(Decision No. C85-781)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATER OF THE APPLICATION OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY TO OBTAIN AUTHORIZIATION FOR THE TRANSFER OF CERTAIN ASSETS ASSOCIATED WITH DIRECTORY ADVERTISING.	))))))	APPLICATION NO. 36247 ORDER OF THE COMMISSION DENYING APPLICATION

- - - - - - - - - - -
June 14, 1985
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Appearances: Russell P. Rowe, Esq.,
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The Mountain States Telephone
and Telegraph Company

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Peter R. Nadel, Esq.,
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Anthony Marquez, Esq.,
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the Staff of the Commission

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For the Commission.

STATEMENT AND FINDINGS OF FACT

BY THE COMMISSION:

I. HISTORY OF PROCEEDINGS

On April 2, 1984, The Mountain States Telephone and Telegraph Company (Mountain Bell) filed Application No. 36247 seeking the Commission's approval of the transfer of certain of its assets pursuant to § 40-5-105, C.R.S. In fact, Mountain Bell, on January 1, 1984, prior to the filing of this application, had transferred certain assets associated with the publishing of telephone directories (directory assets), to Landmark Publishing Company (Landmark). Landmark is a

wholly-owned subsidiary of U S West Inc.[1] These assets, and the net book value associated with them on a total Mountain Bell company basis were as follows:

Cash (Account 113)	$56,300,000.00
Building (Account 212)	2,613,000.00
PBX and Station Equipment (Accts. 234 and 231)	2,738,000.00
Office Equipment and Computers (Account 261)	2,977,000.00
Motor Vehicles	6,000.00
Computer Software Related to Directory Yellow Pages	-0-
TOTAL	$64,634,000.00

Mountain Bell sold and assigned the foregoing assets to Landmark, but did not seek this Commission's authorization of the transfer prior to effecting the transfer of assets, nor did Mountain Bell seek prior authorization of this Commission with possible terms and conditions attached to the transfer.

At the time Mountain Bell transferred its directory assets to Landmark, it received in exchange a .56 share of Landmark stock. Landmark has one share of stock, and thus Mountain Bell for an instant controlled 56% of Landmark. Mountain Bell declared a dividend of the .56 share of Landmark stock to Mountain Bell's then shareholder, U S West, payable on January 3, 1984.

Notice of Application No. 36247 was given by the Executive Secretary of the Commission to all interested persons, firms or corporations on April 18, 1984.

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1 U S West Inc. (U S West) is a publicly-held corporation organized and existing under the laws of the state of Colorado with its principal place of business located in Englewood, Colorado. U S West was incorporated on September 22, 1983 and it is the sole shareholder of Mountain Bell Holdings Inc., a Colorado corporation. Mountain Bell Holdings, Inc., which was incorporated in Colorado on June 14, 1984, is the sole shareholder of Mountain Bell. Landmark Publishing Company, which was incorporated under the laws of the state of Colorado on October 14, 1983, is the parent company of U S West Direct Company (U S West Direct). U S West Direct is also a Colorado corporation which was incorporated on October 14, 1983 and has its principal place of business located in Aurora, Colorado. The foregoing information is common knowledge of which the Commission takes official notice pursuant to Rule 14N of its Rules of Practice and Procedure.

On May 30, 1984, the Commission entered Decision No. C84-620 setting Application No. 36247 for hearing to begin on August 23, 1984. Decision No. C84-620 also set forth certain procedural requirements and further provided that any person, firm or corporation desiring to intervene as a party in Application No. 36247 should file a motion to intervene with the Commission on or before June 27, 1984, and should serve a copy of its motion on Mountain Bell or its counsel of record or both. The Commission also initially set Mountain Bell's application for hearing to begin on August 23, 1984; subsequent developments resulted in the initial hearing date being postponed until May 22, 1985.

On May 1, 1984, the Colorado Municipal League (League) moved to intervene, which request was granted by executive ruling of the Commission on May 31, 1984.

On June 6, 1984, the Commission by notice vacated the hearing that had previously been scheduled for August 23, 1984, and reset the same for September 6 and 7, 1984.

On June 21, 1984, the Staff of the Public Utilities Commission (Staff), through its counsel, entered its appearance in Application No. 36247.

On June 21, 1984, the League filed a Motion to Require Prefiling of Written Direct Testimony in question and answer form and for a prehearing conference to establish procedural dates. By Decision No. C84-788, dated July 10, 1984, the Commission granted the League's motion and set a prehearing conference for July 23, 1984. By the same decision, the Commission vacated the hearing dates of September 6 and 7, 1984.

On August 10, 1984, Hearings Examiner William J. Fritzel entered Decision No. R84-881-I, a procedural order which, inter alia, set the hearing dates for this application for December 12, 13, and 14, 1984. Examiner Fritzel's order also established other dates for discovery and the prefiling of testimony and joint or partial stipulations as to issues.

On August 27, 1984, Mountain Bell filed a Motion to Amend, seeking Commission authorization to amend its application to reflect certain recent developments.

Mountain Bell stated in Paragraph No. 18 of its amended application that on January 1, 1984, it had transferred certain assets associated with the publishing of directories to Landmark Publishing Company in the total amount of $64,634,000. Of that amount, $56,300,000 was cash to be used as cash working capital. In Paragraph No. 24 of its amended application, Mountain Bell stated that the $56.3 million of cash working capital, which was transferred on January 1, 1984, was the result of an estimate. In Paragraph No. 25 of its amended application, Mountain Bell alleged that subsequent events caused U S West Direct (which is the parent company of Landmark Publishing Company) and Mountain Bell to believe that the $56.3 million estimate was larger than necessary. Consequently, on August 1, 1984, U S West Direct transferred to Mountain Bell $16.925 million, together with $949,492 as compensation for the use of the $16.925 million for the first seven months of 1984.

On August 30, 1984, the League filed a response entitled Response Filed by Colorado Municipal League to Motion to Amend. In its response, the League stated that it had no objection to Mountain Bell using the most recent data in its application, including data relating to the true-up. However, the League did oppose the deletion in Mountain Bell's proposed amended application of an entire section which had appeared in the original application entitled "Suggested Procedure." In its statement of the suggested procedure, Mountain Bell indicated that this proceeding "could also be employed to examine the impact of the structural separation on Mountain Bell's 1984 results." Mountain Bell also stated, as follows, in Paragraph No. 26 of its original application:

> In the opinion of Mountain Bell, a proceeding paralleling I&S Docket No. 1655, and considering both the asset transfer and the impact of the structural separation of Mountain Bell's 1984 intrastate Colorado operating results will provide the most efficient, effective, and sensible means of bringing these matters to the attention of the Commission.

The League indicated that it agreed with the statement contained in Paragraph No. 26 of Mountain Bell's original application. The League contended that Mountain Bell should be permitted to amend its original application only to the extent that the application contains data relating to recent developments. That position would require adherence to the suggested procedure set forth by Mountain Bell in Paragraphs No. 22 through 27 of its original application.

On August 31, 1984, the Staff filed a Motion for Extension of Time in which to File a Response to the Motion of Mountain Bell for Leave to File an Amended Application which was granted on September 11, 1984, by the Commission, in Decision No. C84-1033, to September 17, 1984.

On September 17, 1984, the Staff filed a Response and Objection to Leave to File Amended Application, which was directed to Mountain Bell's motion.

On September 21, 1984, the Commission entered Decision No. C84-1068 which granted Mountain Bell's Motion to Amend Application No. 36247 pursuant to the terms and conditions set forth in the decision. In that decision, the Commission stated, in part, as follows:

> The Staff of the Commission has undertaken, on behalf of the Commission, an audit of the figures that were used by Mountain Bell in its original application. The Staff, as of this time, has not had the opportunity to audit the figures which have been used by Mountain Bell in its amended application.
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> Basically, the Commission must determine whether or not conceptually the transfer of assets from Mountain Bell to U S West Direct in connection with directory advertising is in the public interest and should be approved. If an affirmative determination of that issue is made by the Commission, it is

also necessary for the Commission to determine whether the particular dollar value of the asset transferred is reasonable. A possible third determination may involve whether or not conditions should be imposed upon the transfer of assets. It should be noted that Application No. 36247 is an "after the fact" application for approval of a transfer which, in fact, has already occurred. The correct procedure, of course, would have been to obtain Commission authorization for the transfer of assets, pursuant to CRS 40-5-105, prior to the execution of the transfer itself. In these unusual circumstances, the Commission believes that it is incumbent upon it to proceed with Application No. 36247 as expeditiously as possible. As can be seen by an abbreviated recitation of the procedural history, hearings have already been delayed from August to September to December of 1984. Accordingly, the Commission believes that it is appropriate to proceed on with the within application, as originally filed, pursuant to procedural dates that have already been established by Examiner Fritzel's order contained in Decision No. R84-881-I, dated August 10, 1984. We shall so order.

Notwithstanding the fact that the Commission believes it is appropriate for Mountain Bell to proceed on its original application within the time frames established prior to the time it filed its motion for leave to amend its application, we shall also allow Mountain Bell to amend its application to take into consideration the new financial figures which it sets forth in its amended application. However, hearings with respect to the amended application of Mountain Bell will be held sometime in the early part of 1985 and a final decision with respect to Mountain Bell's application, as amended, will be deferred until hearings both with respect to the original application (presently set for December 12, 13, and 14, 1984) and hearings with respect to Mountain Bell's amended application to be set sometime in the early part of 1985 are concluded. Specific procedural dates with respect to the amended application phase will be set forth in a subsequent order of the Commission. In the meantime, we shall order the Staff of the Commission to commence an audit of Mountain Bell's financial data in connection with the figures set forth in its amended application. We shall expect Mountain Bell to cooperate fully with the Staff so that the audit of the amended application figures can proceed in due course and in an expeditious fashion.

