

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **05-cv-00711-LTB-MJW**

MARYLS RATHBUN,

Plaintiff,

vs.

QWEST COMMUNICATIONS INTERNATIONAL, INC., et al,

Defendants.

**MOTION FOR INTERVENTION and NOTICE OF OBJECTIONS
to [Docket No. 26] the AMENDED MOTION FOR CLASS CERTIFICATION**

INTERVENORS/OBJECTORS, **MARY M. HULL**, and **ASSOCIATION OF U S
WEST RETIREES**, by and through their counsel Curtis L. Kennedy, pursuant to
Fed.R.Civ.Proc. Rules 23(d)(2)&(3) and 24(a)(2) and (b)(2), hereby move for leave to intervene
and object to [Docket No. **26**] the pending amended motion for class certification. AS
GROUNDS, they state:

Introduction.

1. This is a proposed class action concerning telephone concession service, an employee fringe benefit provided to employees and retirees of Qwest Communications International, Inc.'s (QWEST). On December 15, 2005, Plaintiff Maryls Rathbun's counsel filed an amended motion for class certification seeking an order to certify a class to include post-1984 U S WEST/ Qwest retirees and an order appointing Plaintiff's counsel to be the class counsel. Rathbun claims she is properly suited to be designated class representative and her counsel designated class counsel.

2. Mary M. Hull (**HULL**) is a post-1984 U S WEST/Qwest retiree. She is a United States citizen and resident of Denver, Colorado. She retired effective April 7, 1995 with a service pension after at least 25 years of employment service with U S WEST, Inc., which corporation merged with Defendant Qwest.

3. The Association of U S WEST Retirees (**AUSWR**) is a non-profit organization serving approximately 40,000 U S WEST/Qwest retirees, and their spouses. This association is comprised of thousands of post-1984 U S WEST/Qwest retirees, members of the putative class with respect to the subject matter of this case. HULL serves as the President of this umbrella organization which is comprised of six separate retiree groups within the former U S WEST area consisting of fourteen states. The six retiree groups date back to 1993. The AUSWR umbrella retiree organization was formed in August 1999, to unite the six retiree groups. The Board of directors of AUSWR consists of HULL and retiree leaders of the original six organizations. See www.uswestretiree.org.

4. Ever since HULL commenced a service pension retirement from U S WEST/Qwest she has received a retiree discount or fringe benefit on telephone services provided by U S WEST/Qwest. The same fringe benefit has been provided to the putative class of post-1984 U S WEST/Qwest retirees. Rathbun seeks in this action, *inter alia*, to have that fringe benefit declared to be **taxable income**. HULL and AUSWR strenuously object, oppose class certification, and assert that Rathbun's counsel is not acting in the best interest of post-1984 U S WEST/Qwest retirees. Moreover, as shown below, there is a tremendous conflict of interest between Rathbun's interests and the interests of HULL and thousand of other post-1984 U S WEST/Qwest retirees.

The Court Should Grant HULL and AUSWR Leave to Intervene.

5. HULL and AUSWR seek leave to intervene as a matter of right pursuant to Rule 24(a)(2) and permissively pursuant to Rule 24(b)(2). Accompanying this motion, pursuant to Rule 24(c), is another copy of the Answer filed herein on April 18, 2005 by Defendant Qwest (See Exhibit 1 hereto – there is no Docket Number for this pleading). The Answer states on page 14 the exact grounds or defense for which intervention is sought by HULL and AUSWR, to-wit: *“This action should not be certified or maintained as a class action because the requirements for a class action have not been and cannot be satisfied.”*

6. Fed.R.Civ.Proc Rules 23(d)(2 & 3) provide that a court may enter “appropriate” orders allowing intervention, and imposing conditions on any intervenors. “Intervention under Rule 23 is intended to ensure that every class member is given an opportunity to be heard. . . . The combined effect of Rule 23(d)(2) and Rule 23(d)(3) is to enable the court to mark out any level of activity for the intervening class members that is appropriate in the particular case.” 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil 3d* § 1799 (2005). See also *Corley v. Entergy Corporation*, 220 F.R.D. 478, 481 (E.D. Tex. 2004) (in certain landowners’ proposed class action against defendant companies, court allows other landowners to intervene to file brief opposing class certification); *Montgomery v. Aetna Plywood, Inc.*, 1996 Westlaw 189347 *6 n. 2 (N.D. Ill. 1996) (granting absent class members’ motion to intervene to file brief objecting to class certification).

