Decision No. C92-0611-Revised

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

CASE NO. 6402

LARRY D. O'BRYANT,

Complainant,

v.

U S WEST COMMUNICATIONS, INC.,

Respondent.

FINAL COMMISSION ORDER:
(1) GRANTING MOTION FOR ATTORNEY'S FEES; AND,
(2) REMANDING CASE TO ADMINISTRATIVE LAW JUDGE.[1]

Mailing date: January 13, 1993
Adopted date: January 13, 1993

I. SUMMARY

For representing the public interest, Complainant Larry D. O'Bryant is entitled to recover reasonable legal fees from Respondent U S West Communications, Inc. ("U S West").

At the administrative level, Mr. O'Bryant established that it was improper for U S West to cut off all telephone service to a consumer who owed money to his long-distance telephone carrier, but who had paid his local exchange bill to U S West in full. O'Bryant thereby achieved an important result at the administrative law level for all consumers, by ensuring that U S West may not disconnect its customers' vital local telephone service because of billing disputes between a customer and a long-distance provider for whom U S West was performing contract

[1] The Commission issues this revised version of our Decision No. C92-611 to reflect, in part, the concerns expressed in O'Bryant's Petition for Rehearing, Reargument, and Reconsideration (August 24, 1992) that the opinion used the term "prevailing party" in an overly broad sense. We agree that the Mountain States standard for the award of attorney's fees does not require a party to prevail as a prerequisite to fees.

services. In this case, the consumer's billing dispute was with AT&T Communications of the Mountain States, Inc. ("AT&T").

On judicial review of the administrative order, O'Bryant prevailed at the Colorado Supreme Court over both U S West and the Colorado Public Utilities Commission ("PUC" or "commission"). See O'Bryant v. PUC, 778 P.2d 648 (Colo. 1989). The Supreme Court held that the commission inappropriately entered into a unilateral settlement agreement with U S West after judicial review began. The district court dismissed the case based on the PUC-U S West settlement to which O'Bryant had not agreed. Therefore, the Supreme Court reversed the district court. O'Bryant v. PUC, 778 P.2d 648, 655 (Colo. 1989). In its unanimous decision, the Colorado Supreme Court remanded the O'Bryant case, finding that the settlement agreement, and the consequent improper dismissal of the case at the district court level, "deprived O'Bryant of any opportunity to recover attorney fees and costs against Mountain Bell [U S West] for successfully litigating an issue that was related to general consumer interests." O'Bryant v. PUC, 778 P.2d 648, 656 (Colo. 1989).

This remand, therefore, concerns whether or not O'Bryant should receive legal fees from U S West for representing the public interest. The Colorado Supreme Court at least suggested that the commission award O'Bryant attorney's fees in O'Bryant v. PUC, 778 P.2d 648, 656 (Colo. 1989). Today, in a case of first impression, the Colorado Public Utilities Commission hereby holds that O'Bryant's is entitled to: (1) attorney's fees from U S West for his representation on judicial review; (2) legal fees for the

fee litigation; and (3) legal fees for advocacy at the commission.

Legal fees for successful appellate review of a commission decision is consistent with the Colorado Supreme Court's decisions in Mountain States Telephone and Telegraph v. PUC, 576 P.2d 544 (Colo. 1978), and Mountain States Telephone and Telegraph v. PUC, 502 P.2d 945 (Colo. 1972).[2] Indeed, the award of legal fees for appellate review of a commission decision necessarily follows from the Mountain States, supra, decisions.

If the commission limited the award of legal fees (to consumer representatives in the appropriate Mountain States circumstances) to advocacy performed solely before the commission, then the Supreme Court's authorization of legal fees would be significantly, perhaps fatally, limited, and a utility would have a great incentive to appeal. By appealing, the utility could exhaust the financial resources of consumers by causing them to incur non-reimbursed attorney's fees to defend their positions on judicial review. In fact, it would be a rare instance where a consumer would ever choose to fight a billing dispute such as this. The amount in controversy in typical consumer billing disputes is small when compared to the legal fees required for protracted litigation. The utility could win every case by the simple expedient of filing an appeal.[3] Similarly, the commission needs to award legal fees for the fee

[2] In the Mountain States, supra, cases, the Supreme Court held that the commission had jurisdiction under the Colorado Constitution to award reasonable legal fees, without specific statutory authority, to a party in a commission proceeding. Further, the Court approved the commission's three standards for legal fees to consumer representatives. Mountain States Telephone and Telegraph v. PUC, 576 P.2d 544, 548 (Colo. 1978). Prevailing party status is not a prerequisite to award of fees.

[3] Cf. Heatherridge Management Co. v. Pennon, 558 P.2d 435, 438 (Colo. 1977) (attorney's fees allowed for appellate work in landlord-tenant

litigation to consumer representatives, in order not to create an incentive for the utility to prolong the fee litigation and deplete the attorney's fees award for work on the merits.

Also, legal fees to consumers' lawyers are a necessary equalizer to the resources of the utilities. As the Colorado Supreme Court has recognized,[4] U S West generally has its attorney's fees reimbursed -- whether it is the prevailing party or not -- from consumers through rates. In sum, the Supreme Court has told the commission to award legal fees in appropriate cases to consumers in the Mountain States, supra, decisions, and a meaningful award of legal fees must include the possibility of legal fees on judicial review for consumers, and fees for the fee litigation.

Finally, the fact that O'Bryant's attorneys took this case without charging him a retainer does not preclude an attorney fee award. Pro bono attorneys who meet the appropriate tests should receive legal fees for their work on an equal basis with privately-retained attorneys, in order to encourage public representation. This case is a good example of private attorneys filling an important role in defending the public interest. Allowing legal fees compensates their participation in pro bono public interest litigation. At the same time, a fee award fills a gap in the Colorado Office of Consumer Counsel's ("OCC") enabling statute, Colorado Revised Statutes § 40-6.5-106(2) (1984

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security deposit litigation, because otherwise landlords could effectively discourage tenants from seeking return of their security deposits by the "simple expedient of an appeal").

[4] See Mountain States Telephone & Telegraph Co. v. PUC, 576 P.2d 544, 547 (Colo. 1978) ("On the basis of the constitutional and statutory grant of legislative authority, the PUC has always allowed Mountain Bell [U S West] to charge off as a proper operating expense attorneys' fees and legal costs incurred in its efforts before the PUC to increase rates.").

Rep. Vol.17), which has been interpreted as prohibiting the OCC from representing individual consumers under all circumstances.

Therefore, the Colorado Public Utilities Commission hereby grants O'Bryant's motion for an award of attorney's fees, which award shall include: (1) his legal fees for his administrative advocacy; (2) his legal fees for the successful defense of the commission decision upon judicial review; and (3) his legal fees for the fee litigation.

II. FACTUAL AND PROCEDURAL BACKGROUND.

A. FACTS.

On May 30, 1984, Respondent U S West Communications, Inc.[5] disconnected Complainant Larry D. O'Bryant's telephone. Mr. O'Bryant could make neither local nor long-distance telephone calls for almost 3 months. See Stipulation of Facts at 2, ¶¶ 8 & 9 (filed July 25, 1985, attached as Exhibit "A" to Complainant's May 8, 1991 Exceptions to Decision No. R91-348) ("Stipulation").

As all parties have stipulated, U S West disconnected Mr. O'Bryant's telephone service for failure to pay his long-distance bill to AT&T, not for failure to pay his bill to U S West. Stipulation at 2, ¶ 7. O'Bryant's May 1984 telephone bill itemized a $24.18 charge to U S West and a $141.30 charge for AT&T's long-distance services. On May 10, 1984, O'Bryant paid the U S West portion of the bill. He could not pay the AT&T portion of the bill ($141.30), perhaps due to a period of

[5] "U S West Communications, Inc." is the current official name of this regional Bell operating company, which provides local exchange telecommunications service in 14 states, including Colorado. Until January 1, 1991, its official name was the Mountain States Telephone and Telegraph Company. The company did business as "Mountain Bell" before and after the 1984 AT&T Breakup. More recently, the company has been doing business as "U S West Communications, Inc." its current official name. In this decision, we will refer to the company simply as "U S West," rather than change the company's name to reflect the changed names during the 1984-1992 time period at issue in this litigation.

unemployment earlier in 1984. See Decision No. R85-1294 at 2, ¶ 3 (October 22, 1985) (the original administrative law judge decision, adopted as the decision of the commission); Stipulation at 2, ¶ 7; and O'Bryant v. PUC, 778 P.2d 648, 649 (Colo. 1989) (facts found by the Colorado Supreme Court in its review of this case).

Although O'Bryant had paid his U S West bill in full, U S West disconnected his telephone on May 30, 1984. O'Bryant remained completely without telephone service throughout June, July, and most of August, 1984. U S West reconnected O'Bryant's telephone when the commission ordered it to do so, on or about August 20, 1984. Stipulation at 2, ¶ 9. At some point in August or September 1984, O'Bryant paid all outstanding long-distance charges to AT&T. Decision No. R85-1294 at 2, ¶ 3 (October 22, 1985).