So that there can be no misunderstanding, the Commission desires to state that Mountain Bell and the parties shall proceed both in the hearings on the original application and in the hearings on the amended application to examine the impact of the structural separation on Mountain Bell's 1984 results. On September 14, 1984, the Office of Consumer Counsel (OCC) filed a petition for intervention, which petition was granted by executive ruling of the Commission on October 2, 1984.[2]

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2 Although the petition for intervention of the Office of Consumer Counsel was late-filed, it was granted inasmuch as the Office of Consumer Counsel which was established pursuant to Article 6.5 of Title 40, C.R.S., did not come into existence until July 1, 1984 and for the further reason that the Office of Consumer Counsel indicated that it would accept the record and all matters pertaining to Application No. 36247 as they existed at the time of its intervention.

On September 21, 1984, the OCC filed a motion for an order to show cause and for a continuance pending the retrieval of directory publishing assets. In essence, the OCC alleged that Mountain Bell had violated § 40-5-105, C.R.S., by transferring directory assets from Mountain Bell to another entity without having first secured approval of the Commission pursuant to the foregoing statutory section. The OCC further alleged that the Commission and its Staff were in the untenable position of having to review for approval, in this application, a transaction which had already occurred, and that, more accurately, the Commission was being asked to ratify an illegal, and therefore void, transaction. Accordingly, the OCC in its motion requested that the Commission continue the evidentiary portion of Application No. 36247 pending the return of directory assets to Mountain Bell, and that the Commission institute a show cause proceeding and order to Mountain Bell to expedite the return of these assets.

It would be well to note that this Commission has referred a number of procedural matters concerning the on-going litigation in this application to one or more of its hearings examiners for determination. A variety of motions have been filed by the parties relating to discovery, procedural dates, continuances, etc. which have been ruled upon by one or more of the Commission's hearings examiners, or by the Commission itself.

On September 25, 1984, U S West Direct filed a pleading entitled Motion for Leave to Enter Limited Appearance and Response to Motion to Compel Discovery filed by the League. The League, on September 19, 1984, had filed a motion to compel discovery, which motion was directed to U S West Direct to answer certain discovery requests made during a deposition taken on September 10, 1984. On September 26, 1984, Hearings Examiner

Robert E. Temmer entered Decision No. R84-1098-I, dealing with the League's motion to compel discovery. In the course of that decision, Hearings Examiner Temmer indicated that the motion for leave to enter limited appearance, which had been filed by U S West Direct was granted as a preliminary matter.

On October 1, 1984, the League filed a response in support of the motion which had been filed by the OCC on September 21, 1984. No response to the OCC was filed by Mountain Bell or the Staff.

On October 10, 1984, the Commission entered Decision No. C84-1148 in which it denied the OCC's motion. The Commission pointed out in that decision that a lawsuit had been instituted in the Denver District Court, The People of Colorado, ex rel Duane Woodard, Attorney General of the State of Colorado vs. The Mountain States Telephone and Telegraph Company, U S West, Incorporated, Landmark Publishing Company and U S West Direct (Civil Action No. 84 CV 8902) in which the same substantive relief was being sought which the OCC was suggesting could be obtained from a Commission-instituted show cause proceeding against Mountain Bell. The Commission pointed out that it did not perceive any advantage in pursuing two parallel courses of action simultaneously and in fact wished to avoid any delay which might result.[3]

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3 Pursuant to § 40-7-104, C.R.S., on September 13, 1984 the Attorney General of Colorado instituted Civil Action No. 84 CV 8902 in the Denver District Court against Mountain Bell in which he sought a court order directing the return of directory assets to Mountain Bell which had been transferred to Landmark on January 1, 1984 and for an accounting of the revenues, with interest, associated therewith. On January 22, 1985, Judge Warren O. Martin granted a motion filed by Mountain Bell to stay proceedings in Application No. 36247.

On April 18, 1985, Senior District Judge Henry E. Santo (sitting in lieu of Judge Martin) ruled that the Colorado Public Utilities Commission had jurisdiction over the directory assets of Mountain Bell and that § 40-5-105, C.R.S., requires Commission approval before an asset transfer can be accomplished. On April 18, 1985, Senior Judge Henry E. Santo also terminated the stay of proceedings on Application No. 36247 before the Commission which had been entered by Judge Warren O. Martin. The litigation in Civil Action No. 84 CV 8902 has not been concluded, as of this date, inasmuch as Judge Santo's order addressed only the jurisdictional issue of whether Mountain Bell's transfer of assets required Commission approval pursuant to § 40-5-105, C.R.S.

On December 12, 1984, Hearings Examiner William J. Fritzel entered Decision No. R84-1451-I, vacating the hearing dates of December 12, 13, and 14, 1984, and rescheduling the matter for January 23, 24, and 25 and January 30, 31, and February 1, 1985. Decision No. R84-1451-I also denied a motion that had been filed by Mountain Bell to continue the hearing in Application No. 36247 to a time after the Denver District Court ruled on the merits in Civil Action No. 84 CV 8902. However, as indicated, in footnote 3, Judge Warren O. Martin of the District Court entered a stay of Commission proceedings in this Application on January 22, 1985. Judge Martin's stay was in effect until April 18, 1985 when it was terminated by Senior Judge Henry E. Santo.

After the Denver District Court stay was terminated by Senior Judge Santo, the Commission, by notice, reset the hearings on this matter to begin on May 22, 1985. Hearings did commence on May 22, 1985 and were concluded on May 30, 1985.

On May 22, 1985, Mountain Bell orally moved to amend the procedural order which had been entered by the Commission on September 21, 1984 in Decision No. C84-1068. Mountain Bell proposed that the Commission proceed with the hearings on Mountain Bell's amended application on May 22, 1985. The Staff objected on the basis that the September 21, 1984 order specifically provided that the hearings which had originally been scheduled to begin on December 12, 1984, were for the purpose of considering Mountain Bell's original application, not its amended application. The Staff position was that the Court stay of Commission proceedings in Application No. 36247 merely froze the Commission's order as contained in Decision No. C84-1068, and that the subsequent termination of the stay by Judge Santo merely unfroze that order so that the May 22, 1985 hearing would stand in the same posture as the hearing previously scheduled for December 12, 13, and 14, 1984, which concerned Mountain Bell's original application, not its amended

application. The Commission from the bench denied Mountain Bell's motion to amend the Commission's procedural order.

The presentation of direct testimony and cross examination of Mountain Bell witnesses Irene G. Chavira and Paul Spieker took place on May 22 and May 23, 1985.[4] The presentation of direct testimony and cross examination of League witnesses Matityahu Marcus and Richard W. LeLash and Staff witnesses William A. Steele, Philip Temmer, and Robert Ekland took place on May 23, 1985. The presentation of direct testimony and cross examination of Staff witness Carl Hunt took place on May 23 and May 24, 1985. The presentation of direct testimony and cross examination of Staff witness Diane Wells took place on May 30, 1985.

At the close of the evidentiary hearing on May 30, 1985, Mountain Bell made an offer of proof by submitting a stipulation which had been entered in the Denver District Court litigation as Offer of Proof Document No. 1, the testimony of Keith Galitz as Offer of Proof Document No. 2, the deposition of Eugene P. O'Neil as Offer of Proof Document No. 3.

At the close of the evidentiary hearing on May 30, 1985, four motions by Mountain Bell were taken under advisement by the Commission:

1. A renewed motion to supplement the record by admitting the Denver District Court Stiplation.
2. A motion for an order to set future hearing dates on Mountain Bell's amended application.
3. A motion to receive into evidence Miscellaneous Exhibit No. 3, which is a decision of an administrative law judge of the New York Public Service Commission; and

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4 As has been the practice in major utility cases, the direct and rebuttal testimony of various witnesses was prefiled with the Commission in question and answer format. An exhibit list, including prefiled testimony which was marked as exhibits, is appended to the Commission's decision as Appendix A.

4. A motion to dismiss for lack of jurisdiction over the transfer of the publishing line of business assets (sometimes referred to herein as directory assets).

Rulings on these motions are made by this decision and order.

At the close of the evidentiary hearing on May 30, 1985, the Commission indicated that the parties had the option to file statements of position and proposed findings of fact on or before June 6, 1985.

Statements of position or proposed findings of fact or both were filed on or before June 6, 1985 by Mountain Bell, the OCC, the League, and the Staff.

Submission

This matter has been submitted to the Commission for decision. Pursuant to the provisions of the Colorado Sunshine Act of 1972, C.R.S. 24-6-401, et seq., and Rule 32 of the Commission's Rules of Practice and Procedure, the subject matter of this proceeding was placed on the Commission's June 11, 1985 open meeting agenda. The matter was discussed at the open meetings on June 11 and 14, 1985; the decision was entered by the Commission on June 14, 1985.

II. MOUNTAIN BELL MOTIONS

As indicated above, the Commission on May 30, 1985, took four Mountain Bell motions under advisement. We find that all four Mountain Bell motions should be denied.