7. AUSWR, a non-profit association established and operated for the benefit of U S

WEST/Qwest retirees, has standing to intervene. See, e.g., *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 225 (4th Cir. 2001) wherein the appellate court declared and noted:

“[A]n association may have standing to sue in federal court either based on an injury to the organization in its own right or as the representative of its members who have been harmed.” *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 155 (4th Cir.2000) (en banc). Representational standing is established if “(1) at least one of [the organization’s] members would have standing to sue in his own right; (2) the organization seeks to protect interests germane to the organization’s purpose; and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit.” *Id.*; see *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

8. When considering a motion to intervene, the court “must accept as true the non-conclusory allegations of the motion.” *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995). “A motion to intervene as a matter of right, moreover, should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved under the complaint.” *Id.* at 321 (citing *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir.1983)). Each intervention case is “highly fact specific and tend[s] to resist comparison to prior cases.” *Id.* at 321.

9. In deciding whether an intervenor may intervene as “of right,” the Court should consider the nature of this action which Rathbun takes a shotgun approach to have class certified under Fed.R.Civ. Rule 23(a), b(1), b(2) and b(3). Under the specific facts and circumstances of this case, HULL and AUSWR have an interest in this litigation, which Rathbun is not adequately protecting and which HULL and AUSWR will be unable to protect if these parties are not allowed to intervene to oppose class certification. The best way to clear any obstacles to

challenging the proposed class action motion pending herein is to grant HULL's and AUSWR's application to intervene as of right. Certainly, judicial resources will be conserved if this Court were to deny class certification, at this juncture, rather than to re-visit the issue after being faced with an onslaught of thousands of objections from putative class members in the wake of a notice of class certification being sent out to the post-1984 U S WEST/Qwest retirees.

A. The Intervenor's Motion Is Timely

10. As a threshold issue, an intervenor's motion must be timely. Factors to be considered include the "length of time since the applicant knew of his or her interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (internal quotation marks and citation omitted). The test for timeliness, however, is essentially one of *reasonableness*. *Nissei Sangyo America, Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir.1994). Importantly, "the prejudice prong of the timeliness inquiry measures prejudice caused by the intervenors' delay--not by the intervention itself." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001) (citation and quotation omitted).

11. HULL did not learn of the jeopardy to her interest until several weeks after Rathbun's counsel filed [Docket No. 26] the pending amended motion for class certification. Rathbun's counsel has bothered to try and share this court filing with members of the putative class, despite having first hand knowledge of undersigned counsel's long standing representation of U S WEST/Qwest retirees' interest and easy accessibility to communicate with AUSWR

leadership and thousands of potentially affected retirees.¹ The pending motion was accidentally discovered by the undersigned counsel using PACER, a legal research tool about which most retirees lack the necessary legal skills and know-how in order to discover pending litigation that could affect their rights and interests.

12. Strikingly, while Rathbun's counsel speciously contend they seek to represent the interests of a fictional defined benefit plan which they have self-named the "Telephone Concession Plan" and thousands of retirees, no effort has ever been made by any of her cadre of lawyers to either speak to or educate the affected putative retiree class. For sure, the vast majority of post-1984 U S WEST/Qwest retirees and their spouses do *not* want to see the historically provided fringe benefit (retiree telephone concession) declared to be taxable income, an erstwhile position being espoused by Rathbun's counsel. Rathbun's counsel has never asked the putative class members for comment or opinion.²

¹ In addition, despite having the clear ability to post this information at its law firm website, Rathbun's counsel never posted a copy of the pending motion for class certification. There is a single website posting concerning this case – the *outdated* original Complaint as filed in the District of Arizona. See http://www.cmht.com/cases_qwest.php There have been no updates, a glaring example of Rathbun's counsel disinterest in keeping potentially affected retirees informed about this legal proceeding.