B. PROCEDURE -- THE COMMISSION, 1984-1986.

On July 11, 1984, during the period when Mr. O'Bryant was completely without telephone service, O'Bryant filed a pro se Complaint at the commission. He alleged that U S West's disconnection of his entire telephone service, for failure to pay an AT&T bill, violated then-applicable Rule 13 of the Commission's Rules Regulating the Service of Telephone Utilities, 4 Code of Colorado Regulation 723-2 (1973). Rule 13 stated that a utility should not disconnect service except "for utility service rendered by the utility in the State of Colorado." (emphasis added). O'Bryant argued that the language referring to "the utility" meant that U S West could not cut off service for

failure to pay an AT&T bill, given that U S West and AT&T were separate utilities after the January 1, 1984 break-up of the formerly unified Bell System.[6]

As U S West concedes in this litigation, during the relevant time period (1984-1985), U S West gave its customers one telephone bill. The one telephone bill contained both local and long-distance charges, as it had prior to divestiture. U S West treated the telephone bill as one inseparable unit, as it had done prior to divestiture. It enforced collection of either part of the bill by disconnection.[7] O'Bryant argued that because divestiture had made AT&T and U S West into separate companies, U S West could not enforce collection of AT&T's bills by disconnecting a customer's local service, if the customer had paid the local exchange portion of the telephone bill. See Complaint at 1, ¶¶ 3-5 (filed July 11, 1984).

On September 12, 1984, after Mr. O'Bryant had paid his AT&T bill, and after U S West had reconnected O'Bryant's telephone, U S West filed a "Motion to Dismiss the Complaint as Moot." U S West argued that the matter was moot because it had reconnected O'Bryant's telephone, and because O'Bryant and AT&T no longer had a billing dispute.[8]

On November 7, 1984, Chief Administrative Law Judge Robert E. Temmer denied the motion to dismiss. See Decision No. R84-

[6] The divestiture decree separated AT&T (the long-distance company) from U S West and the other regional Bell operating companies (local exchange companies) --- making AT&T and the 7 regional Bell operating companies distinct and unrelated corporations. See "Modification Of Final Judgment," Section I of the Decree entitled "AT&T and Reorganization," United States v. American Telephone & Telegraph Co., 552 F. Supp. 131, 226-227 (D.D.C. 1982) (Greene, J.), affirmed mem. sub nom., Maryland v. United States, 460 U.S. 1001 (1983) ("divestiture decree").

[7] See U S West's Response to Exception and Cross Exception at 3 (filed May 22, 1991) (arguing that U S West "became a collection agent at divestiture" for AT&T; and that it was not feasible to block long-distance service).

[8] Also, U S West argued that its action were legal under Rule 13 of the commission's telephone rules, as well as mandated by contract. U S West attached the contract with AT&T to its summary judgment motion, which it alleged compelled it to disconnect O'Bryant. See U S West Brief in

1277-I at 1. The administrative law judge denied the motion to dismiss because the legality of U S West's collection practices on behalf of AT&T was not resolved.

After the administrative law judge denied the motion to dismiss, Mr. O'Bryant continued to prosecute the case pro se, but encountered difficulty in attempting to respond to U S West's discovery requests. See U S West's Motion to Dismiss, or in the Alternative for Judgment by Default Against Complainant (filed April 17, 1985).

According to the Affidavit of Diana M. Poole, Executive Director of the Colorado Lawyers Committee ("Lawyers Committee"), Mr. O'Bryant approached the Lawyers Committee for pro bono representation. The Lawyers Committee's Board of Directors approved O'Bryant's request for representation in June 1985.[9] Affidavit of Diana M. Poole at 2, ¶ 5 (Attached to the Lawyers Committee Amicus Brief) (filed on May 30, 1991) ("Poole Affidavit"). The Lawyers Committee states that its Board of Directors agreed that the O'Bryant case was an appropriate matter for placement with a volunteer law firm. It decided to take O'Bryant's case after considering U S West's practice of disconnecting local telephone service, and the "particularly extreme" impact of the disconnection practice on senior citizens and disabled individuals. Lawyers Committee Amicus Brief at 2 (May 30, 1991). After the Lawyers Committee Board of Directors

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Support of its Motion for Summary Judgment (filed August 15, 1985) (contract attached as sealed exhibit "H" to the brief).

[9] The Lawyers Committee, a nonprofit organization, works "to mobilize the private bar to provide pro bono assistance in matters of public concern to individuals and organizations throughout the State of Colorado who cannot afford legal services." Poole Affidavit at 1. See also Brochure from Lawyers Committee (Attached to Amicus Brief). The Lawyers Committee acts as a clearinghouse, evaluating requests for pro bono assistance, and then placing approved requests with volunteer lawyers from its 22 member firms in the metropolitan Denver area. The Lawyer Committee has over 800 individual lawyers to call upon to provide free legal service. Poole Affidavit at 1.

approved Mr. O'Bryant's request for representation, it assigned one of its member firms, Hill & Robbins, to the case.[10] Poole Affidavit at 2, ¶ 5. On July 3, 1985, the law firm of Hill & Robbins entered its appearance as the attorneys for Mr. O'Bryant. (Hill & Robbins represented Mr. O'Bryant at all stages of this litigation from July 1985 until the victory in the Colorado Supreme Court in September 1989.[11])

On July 5, 1985, the Colorado Office of Consumer Counsel moved for leave to intervene, or in the alternative, to participate as amicus curiae. O'Bryant supported Consumer Counsel's intervention. Respondent U S West and Intervenor AT&T opposed the intervention. They argued that the Consumer Counsel's enabling statute[12] precluded the OCC from intervening in cases involving individual residential customers, notwithstanding the argument that a case such as Mr. O'Bryant's disconnection case might have broader public interest implications to the class of consumers that the OCC represents. On July 17, 1985, Administrative Law Judge Arthur G. Staliwe denied the OCC's motion to intervene, agreeing with the narrow reading of the OCC statute successfully argued by U S West and AT&T.[13]

Subsequently, the three parties in the case (O'Bryant, U S West, and AT&T) each filed motions for summary judgment on August

[10] After the Supreme Court remanded this case to the commission, the Lawyers Committee, through the law firm of Hutchinson, Black, Hill & Cook, filed an Amicus Brief supporting O'Bryant's motion for attorney's fees.

[11] After remand to this commission, the law firm of Gorsuch, Kirgis, Campbell, Walker, and Grover entered its appearance. The Gorsuch firm represents O'Bryant (and his attorneys, Hill & Robbins) in this motion for attorney's fees.

[12] The relevant statutory language, which has remained the same since the creation of the OCC by the legislature in 1984, states: "the consumer counsel shall not be a party to any individual complaint between a utility and an individual." Colorado Revised Statutes § 40-6.5-106(2) (1984 Rep. Vol.17).

[13] "The motion of the Office of Consumer Counsel for leave to intervene, or, alternatively, to participate as an amicus in this matter is denied. Such

15, 1985. On October 22, 1985, the administrative law judge granted O'Bryant's motion, ruling that U S West violated Rule 13 of the Telephone Rules, 4 Code of Colorado Regulation 723-2 (1973). For relief, the administrative law judge ordered U S West to "immediately cease from disconnecting any of its customers for failure to pay any charges except for those services rendered by Mountain Bell [U S West] in the State of Colorado." Decision No. R85-1294 at 5, ¶ 1 (October 22, 1985). Further, he ordered U S West to stop disconnecting customers such as Mr. O'Bryant who were current on their U S West bill, and ordered U S West to restore service immediately to all such disconnected customers. Decision No. R85-1294 at 5, ¶¶ 1-2.

U S West and AT&T filed joint exceptions to the administrative law judge's recommended decision. O'Bryant also filed exceptions. On December 23, 1985, the commission denied all exceptions. It adopted Decision No. R85-1294 as the decision of the commission. Decision No. C85-1549. U S West and AT&T filed applications for rehearing, reargument, or reconsideration of the decision (the requirement for judicial review). On February 20, 1986, the commission denied all applications. Decision No. C86-210. On March 21, 1986, U S West filed a petition for a writ of certiorari or review of the commission's decision at Denver District Court.

C. PROCEDURE -- JUDICIAL REVIEW 1986-1989.

It is important to note that the judicial review of the O'Bryant case did not directly concern the legality of U S West's

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denial is premised solely on the statutory limitation contained in § 40-6.5-106(2), C.R.S." Decision No. R85-921-I at 1-2 (July 17, 1985).

disconnection of Mr. O'Bryant's telephone. While the O'Bryant case was pending in district court, the Staff of the commission and U S West entered into a settlement agreement, and then filed a Joint Motion to Dismiss the Appeal. See O'Bryant v. PUC, 778 P.2d 648, 651-652 (Colo. 1989). The district court granted the motion, and approved the settlement agreement over O'Bryant's objections. O'Bryant appealed the dismissal to the Colorado Supreme Court.

The Colorado Supreme Court summarized the relevant terms of the settlement agreement as follows:

> Attached to the joint motion to dismiss was a settlement agreement that contained the following relevant provisions: (1) a stipulation that the PUC decision requiring Mountain Bell to cease disconnecting its customers for failure to pay charges, except for services furnished by Mountain Bell, was rendered moot by an amended Rule 13 which would allow Mountain Bell to disconnect its service for failure to pay the long-distance charges of AT & T Communications; (2) a stipulation that the portion of the PUC order requiring Mountain Bell to immediately restore service to customers whose telephones were disconnected in violation of Rule 13(b) be modified in such a manner as to require reconnection only upon the customer's request; (3) a stipulation that the PUC specifically agreed that its prior decision was not a finding by the PUC that Mountain Bell had willfully or intentionally violated the provisions of Rule 13(b).

O'Bryant v. PUC, 778 P.2d 648, 651-652 (Colo. 1989).

The Colorado Supreme Court reversed the district court, and remanded this case to the commission for further proceedings, holding that the commission had acted improperly by entering into the settlement agreement and modifying its decision while judicial review was pending.