A. Motion to Supplement the Record.

With respect to Mountain Bell's motion, originally made in writing on May 15, 1985, and orally renewed on May 30, 1985, to supplement the record in this proceeding by admitting the stipulation between the Commission and Mountain Bell which was entered in the Denver District Court Case No. 84 CV 8902, the Commission finds that this motion should be denied. In its original written motion, Mountain Bell argued that the Denver District Court stipulation was an admission by the Commission and also was admissible under the doctrine of collateral estoppel. During the course of the hearing, Mountain Bell orally abandoned the theory of collateral estoppel.

Mountain Bell continues to believe that the Denver District Court stipulation is an admission by the Commission which should be admitted in Application No. 36247. The Commission will not make a semantic argument about whether the real party-in-interest plaintiff in the Denver District Court action is the Attorney General of the State of Colorado or the Commission. Whether the real-party-in-interest is the Attorney General or the Commission is irrelevant. What is important and clear, however, is that the Commission is not a party in Application No. 36247 but is a constitutional and statutory agency of the State of Colorado charged with the responsibility of making the initial administrative determination of whether Application No. 36247 is in the public interest and should be granted or denied. Mountain Bell orally argued that "part" of the Commission, as an institution, is a party in this Application inasmuch as the Staff of the Commission is a party participant in this docket. Mountain Bell's legal position is untenable. Section 40-2-101, C.R.S., specifically states that the Public Utilities Commission consists of three members who shall be appointed by the Governor with the consent of the Senate. Accordingly, it is quite clear that the Commission consists of its three appointed members and not its three appointed members together with its Staff. Commission employees "devote their entire time to the service of the Commission" (§ 40-2-104, C.R.S.); Commission employees are not "part" of the Commission.

There is not an identity of parties in the Denver District Court litigation, and the parties who are appearing before the Commission in this Application. The Staff of the Commission was not a party in the Civil Action No. 84 CV 8902 in the Denver District Court. It has entered its appearance as a party to Application No. 36247. The League and the OCC were not parties in the District Court litigation or to that stipulation. The stipulation that was entered in the Denver District Court proceeding was between the Commission and Mountain Bell.

Accordingly, Mountain Bell's argument that the Denver District Court stipulation is an admission against the Commission in this proceeding in which the Commission is not a party and, as such, should be admitted in Application No. 36247 is not well founded.

On August 10, 1984, Hearings Examiner William J. Fritzel entered Decision No. R84-882-I which provided that the prefiled testimony of Mountain Bell was to be filed on or before August 27, 1984. Mountain Bell's motion to supplement the record is a drastic departure from that procedural directive, and Mountain Bell did not establish that the facts which it desired to place into the record via the Denver District Court stipulation were facts that were not known, or could not have been known, prior to the time it was required to file its direct case. Procedural fairness to the League, the OCC, and the Staff of the Commission, who were not parties to the Denver District Court stipulation, dictates that a last-minute supplementation of its direct case, some nine months after its direct case was to have been pre-filed on August 27, 1984, should not be permitted.[5]

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5 Mountain Bell in its statement of position alleges procedural unfairness because the Commission would not permit Mountain Bell to submit the testimony of Mr. Galitz, who would testify as to the nature of the publishing business and the relationship between Mountain Bell and U S West Direct, together with the testimony of Mr. Eugene O'Neil who would testify as to the financial records of U S West Direct. Mountain Bell alleges that the Commission's refusal to permit it to put on the testimony of Mr. Galitz and Mr. O'Neil precluded it from presenting a comprehensive case to the Commission. Mountain Bell's position is without merit. Mountain Bell has cited no authority for the proposition that a proponent in a proceeding can supplement its case from time to time as the case proceeds through litigation. In fact, Mountain Bell was permitted to supplement the testimony of Ms. Chavira and Mr. Spieker with testimony prefiled on January 16, 1985, entitled Rebuttal A and Rebuttal B, and the testimony filed by Mountain Bell witnesses Chavira and Spieker addressed not only Mountain Bell's original application, but also its amended application. Contrary to Mountain Bell's assertion, made on page 7 of its statement of position, the supplementation of Staff testimony by Staff witness Wells was in response to Ms. Chavira's rebuttal testimony, and likewise the testimony filed by League witness LeLash dealt with rebuttal testimony filed by Ms. Chavira. The attempt by Mountain Bell to introduce two new witnesses' direct testimony, namely that of Mr. Galitz and Mr. O'Neil, would have directly violated the Commission's procedural order when, as indicated above, Mountain Bell made no showing whatsoever that the additional testimony would deal with facts that it did not know or could not have known at the time it was required to file its direct case.

B. Motion to Set Hearing Dates.

Likewise the Commission finds that Mountain Bell's motion to set hearing dates on Mountain Bell's amended application should be denied. The reasons are twofold. First of all, the Commission made it very clear in its Decision No. C84-1068, dated September 21, 1984, that its initial determination with respect to Mountain Bell's application was the conceptual issue of whether or not the transfer of assets from Mountain Bell to U S West Direct in connection with directory advertising is in the public interest and should be approved. In that decision, the Commission further stated that if an affirmative determination of that issue were to be made by the Commission, it would then be necessary for the Commission to determine whether the particular dollar value of the assets transferred was reasonable, and that a possible third determination might involve whether or not conditions should be imposed upon the transfer of assets. For reasons which will be delineated in this decision, the Commission finds that the transfer of assets from Mountain Bell to U S West Direct is not only not in the public interest, but is contrary to the public interest, and that accordingly Application No. 36247 should be denied. Since the Commission both for non-financial reasons, as well as financial reasons, has determined on the record already made that the transfer of assets is not in the public interest, the issue of further hearings in this application, even as amended, has become moot.

There is a second reason why the Commission is denying Mountain Bell's motion to set further hearing dates with respect to its application. Mountain Bell stated in paragraph No. 18 of its amended application that on January 1, 1984, it transferred certain assets associated with the publishing of directories to Landmark in the total amount of $64,634,000. Of that amount, $56,300,000 was cash to be used as cash working capital. In Paragraph No. 24 of its amended complaint, Mountain Bell states that the $56.3 million of cash working capital,

which was transferred on January 1, 1984, was the result of an estimate. In Paragraph No. 25 of its amended application, Mountain Bell contends that subsequent events have caused U S West Direct (which is the parent company of Landmark) and Mountain Bell to believe that the $56.3 million estimate was larger than necessary, and as a result on August 1, 1984, U S West Direct transferred to Mountain Bell $16.925 million together with $949,492 which was also transferred as compensation for the use of the $16.925 million for the first seven months of 1984.

The foregoing financial information, as set forth in Mountain Bell's amended application, was incorporated into the prefiled testimony of Mountain Bell witness Chavira. The Staff moved to strike Ms. Chavira's testimony on the grounds that it incorporated data pertaining to the amended application as distinguished from the original application. The Commission denied the Staff's motion and permitted Mountain Bell to proceed with Ms. Chavira's pre-filed direct and rebuttal testimony, notwithstanding the fact that the testimony also dealt with Mountain Bell's amended application. Likewise, the Commission admitted Mountain Bell witness Spieker's pre-filed direct and rebuttal testimony.[6] At the same time, the Commission determined that Mountain Bell would not be permitted to supplement the record with the Denver District Court stipulation or with new testimony. Mountain Bell claims that the Commission's refusal to let it supplement the record with the Denver District Court stipulation or with new testimony is a denial of due process. As indicated previously that contention is untenable.

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6 Unlike the testimony of Galitz and O'Neill, proferred on May 22, 1985, rebuttal testimony by Mountain Bell was filed well in advance of the hearing dates. This four-month difference in the date of offering testimony is a critical factor in the Commission's decision not to allow Mountain Bell rebuttal testimony and to disallow entirely new testimony from Galitz and O'Neill.

Mountain Bell, of course, had ample time between May of 1984, or even September of 1984, and the commencement of the hearing in this matter on May 22, 1985, within which to move for leave to supplement the record either with respect to its original application or its amended application. Ordering paragraph 4 of Decision No. C84-620, which was entered on May 30, 1984, stated:

> Except upon timely motion and for good cause shown, or by stipulation of all the parties and the Staff of the Commission, no other, different or additional exhibits, witnesses, or scope of witnesses' testimony will be permitted to be offered in support of Mountain States Telephone and Telegraph Company's direct case.

As indicated above, all prefiled testimony, direct and rebuttal, was admitted into evidence and cross examination was had with respect to almost every witness. The direct and surrebuttal testimony of the parties dealt not only with Mountain Bell's original application, but also its amended application. Since for reasons stated later, the Commission has determined that Mountain Bell's application should be denied, the issue of further hearing dates on this application has become moot. The Commission finds the motion should be denied.[7]

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7 In its statement of position, on page 11, Mountain Bell states:

> In the event that this Commission finds that the record is sufficiently incomplete to approve the transfer, the Commission should continue these proceedings until a more complete record can be established and Mountain Bell is given an opportunity to fully present evidence of its contractual relationship with U S West Direct.

> Mountain Bell, of course, as the applicant in this proceeding had the burden of going forward and the burden of proof. This Commission is unaware of any legal authority, and Mountain Bell has cited none, for the proposition that procedural due process entitles an applicant to one or two or perhaps even three bites at the apple to prove its case. Due process of law also applies to the Commission and other parties before it. There is no reason that this Commission or other parties before it should be subjected to continuous and ongoing litigation until Mountain Bell gets it right.