² Rathbun's counsel has ample knowledge about the undersigned counsel's entrenched working relationship with U S WEST/Qwest employees and retirees, but they made *no* effort to request an audience with any of the retirees. Likewise, AUSWR leaders and post-1984 U S WEST/Qwest retirees find it most difficult to understand how Ms. Rathbun could even try to argue that she should be deemed fit to serve as class representative when she has *never* made any effort to communicate with the AUSWR organization and participate in regular retiree meetings. Many years ago, it would have been excusable for a U S WEST or Qwest retiree litigant wishing to serve as a class representative to not communicate with fellow retirees before becoming a class representative, considering the lack of any known list of retiree's names and addresses. But that excuse can no longer apply, considering AUSWR's existence, its regular newsletters, almost daily mass distribution of email messages, massive group meetings and detailed Internet

13. Under Rule 24(b)(2), anyone may be permitted to intervene in an action if his or her claim or defense and the main action have common questions of law and fact, so long as the intervention will not unduly delay or prejudice the rights of the original parties. Permitting HULL and AUSWR to intervene in order to object to the pending motion for class certification and the adequacy of Plaintiff and her counsel to represent the interests of post-1984 U S WEST/Qwest retirees will not unduly delay or prejudice the original parties. HULL and AUSWR have acted in a timely and reasonable manner to file this motion. The timing of this motion could in no way prejudice the parties. HULL and AUSWR, which organization's primary mission is to engage in efforts to protect the interests of all U S WEST/Qwest retirees, including all post-1984 retirees (both management and nonmanagement), will be extremely prejudiced if this case is allowed to proceed as a class action. Accordingly, this motion for intervention is timely.

B. Intervenor Have An Interest Relating To The Subject Matter Of The Litigation.

14. There can be no dispute that HULL and AUSWR have an interest relating to the subject matter of the litigation. The Intervenor's interest is to see that the telephone retiree concession fringe benefit continues to be treated as non taxable. The Intervenor contend that since the telephone concession is something provided by Qwest which cannot be transferred and, hence, has no measurable market value because a retiree cannot resell it or give it away, has always been correctly treated as a working and retiree fringe benefit. Since this practice has

postings of numerous legal matters affecting the rights and concerns of retirees: See, e.g., <http://www.uswestretiree.org/legal2.htm>

gone on for over 40 years, it is very hard to believe the tax authorities would have been in the dark. Certainly, there is no tax case law or regulation to agree with Rathbun's and her counsel's position.

15. Indeed, HULL and AUSWR have an interest to see that the retiree telephone concession remains tax free, as any tax would financially burden retirees, their spouses and lessen their enjoyment of the fringe benefit. There is ample legal authority for HULL's and AUSWR's legal position which is diametrically opposed to Rathbun's legal position. The Internal Revenue Code at 26 U.S.C. § 132 declares certain fringe benefits are excluded from gross taxable income, such as a working condition fringe benefit. Since the retiree telephone concession is a "no-additional-cost service" fringe benefit, it fits squarely within regulation 26 C.F.R. § 1.132-2(a)(6) which makes "payments for telephone service" excludable from gross income and, hence, non taxable.³

16. Clearly, Intervenors HULL and AUSWR assert a significantly protectable interest in the subject matter at issue. Thus, Intervenors without a doubt have the right to assert these interests which defeat Rathbun's efforts to obtain class certification.

C. Disposition Of This Action Will Impair And Impede Intervenors' Ability To Protect Their Interests Which Are Not Adequately

³ 26 C.F.R. § 1.132-2(a)(6) states: *Payments for telephone service.* Payments made by an entity subject to the modified final judgment (as defined in section 559(c)(5) of the Tax Reform Act of 1984) of all or part of the cost of local telephone service provided to an employee by a person other than an entity subject to the modified final judgment shall be treated as telephone service provided to the employee by the entity making the payment for purposes of this section. The preceding sentence also applies to a rebate of the amount paid by the employer for the service and a payment to the person providing the service. This paragraph (a)(6) applies only to services and employees described in section 1.132-4(c). For a special line of business rule relating to such services and employees, see section 1.132-4(c).

Represented by Rathbun and Her Counsel Who Have a Conflict With the Interests of Post-1994 U S WEST/Qwest Retirees.

17. Under Fed.R.Civ. Rule 24(a)(2), once an applicant has established an interest in the subject of the action, he must then 'demonstrate that the disposition of that action *may*, as a practical matter, impair or impede the applicant's ability to protect that interest.' "To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. ***This burden is minimal.***" *Utah Association*, 255 F.3d at 1253 (citations and internal quotations omitted) (emphasis added).

18. HULL's and AUSWR's interest – the interest of thousands of post-1984 U S WEST/Qwest retirees – is not adequately represented by Rathbun's lawyers. Inadequacy of representation is shown if when there is proof that Plaintiff's interest is adverse to that of the petitioning intervenor. As the Tenth Circuit observed, "that burden is the 'minimal' one of showing that representation 'may' be inadequate." *Utah Ass'n*, 255 F.3d at 1254 (quoting *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984)). "The possibility that the interests of the applicant and the parties may diverge 'need not be great' in order to satisfy this minimal burden." *Id.* (quoting *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 578 F.2d 1341, 1346 (10th Cir. 1978)).