> While section 40-6-115, 17 C.R.S. (1984), provides for judicial review of a PUC decision in the district court and for appellate review in the supreme court, there is

> nothing in the statutory procedure for judicial and appellate review which authorizes the PUC, once a judicial review proceeding has been commenced, to alter or amend its decision by entering into a settlement agreement with only one party to the judicial review proceeding to the exclusion of the other party. On the contrary, the Public Utilities Law contemplates that the PUC, which obviously has no personal, economic, or other tangible interest in its decision, will act as a neutral decisionmaker in resolving the issues before it. Once judicial review is commenced in the district court by filing a petition for writ of certiorari, the PUC's obligation is to certify the record in a timely fashion and, if it so desires, to appear before the district court in support of its decision.

O'Bryant v. PUC, 778 P.2d 648, 655 (Colo. 1989) (emphasis added).

The Supreme Court found that the Settlement Agreement, and the district court's acceptance of the agreement, and dismissal of O'Bryant's case, violated O'Bryant's "legally protected interests" in three ways.

> First, the settlement agreement, along with the judgment of dismissal, deprived O'Bryant of his right to require Mountain Bell to comply with Rule 13(b) and to require the PUC to abide by its own rules in administering the statutory scheme affecting public utilities; second, the agreement and the ensuing judgment had the effect of impairing O'Bryant's prospective statutory claim for punitive damages against Mountain Bell for willful violation of Rule 13(b); and finally, the settlement agreement and judgment of dismissal deprived O'Bryant of any opportunity to recover attorney fees and costs against Mountain Bell for successfully litigating an issue that was related to general consumer interests.

O'Bryant v. PUC, 778 P.2d 648, 656 (Colo. 1989) (emphasis added).

Thus, this case is before the commission on the remand instructions of the Colorado Supreme Court, which explicitly required the commission to consider the award of attorney's fees and costs to Mr. O'Bryant "for successfully litigating an issue that was related to general consumer interests." O'Bryant v. PUC, 778 P.2d 648, 656 (Colo. 1989).

III. DISCUSSION.

A. THE "AMERICAN RULE" AGAINST THE AWARD OF ATTORNEY'S FEES AND ITS EXCEPTIONS.

In England, the prevailing party has his legal fees paid by the losing party as part of winning the judgment. In the United States, unless there is specific legislative authorization for attorney's fees, "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975) (environmental group challengers to the trans-Alaska pipeline not entitled to attorney's fees from the consortium of oil companies owning Alyeska Pipeline).[14]

The exceptions to the "American Rule" -- that each party pays its own legal fees in lawsuits -- are various statutes and rules which allow attorney's fees to be imposed in situations of "bad faith" by the non-prevailing party. As the Colorado Supreme Court has summarized the Colorado "bad faith" exceptions to the American Rule:

> Our state has various statutory and rule exceptions to the American rule regarding attorney fees which allow attorney fees to be imposed for suits brought in bad faith. In general, section 13-17-101, 6A C.R.S. (1987), provides that attorney fees may be recovered at the discretion of the trial court if it is determined that the bringing or defense of an action has been "substantially frivolous, substantially groundless, or substantially vexatious." Furthermore, section 13-17-101 instructs the courts to construe the provisions of the article regarding attorney fees liberally. *See Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo.1984) (attorney fees awarded for bad faith which includes conduct which is arbitrary, vexatious, abusive, or stubbornly litigious, and conduct aimed at

[14] The Alyeska Pipeline case caused Congress to enact legislation the next year to overturn the result. See City of Riverside v. Rivera, 477 U.S. 561, 567 (1986) ("In response to Alyeska, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which authorized the district courts to award reasonable attorney's fees to prevailing parties in specified civil rights litigation.").

> unwarranted delay or disrespectful of truth and accuracy). Also, our rules of civil procedure explicitly authorize the award of attorney fees in certain circumstances. *See, e.g.*, C.R.C.P. 3(a) (civil action vexatiously commenced); C.R.C.P. 11 (willful violation of rule regarding the signing of pleadings); C.R.C.P. 30(g) (failure to attend deposition or failure to serve a subpoena for attendance to deposition); C.R.C.P. 37(a)(3) (failure to respond to discovery requests); C.R.C.P. 37(c) (failure to admit the genuineness of any documents or the truth of requests for admission); C.R.C.P. 56(g) (affidavits made in bad faith); C.R.C.P. 107(d) (sanction for civil contempt). Consequently, the trial courts have ample authority to award attorney fees in appropriate cases.

Bunnett v. Smallwood, 793 P.2d 157, 162 (Colo. 1990).

The commission finds that the "bad faith" exceptions to the American Rule do not apply to the facts in the O'Bryant case. Although U S West did not prevail, the commission finds that its actions in this matter were not in bad faith. The divestiture decree established that U S West and AT&T were separate, unrelated entities. U S West's collection and billing practice, as applied to Mr. O'Bryant, *i.e.*, total disconnection of service for failure to pay the new unrelated long-distance company's charges, was improper, as the administrative law judge found in Decision No. R85-1294. (Also, U S West's disconnection policy to enforce collection of AT&T's charges was probably in violation of United States District Judge Harold H. Greene's divestiture decree.) Nevertheless, the commission finds that U S West's argument that its contract with AT&T required disconnection was not frivolous, and was not in bad faith. Given the confusion in 1984-1985 after divestiture, U S West had a plausible argument. Thus, the American Rule exceptions discussed in Bunnett v. Smallwood, 793 P.2d 157, 162 (Colo. 1990), are not applicable.

If Mr. O'Bryant is entitled to attorney's fees from U S West, O'Bryant is not entitled to fees from U S West for "bad faith" litigation.

B. THE COMMISSION'S JURISDICTION TO AWARD NON-STATUTORY ATTORNEY'S FEES: THE 1972 AND 1978 MOUNTAIN STATES CASES.

The leading case holding that the Colorado Public Utilities Commission has the power to order that a party have its legal fees is Mountain States Telephone and Telegraph v. PUC, 576 P.2d 544 (Colo. 1978). ("Mountain States").

In a case decided in 1972, Mountain States Telephone and Telegraph v. PUC, 502 P.2d 945, 952 (Colo. 1972), the Colorado Supreme Court reversed the commission[15] and held that the Colorado PUC had jurisdiction to award reasonable attorney's fees to the Colorado Municipal League from U S West as a party in a successful refund action against U S West. The 1978 Mountain States Colorado Supreme Court case, however, analyzed the commission's constitutional and statutory power to award attorney's fees in detail, not merely in passing. Thus, Mountain States Telephone and Telegraph v. PUC, 576 P.2d 544 (Colo. 1978), is the best authority for the proposition that the commission can award attorney's fees in appropriate cases, without statutory authority.

In every reported case, the Colorado Supreme Court has upheld the commission's power to award legal fees and costs to a party in appropriate circumstances. Mountain States Telephone

[15] The commission, over the dissent of one commissioner, denied the Colorado Municipal League's request for attorney's fees and costs "after finding it had no jurisdiction to award attorney's fees and costs." Mountain States Telephone and Telegraph v. PUC, 502 P.2d 945, 951 (Colo. 1972). The Colorado Supreme Court reversed the commission, and held that the PUC had jurisdiction to award legal fees.

and Telegraph v. PUC, 502 P.2d 945, 952 (Colo. 1972); Mountain States Telephone and Telegraph v. PUC, 576 P.2d 544 (Colo. 1978); Colorado-Ute Electric Association, Inc. v. PUC, 602 P.2d 861, 868 (Colo. 1979). The Colorado Supreme Court also has upheld the commission's determination regarding the appropriateness of legal fees and costs in every reported case. E.g., Colorado Municipal League v. PUC, 591 P.2d 577, 583 (Colo. 1979).

The Colorado Supreme Court has often cited the Mountain States Telephone and Telegraph v. PUC, 576 P.2d 544 (Colo. 1978), case for the proposition that the commission possesses legislative powers, by the analogy to the commission's power to award attorney's fees without statutory authorization. See, e.g., Colorado Office of Consumer Counsel v. Mountain States Telephone and Telegraph, 816 P.2d 278, 283 (Colo. 1991) ("Article XXV delegates to the Commission legislative authority to regulate public utilities previously vested in the General Assembly.") (citing the 1978 Mountain States case); Colorado-Ute Electric Assn., Inc. v. PUC, 760 P.2d 627, 638 (Colo. 1988); Colorado Municipal League v. PUC, 597 P.2d 586, 588 (Colo. 1979). The reason that the 1978 Mountain States case is such a powerful precedent for the commission's legislative powers, is that under the "American Rule" each party bears its own litigation costs, absent legislation to the contrary. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). See also Bunnett v. Smallwood, 793 P.2d 157, 160, 162 (Colo. 1990) (discussing the American Rule, and its exceptions, under Colorado law). Cf. Buder v. Sartore, 774 P.2d 1383, 1390-1391 (Colo.

1989) (new exception to the American Rule). The fact that the Colorado PUC has the power to award attorney's fees is a result of the commission's legislative powers, as noted by courts from other jurisdictions. See Consumers Lobby Against Monopolies v. California PUC, 603 P.2d 41, 54 & n. 10 (Cal. 1979) (holding California PUC had power under the equitable "common fund" exception to the American Rule to award attorney's fees to public interest participants in quasi-judicial proceedings, but that the California PUC did not have the power to award attorney's fees in quasi-legislative proceedings) (distinguishing the Colorado PUC and its authority to award attorney's fees also in quasi-legislative proceedings) (citing Mountain States). See also Idaho Power Co. v. Idaho PUC, 639 P.2d 442, 450-451 (Idaho 1981) (citing Consumers Lobby, supra, and Mountain States, supra,) ("In Colorado the commission has even broader constitutional powers than the California commission. Thus neither Consumers Lobby, nor Mountain States, supra, has relevance to the scope of the Idaho Commission's legislative grant of power.").