C. Admission of Miscellaneous Exhibit No. 3.

Mountain Bell also moved for the admission of Miscellaneous Exhibit No. 3, which is a decision by an administrative law judge of the New York Public Service Commission dealing with directory services.

Mountain Bell believes that the admission of Miscellaneous Exhibit No. 3 would impeach the testimony of Dr. Carl Hunt when he quoted from the July 26, 1984 opinion by Judge Harold Greene concerning publishing fees. When Dr. Hunt was asked by Mountain Bell's counsel whether he was aware whether or not the New York Commission had analyzed the impact of the arrangement in New York for directory advertising, Dr. Hunt replied that he did not know what action the New York Commission had taken. The fact that an administrative law judge had entered a decision, on which the New York Public Service Commission itself had not even rendered an opinion, does not have any relevance to the testimony of Dr. Hunt in which he quoted what Judge Greene had said in July of 1984. If Dr. Hunt had testified that the New York Commission had taken a certain line of action, and Mountain Bell had introduced an exhibit embodying a decision of the New York Commission which contradicted Dr. Hunt's testimony, that would be proper impeachment. However, since Dr. Hunt specifically stated that he did not know what action the New York Commission had taken with respect to directory advertising, the proffered introduction of the decision of an administrative law judge (which, in any event, is not a decision of the New York Commission itself) does nothing to impeach the testimony of Dr. Hunt. Accordingly, since Mountain Bell proffered Miscellaneous Exhibit No. 3 for the purpose of impeachment of Dr. Hunt and no impeachment is involved, the Commission finds that Mountain Bell's motion to admit Miscellaneous Exhibit No. 3 should be denied.

D. Motion to Dismiss.

Finally, Mountain Bell has moved to dismiss Application No. 36247 on the basis that the Commission has no jurisdiction over the subject matter, namely publishing line of business assets, otherwise known as directory assets. Mountain Bell's factual and legal argument in this regard is without merit and its motion to dismiss Application No. 36247 will be denied.

The starting point in this discussion is the provision of the Colorado Public Utilities Law which is embodied in § 40-5-105, C.R.S. which states:

> Certificate or assets may be sold, assigned, or leased. The assets of any public utility, including any certificate of public convenience and necessity or rights obtained under any such certificate held, owned or obtained by any public utility, may be sold, assigned, or leased as any other property other than in the normal course of business but only upon authorization by the commission and upon such terms and conditions as the commission may prescribe.

It is important to point out that the statute refers to "the assets of any public utility" not "public utility assets." No one, of course, is contesting the obvious fact that Mountain Bell is a public utility. Mountain Bell is merely contending that certain of its assets, such as line of business publishing assets, are not public utility assets and, accordingly, are not subject to the provisions of 40-5-105, C.R.S.

Clearly, the statute applies to all assets of a public utility, not only to those being used in the provision of regulated services. The rationale for requiring approval of asset transfers by utilities (whether or not the assets are used in the provision of a regulated service) is to give utility commissions the opportunity to assess the impact of the sale upon utility customers. See: Re. Pacific Telephone and Teleg. Co., 39 Public Utility Reports (PUR) 3d 132, (Ore. Pub. Util. Comm. 1961). This

rationale holds true whether or not the assets are used in the provision of a utility service. Hence, the argument that the property being transferred is not used to provide a utility service is irrelevant to the question of the Commission's jurisdiction under § 40-5-105. [Cf. Re. Central R. Co. of New Jersey, 39 PUR 3d 196 (N.J. Board of Public Utility Comm. 1961) (Public utility is required to obtain board approval before selling or leasing even surplus property.)]

In exercising its authority under § 40-5-105, the Commission must determine whether a transfer of assets would be consistent with the public interest. The Oregon Public Utility Commissioner in Re. Pacific Telephone and Teleg. Co., 39 PUR 3d 132, at 140 (1961), in ruling upon an application for a transfer of utility property and operations, observed that the duty of the Commissioner was:

> [T]o protect patrons, users, consumers and the public generally from unjust and unreasonable exactions and practices and of obtaining for them adequate service at fair and reasonable rates. Such duty necessarily involves safeguarding the public from not only immediately discernible added charges but also from any future rate increases or service inadequacies that may result directly or indirectly from granting the instant application.

Similarly, in Committee of Cons. Ser. v. Publ. Serv. Comm., 595 P.2d 871, at 878 (Utah 1979), the pertinent standard for determining whether the transfer of a utility asset should be approved was set forth as "whether the transaction is detrimental to the ratepayer, and whether it is in the public interest."

As indicated in footnote 3 above, Senior District Judge Henry E. Santo has already ruled that this Commission has jurisdiction over the directory assets of Mountain Bell and that § 40-5-105, requires Commission approval before an asset transfer can be accomplished. Judge Santo's decision, of course, is consistent with a number of appellate decisions in other states that have held the publication of telephone directories is an essential part of telephone service. If the publication of telephone directories is an essential part of telephone service, then assets which are dedicated to the publication of telephone directories are public utility assets in any event.

In California Fireproof Storage Co. v. Brundige, 199 Cal. 185, 248 P. 669 (1926) the question before the court was whether the railroad commission had, and should, assume jurisdiction over the telephone directories of the Southern California Telephone Company. The court held that:

> A California directory is an essential instrumentality in connection with the peculiar service which a telephone company offers for the public benefit and convenience. It is as much so as is the telephone receiver itself, which would be practically useless for the receipt and transmission of messages without the accompaniment of such directories. The form which such directories conveniently took with the inception of this modern method of message transmission was that of an alphabetical list of the names of the subscribers to the service, and there can be no question as to the right of the regulatory body over this form of public utility to regulate the form, content and cost thereof to subscribers who had entitled themselves to the convenient use of such service.

Id. at 672.

In National Merchandising Corp. v. Public Service Commission, 153 N.E. 2d 714 (1959) the court held that:

> A telephone directory is, to some extent, a device used in the business of telephonic communications, and is, therefore, subject to the regulatory powers of the commission. Directories provide a useful and necessary service which facilitates the use of telephones. Accordingly, ordinary alphabetical listings in both the general directory and in the classified directory are subject to the jurisdiction of the commission.

Id. at 716.

The court in Missouri went even further and held in Videon Corporation v. Burton, 369 S.W. 2d 264 (1963) that:

> We believe that the publication of the Classified Directory and the advertising thereunder is a method, procedure and operation which is designed for and actually does facilitate the business of affording telephonic communication, is truly a monopoly in that advertising field and is public business insofar as its business subscribers are concerned. Such a publication sui generis ought to be subject to reasonable rules and regulation. We believe our legislature has by statute (Sec. 368.020/18/supra) vested such power and authority in the Commission. It is our opinion that during recent years the importance and value of the Classified Directory and the advertising therein in a large city,

> has become so great and vital, that the courts should liberally approve rather than narrowly restrict, the exercise of such regulation.

Id. at 270.

As an essential feature of the service rendered by the telephone company, rules and regulations regarding publication and distribution of the directories have been promulgated by commissions. Moreover, this information must appear with tariffs filed with commissions. McTighe v. New England Telephone & Telegraph Co., 216 F.2d 26 (1954). See also Behrend v. Bell Telephone Company of Pennsylvania, 243 A.2d 346 (1968); and Frank Serpa Jr. v. Pacific Telephone & Telegraph Co., 17 P.U.R. 3d 378 (1957) (wherein the California Public Utilities Commission stated that the publication of advertisements and the listing of businesses in a directory is vital to the proper rendition of telephone service).

The essential nature of the directory service is further evidenced by the fact that the receipts for directory advertising traditionally have been included in the operating revenue account. This account is used as the basis for calculating permissible rates for telephone service. See District of Columbia v. Chesapeake & Potomac Telephone Co., 179 F.2d 814 (1950).

In Colorado, the assets associated with publication of the directories historically have been included in rate base and the revenues and expenses associated therewith in Mountain Bell's cost of service for ratemaking purposes. Mountain Bell has been allowed to earn a rate of return from the ratepayer on those assets used for directory publishing. Also, the Commission has promulgated rules regarding publication and distribution of the directories. In other words, Mountain Bell's directory operations have been fully integrated with the provision of Mountain Bell's public utility services.

Divestiture has not changed the nature of the local exchange service. The attempt of the American Telephone and Telegraph Company (AT&T) to retain control over this lucrative and essential aspect of telephone service was successfully thwarted by Judge Greene, in United States v. American Telephone & Telegraph Company, 552 F. Supp. 131, 194 fn. 263 (1982). In fact, based on this understanding of the two-fold nature of the telephone industry, Judge Greene refused to accept AT&T's and the Justice Department's proposed decree unless it was modified to allow the Bell operating companies (BOCs) to retain both the right to publish the telephone directories and the assets necessary for publication. Moreover, the court stated that:

> If the legislators or the regulators should conclude, for their own reasons, that a separate (publishing) subsidiary would be appropriate, they may, of course, impose this requirement in the exercise of their own responsibilities.

Id. at p. 193 n. 251.

In Judge Greene's most recent ruling regarding requests by certain operating companies for waivers from the MFJ line of business restrictions, the court stated that the publication of directory advertising is closely related to and traditionally has been associated with the telecommunications business. United States of America v. Western Electric Co., Inc. & AT&T (Misc. No. 82-0192 (Pl) decided July 26, 1984 at p. 39 n. 77). He further stated that some of the Regional Holding Companies have breached the understanding expressed by the court in the MFJ as to the purpose for the BOCs maintaining control of the publication of directory advertising. Mountain Bell is a BOC; neither Landmark nor U S West Direct is a BOC and neither was even in formal existence at the time Judge Greene entered his original order in August of 1982.