19. In making a determination of class certification, this Court should consider the self-interest conduct displayed by Rathbun's counsel after a class settlement had been reached in a state law case concerning the telephone concession fringe benefit provided to almost 3,000 former U S WEST/Qwest retirees. In the case of *Colvin v. Qwest Communications, International, Inc.*, Civil Action No. 04-CV-039, Otero County District Court, the parties had agreed to class-wide settlement for the benefit of approximately 3,000 retirees living in

independent telephone company territories and the agreement was submitted to the trial court for approval. That same day or the very next day, Rathbun's counsel filed a motion to intervene in order to prevent the settlement from going forward, despite the settlement having the blessings from over a thousand retirees. In that case, Rathbun's counsel's never tried to communicate with the retirees in order to see what they *really* wanted accomplished and the erstwhile legal maneuvers served only to add about eight months delay to the final approval and implementation of the settlement which was accepted by almost 2,700 of the retirees eligible to submit claim forms. The Otero County District Court had this to say about Rathbun's counsel's tactics:

“Ms. Rathbun complains that if this Court approves the proposed settlement of this case and putative class members receive the lump sum payment and lifetime long distance service provided for in the settlement, she will be able to recover less money for “funding” the alleged retirement plan, assuming *arguendo* she prevails in the Arizona case. The effect of what Ms. Rathbun seeks to do [in this state case] is to make thousands of retirees, many of whom are elderly, wait years before possibly recovering any financial benefit – a delay that many of the retirees would not outlive. This Court is mindful that some of the benefits provided under the proposed settlement have value throughout retirees’ “lifetime,” but not thereafter.”

(See Exhibit 2, at p. 11 ¶ 5, April 7, 2005 “Findings of Fact and Conclusions of Law” by District Court Judge Michael Schiferl). Subsequently, almost 80% of the retiree class members submitted claims forms, demonstrating an overwhelming disapproval of Rathbun's counsel's legal position taken in that case. ⁴

20. Rathbun's position that the telephone concession fringe benefit provided to thousands of post-1984 U S WEST/Qwest retirees be determined to be taxable income, is a

⁴ During oral argument to oppose preliminary approval of the class-wide settlement, Rathbun's counsel insisted that it was most likely that only a small percentage of the eligible class members would send in the claim form in order to receive the settlement benefit.

position that would harm thousands of persons in the putative class, including their spouses.

HULL and the post-1984 retirees have enjoyed the retiree telephone concession that Qwest (and predecessor companies U S WEST and AT&T) has properly treated as a non-taxable fringe benefit.

21. HULL recently attended a meeting of over 300 AUSWR members in Phoenix, Arizona and those retirees expressed their collective desire that the retiree telephone concession remain a non taxable fringe benefit. They do not share Rathbun's sentiments. Under Rule 23(a)(4) a proposed class members must be one who will "adequately protect the interests of the class." This "adequacy" requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Anchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). For example, in *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 463-64 (10th Cir. 1974), the Tenth Circuit proclaimed: "It is axiomatic that a plaintiff cannot maintain a class action when his interests are antagonistic to, or in conflict with, the interests of the persons he would seek to represent." Here, since the relief being sought by Rathbun is not desired by thousands of putative class members, it would be inequitable to catapult Rathbun to class representative. See *Dierks v. Thompson*, 414 F.2d 453, 456 (1st Cir. 1969) ("Unless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize plaintiffs as representative, and a violation of due process to permit them to obtain a judgment binding absent plaintiffs.").

22. Rathbun's and her counsel's underlying intent in this case, an intent expressed during the *Colvin* case settlement proceedings, is to get a court decree that telephone retiree

concession constitutes an ERISA defined benefit pension plan. But, it has never been treated as such for over 40 years. In order to succeed, Rathbun must take the position that the retiree telephone concession is some sort of deferred taxable income. Rathbun claims in this action that the retiree telephone concession is deferred taxable income and, therefore, there should be an established defined pension benefit plan with all the trappings of ERISA and compliance with its numerous and onerous federal regulations. Rathbun's claim is based entirely on a lone case decision, *Musmeci v. Schwegmann Giant Super Markets*, 332 F.3d 339 (5th Cir. 2003). In order to get a result like that obtained in *Musmeci*, Rathbun must espouse the position that the retiree telephone concession constitutes taxable income to the retirees. **Stated quite simply, the thousands of post-1994 U S WEST/Qwest retirees don't want that outcome.**