The month before the Colorado Supreme Court unanimously held in Mountain States Telephone and Telegraph v. PUC, 576 P.2d 544 (Colo. 1978), that the Colorado Public Utilities Commission had the power to award attorney's fees without statutory authority, the same Colorado Supreme Court unanimously held that the commission did not have the power to impose monetary fines, as an alternative to revocation of a contract carrier's certificate of public convenience and necessity. Haney v. PUC, 574 P.2d 863, 864-865 (Colo. 1978) ("Haney").

How can the two lines of Supreme Court authority in the Haney and Mountain States cases be reconciled? The best way to distinguish the cases is to note that the Supreme Court analyzed the commission's action in the Haney case under two narrow transportation statutes -- Colorado Revised Statutes § 40-11-110 (1973) and Colorado Revised Statutes § 40-11-112 (1973) -- concerning the revocation of transportation permits. In Haney, the Colorado Supreme Court held that as a matter of statutory construction, the commission did not have the power to impose monetary fines as an alternative to the revocation of transportation permits. The language in the then-applicable statutes stated that the commission "may revoke, suspend, alter, or amend" any permit or certificate -- the statute did not list the less drastic alternative of a monetary fine. Because the statute did not contain the alternative of a fine, the Colorado Supreme Court held in Haney that the commission exceeded its statutory authority.[16]

By contrast, in the 1978 Mountain States case, the Colorado Supreme Court analyzed the commission's powers under the Constitution itself. Further, the Colorado Supreme Court found that a statute, Colorado Revised Statutes § 40-3-102, supported the commission's constitutional powers to award legal fees. The

[16] In 1989, the Legislature modified the result in the Haney case by adding the phrase "or may impose a civil penalty" to list of sanctions the commission could impose for violations on transportation permit holders. The current version of the statutes is codified at Colorado Revised Statutes § 40-10-112 (1991 Cum.Supp. Vol.17) and Colorado Revised Statutes § 40-11-110 (1991 Cum.Supp. Vol.17).

Rather than attempt to reconcile the Haney and Mountain States cases, if one wishes to interpret the cases as inconsistent, the Mountain States case controls because it was decided last. Furthermore, the fact that the Legislature changed the two transportation statutes to overturn the Supreme Court's decision in Haney may indicate that the Legislature felt that the Haney case was wrongly decided. We choose to distinguish the cases on the basis of statutory construction, and not to decide that the Legislature felt that Haney was wrongly decided. Haney interpreted the PUC's authority under two narrow transportation statutes; while Mountain States interpreted the PUC's authority under Article XXV of the Colorado Constitution, which the Colorado Supreme Court found to be bolstered by the statute giving the PUC broad power and duty to do all things "necessary and convenient" in the exercise of its regulatory duty, Colorado Revised Statutes § 40-3-102 (1984 Repl. Vol.17).

statute states that the commission has the power "to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary and convenient in the exercise of such power." See Mountain States Telephone & Telegraph Co. v. PUC, 576 P.2d 544, 547 (Colo. 1978) (in the opinion, the Colorado Supreme Court cited and emphasized this language in the statute). As applied to the O'Bryant case before us today, the Mountain States case is more applicable authority than the Haney case, because we are applying the commission's constitutional and statutory powers to award attorney's fees, as in Mountain States, not interpreting a narrow statute, as in Haney.

As discussed, Colorado Supreme Court cases have held that the Colorado Public Utilities Commission holds the legislative authority to award legal fees. E.g., Mountain States Telephone and Telegraph v. PUC, 576 P.2d 544 (Colo. 1978). See also Colorado Energy Advocacy Office v. Public Service Co. of Colorado, 704 P.2d 298, 306 (Colo. 1985) ("The Colorado PUC is given power by the Colorado Constitution, and its power is equivalent to the legislature except as limited by statute."). In the 20 years since the Colorado Supreme Court first held that the commission had jurisdiction to award attorney's fees in the 1972 Mountain States case, the Legislature has chosen not to alter the commission's authority with respect to the award of legal fees and costs.[17]

[17] Especially significant on the facts of this case, the Legislature has not restricted the commission's authority to award legal fees for judicial review of a commission decision, nor has the Legislature limited the commission's power to award legal fees for fee litigation.

C. CRITERIA FOR COMMISSION AWARD OF ATTORNEY'S FEES.

The Colorado Supreme Court has approved the three standards established by the commission for the award of attorney's fees and costs to consumer representatives. Mountain States Telephone and Telegraph v. PUC, 576 P.2d 544, 548 (Colo. 1978). The three standards are: (1) the representation and expenses must relate to the "general consumer interest"; (2) the party's testimony, evidence, and exhibits must "materially assist" the commission in reaching its decision; and, (3) the legal fees and costs must be "reasonable." Id.

O'Bryant, in his Exceptions, incorrectly states that there are four standards for the commission's award of attorney's fees, unnecessarily adding "the service performed must be exceptional," a fourth standard that Mountain States does not require. See O'Bryant's Exceptions to Decision No. R91-348 at 4-5 (filed May 8, 1991). The confusion may result from Colorado-Ute Electric Association, Inc. v. PUC, 602 P.2d 861 (Colo. 1979). As in Mountain States, the Colorado Supreme Court upheld the commission's attorney fee award. The Court also upheld the commission's creation of two extra standards, in addition to the normal three Mountain States standards, due to the particular facts of the case.

> Here, the commission determined the fees and costs came within the Mountain States standard. Moreover, because of its concern that these fees ultimately would be borne by the member cooperatives and their customers, the commission imposed two additional standards. The first was that the services performed be exceptional, and the second that they materially contribute to the decision of the commission (the standard in Mountain States was "materially assist").

Colorado-Ute Electric Assn. Inc. v. PUC, 602 P.2d 861, 868 (Colo. 1979).

The more stringent standard in Colorado-Ute, supra, is not applicable to U S West, a private for-profit corporation, not a member-owned cooperative like Colorado-Ute. Therefore, the three original standards in the 1978 Mountain States case govern the O'Bryant case, which involves legal fees against the same company, now officially known as U S West Communications, Inc.

D. APPLICATION OF THE THREE MOUNTAIN STATES CRITERIA TO THE FACTS OF THE O'BRYANT CASE.

1. First standard for legal fees: representation of the consumer interest.

a. Legal fees at the commission. O'Bryant meets the "general consumer interest" standard for his work at the commission, because the result of his lawsuit benefited all 1.8 million Colorado U S West customers. The O'Bryant case established the principle that it is improper for U S West to disconnect a customer's entire telephone service for failure to pay a long-distance company's charges. O'Bryant was completely without telephone service for almost 3 months (June, July, and August 1984), even though he had paid in full his bill to U S West. U S West's practice contradicted the legislative mandate and commission policy of universal service, the idea that access to basic telephone service is a necessity.[18] Further, on the facts of the case, O'Bryant was unemployed during part of 1984.

[18] See Colorado Revised Statutes § 40-15-101 (1991 Cum.Supp. Vol.17) (legislative declaration that it is the "policy of the state of Colorado to promote a competitive telecommunications marketplace while protecting and maintaining the wide availability of high-quality telecommunications services") (emphasis added).

O'Bryant may have found it more difficult to get a new job without telephone service.

The Colorado Supreme Court, in its unanimous O'Bryant decision, found that O'Bryant satisfies the first criteria for the award of legal fees, when it remanded the case, and explicitly required the commission to consider the award of attorney's fees and costs to Mr. O'Bryant "for successfully litigating an issue that was related to general consumer interests." O'Bryant v. PUC, 778 P.2d 648, 656 (Colo. 1989). Under the "law of the case" doctrine, this commission on remand should follow the Colorado Supreme Court's finding that Mr. O'Bryant represented the "general consumer interests."

Further, the commission itself determined that O'Bryant represented the general consumer interest. On September 12, 1984, after Mr. O'Bryant had paid his AT&T bill and U S West had reconnected O'Bryant's telephone, U S West filed a Motion to Dismiss the Complaint as Moot. On November 7, 1984, then Chief Administrative Law Judge Temmer[19] denied the motion to dismiss, finding that "[t]here still exists a controversy between the complainant and the respondent concerning whether or not Rule 13 has been violated." Decision No. R84-1277-I at 1. The administrative law judge denied the motion to dismiss because the legality of U S West's collection practices on behalf of AT&T (disconnection of all telephone service) was not resolved. Even though the specific case of Mr. O'Bryant was moot because U S West reconnected his telephone, the general legal issue of

[19] Chief Administrative Law Judge Temmer is now Chairman of the Colorado Public Utilities Commission. He has decided not to participate in

whether U S West could disconnect consumers for failure to pay a long-distance bill, remained a live controversy. Thus, the plaintiff in the O'Bryant case represented interests of all Colorado consumers in the dispute with U S West.