Not only the case law from other jurisdictions, but the very evidence adduced in Application No. 36247 clearly indicates that directory publishing assets are public utility assets.

Interestingly enough, at page 1 of the publishing agreement between Mountain Bell and U S West Direct, Mountain Bell specifically admits that the Commission still has jurisdiction over the directory publishing assets. Mountain Bell states in the publishing agreement as follows:

> Whereas, the telephone company has assumed, as part of its public utility function, the obligation of causing to be regularly published an alphabetical service directory for each telephone exchange, listing the name, address and telephone number of all subscribers served by that exchange . . .
>
> Whereas, the parties agree and recognize that there is unique value in the publication and distribution of directories containing both the alphabetical and exchange service directory information and advertising by a single publisher.

Furthermore, Staff witness Dr. Carl Hunt explained, and we agree, that the relationship between a telephone subscriber line and a telephone directory is unique. For the average subscriber, the existence of a subscriber line (access to the switched network) gives a telephone directory greater value than a directory without a subscriber line. Also, a subscriber line has greater value when accompanied by a directory than without a directory. As a matter of fact, Mountain Bell in the past has argued that an increased number of subscribers increases the value of a subscriber line. If one cannot gain access to other telephone subscribers through the use of a directory, the value of the subscriber line is severely reduced. The existence of the telephone enhances the value of the directory and the value of the directory enhances the value of the telephone. In other words, they are complementary goods. Since it is obvious that the one good, namely the telephone, is a public

utility, it sensibly follows that the other, namely the telephone directory is also imbued with the public interest.

The Commission is aware of the case of University Hills Beauty Academy v. Mtn. States T. & T. Co., 38 Colo. App. 194, 554 P.2d 723 (1976), in which the Colorado Court of Appeals stated that the publication of Yellow Pages was a private concern. However, the Commission also recognizes that this dictum does not address the Commission's authority, under § 40-5-105, to review the transfer of all assets. Moreover, we also take special note of State ex. rel. Util. Comm. vs. Bell Tel., 299 S.E.2d 264, at 265-66 (N.C. App. 1983). Faced with precedent similar to University Hills, the North Carolina courts, nevertheless ruled that the state utilities commission had authority to consider Yellow Pages revenues and expenses in a rate case:

> In making our decision, we have not ignored our Supreme Court's statement in Gas House, Inc. v. S. Bell Tel. & Tel. Co., 289 N.C. 1975, 221 S.E. 2d 499 (1976), that yellow page advertisements are not a part of a telephone company's public utility business. But the holding in that case did not turn on the same issue that is before us. Instead, Gas House simply held that a limitation of liability clause in a contract between an advertiser in the yellow pages and Southern Bell was reasonable. Because that case was not decided on the issue that is central to the case sub judice and because the court's statement about the yellow pages was obiter dictum, we are not bound by it.

St. ex. rel. Util. Comm., 299 S.E.2d at 265-66. Similarly, University Hills did not involve the question of the Commission's authority under any public utilities statute, including § 40-5-105, but rather involved a limitation of liability clause in a Yellow Pages contract. Furthermore, the court's statement was obiter dictum and certainly not relevant to any question in this proceeding.

The Commission has also reviewed In the Matter of Northwestern Bell, C4-84-1872 and C8-84-1888 (Minn. Court of Appeals 1985), in which

the Minnesota court determined that the state commission lacked authority to void the transfer of Northwestern Bell Telephone's directory operations. This decision is based upon a Minnesota statute substantially different from § 40-5-105, and is clearly irrelevant to our authority under Colorado statutes.

In summary, § 40-5-105, C.R.S., by its very terms, refers to the assets of the public utility, not to public utility assets. In any event, it is clear, and we find that publishing line of business assets are public utility assets and that their transfer, other than in the ordinary course of business, requires the approval of this Commission.[8] Accordingly, Mountain Bell's motion to dismiss Application No. 36247 for lack of jurisdiction will be denied.

III. CONSIDERATION OF THE TRANSFER OF ASSETS

A. Basic Facts of the Transfer.

The basic facts of the asset transfer for which Mountain Bell seeks Commission approval in Application No. 36247 are not in dispute. Mountain Bell, of course, is a telephone corporation, and accordingly a public utility subject to the jurisdiction of this Commission by virtue of §§ 40-1-103(1)(2), 40-3-102, and other provisions of the Public Utilities Law as contained in Title 40 of the Colorado Revised Statutes. The directory assets which are the subject matter of this application were owned by Mountain Bell on and before December 31, 1983. The effect of the transfer and its impact upon Mountain Bell's ratepayers divided Mountain Bell from all other parties in this docket.

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8 No party in Application No. 36247 contended that the transfer of the publishing line of assets from Mountain Bell to Landmark was in the ordinary course of business and thus entitled to the statutory exemption not requiring Commission approval. We specifically find the transfer of directory assets was not in the ordinary course of business.

The assets which were transferred from Mountain Bell to Landmark consisted of the following:

Cash (acct. 113)	$56,300,000
Building (acct. 212)	2,613,000
PBX and station equipment (accounts 234 and 231)	2,738,000
Office furniture and computers (accts. 261)	2,977,000
Motor vehicles (acct. 264)	6,000
Computer software related to directory Yellow pages	0
TOTAL ORIGINAL COST	$64,634,000

This transfer took place on January 1, 1984. At the time Mountain Bell transferred its directory assets to Landmark, it received in exchange a .56 share of Landmark stock and, on January 3, 1984 Mountain Bell declared a dividend of the .56 share of Landmark stock to Mountain Bell's then sole shareholder, U S West.

Of the $64,634,000 that were transferred from Mountain Bell to Landmark, $56.3 million consisted of cash which Mountain Bell transferred to satisfy cash-working-capital requirements created by the directory publishing line of business ultimately transferred to U S West Direct, a subsidiary of Landmark. This transfer of cash working capital was Mountain Bell's part of the capitalization of the new company, Landmark. Ms. Chavira testified that the capitalization of Landmark was done solely by Mountain Bell and other BOCs, not by U S West. Ms. Chavira also testified that such capitalization would not have been done were Mountain Bell negotiating with other than a sister subsidiary. A redetermination, or what Mountain Bell witness Chavira referred to as a "true-up" was made on August 1, 1984. On that date it was determined by Mountain Bell, perhaps in conjunction with U S West Direct, that the cash transferred on January 1, 1984, was more than U S West Direct estimated that it would need for 1984, and that there was an excess of cash transfer in the amount of $16.9 million. Accordingly, $16.9 million was returned by U S West Direct to Mountain Bell.

A transition agreement between Mountain Bell and U S West Direct which was entered into on February 27, 1984, to be effective as of January 1, 1984, provided that U S West Direct would pay Mountain Bell a monthly transition fee totaling $19 million in 1984 and $9 million in 1985. As a result of the August 1, 1984, true-up, U S West Direct agreed to pay Mountain Bell another $3.3 million payable over the last five months of 1984.

Also executed on February 27, 1984, effective as of January 1, 1984, was a publishing agreement between Mountain Bell and U S West Direct. This agreement provided that Mountain Bell would furnish the basic listing information about its subscribers to U S West Direct, and that U S West Direct would publish alphabetical exchange service directories for all exchanges in which Mountain Bell provides telephone service, and also publish directories containing both the alphabetical exchange service information and the classified Yellow Pages and advertising within the alphabetical exchange service directories. In consideration of the foregoing (along with other usual business agreements), U S West Direct agreed to pay Mountain Bell an annual listing and users fee of $41,300,000 in 1984, $127,400,000 in 1985, and $146,300,000 in 1986.[9]

The term of the publishing agreement between Mountain Bell and U S West Direct is for three years, namely, January 1, 1984, through December 31, 1986. Mountain Bell has the right to extend the agreement for an additional two-year term until December 31, 1988, by giving written notice to U S West Direct no later than July 1, 1986, for a publishing fee to be mutually agreed upon.

We find that the foregoing narrative sets forth the salient facts concerning the transfer of assets from Mountain Bell through Landmark Publishing Company to U S West Direct. As already stated, it is

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9 The publishing agreement, and the transition agreement, respectively, were admitted into evidence as Spieker Exhibit-1 and Spieker Exhibit-2.

the effect and impact of those facts upon Mountain Bell's ratepayers which divided Mountain Bell from all other parties in this proceeding and concerning which the Commission is obliged to make a decision.

Mountain Bell claims that prior to January 1, 1984, it was engaged in a number of business activities including both a "listing line of business" (which involved the acquisition of the name, address, and telephone number of Mountain Bell subscribers) and a "publishing line of business" (which involves the marketing of classified and other advertising in telephone directories). Mountain Bell states that its Board of Directors on December 20, 1983, passed a resolution approving the transfer of assets previously used by Mountain Bell in the publishing line of business to Landmark. These assets were immediately transferred from Landmark to U S West Direct, a subsidiary of Landmark. Mountain Bell reasons that inasmuch as other publishers engage in the "publishing line of business within Colorado" (which business entities are not regulated by this Commission), that the publishing line of business is competitive and should be placed into an unregulated subsidiary. Mountain Bell goes on to state that the principal motivation for the segregation of its competitive lines of business (including its publishing line of business) from its regulated line of business was to avoid allegations of antitrust misconduct.

