(Decision No. R90-473)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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RE: INVESTIGATION AND SUSPENSION OF PROPOSED CHANGES IN TARIFF -- COLORADO PUC NO. 5 - TELEPHONE -- THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, DENVER, COLORADO 80202.	)	INVESTIGATION & SUSPENSION DOCKET NO. 1400 (REMAND)
	)	RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR G. STALIWE

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April 2, 1990
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Appearances: Coleman M. Connely, Esq., Denver, on behalf of The Mountain States Telephone & Telegraph Company;

Dudley P. Spiller, Esq., Denver, on behalf of the Colorado Municipal League; and

Mark W. Gerganoff, Assistant Attorney General, Denver, on behalf of the Staff.

STATEMENT OF THE CASE

By decision issued in 1988, Colorado Municipal League v. The Mountain States Telephone and Telegraph Company, 759 P.2d 40, (1988), the Colorado Supreme Court remanded the matter to determine whether or not additional productivity offsets were required to certain annualized wage and salary increases which had gone into effect during the 1979 test year. In the words of the Court:

> We therefore conclude as a matter of law that there was no substantial evidence in the present record to justify the Commission's finding in the supplemental decision of August 20, 1985, that no productivity offset is required.[7]

The court then went on to state in footnote seven:

> This does not preclude the Commission from taking new evidence and making additional findings based on this new evidence.

759 P.2d at 46. Subsequent to the issuance of the Supreme Court decision the matter was remanded back to the Commission by the district court.

The matter came on for hearing on July 24, 1989, before Administrative Law Judge Arthur G. Staliwe. Final briefs were filed in August 1989 by the parties. Also, an issue regarding whether or not new hearings could be held was presented by the Colorado Municipal League (League) in the form of a motion for summary judgment, wherein the League argued that other Colorado Supreme Court decisions prohibited this Commission from conducting additional evidentiary hearings, thus entitling the League to immediate victory. Obviously, given the language of the Colorado Supreme Court in the decision pertinent to this docket, as quoted above, additional hearing in this matter was indicated. It should be noted that this is the second remand on this very issue.

FINDINGS OF FACT

Based upon all the evidence of record the following is found as fact:

1. To begin, as conceded by all of the parties at the conclusion of the hearing, there are no facts in dispute. Rather, the gravamen of this case involves what economic and/or accounting policy the Commission should follow in utilizing in-period adjustments. Any evidence in this regard would not be of the classic physical, documentary, or testimonial evidence normally used in a trial to establish the existence of real facts. Rather, this case involves the application of logic to policy determination.

2. As indicated in Exhibit No. 2, the filed testimony of Eric L. Jorgensen, a principle financial analyst for this Commission, separate productivity offset studies are not applied to in-period wage increases because a given test year already includes the various relationships between inputs and outputs of productivity as part of that test year. Thus, to utilize a given test year and also add a productivity offset to the wage and salary increases that had been annualized during that test year, would have the net effect of doubling the productivity offset, and thus work a penalty against the utility it was being applied to.

Further, not applying separate productivity offsets to in-period adjustments allows utilities to share in the benefits of increased productivity, thus creating incentives to continue increasing their productivity. It would not take a utility long to determine that if all of its productivity gains were to be held against it at the time of ratemaking, with the company not sharing in any of its efficiency measures, then there would no longer be incentives to be efficient, and to continue productivity gains. It would be far simpler to allow corporate operations to continue at a status quo for some period preceding the filing of a rate case, and only apply productivity measures after rates had been established at an artificially high level.

3. This Commission was faced with the identical question by the same parties in the next Mountain Bell rate case, Investigation &

Suspension Docket No. 1575, involving a 1981 test year. In its decision, the Commission addressed this issue as follows:

> G. 1981 Wages and Benefits.
>
> As with all revenue and expense changes within the test period, Mountain Bell has annualized wage increases that become effective during the test period. Following past Commission practices, neither Mountain Bell nor the Staff of the Commission proposed a productivity offset to a test year wage increase. Georgetown Group Witness Madan again proposed an offset to the in-period wage increase annualization.
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> The evidence reflects that certain Mountain Bell employees received wage increases in April of 1981, and others received pay increases in August of 1981. Both the Company and the Staff of the Commission "annualized" these wage increases, i.e., revised wage expenses as if the rate of pay after the increases became effective was the rate of pay on the first day of the test period. The annualization method employed was identical to other expense changes, such as the two 1981 postage rate increases, and also identical in methodology to the 1981 directory advertising rate increases that caused test period revenues to be adjusted upwards.
>
> Mr. Madan's adjustment focuses on the 12 months following the effective date of a wage increase. Under this adjustment, a productivity offset is applied to that portion of the 12-month period not booked by Mountain Bell during the 1981 test year. Mountain bell submits, and we agree, that Mr. Madan has not provided any rationale supporting the need to focus on the first 12 months after a wage increase. The purpose of an annualization adjustment is to take a price level change during the test year and adjust the year as if that price were in effect on the first day of the test period. Test year volumes, therefore, remain unchanged. This annualization is necessary for both revenues and expenses. In this manner, the Commission is presented with a full 12 months of revenue-to-expense relationships more consistent with the