Finally, a review of the relief recommended by Administrative Law Judge Staliwe in October 1985 -- ordering U S West to stop disconnecting customers who were current on their U S West bill, and ordering U S West to restore service immediately to all such disconnected customers, Decision No. R85-1294 at 5, ¶¶ 1-2 (October 22, 1985) -- demonstrates that the O'Bryant case had broad consumer impact. As far as O'Bryant's work at the commission is concerned, the first Mountain States standard of representation of the "general consumer interest" is met. On remand of this case from the Colorado Supreme Court in 1991, Administrative Law Judge Staliwe found that to award Mr. O'Bryant attorney's fees for winning this victory for Colorado U S West consumers:

> would be uncomfortably close to rewarding a bank robber on the theory that his misconduct exposed security defects in the bank. Simply put, Mr. O'Bryant's refusal to timely pay his bills should not be rewarded, regardless of any perceived collateral benefits.

Decision No. R91-348 at 7 (March 19, 1991).

We strenuously disagree with this reasoning. O'Bryant paid his U S West bill in full, and the legal question was not whether he should be "rewarded" for failing to pay his AT&T bill on time, but rather, whether or not U S West's disconnection of his local

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this Decision.

service, for which he had paid in full, was a fair collection practice.

b. Legal Fees On Appeal. The question of legal fees on appeal is especially significant in the O'Bryant case because the major part of the fee request is for work done outside the commission. O'Bryant requests approximately $22,000 in fees and costs for work at the commission; $11,000 in fees and costs for work at the district court; and $40,000 in fees and costs for work done at the Colorado Supreme Court.[20]

In discussing the legal fees for work on appeal issue, we will divide the discussion into four parts: (1) whether O'Bryant represented the general consumer interest in his advocacy on appellate review of the commission's decision at the district court and at the Colorado Supreme Court; (2) whether there is precedent for the fees-on-appeal question; and, if not, (3) whether the commission has the authority to make such an award of attorney's fees for work on review of the commission's decision; and finally, (4) whether an award is appropriate on the specific facts of this case.

1. Legal fees for the appeal: O'Bryant represented the general consumer interest on appeal. As mentioned previously, to analyze O'Bryant's entitlement to attorney's fees at all stages of the litigation, it is necessary to realize that the issue on appeal was not quite the same as the issue at the commission. See Ante, at 10-12. At the commission in the proceedings from 1984-1986, the O'Bryant case concerned the legality of U S West's

[20] See O'Bryant's Reply on Motion for Award of Fees and Costs, "Exhibit B -- Summary of Fees and Costs" (filed April 11, 1990). See also

disconnection of Mr. O'Bryant's telephone. While the O'Bryant case was pending in district court, the commission and U S West entered into a settlement agreement -- without the consent of Mr. O'Bryant. See O'Bryant v. PUC, 778 P.2d 648, 651-652 (Colo. 1989). An important issue on appeal was whether the commission could "settle" a case -- modifying its prior decision after judicial review had begun -- over the objections of one of the parties.

As discussed previously, the Colorado Supreme Court, in strong language, held that the commission had acted improperly by "settling" the O'Bryant case with U S West, over the objections of Mr. O'Bryant. See O'Bryant v. PUC, 778 P.2d 648, 655 (Colo. 1989) ("there is nothing in the statutory procedure for judicial and appellate review which authorizes the PUC, once a judicial review proceeding has been commenced, to alter or amend its decision by entering into a settlement agreement with only one party to the judicial review proceeding to the exclusion of the other party."). Also of importance on the issue of consumer interest is the fact that a review of the commission's settlement agreement with U S West shows that the commission converted O'Bryant's victory for consumers into a defeat for consumers, because the commission amended Rule 13 of the commission's Rules Regulating the Service of Telephone Utilities, 4 Code of Colorado Regulation 723-2 (1973). The amendment to the telephone rules allowed U S West to disconnect consumers for failure to pay long-distance charges -- the very practice that the commission found

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O'Bryant's Motion to File One Copy of Billing Records (attaching voluminous billing records) (filed April 11, 1990).

to be improper in O'Bryant's case. See O'Bryant v. PUC, 778 P.2d 648, 651-652 (Colo. 1989) (summarizing the terms of the settlement agreement). We conclude that O'Bryant meets the standard for representing the consumer interest on appeal. If O'Bryant had not pursued his case on judicial review, then his victory over U S West's disconnection practices would have been specific only to him, not generally applicable to all Colorado U S West customers. The O'Bryant case established not only the impropriety of U S West disconnection practices; the O'Bryant case also established the impropriety of the commission's "settling" a case after judicial review had started. On both grounds, Mr. O'Bryant won an important victory for consumers -- over Colorado's largest telecommunications company (and its powerful ally, AT&T), and over the Colorado Public Utilities Commission. We conclude that O'Bryant protected the public interest on judicial review of the commission's decision. We must next determine whether he can receive legal fees for his efforts.

2. Legal fees for the appeal: There is no binding precedent concerning attorney's fees for appellate review of a Colorado PUC decision. In the first Colorado case stating that the commission had jurisdiction to award attorney's fees, without limiting language, the Colorado Supreme Court declared the commission's general power to award legal fees to a party. In that case, the complainant sought fees for "various proceedings," including judicial proceedings. See Mountain States Telephone and Telegraph v. PUC, 502 P.2d 945, 951 (Colo. 1972) ("The

Colorado Municipal League asked the Commission for an award of reasonable attorneys' fees and expenses incurred by it in the various proceedings in which it opposed the 1969 Mountain Bell rate increase.") (emphasis added).

O'Bryant argues that "the first Colorado Supreme Court case to recognize the Commission's jurisdiction to award attorneys' fees dealt with an amalgam of Commission and appellate proceedings." O'Bryant Exceptions to Decision No. R91-348 at 10. We do not view the "various proceedings" language in the 1972 Mountain States case as a "holding" that the commission can award attorney's fees in judicial proceedings, as O'Bryant seems to argue.

We similarly reject U S West's argument that the Colorado Supreme Court, by case law, has foreclosed an award of legal fees for judicial review of a PUC decision. U S West cites the language in Colorado-Ute Electric Association, Inc. v. PUC, 602 P.2d 861, 868 (Colo. 1979), that "the commission has broad constitutional and statutory discretion to determine when attorneys' fees should be awarded in its own proceedings," for the proposition that the courts restricted the commission's jurisdiction to award attorney's fees on appellate review of a commission decision. We do not read the Colorado-Ute supra, case so broadly. The case did not "hold" due to the language in its own decision that the commission could not award legal fees on appeal. The language is positive, in stating what the commission can do, not restrictive, and did not decide whether or not a

commission "proceeding" includes judicial review of a commission decision.[21]

Besides the vague "various proceedings" language of Mountain States Telephone and Telegraph v. PUC, 502 P.2d 945, 951 (Colo. 1972), no reported Colorado decision has specifically addressed the commission's power to award attorney's fees for judicial review of its decisions.[22]

There are only two reported cases concerning state[23] public utility commissions that are on point, and both of them tend to support O'Bryant's position that an attorney fee award should include fees on appeal. The Maine Public Utilities Commission has established that consumers are entitled to their reasonable attorney's fees, expert witness fees and other reasonable costs, in certain instances for their participation before the commission, and upon successful judicial review of a commission decision. See Re Costs of Participation in Commission Proceedings on PURPA, 37 PUR4th 280 (Maine PUC 1980).

Much earlier, the New Jersey Supreme Court reached a similar result, and allowed legal fees for judicial review of its public utilities commission's decisions. The New Jersey Supreme Court decided that a New Jersey statute, allowing attorney's fees to

[21] The New Jersey Supreme Court has construed the term "proceeding" to include judicial review of its public utility commission orders. See Alexander v. New Jersey Power & Light Co., 21 N.J. 373, 122 A.2d 339, 343, 13 PUR3d 620, 624 (N.J. 1956).

[22] U S West cites an unreported district court decision supporting its view that the commission does not have the right to award attorney's fees in appellate proceedings. See Mountain States Telephone and Telegraph v. PUC, Case No. 85 CV 11531 (Denver Dist. Ct. March 6, 1990). (As an unreported district court decision, the ruling is entitled to no precedential weight.) The decision correctly restates the American Rule that legal fees are not recoverable as part of the judgment absent specific contractual, statutory or other basis, but seems to imply that the Colorado Municipal League ("League") was not entitled to legal fees on judicial review because the Office of Consumer Counsel was a party to the case and represented the public interest and the interests of the consumers. Thus, the decision may have found against the League on the second Mountain States legal standard ("materially assisting" the commission in its decision). In any event, the case is distinguishable from O'Bryant because the Consumer Counsel was prevented from intervening in O'Bryant, and Mr. O'Bryant alone represented the consumer interest, both at the commission and on judicial review.

[23] The federal Public Utility Regulatory Policies Act of 1978 provides for attorney's fees for consumer representative intervenors, and specifically states that the authority includes "fees and costs of obtaining judicial review of any determination." 16 U.S.C. § 2632(a)(1).

private attorneys who protect the public interest before the New Jersey Board of Public Utility Commissioners, also included attorney's fees for judicial review of the Board's decision, in situations such as the O'Bryant case where the utility unsuccessfully appealed a Board decision in favor of a consumer. Alexander v. New Jersey Power & Light Co., 21 N.J. 373, 122 A.2d 339, 13 PUR3d 620 (N.J. 1956).[24]

3. Legal fees for the appeal: The Commission has jurisdiction to award attorney's fees for judicial review of a Commission decision, and for the fee litigation. As discussed, the Colorado Public Utilities Commission has legislative powers, granted to the commission by the people of Colorado in Article XXV of the Colorado Constitution of 1954. The Colorado Constitution provides:

Article XXV
Public Utilities

> In addition to the powers now vested in the General Assembly of the State of Colorado, all power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility, as presently or as may hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate.