In addition to its antitrust motivation, Mountain Bell claims that the transfer of its directory publishing business will leave Mountain Bell's ratepayers in as good a financial position as they would have been without the transfer, eliminate publishing risks for Mountain Bell and its ratepayers, and bring about cost economies that allegedly would result from combining into a single entity (U S West Direct) the directory operations of Mountain Bell, Pacific Northwest Bell, and Northwest Bell.

B. The Antitrust Consideration

The Commission is not persuaded by Mountain Bell's antitrust argument. Although it is true that other firms publish telephone directories, Mountain Bell witness Chavira (who is no antitrust expert by

her own admission) did not quantify the competitive impact upon Mountain Bell of the fact that other firms publish telephone directories. In our view, the only credible evidence with respect to the antitrust issue came from Staff witness, Dr. Carl Hunt, and League witness, Dr. Matityahu Marcus. Dr. Hunt testified that the directory publishing business did not meet the criteria of the workably competitive market. First of all, Mountain Bell held approximately 85 percent of the market prior to the asset transfer, which is probably understated inasmuch as this market share includes directories outside of Mountain Bell's certificated territory. With such a dominant market share by one firm, such as Mountain Bell, workable competition is not practicably possible. Effectively, the directory formally published by Mountain Bell is unique in character both in terms of timeliness and completeness. It also is unique in terms of acceptance by consumers of it as an official, reliable census of residential and business inhabitants. In fact, this stamp of legitimacy helps explain its ability to earn supra-competitive profits. Allegedly competing telephone directories are for specialized geographical areas or are not published on as timely a basis as the Mountain Bell or U S West directories or, in any event, are not relied upon to the same extent by consumers.

We also agree with the contention made by Dr. Marcus to the effect that any attempt by Mountain Bell to lessen antitrust exposure through the vehicle of structural separation is probably illusory at best. Since Mountain Bell and U S West Direct are sister companies, both of which are owned by the same stockholder, any antitrust complaint against U S West Direct is likely to be as attractive to a potential plaintiff with the transfer of assets as without it. One can reasonably anticipate that the corporate veil would be pierced whether antitrust activity were engaged in by Mountain Bell or U S West Direct. In any event, we find that Mountain Bell presented no credible evidence or legal argument which would indicate that a mere corporate reorganization effectively would act as a shield against antitrust misconduct, or lessen the risk of antitrust problems.

The Commission also notes that Federal District Judge Harold Greene in the Modified Final Judgment (MFJ), United States v. American Telephone & Telegraph Co. [U.S. v. AT&T], 552 F.Supp. 131, at 193 (Dis. Col. 1982), addressed the specific question whether the BOCs should be allowed to retain Yellow Pages in the American Telephone and Telegraph divestiture:

> The proposed decree would bar the divested Operating Companies from all activities related to directory advertising, including the production of the so-called Yellow Pages. This restriction lacks an appropriate basis and is not in the public interest.
>
> Neither of the reasons underlying the other restrictions on the Operating Companies -- the need to prevent cross subsidization and the importance of preventing competitor discrimination -- has any relevance to the printed directory market.
>
> All parties concede that the Yellow Pages currently earn supra-competitive profits. See, e.g., the Department of Justice Response to Comments at 71. There is no warrant therefore for proceeding on the premise that the advertising prices charged by the Operating Companies are artificially low as the result of a subsidy from local exchange service. Similarly, there is no possibility of improper discrimination by the Operating Companies against competing directory manufactures since access to the local exchange network is not required for production of a printed directory. In short, the Operating Companies would have little or no ability to discriminate against competitors in the printed directory market, and this restriction thus has no procompetitive justification whatever. [Emphasis added.]

Judge Greene concluded that the BOCs should retain Yellow Pages since loss of the substantial contribution from advertising would jeopardize the goal of universal service. U.S. v. AT&T, supra, at 194. In any event, in the decree resolving the antitrust suit against AT&T, the Court specifically considered the antitrust implications of the retention of directory operations by the BOCs. After this consideration, the Court concluded that the BOCs' loss of Yellow Pages publication would be adverse to the public interest.

The consolidation of U S West directory operations in U S West Direct (compared to retention by the various BOCs within U S West) does not reduce the potential for antitrust litigation. If anything, the concentration of directory publishing at the regional level probably

would be more anticompetitive than under the old structure. (Cf. MFJ's conclusions that the concentration of directory production in one nationwide company [AT&T] is "anathema to the antitrust laws." U.S. v. AT&T, supra, at 194.)

Judge Greene reaffirmed his reasoning on Yellow Pages in U.S. v. Western Electric, 592 F.Supp. 846, at 865-866 (Dis.Col. (1984):

> When the Court required AT&T to turn over its Yellow Pages operations to the Operating Companies, it assumed that the revenues from directory advertising would continue to be included in the rate base of the Operating Companies, providing a subsidy to local rates. Yet, the Regional Holding Companies, or some of them, have breached that understanding. Instead of funnelling Yellow Pages revenues to the Operating Companies, they have created separate subsidiaries to handle their directory publishing operations which do not feed the revenues from those operations into the rate base.

We find that Mountain Bell's transfer of assets to U S West's subsidiary, U S West Direct, has not been shown to be necessitated by the antitrust laws, has not been shown to lessen antitrust problems, and it is also a violation of the spirit of Judge Greene's order.

C. The Financial Impact of the Transfer upon Ratepayers

Mountain Bell alleged that its comprehensive analysis submitted through its witness, Ms. Irene G. Chavira, demonstrates that Mountain Bell is in as good or better position after the transfer of the directory publishing assets than it was before the transfer. We find that Mountain Bell did not prove its case in this regard. In the first place, the only comparison made by Mountain Bell was for the year 1984. It made no comparison of divested versus non-divested financial impact for the years 1985 and 1986 or beyond. Second, the comprehensive analysis compares the rate of return on equity in an attempt to demonstrate that Mountain Bell (that is, U S West, the Mountain Bell shareholder) is in as good or better a position as it would have been had the transfer not occurred. Mountain Bell assumes that if the shareholder is unaffected, the

Mountain Bell ratepayer likewise must be unaffected. We are in agreement with the testimony of Staff witness, Ms. Diane Wells, to the effect that Mountain Bell did not present any credible evidence as to the impact of the asset transfer on Mountain Bell ratepayers, but merely made the quantum leap of faith by contending that if the stockholders are not harmed, then Mountain Bell's ratepayers cannot be harmed. Mountain Bell failed to show that its presently effective telephone rates would be unaffected and would continue to be reasonable notwithstanding the transfer. Nor did Mountain Bell present any evidence to prove that telephone service would remain adequate or improve as the result of the transfer. Mountain Bell's study did not look beyond 1984; the Commission must look beyond 1984 in its determination of the public interest.

U S West, the parent of both Mountain Bell and U S West Direct, is benefited whenever U S West Direct or Mountain Bell increases its earnings. The stockholders of U S West are hedged against any loss resulting from the transfer of the directory publishing assets since what is lost by Mountain Bell in giving up the directory publishing line of business is gained by U S West. The payoff to the shareholder is in denying Mountain Bell the full benefit of growth in the directory publishing income. Revenues denied to Mountain Bell, as a subsidy to ratepayers in providing an authorized rate of return on rate base in the form of a revenue requirement, are made up to Mountain Bell and thus its shareholder in the ratemaking process through increased rates. Whatever potential profits of directory publishing are realized, the gain to
U S West is in removing the subsidy from the regulated area and replacing those earnings with ratepayer dollars.

Mountain Bell's arguments about gaining economies of scale have no substance, and such economies could have been accomplished by Mountain Bell had it retained the directory

publishing line of business and contracted out the various operations of the directory such as printing, distribution, etc., which Mountain Bell had always done in the past in any event. Mountain Bell claims that the three-year fixed-fee arrangement with U S West Direct insulates Mountain Bell and its ratepayers from the risk of an economic downturn. Mountain Bell did not prove the likelihood of any economic downturn and its contention in this regard is purely speculative. In fact, we agree with Judge Greene who characterized a similar arrangement made by NYNEX with one of its separate subsidiaries by stating that the "NYNEX arrangement does not assist the ratepayers; it assists only NYNEX."[10]

Even if we were persuaded that the fixed-fee arrangement were a sensible one, it does not follow that the fixed-fee arrangement with U S West Direct is necessarily the most favorable. The only so-called negotiations were conducted between Mountain Bell and U S West Direct.[11] Mountain Bell witness Spieker admitted that no competitive bids were sought by Mountain Bell with other possible publishing entities. Thus it is not possible for the Commission to find that a fixed-fee arrangement, even if conceptually desirable, was obtained at the best possible price for Mountain Bell and its ratepayers. Furthermore, if the publishing line of business became unprofitable in the future, Mountain Bell at that time could decide to get out of that line of business. We are more convinced by the testimony of Staff

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10 See United States of America v. Western Electric Company, Inc. and AT&T (Misc. No. 82 0192 decided July 26, 1984 at page 41, Note 80).

