff sought the deposition of an attorney for the Staff of the Public Utilities Commission this Court on page 163 of the P.2d Reporter stated:

> "[10] The deposition was request as part of a post-hearing, pre-appeal administrative proceeding. This situation is not comparable to pretrial discovery, during which the rules of civil procedure are generally read to favor the production of information that may be relevant to the subject matter of the action at hand. See C. Wright, Law of Federal Courts. § 81 (3d ed. 1976). Here the Commission had considerable discretion in deciding

> whether or not Vermuelen's deposition was required. See C.R.C.P. 27(b). We therefore conclude that in a post-hearing pre-appeal administrative proceeding, discovery should be available as a matter of right only if the party alleging procedural irregularities first shows by affidavits or other substantial evidence that there is good cause to believe that ex parte communications, personal bias, or other impermissible considerations played a part in the tribunal's decision. (emphasis supplied.)

In the words of the Peoples case, there was no affidavit or other substantial factual evidence that there was good cause to believe that ex parte communications, personal bias, or other impermissible considerations played a part in the tribunal's decision. Accordingly, the Denver District Court was correct in finding that there was no basis upon which to proceed with a deposition under the rule laid down in the Public Utilities Commission v. District Court case cited above.

CONCLUSION

In conclusion, it is abundantly clear that the Denver District Court was correct in affirming the supplemental decision of the Commission in Investigation and Suspension Docket No. 1400 which supplemental decision the Commission rendered in compliance with this Court's order of remand to make findings upon in-period wage and salary adjustment vis-a-vis productivity issue and the de minimus issue. In affirming of the Commission, the Denver District Court complied with the numerous cases with which this court is quite familiar and which have been cited above in this brief. With respect to the issue of the taking of the deposition of Chairman Lehr, the League has cited no statutory or case law authority which would have empowered the Denver District Court to order the taking of Chairman Lehr's deposition in the circumstances of the Commission's entering a supplemental decision. In fact, as indicated above, the case law in this state is to the contrary and the Denver District Court was correct in following established legal precedent with respect to this issue. Accordingly, the Commission prays that this court will affirm the decision of the Denver District Court which in turn affirmed the decision of the Commission upon remand.

Respectfully submitted,

DUANE WOODARD
Attorney General

CHARLES B. HOWE
Chief Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

JOHN E. ARCHIBOLD
Special Assistant Attorney General

BY _____
John E. Archibold, #4388
ATTORNEYS FOR THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF COLORADO
Logan Tower, OL2
1580 Logan Street
Denver, CO 80203
Telephone No: (303)866-3188

February 20, 1987

I hereby certify that, on this 20th day of February 1987, I served the foregoing ANSWER BRIEF OF RESPONDENTS-APPELLANTS, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, ANDRA SCHMIDT, AND RONALD L. LEHR by depositing a true and correct copy thereof in the United States mail, postage prepaid to the following:

Mr. Leonard M Campbell
Gorsuch, Kirgis, Campbell,
Walker and Grover
1401 - 17th Street, Suite 1100
P.O. Box 17180 TA
Denver, Colorado 80217-0180

Coleman M. Connolly, Esq.
Mountain States Telephone
and Telegraph Company
1801 California Street #5100
Denver, CO 80202

Linda L. Mitchell
Staff Assistant I

lm:1676P