[24] In construing the statutory term Board "proceeding," the New Jersey Supreme Court held that because the intent of the statute was the protection of the public interest, a "proceeding" should not be limited to a Board proceeding. Alexander v. New Jersey Power & Light Co., 21 N.J. 373, 122 A.2d 339, 343, 13 PUR3d 620, 624 (N.J. 1956) ("The statutory 'proceeding' did not come to an end until the last judicial review was had. The Legislature quite evidently had in view a rate 'proceeding' that in its very nature was subject to judicial examination, and so the continuance of the public representation to the end[.]").

Until such time as the General Assembly may other designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado; provided however, nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises; and provided, further that nothing herein shall be construed to apply to municipally owned utilities.

As the Colorado Supreme Court has construed the constitutional provision, "Article XXV delegates to the Commission legislative authority to regulate public utilities previously vested in the General Assembly." Colorado Office of Consumer Counsel v. Mountain States Telephone and Telegraph, 816 P.2d 278, 283 (Colo. 1991). This Constitutional grant of power to the commission means that the commission may do anything that the Legislature may do regarding the regulation of public utilities, unless a statute specifically restricts the commission's authority. Colorado Energy Advocacy Office v. Public Service Co. of Colorado, 704 P.2d 298, 306 (Colo. 1985) ("The Colorado PUC is given power by the Colorado Constitution, and its power is equivalent to the legislature except as limited by statute.").

We hold that the commission has jurisdiction to award the attorney's fees requested by Mr. O'Bryant and for legal fees for the fee litigation, based on the Colorado Constitution, as construed by the Colorado Supreme Court in the cases cited in this decision, including of course the two Mountain States decisions, Mountain States Telephone & Telegraph Co. v. PUC, 576

P.2d 544, 547 (Colo. 1978) and Mountain States Telephone & Telegraph Co. v. PUC, 502 P.2d 945 (Colo. 1972).

4. Legal fees for the appeal: On the facts of this case, an award is appropriate to O'Bryant on appeal, and his fees for the fee litigation, even though his lawyers took the case on a pro bono basis. Without allowing legal fees for the judicial review of a commission decision, the Supreme Court's Mountain States, supra, decisions would be eviscerated. This case is a good example. The initial amount of controversy was Mr. O'Bryant's $141.30 AT&T bill. While we do not have records for the amount of fees U S West spent in litigating this matter, we know that the law firm of Hill & Robbins has submitted billing records requesting approximately $22,000 in fees and costs for work at the commission; $11,000 in fees and costs for work at the district court; and $40,000 in fees and costs for work done at the Supreme Court on this case.

If the commission today were to decide that it lacked jurisdiction to award attorney's fees for judicial review, no future rational litigant in O'Bryant's situation would have continued this litigation. If such a litigant continued the fight, it would be reimbursed only $22,000 for work at the commission, and would expend $51,000 in securing the "victory" in the court system. Thus, as "reward" for representing the consumer interest, the litigant would pay a net amount of $29,000 after years of litigation. If the Mountain States decisions are

to have any practical meaning, the commission should award legal fees for successful appeals, such as O'Bryant's appeal.[25]

Courts have interpreted other statutes in this same manner -- if there is a fee entitlement for legal fees as part of the judgment to the prevailing party in the court or agency of first instance, then the fee entitlement continues for appellate review. Under Colorado attorney fee law, the best example of this principle to include fee entitlement for appellate review is Colorado's statute on security deposits. The statute provides that a landlord who wrongfully retains a tenant's security deposit is "liable for treble the amount of that portion of the security deposit wrongfully withheld from the tenant, together with reasonable attorneys' fees and court costs." Colorado Revised Statutes § 38-12-103(3)(a) (1982 Repl. Vol.16A). As in the Colorado Supreme Court's pronouncements in the Mountain States decisions, the security deposit statute states that there is an entitlement to reasonable attorney's fees, but is silent as to whether the fee entitlement includes legal fees for judicial review.

In order to make sense of the statutory scheme, the Colorado Supreme Court has held that tenants who are successful on appeal are entitled to legal fees on appeal, even though the statute is silent. See Martinez v. Steinbaum, 623 P.2d 49, 55 (Colo. 1981); Martin v. Allen, 566 P.2d 1075, 1076 (Colo. 1977); Heatherridge

[25] Given that the underlying amount of damages in individual consumer complaint cases such as this may be small (unless of course one multiplied O'Bryant's problem times 1.8 million Colorado U S West customers), the amount of attorney's fees in situations such as this will greatly exceed the damages. Again, if the Colorado Supreme Court's Mountain States decisions are to have any practical meaning, an attorney fee award cannot be required to be proportional to the amount of actual damages. We agree with the United States Supreme Court's determination that the amount of the attorney fee award can greatly exceed the underlying award of damages. City of Riverside v. Rivera, 477 U.S. 561 (1986) (attorney fee award under

Management Co. v. Pennon, 558 P.2d 435, 438 (Colo. 1977). As the Colorado Supreme Court has stated:

> This statute [the security deposit statute, Section 38-12-103, Colorado Revised Statutes], salutary in nature, is designed to assist tenants in vindicating their legal rights and to equalize the disparity in power which exists between landlord and tenant in conflicts over such relatively small sums. To deny attorney's fees to tenants who are forced to prosecute an appeal would undercut the objectives of these provisions. Landlords, by the simple expedient of an appeal, could effectively discourage tenants from obtaining legal redress. We, therefore, hold that tenants who are successful on appeal are entitled to an award of reasonable attorney's fees.

Martin v. Allen, 566 P.2d 1075, 1076 (Colo. 1977) (citations omitted).

The same considerations are present here -- if attorney's fees were not awarded for appellate review of a commission decision such as the O'Bryant decision, then the utility could win every case by the simple expedient of an appeal. The amount in controversy in individual consumer complaints is typically far less than the costs of protracted litigation. The purpose of allowing legal fees at the commission is to encourage public interest litigation by the private bar in limited circumstances such as the O'Bryant case where the Colorado Office of Consumer Counsel cannot represent an individual consumer.

The Colorado Supreme Court has explained the purpose of the security deposit statute in a manner that supports the rationale for the fee request by Mr. O'Bryant. The purpose of the statute, allowing attorney's fees to tenants who prevail in recovering security deposits wrongfully kept by landlords, is for:

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42 U.S.C. § 1988 not required to be proportional to award of damages actually recovered).

> (1) insulating the award of damages to the plaintiff from being substantially depleted by attorneys' fees, and (2) encouraging the private bar to enforce the provisions of section 38-12-103 in actions which generally involve only small sums of money.

Torres v. Portillos, 638 P.2d 274, 277 (Colo. 1981), citing Ball v. Weller, 563 P.2d 371 (Colo. App. 1977) (footnote and citation omitted).

Once again, we believe that the considerations, for attorney fees for consumer representation at the commission, are the same the Colorado Supreme Court in Torres v. Portillos, supra, noted for attorney's fees in the security deposit statute. By allowing attorney's fees at the commission, the Colorado Supreme Court's Mountain States decisions are insulated from having the award of damages to the plaintiff being substantially depleted by attorney's fees. Also, legal fees encourages the private bar to enforce the provisions of the public utility law, in actions that generally involve only small sums of money.

The award of attorney's fees for successful appellate review of a commission decision is consistent with the Colorado Supreme Court's Mountain States decisions. Indeed, the award of legal fees for appellate review necessarily follows from the Mountain States decisions. Otherwise, the initial award would be substantially depleted by appellate legal fees (we have shown how O'Bryant's award would be more than just substantially depleted -- it would be wiped out and turned into a substantial loss), and the private bar would be discouraged from enforcing the public utility law.

The United States Supreme Court has interpreted federal fee-shifting statutes just as the Colorado Supreme Court has interpreted the attorney's fees in the security deposit statute -- once there is fee entitlement, that entitlement includes fees for judicial review. The United States Supreme Court has interpreted the Civil Rights Attorney's Fees Statute, 42 U.S.C. § 1988, and the Equal Access to Justice Act, 28 U.S.C. § 2412, to include fees to litigation at the trial court, and all subsequent appeals, and has even allowed federal courts to award attorney's fees backwards in time to cover work done in state administrative agencies before the matter came to federal court.[26]

For the same reasons that a "halfway" award of fees would eviscerate the Mountain States holding that the commission has the jurisdiction to award attorney's fees, legal fees for the fee litigation should be awarded. U S West has vigorously fought this fee request for several years now. If O'Bryant did not receive an award for the fee litigation, his attorney's fees for the fee litigation would substantially deplete the initial award owed to him for representation at the commission. The expense and the delay in collecting fees would discourage the private bar from enforcing the public utility law in lawsuits such as the O'Bryant case.[27]

The United States Supreme Court allows "fees on fees," legal fees for the fee litigation, as a matter of right, under a lesser

[26] See New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). The Court reasoned that allowing attorney's fees for state administrative work would further the goals of the civil rights laws: "Only authorization of fee awards ensures incorporation of state procedures as a meaningful part of the Title VII enforcement scheme." New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 65 (1980).