11 The Commission is cognizant of the fact that at the time "negotiations" were begun between Mountain Bell and U S West Direct, namely, on August 10, 1983, the negotiators were all Mountain Bell employees since Landmark (the parent) and U S West Direct (the subsidiary) did not come into formal existence until October 14, 1983.

witness Hunt who clearly showed that directory advertising had been growing at a rate faster than the economy as a whole in the State of Colorado. Mountain Bell did not effectively refute witness Hunt's testimony in this regard. Thus the Mountain Bell-U S West Direct three-year fixed-fee arrangement, rather than insulating Mountain Bell ratepayers against an economic downturn, effectively forecloses Mountain Bell ratepayers from sharing in the likely benefits of growth of revenues in the directory business.

By transferring the directory assets to U S West Direct, Mountain Bell has lost control of the assets to the unregulated sister corporation which is not subject to regulation by this Commission. The longer the period that U S West Direct, rather than Mountain Bell, publishes the directories, the less power Mountain Bell will have for negotiation favorable publishing agreements in the future.

Had Mountain Bell desired to retain control of the directory publishing operations by U S West Direct, theoretically it could have retained its .56 share of Landmark Publishing Company stock in return for the assets it transferred. However, Mountain Bell's subsequent dividending of this share to U S West eliminated all opportunity for Mountain Bell to control the directory publishing line of business and effectively removed the involved assets, and profits to be there derived, from direct surveillance by this Commission.

The fact that the Mountain Bell-U S West Direct agreement is for a period of three years can hardly be said to benefit Mountain Bell's ratepayers. At the end of the term of the publishing agreement, Mountain Bell has much less in the way of bargaining power with which to negotiate a new agreement with U S West Direct or any other entity. In fact, Mountain Bell put on no evidence as to what it would do should U S West Direct elect not to publish directories at the end of the three-year period or some other future time. If Mountain Bell has any contingency plans, it did not share them with the Commission.

In the event U S West Direct decides not to renew its publishing agreement with Mountain Bell, U S West Direct will retain the yellow

pages on line (YPOL) software, the cash transferred to it, the trained employees that market, publish, and distribute the directories, as well as all of the other assets which were transferred. The initial publishing fee agreement provides for the payment of a publishing fee in return for a going concern. Generally speaking, the market value of an ongoing business is based on the net income it produces. The net operating income is produced by the book assets, assets which were in this case assigned a zero value, including YPOL, trained personnel, goodwill, the Mountain Bell name, the Mountain Bell logo, etc. If this Commission were to put its approval on the transfer of assets, future contracts necessarily would have to be negotiated by Mountain Bell absent its book assets, personnel, and YPOL. With so much less to offer, we cannot find that Mountain Bell and ultimately its ratepayers would be benefited in the next contract on terms even as favorable as exist in the present contract. Even a competitive bid process is unlikely in the future to result in as advantageous a publishing agreement as that which has already been developed between Mountain Bell and U S West Direct initially, given Mountain Bell's reduced bargaining strength at that future time.

Mountain Bell failed to put on any evidence to demonstrate that although the book value of these going-concern assets is listed at zero, its market value is also zero. Development of the YPOL software cost Mountain Bell something at least in terms of employee hours, and computer equipment and time, and the development was conducted by Mountain Bell under rate regulation by this Commission. U S West Direct also received an experienced office sales force capable of continuing the development, marketing, publication, and distribution of directories with no dollar value assigned to this sales staff. In fact, Mountain Bell even agreed to pay the accrued liabilities associated with these employees at the time of the transfer to U S West Direct.

As Staff witness Hunt testified, the relationship between a subscriber line and a directory is one of complementary goods, that is, a subscriber line standing alone, without the benefit of a directory, is of

little value while the availability of a directory greatly enhances the value over what it would be if there were a directory without a subscriber line. Witness Hunt also discussed the relationship between yellow pages listings and yellow pages advertising:

> Yellow pages advertising has a unique character because it is attached to a complete listing of business establishments by activity and distributed to each residential and business subscriber. It is the completeness and the ubiquity of the directory that gives the Yellow Pages its value and ability to earn revenue through advertising. A large portion of the advertising value is gained because of the public utility nature of the activity, or the activity's increased value due to its proximity to a public utility. Without that the value of the Yellow Pages advertising would be less. [Emphasis supplied.]

Witness Hunt's analysis was not disputed by any other party in this docket and accurately describes the valuable nature of the assets assigned a zero value by Mountain Bell.

We find that the transfer of these going concern assets of Mountain Bell at zero value was an abuse of management discretion and contrary to the public interest.

League witness LeLash demonstrated, and we find, that on a total company basis, Mountain Bell would incur a $45.7 million three-year net-income deficiency as a result of the asset transfer when compared to the situation that would obtain had the assets not been transferred to U S West Direct. On a present value basis, the net income deficiency is $35.9 million. Witness Hunt testified that in 1981, in Investigation and Suspension Docket No. 1575, the embedded direct analysis of Mountain Bell showed directory publishing generated $54.3 million in revenues and was allocated $22.84 million in costs. The contribution derived was $31.46 million from directory revenues which, of course, helped offset what otherwise would have necessitated an increase in rates to Mountain Bell's general body of ratepayers. It is true that the $22.84 million in costs were only direct costs and did not include indirect or overhead costs. However, witness Hunt testified that overhead generally is not much more than about 10 percent. Accordingly, if the $22.84 million costs were increased by 10 percent to $25.12 million, the contribution still would

have been $29.18 million ($54.3 million less $25.12 million). It is not possible to obscure the fact that the publishing business has in the past, and given continuation of present trends, probably will continue in the future, to generate supra-normal profits to the entity in control of the assets.

We find, upon the basis of the supra-normal profits that Mountain Bell has earned in the past, that currently there is very little risk to Mountain Bell in its directory operations. When a telephone directory is published by a Mountain Bell affiliate, it has the aura of being the official directory. An official directory has sufficient market power that business risk, vis-a-vis other directory publishers, is almost, if not completely, non-existent. Mountain Bell would have this Commission believe that business risks exist with respect to printing costs, such as increases in the prices of paper and ink, which are avoided by transferring them to U S West Direct; we find that such risk avoidance could more easily have been accomplished by entering into appropriate contracts with suppliers and printers. We further find that any risk shifted to U S West Direct will be accompanied by more than substantial benefits to U S West Direct which ultimately will cost Mountain Bell and its ratepayers.

Mountain Bell alleged that economies of scale could be accomplished by combining the publishing activities of Pacific Northwest Bell, Northwestern Bell, and Mountain Bell in one publishing subsidiary, namely, U S West Direct. No quantification of these economies of scale was presented by Mountain Bell in support of its application. On the contrary, we agree with League witness Marcus that by separating the listing line of business from the publishing line of business, which heretofore had been vertically integrated, what now has resulted is vertical disintegration and resultant diseconomies. Whereas previously the listing line of business and publishing line of business were under one roof, now as a result of structural separation, duplication will occur with a consequent rise in production costs. Furthermore, as witness Marcus pointed out, stages in the directory publishing business

which are labor intensive, such as solicitation of advertisers, offer little potential for economies of scale.

Mountain Bell has failed to prove that the transfer of assets, from the financial standpoint of its impact upon Mountain Bell's ratepayers, is in the public interest. For the reasons set forth above, we find that it is not only not in the public interest, but it is contrary to the public interest and was an abuse of management discretion.

The Commission has considered conceptually the possibility of allowing a transfer of assets from Mountain Bell to some other entity with the possibility of imputing directory publishing revenues for ratemaking purposes to Mountain Bell. The problems with the imputation of revenues for ratemaking purposes are the difficulty in ascertaining the proper level of imputed revenues and the possible negative impact that they may have upon the quality of service and the future cost of capital.[12] Imputing revenues has the potential for causing a negative reaction among investment analysts which could decrease Mountain Bell's financial standing in the capital markets. A perceived decrease of Mountain Bell's financial health could result in an increase of the cost of money to Mountain Bell. The Commission would be obliged to include in its consideration of a future Mountain Bell rate case the possible increase in the cost of money in determining the revenue requirement of Mountain Bell. Higher costs of money could trigger the necessity for an authorization of a higher rate of return for Mountain Bell and, of course, higher rates for the ratepayers. In the alternative, with part of the revenue flow to the utility taking the form of imputed revenues, a neglect of current needs and maintenance requirements could occur. Accordingly, a divestiture with imputation of revenue is not a viable alternative.

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12 The term imputed revenue means revenue included in the ratemaking process during the revenue requirement phase of a general rate case, but which revenues are not actually received by the regulated utility.

In summary, the Commission finds that in order to protect ratepayers both now and in the future it has no alternative but to disapprove the transfer proposed by Mountain Bell. We further find it is necessary that we order Mountain Bell to resume the provision of directory service under the structural arrangement as it existed prior to January 1, 1984. In other words, insofar as its Colorado operations are concerned, Mountain Bell must resume the directory publishing business and effect the retransfer to itself of the assets which it had previously transferred to Landmark, and which were in turn transferred to Landmark's subsidiary, U S West Direct. In the circumstances of this proceeding, the public interest will permit no other alternative.

IV. DIRECTIVES TO MOUNTAIN BELL

Ordinarily an application which is being denied by the Commission requires only a simple order. Unfortunately, Application No. 36247 was filed by Mountain Bell after the fact seeking approval of a transaction which had already taken place on January 1, 1984. Undoing what should not have been done in the first instance, at least insofar as Colorado Mountain Bell ratepayers are concerned, regrettably will entail some effort and expense.