> revenue-to-expense relationships that will exist when rates authorized will be effective. Nothing in this process suggests that an annualization adjustment should somehow be modified by focusing on the first 6 months, 12 months, or 18 months that the revenue or expense level is booked by the utility.
>
> Mountain Bell submits that all productivity increases realized by Mountain Bell in Colorado are reflected in 1981 operating results presented to the Commission as the test year in this proceeding. The Company and Staff wage annualization adjustment merely recasts the 1981 test year as if the wage levels increased during the year were effective from the first day of the year. No rationale has been presented to treat in-period wage annualizations in a manner different than other price level changes during the test year. Further, by focusing on the 12 months after a wage increase becomes effective (for whatever reason), and proposing to offset with a productivity adjustment that portion of the first 12 months not paid in the test year, Mr. Madan seeks to have productivity gains after the test period applied to wage increases annualized in the test year. This ignores the capital and other expenses attendant to productivity gains during the year 1982 and consequently we are of the opinion that Mr. Madan's adjustments would constitute a regulatory mismatch. Accordingly, we adopt the position of Mountain Bell and the Staff, consistent with our treatment in I&S Docket No. 1400, and reject the theory that an in-period wage annualization must be offset in part by a productivity factor. As a result of our acceptance of Mountain Bell's and the Staff's position with respect to 1981 wages and benefits, the booked net operating earnings of the Company are reduced by $4,455,000.

Decision No. C82-1905 (December 7, 1982) at 54,55.

As explained above, a given test year inherently has its own productivity measure; this is not a situation where certain wage and salary increases escape completely untouched in one scenario, while they bear an onerous burden in another. As conceded by the League's witness Jamshed K. Madan, the difference in productivity offsets between the 8.9

percent average for the years 1975 through 1979, and the 10.1 percent productivity estimated for the calendar year 1980, is 1.2 percent, or an estimated $1,000,000 in revenue requirement. The use of an average buffers the effect of the productivity offset; this benefits the company during a period of gains and ameliorates the impact on consumers during productivity losses. There is no question among the parties to this proceeding that an existing test year carries with it the productivity gains (or losses) present in a utility's operation during that period.

4. One argument that needs to be addressed is the League's concern that if a wage and salary increase is able to be squeezed in on the last day of a test year, and annualized for that test year, it is treated significantly different from an out-of-period adjustment filed one day after the test year, presumably allowing the company to receive a windfall. From this administrative law judge's experience in dealing with these adjustments, such is not the case. The reason an out-of-period adjustment is subject to its own specific productivity offset is that, by definition, it stands alone and is not related to any of the other financial adjustments or countervailing allowances inherent in a complete test year. Because of the possibility that an out-of-period adjustment might have a skewing effect, that out-of-period adjustment is subject to its own specific productivity offset. Further, after having its own productivity offset applied to it, the measurement of that out-of-period adjustment is applied as a percentage increase to the test year expense level for that item.

DISCUSSION

As noted by the Colorado Supreme Court in its decision in Colorado Municipal League v. The Mountain States Telephone and Telegraph Company, 759 P.2d 40 (1988), this Commission was specifically empowered to conduct additional hearings for purposes of adducing the underlying rationale behind its Commission's policy of not applying two productivity offsets against in-period wage and salary adjustments. Whether in-period or out-of-period, some productivity offset is applied to wage and salary increases. The only reason for the specific offset application to out-of-period increases is the fact that these increases occur without reference to a given test year, and thus require a separate productivity study.

Upon analysis it does not appear that allowing the utility to share in the benefits of its productivity gains is either improper or against public policy. Indeed, as noted by the U. S. Supreme Court in Duquesne Light Company v. Barasch, 109 S. Ct. 609 (1989):

> . . . Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions. . . .

109 S. Ct. at 619. Accordingly, this administrative law judge does not feel at liberty to change this Commission's long standing practice regarding the utilization of productivity studies, and therefore does not feel any changes are in order. In view of this, there need be no adjustments to the overall expense level or revenue requirement.

ORDER

THE COMMISSION ORDERS THAT:

1. As noted above, in accordance with existing Commission practices no additional productivity offset is indicated for in-period wage and salary adjustments, since in-period adjustments are already subject to the productivity factors inherent in a test year.

2. The Colorado Municipal League's motion for summary judgment is denied.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a. IF NO EXCEPTIONS ARE FILED WITHIN 20 DAYS AFTER SERVICE OR WITHIN ANY EXTENDED PERIOD OF TIME AUTHORIZED, OR UNLESS THE DECISION IS STAYED BY THE COMMISSION UPON ITS OWN MOTION, THE RECOMMENDED DECISION SHALL BECOME THE DECISION OF THE COMMISSION AND SUBJECT TO THE PROVISIONS OF § 40-6-114, C.R.S.

b. IF A PARTY SEEKS TO AMEND, MODIFY, ANNUL, OR REVERSE BASIC FINDINGS OF FACT IN ITS EXCEPTIONS, THAT PARTY MUST REQUEST AND PAY FOR A TRANSCRIPT TO BE FILED, OR THE PARTIES MAY STIPULATE TO PORTIONS OF THE TRANSCRIPT ACCORDING TO THE PROCEDURE STATED IN § 40-6-113, C.R.S. IF NO TRANSCRIPT OR STIPULATION IS FILED, THE COMMISSION IS BOUND BY THE FACTS SET OUT BY THE ADMINISTRATIVE LAW JUDGE AND THE PARTIES CANNOT CHALLENGE THESE FACTS. THIS WILL LIMIT WHAT THE COMMISSION CAN REVIEW IF EXCEPTIONS ARE FILED.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

(S E A L)

ARTHUR G. STALIWE

Administrative Law Judge

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