[27] Cf. Torres v. Portillos, 638 P.2d 274, 277 (Colo. 1981) (purpose of attorney fee provision in security deposit statute to insulate award of damages from being depleted by attorney's fees, and to encourage private bar to enforce the law, in actions which typically involve small sums of money).

showing than the original threshold showing for entitlement to attorney's fees. See Commissioner INS v. Jean, __ U.S. __, 110 S.Ct. 2316 (1990) (unanimous decision). The Court reasoned that the average person challenging government action needed fees on fees, to effectuate one of the purposes of the Equal Access to Justice Act ("EAJA") statute, to eliminate the financial disincentive for the average person to challenge unreasonable governmental actions. Because the cost of litigating fee requests often exceeds the costs incurred for litigating the merits of a claim: "If the Government could impose the cost of fee litigation on prevailing parties . . . the financial deterrent that the EAJA aims to eliminate would be resurrected." Commissioner INS v. Jean, __ U.S. __, __, 110 S.Ct. 2316, 2322 (1990). In this case, the cost of O'Bryant's fee litigation may exceed the costs of litigating the merits of his claim.

Without fees for fee litigation, U S West has a powerful incentive to prolong fee litigation. We believe that legal fees for the fee litigation is a the necessary final step needed to implement the Supreme Court's Mountain States decisions. If fees are allowed at the commission, it is essential that the commission award legal fees for appellate review, and legal fees for the fee litigation, to complete the logical circle.

We believe that this complete implementation of the Mountain States decisions will actually lower costs, by encouraging quick settlements, instead of providing an impetus for further litigation. The complete framework will lead a utility such as U S West, facing fees for work at the commission, an added

calculus in the decision about whether or not to appeal a commission order. If there were no appellate attorney's fees, counsel for U S West might reasonably appeal every case, as wise litigation strategy to wear down the opposition.

Similarly, fees for fee litigation are needed in order to provide a financial disincentive for the utility to delay, and to litigate further, instead of resolving fee matters quickly. Under the American Rule, litigants are not accustomed to paying the attorney's fees of their opponent, unlike in England where the risk of paying attorney's fees to the opponent if one loses is part of the calculus for every lawsuit. Fees for fee litigation may by particularly needed to increase the incentive to settle fee disputes if fees for fee litigation were not allowed. There may be considerable bitterness on the part of the losing party in being required to pay the opponent's legal fees, which could lead the client to order their attorneys to drag out the fee litigation. With fees for the fee litigation provided, a cost-conscious attorney would advise the client to accept a reasonable fee request. Therefore, we conclude that fees for the fee litigation, and fees for appellate review, is the most equitable and the most efficient way for this commission to implement the Colorado Supreme Court's Mountain States decisions.

Legal fees on appeal to a consumer are a necessary equalizer to the resources of the utilities. As the Colorado Supreme Court has recognized, the ratepaying public generally reimburses U S West's attorney's fees whether the company is the prevailing party or not. See Mountain States Telephone & Telegraph Co. v.

PUC, 576 P.2d 544, 547 (Colo. 1978). Just as the United States Supreme Court was concerned about the financial disincentive the average person has in litigating against the United States government in its discussion in Commissioner INS v. Jean, __ U.S. __, 110 S.Ct. 2316, 2322 (1990), the average Colorado consumer faces a powerful financial disincentive in litigating against U S West. U S West receives fees win or lose, and the average consumer ironically funds U S West's litigation war chest through rates. If a party can recover legal fees, there is some balance for the consumer litigating against wealthy regulated corporations, such as U S West Communications, Inc.

Next, it is important to realize that there will be very few instances in the future in which a consumer representative will qualify for attorney's fees. The Colorado Supreme Court decided Mountain States Telephone and Telegraph v. PUC, 502 P.2d 945 (Colo. 1972) and Mountain States Telephone & Telegraph Co. v. PUC, 576 P.2d 544, 547 (Colo. 1978), before the Legislature institutionalized an "equalizer" to the regulated corporations' power at the commission by creating the Colorado Office of Consumer Counsel in 1984. Now, the Office of Consumer Counsel represents the consumer interest -- except in situations involving an individual consumer such as the O'Bryant case. In typical cases where consumers and the utilities have a dispute, such as rate cases, the OCC will represent the consumer interest. The second Mountain States standard for awarding fees -- "materially assisting" the commission in reaching the decision -- probably will block attorney's fees to individual consumer

litigants, if the OCC is involved. In other words, the Legislature has significantly addressed the consumer representation problem by creating the OCC, and there will be few instances where the commission will use its jurisdiction under Mountain States Telephone & Telegraph Co. v. PUC, 576 P.2d 544 (Colo. 1978), to award legal fees to consumer representatives.[28]

Also, as a practical matter, it is important to realize that there is no "windfall" to attorneys by awarding legal fees in these limited circumstances. First, O'Bryant's attorneys only will be paid, as any other person would be paid for doing a job. We are not awarding any bonus; we are simply ordering that O'Bryant's attorneys be paid, just as U S West's attorneys are paid. Second, an attorney thinking of accepting a public interest case and representing an individual consumer at the PUC hardly will be overwhelmed by the "bonanza" of legal fees -- all the attorney will receive is his payment for a job -- and only after considerable effort, out-of-pocket expense, and delay.

Mr. O'Bryant's attorneys, Hill & Robbins, took this case pro bono, receiving the assignment on a volunteer basis from the Lawyers Committee. See Ante at 8. We believe that the fact that O'Bryant's attorneys took this case without charging him a retainer does not preclude an attorney fee award. Pro bono attorneys should receive legal fee awards for their work on an equal basis with privately-retained attorneys. We need to encourage consumer representation, and to emphasize that public

[28] O'Bryant filed this case on July 11, 1984, eleven days after the Legislature established the OCC. Although the was in existence at the time of O'Bryant's lawsuit, it was not allowed to participate, as discussed previously, due to the strict construction of the OCC's enabling statute, preventing the OCC from intervening on behalf of individual consumers under all circumstances. See Ante at 9 & nn. 11-12.

interest litigation is just as important and just as serious as the litigation performed by paid, privately-retained law firms.[29]

As discussed, this case is a good example of private attorneys filling an important role in defending the public and consumer interest. The allowance of fees compensates their participation in pro bono public interest litigation, and at the same time fills a gap in the Colorado Office of Consumer Counsel's enabling statute. See Colorado Revised Statutes § 40-6.5-106(2) (1984 Rep. Vol.17) (consumer counsel not allowed to represent individuals).

The Colorado Supreme Court recognized that it should award legal fees to attorneys employed by a public interest firm or organization on the same basis as private practitioners in Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1982).[30] In areas outside the security deposit statute, Colorado courts have applied similar reasoning. See In re Marriage of Swink, 807 P.2d 1245, 1247-1248 (Colo. App. 1991) (pro bono divorce attorney entitled to attorney's fees); Hartman v. Freedman, 591 P.2d 1318, 1322 (Colo. 1979) (attorney's fees allowed on appeal where there is an entitlement to fees by statute in the original proceeding) (wage collection statute).

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[29] The Colorado Court Of Appeals reaffirmed these principles, In re Marriage of Swink, 807 P.2d 1245, 1248 (Colo. App. 1991):

> allowance of reasonable fees to attorneys who provide pro bono services to the economically disadvantaged tends, as a matter of economic reality, to encourage greater lawyer-participation in such activities and that such practice should be encouraged as a matter of public policy.

[30] Mau v. E.P.H. Corp., 638 P.2d 777, 780 (Colo. 1982) (evidence that a students association furnished tenant's attorney with an office, a monthly salary, and secretarial service, does not justify reducing the attorney's fee award) (referring with approval to the federal civil rights cases where "attorney's fees are awarded to attorneys employed by a public interest firm or organization on the same basis as to a private practitioner"). See also, New York Gaslight Club Inc. v. Carey, 447 U.S. 54, 70, n. 9. (1980) (public interest group); Blum v. Stenson, 465 U.S. 886, 894-895 (legal aid society); Keyes v. School Dist. No. 1, 439 F. Supp. 393, 405-407 (D. Colo. 1977) (the fact that attorneys from Holland & Hart appeared pro bono on behalf of NAACP Legal Defense Fund does not affect their entitlement to fee recovery); Ramos v. Lamm, 539 F. Supp. 730, 744 (D. Colo. 1982) (attorneys from Holland & Hart appearing pro bono on behalf of ACLU entitled to recover fees "equal to that paid to regularly-employed attorneys involved in this type of litigation"), affirmed, 713 F.2d 546, 551-552 (10th Cir. 1983) (denial of fees would reduce the incentive to eliminate

Other courts also have affirmed the proposition that pro bono attorneys should not have their fees eliminated or reduced, merely because they took a case without a retainer paid by the client.[31] As the United States Court of Appeals for the Second Circuit has noted, the securing of legal protection and statutory compliance "has frequently depended on the exertions of organizations" dedicated to public interest goals, and awarding legal fees to public interest law firms "promotes their continued existence and service to the public in this field," and "helps assure the continued availability of the services to those most in need of assistance." Torres v. Sachs, 538 F.2d 10, 13 (2nd Cir. 1976). As the Colorado Supreme Court has noted, the recovery of fees is also necessary in order to attract competent counsel to pursue private statutory enforcement. Mau v. E.P.H. Corp., 638 P.2d 777, 780 (Colo. 1982). Hill & Robbins, Mr. O'Bryant's attorneys, performed the public service function mentioned by the Second Circuit in Torres v. Sachs, with the professional competence mentioned by the Colorado Supreme Court in Mau v. E.P.H. Corp.. O'Bryant is an individual consumer who filed a pro se complaint in July 1984. O'Bryant's counsel, Hill & Robbins, began representing him in July 1985, and the matter proceeded as follows:

> July-December 1985: Discovery, filing of factual stipulations, filing of summary judgment motions, issuance of Commission decision of violation, U S West's filing of exceptions.