Inasmuch as Mountain Bell elected to proceed without securing prior Commission approval of the asset transfer, a transfer which this Commission has not and does not approve, Mountain Bell will have to incur the necessary time, effort, and expense of securing the return of the directory assets from U S West Direct to Mountain Bell, and it will also have to undertake the expense of re-entering the directory publishing business, insofar as the State of Colorado is concerned, at its own expense and not at that of the ratepayers. See Western Colorado Power Company v. PUC, 159 Colo. 262, 411 P.2d 785 (1966).[13]

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13 The fact that Mountain Bell elected to give away to U S West the .56 share of Landmark stock it received in exchange for the directory assets cannot preclude an order from this Commission retrieving the assets which it transferred to Landmark without authorization from this Commission.

Mountain Bell, on the effective date of this Decision and Order, shall commence whatever action is necessary to effect the retransfer of directory publishing assets from U S West Direct to itself insofar as its Colorado intrastate operations are concerned. The assets to be retransferred shall be those specified in paragraph 18 of Mountain Bell's application and which are referred to by Staff witness Temmer in his direct testimony in Application No. 36247.[14] The asset transfer will include all fixed Colorado assets and cash transfers. The asset transfer will also include all Colorado assets assigned a zero value which previously had been transferred by Mountain Bell to Landmark. This will include the yellow pages on line (YPOL), Mountain Bell's name Mountain

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14 Exhibit 1 to Staff witness Temmer's testimony contains the minutes of a Mountain Bell board of directors meeting held on December 20, 1983. The minutes, in connection with the approval of the transfer, state:

> It was further explained that under the statutes of some states, transfer of assets, particularly to an affiliating company such as Landmark Publishing Company, must be reviewed and approved by the state public utilities commissions. This is true, for example, in Colorado. Accordingly, the transfer of assets will be submitted to the appropriate regulatory commissions for review and is subject to and contingent upon their approval.

Exhibit 2 to Staff witness Temmer's testimony is a copy of the bill of conveyance by Mountain Bell to Landmark Publishing Company. One of the paragraphs in the bill of conveyance states as follows:

> The Mountain States Telephone and Telegraph Company, a Colorado corporation ("Assignor"), by this instrument, does grant, assign, transfer and convey and deliver to Landmark Publishing Company ("Assignee"), a Colorado corporation, its successors and assigns, all its right, title and interest to all the aforementioned assets as further identified in Schedule A, attached hereto and made a part hereof. Such conveyance shall be contingent, in part, upon approval of the Colorado Public Utilities Commission pursuant to its authority in C.R.S. 1973, Section 40-5-105.

Inasmuch as this Commission has not given its approval to the asset transfer, presumably by its very terms, the bill of conveyance of the assets has become void. Based upon the foregoing, the Commission would anticipate that it should not be necessary for Mountain Bell to resort to litigation to effect a retransfer of the Colorado portion of the assets. However, if non-litigative means are unavailing to effect the retransfer of assets, Mountain Bell specifically is ordered to commence whatever litigation may be required to effect the retransfer of assets.

Bell's logo, and any and all other assets which were transferred by Mountain Bell to Landmark at zero value. In the foregoing connection, Mountain Bell will take whatever steps are necessary to ensure that none of the YPOL information is retained by any other entity for its Colorado operations.

Mountain Bell must also ensure that appropriately trained personnel are transferred to itself or otherwise employed for its Colorado operations with respect to the reprovision of directory publishing services and that Mountain Bell will be able to conduct its Colorado operations, in connection with its directory publishing operations on a going-concern basis.

Mountain Bell shall keep a detailed accounting of all services, assets, and expenses incurred as a result of the retransfer of assets and start up costs of reproviding directory services. These detailed accounts shall be kept in accordance with Part 31 of the Federal Communications Commission's Uniform System of Accounts. All expenses associated with the original transfer and the retransfer shall be accounted for separately and shall be booked below the line for ratemaking purposes.

In the event the Commission, by subsequent order, elects to retain the services of an independent accounting firm to audit and ensure the impartiality with respect to the recognition of those directory publishing assets which are to be re-acquired by Mountain Bell, Mountain Bell shall bear that expense below the line as a non-ratepayer expense.

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In the event the Commission, by subsequent order, elects to retain the services of an independent accounting firm to audit and ensure the impartiality with respect to the recognition of those directory publishing assets which are to be re-acquired by Mountain Bell, Mountain Bell shall bear that expense below the line as a non-ratepayer expense.

V. CONCLUSION

For the reasons stated here, the Commission finds that the granting of Application No. 36247 is not in the public interest and should be denied. The Commission further states that Mountain Bell should be required to effect a retransfer of directory publishing assets in accordance with Section IV above.

THEREFORE THE COMMISSION ORDERS THAT:

1. Application No. 36247, filed by The Mountain States Telephone and Telegraph Company on April 2, 1984, as amended on August 27, 1984, is denied.

2. The following pending motions filed or presented by The Mountain States Telephone and Telegraph Company are denied: (a) Motion to Supplement the Record, (b) Motion to Set Hearing Dates, (c) Motion to Admit Miscellaneous Exhibit No. 3, and (d) Motion to Dismiss for Lack of Jurisdiction.

3. All other pending motions are denied.

4. The Mountain States Telephone and Telegraph Company shall comply with the directives contained in Section IV of this Decision, and shall submit to the Commission within 15 days of the effective date of this Decision and Order a written detailed plan setting forth the manner in which it intends to comply with the directives in Section IV of this Decision. The detailed plan to be submitted by The Mountain States Telephone and Telegraph Company shall set forth a timetable for compliance with the directives set forth in Section IV of this Decision with a completion date no later than 60 days from the effective date of this Decision and Order.

5. This Decision and Order shall be deemed a final decision and order for purposes of §§ 40-6-114 and 40-6-115, C.R.S.

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

7. This Decision shall become effective on the twentieth day from the date hereof, unless stayed in accordance with this ordering paragraph. In the event a timely application for rehearing, reargument, or reconsideration is filed to this decision, in accordance with § 40-6-114, C.R.S., this Decision shall be stayed until further order of the Commission.

DONE IN OPEN MEETING the 14th day of June, 1985.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Edythe S. Miller

Linda Schmidt

Ronald L. Lehr

Commissioners

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Appendix
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EXHIBIT LIST

No.	Description
A	Direct Testimony of Irene G. Chavira
A-1	Exhibit of Irene G. Chavira
Rebuttal A	Rebuttal Testimony of Irene G. Chavira
Rebuttal A-1	Exhibits with Rebuttal of Irene G. Chavira
Misc. Exh. 1	Responses of Mountain Bell to Data Requests
Speiker-Direct-1	Publishing Agreement
Speiker-Direct-2	Transition Agreement
B	Paul Spieker Direct Testimony
Rebuttal 1-B	Paul Spieker Rebuttal Testimony
Marcus-Direct	Direct Testimony of Matityahu Marcus
LeLash-Direct	Direct Testimony of Richard W. LeLash
LeLash-Surrebuttal	Surrebuttal Testimony of Richard W. LeLash
LeLash-1	Exhibit of Richard W. LeLash
LeLash-2	Exhibit of Richard W. LeLash
Steele-Direct	Direct Testimony of William A. Steele
Steele Corrections	Corrections to Testimony of William A. Steele
Temmer-Direct	Direct Testimony of Philip Temmer
Temmer-Corrections	Corrections to Testimony of Philip Temmer
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Hunt-Direct	Direct Testimony of Carl Hunt
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Misc. Exh. 2	Mountain Bell Colorado Intrastate Operations Pro Forma 1983 Directory Revenues and Expenses
Offer of Proof 1	Stipulation which had been entered in the Denver District Court litigation
Offer of Proof 2	Testimony of Keith Galitz
Offer of Proof 3	Deposition of Eugene P. O'Neill

EXHIBIT LIST - Continued

No.	Description
Misc. Exh. 2	Mountain Bell Intrastate Operations Pro forma 1985 Directory Revenues and Expenses
Misc. Exh. 3 (ruling reserved)	ALJ New York Commission Ruling
Misc. Exh. 4 (rejected)	Minnesota Supreme Court Decision

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(Decision No. C85-781-E)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE APPLICATION OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY TO OBTAIN AUTHORITIZATION FOR THE TRANSFER OF CERTAIN ASSETS ASSOCIATED WITH DIRECTORY ADVERTISING.	)	APPLICATION NO. 36247 ERRATA NOTICE

- - - - - - - - - - -
September 5, 1985
- - - - - - - - - - -

Decision No. C85-781
(Issued June 14, 1985)

1. Page 16, footnote 7, second paragraph is not included in the quoted matter and therefore should not be indented.

2. Page 22, quoted material, change "(publishing)" to "[publishing]".

3. Page 41, delete the last paragraph in its entirety because it is a duplication.

4. Page 42, delete the first paragraph in its entirety because it is a duplication.

5. Page 45, Appendix, change the following exhibits to read as follows:

EXHIBIT LIST

No.	Description
Rebuttal A-1	Exhibits with Rebuttal of Irene G. Chavira
Misc. Exh. 1	Responses of Mountain Bell to Data Requests
LeLash-Surrebuttal	Surrebuttal Testimony of Richard W. LeLash
Steele Corrections	Corrections to Testimony of William A. Steele
Temmer-Corrections	Corrections to Testimony of Phillip Temmer

Offer of Proof 1

Stipulation which had been entered in the Denver District Court litigation

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

HARRY A. GALLIGAN, JR. Executive Secretary

Dated at Denver, Colorado this 5th day of September, 1985

jw:ao/1/Q