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violations and to settle; recovery will increase the ability to finance litigation that otherwise would not be pursued).

[31] Denying attorneys' fees to public interest counsel would substantially decrease the incentive to "obey the law," Alexander v. Hill, 553 F. Supp. 1263, 1266 (W.D.N.C. 1983), and to agree to reasonable settlements once proceedings are commenced, Gunther v. Iowa State Men's Reformatory, 466 F. Supp. 367, 369 (N.D. Iowa 1979). ("Why should an employer settle when it can go to court and risk so little as long as a salaried public interest lawyer is representing plaintiff?").

> 1986: Commission adoption of decision, U S West's filing of application for rehearing, denial of rehearing, U S West's petitioning for writ of certiorari in District Court, PUC rulemaking procedures, attempted settlement, O'Bryant's objection to settlement.
>
> 1987: District Court's dismissal, initiation and pursuit of Colorado Supreme Court appeal.
>
> 1988: Supreme Court proceedings.
>
> 1989: Supreme Court reverses District Court dismissal and remands; U S West voluntarily dismisses complaint for judicial review at district court, and matter goes back to PUC.

This individual consumer probably could not have afforded to hire and pay for counsel to pursue these proceedings. It was not in Mr. O'Bryant's economic best interest to do so even if he were able, given the extremely small amount of money or damages at stake for him alone.ly on appellate legal fees, we conclude that O'Bryant did not waive his fee request by filing this motion for attorney's fees at the commission on March 16, 1990, after remand from the Colorado Supreme Court in 1989. Under the analogous federal statutes, O'Bryant's fee request was timely. Normally, a prevailing party is not allowed to file a fee petition until after the merits of a claim have been finally determined. In administrative attorney fee awards, the party seeking fees must wait until the appeals are over -- then go back to the agency to seek attorney's fees -- exactly what O'Bryant has done in this case. The Equal Access to Justice Act statute, allowing attorney's fees to prevailing parties in administrative adjudications, is typical of the normal procedure. The Equal Access to Justice Act provides:

> A party seeking an award of fees and other expenses shall, within thirty days of a final disposition of the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court of appeal or until the underlying merits of the case have been determined pursuant to appeal.

Equal Access to Justice Act, 5 U.S.C. § 504(a)(2) (emphasis added).

Thus, by analogy, O'Bryant did not waive his attorney's fees request by failing to file a motion for attorney's fees at the commission in 1984-1986. U S West exhausted its administrative remedies, then appealed the commission's decision to district court within the 30-day statutory period, before O'Bryant could seek fees. See Ante at 10. After the Colorado Supreme Court issued a final decision ending the litigation of the merits, O'Bryant properly filed a fee petition with the commission.

The Colorado Supreme Court, in the first Mountain States case, recognized that the commission, not the Supreme Court, should make the determination of attorney's fees. See Mountain States Telephone and Telegraph v. PUC, 502 P.2d 945, 952 (Colo. 1972) ("Whether or not such an award would be equitable and proper under the circumstances of the case is, of course, a question to be decided by the Commission and not initially by

this court.") The O'Bryant fee request was properly and timely filed with this Commission.

5. On the facts of this case it is the appropriate for O'Bryant as the prevailing party to receive his fees from U S West.

Under the Colorado Supreme Court's Mountain States criteria for the award of attorney fees at the commission, it is not necessary for a party to be the prevailing party in order to be entitled to fes, unlike most attorney fee statues. As O'Bryant points out in his Petition for Rehearing, Reargument, and Reconsideration (August 24, 1992), the Mountain States standards can be met by a party that does not prevail on any issue, if that party successfully brings information to the Commissioners' attention and materially assists the commission in makings its decision.[32] In this particular case, O'Bryant prevailed at all stages in this litigation, which makes his case for the entitlement to fees particularly strong. Furhter, because O'Bryant was the prevailing party, we think that it is fair that U S West, rathern than the commission, pay the fee award, as is the case in the statutory fee award situation.

We conclude that O'Bryant properly filed his fee request with the Commission after remand. Further, he should receive legal fees for judicial review and for the fee litigation, and

[32] O'Bryant gives the following useful example of such a situation:

> For example, a utility and an intervening party may suggest opposing positions, from which the Commission may adopt a third hybrid approach. In this instance, although the intervenor did not prevail, it should merit consideration for an award of attorney's fees if the Commission believes that it could not have adopted its preferred position in the absence of the activities of the inteervenor; i.e., but for the efforts of the intervenor record evidence would have been lacking. (O'Bryant's Petition for Rehearing, Reargument, and Reconsideration ¶4 at 2-3 (filed August 24, 1992).)

the commission should not reduce O'Bryant's fee due to the fact that his attorneys took the case on a pro bono basis.

2. Second standard for legal fees: "materially assisting"the Commission in reaching the decision.

The second standard for the award of attorney's fees -- "materially assisting" the commission in reaching the decision -- is aimed principally at multiple intervenor litigation such as U S West or Public Service Company of Colorado rate cases, where the Colorado Municipal League, for example, intervenes as one of many parties. If the commission denied a rate increase, for example, the Colorado Municipal League as one of many opponents would not automatically receive attorney's fees for its efforts, if the key evidence came from other sources, for example the Staff of the commission or the Colorado Office of Consumer Counsel. O'Bryant meets the second criteria because he was the only party plaintiff in the case at the commission.[33]

Similarly, on appeal, O'Bryant "materially assisted" the Colorado Supreme Court's decision by not withdrawing, and by refusing to accept the district court's dismissal of the appeal as "moot" because of the settlement agreement between U S West and the commission. Thus, O'Bryant meets the second criteria.

3. Third standard for legal fees: "reasonableness."

The third standard for attorney's fees and costs is that the amount requested must be "reasonable." We cannot rule on the amount of legal fees today, and must remand this motion to the administrative law judge for a hearing.

[33] U S West and AT&T helped to ensure that O'Bryant stood alone by successfully preventing the OCC from intervening. See Ante at 9.

Evidentiary hearings are required to determine the reasonableness of attorney's fees. See Heatherridge Management Co. v. Pennon, 558 P.2d 435, 438 (Colo. 1977). We cannot rule on the amount of attorney's fees, because the administrative law judge did not hold an evidentiary hearing on O'Bryant's fee request.[34] Today, we find only that, as a matter of law, O'Bryant: (1) is entitled to reasonable attorney's fees and costs before the commission; (2) is entitled to reasonable attorney's fees and cost on appeal; and (3) is entitled to reasonable attorney's fees and costs for the fee litigation. We remand the case to the administrative law judge to conduct an evidentiary hearing as to the appropriate amount of legal fees and costs.

E. ISSUES ON REMAND TO THE ADMINISTRATIVE LAW JUDGE.

On remand to the administrative law judge, the commission directs the administrative law judge to hear legal argument on the standard for determining the reasonableness of a fee request.

In Colorado, there are few attorney fee statutes, unlike the federal system which has fee shifting statutes such as the Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988; the Equal Access to Justice Act statute allowing attorney's fees for a prevailing party (other than the government) in administrative adjudications, 5 U.S.C. § 504; and the Equal Access to Justice Act statute awarding fees to prevailing parties in civil actions by or against the United States, 28 U.S.C. § 2412. The federal test awards fees by, multiplying: (1) the hourly fee, determined

[34] On remand to the commission, the administrative law judge determined, as a matter of law, that O'Bryant failed the first threshold standard in the Mountain States test for the right to claim attorney's fees. See Decision No. R91-348 at 8, Ordering ¶ 1 (March 19, 1991). Therefore, he held no evidentiary hearings on the amount of the fee request.

at prevailing market rates, times (2) the number of hours reasonably expended in the case. See Blum v. Stenson, 465 U.S. 886 (1984). (This reasonable hourly fee, times reasonable number of hours, is the "lodestar" calculation.)

One of the few Colorado fee-shifting statutes is the security deposit statute. If a landlord wrongfully retains a security deposit, the statute awards a tenant treble the amount of the wrongfully withheld deposit, plus reasonable attorney's fees and costs. See Colorado Revised Statutes § 38-12-103 (1982 Rep. Vol.16A). In construing the attorney fee provision in Colorado's security deposit statute, the Colorado Supreme Court has looked to the extensive body of law construing the federal Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988. See Mau v. E.P.H. Corporation, 638 P.2d 777, 780 (Colo. 1981). Therefore, the administrative law judge may also find the federal lodestar standard applicable for judging the reasonableness of the fee request in O'Bryant.

IV. CONCLUSION.

O'Bryant is entitled to reasonable attorney's fees and costs from U S West, which should: (1) include legal fees for his representation at the commission; (2) include legal fees for his representation on judicial review; and (3) include legal fees for the fee litigation, for the reasons stated above.

THEREFORE THE COMMISSION ORDERS THAT:

1. Complainant Larry D. O'Bryant's motion for attorney's fees and costs is granted.

2. This matter is remanded to the administrative law judge for further findings and conclusions not inconsistent with this Decision.

3. The 20-day time period provided in Colorado Revised Statutes § 40-6-114(1) (1991 Cum.Supp. Vol.17) to file an application with the Commission for rehearing, reargument, or reconsideration of this Decision, begins on the day after the release date (mailing date) of this Decision.

4. This Order is effective on its date of mailing.

ADOPTED IN OPEN MEETING January 13, 1993.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

CHAIRMAN ROBERT E. TEMMER NOT PARTICIPATING.