23. The retiree telephone concession fringe benefit provided to HULL and thousands of post-1984 U S WEST/Qwest retirees has always been treated as excludable income, a *non-taxable fringe benefit*. HULL and AUSWR profess on behalf of those thousands of retirees that they will remain better off if they continue to receive the retiree telephone concession as a non-taxable fringe benefit rather than as taxable income. So, why would Rathbun and her counsel contend otherwise? This just smacks of being a case where Rathbun and her counsel seek to benefit at the expense of the proposed putative class, not one where they are truly looking out for the best interests of the retirees. HULL and AUSWR contend that this case is an example of the tail wagging the dog.

24. Here, this Court should deny the pending motion for class certification,

because Rathbun and her counsel have never tried to communicate and educate the putative class and they should know that they have taken a position on a tax issue that conflicts with the position virtually all post-1994 U S WEST/Qwest retirees will take.

25. In *Block v. First Blood Associates*, 691 F. Supp. 685 (S.D.N.Y. 1988), the court denied the plaintiff's motion for class certification on the basis that:

[P]otential conflicts concerning Block's position with respect to the tax consequences of the First Blood investment bear on both the numerosity issue and the adequacy of Block's representation. *It is entirely possible that given an interest in preserving the tax deduction, a position apparently at odds with Block's litigation posture, none of the putative class members shares Block's position.*

Id. at 695 (emphasis added). See also, *Mechigian v. Art Capital Corp.*, 612 F. Supp. 1421, 1433 (S.D. N.Y. 1985), wherein class certification was denied because "[P]laintiff's position regarding the tax consequences resulting to all members of the proposed class from their purchases of art works from defendants is almost certainly antagonistic to the general position of the class." *Id.* at 1433. Likewise, this Court should deny class certification in this case due to the real conflict that exists between Rathbun and the class, especially between Rathbun's counsel and the putative class of retirees, about the tax consequences of the retiree telephone concession fringe benefit.

26. Certificate of Compliance with Local Rule 7.1 Prior to filing this motion, the undersigned sent to both Rathbun's and Qwest's counsel a draft (11 pages) of this motion setting forth all the substantive arguments. In addition, the undersigned engaged in a lengthy telephone discussion with Rathbun's counsel Attorney Joe Barton and the parties were unable to work out the issues. Therefore, it is presumed that this motion and the objections

to class certification will be opposed by Rathbun. The undersigned counsel had a telephone discussion with Qwest's counsel Chris Koenigs who stated that Qwest does not oppose this motion for intervention for purposes of opposing class certification.

WHEREFORE, INTERVENORS/OBJECTORS MARY M. HULL and ASSOCIATION OF U S WEST RETIRES, move this Court to enter an order: **1)** granting them intervention for purposes of opposing class certification; and **2)** accepting their objections as stated herein as a brief filed in opposition to the pending motion for class certification. In addition, due to the importance of the legal issues - the tax issues - presented in this civil action which case will, *now*, being monitored by thousands of post-1984 U S WEST/Qwest putative class members, the Intervenor request an oral argument hearing on Rathbun's pending motion for class certification.

Respectfully submitted this 27th day of January, 2006.

s/ Curtis L. Kennedy
Curtis L. Kennedy
8405 East Princeton Avenue
Denver, CO 80237-1741
Telephone: 303-770-0440
Facsimile: 303-843-0360
e-mail CurtisLKennedy@aol.com
Attorney for Intervenor/Objectors
Mary M. Hull and Association of U S WEST Retirees

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of January, 2006, a true and correct copy of the above and foregoing document, together with Exhibits 1 and 2, was electronically filed with the Clerk of the Court using the CM/ECF system and a courtesy copy was emailed to counsel of record as follows:

March I. Machiz, Esq.
R. Joseph Barton, Esq.
COHEN, MILSTEIN, HAUSFELD, et al
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005
Tele: 202-408-4500
Fax: 202-408-4699
jbarton@cmht.com (Joseph Barton, Esq.),
mmachiz@cmht.com (Mark Machiz, Esq.)
Counsel for Plaintiff Rathbun

Christopher J. Koenigs, Esq.
Michael B. Carroll, Esq.
SHERMAN & HOWARD, L.L.C.
633 17th Street, Suite 3000
Denver, CO 80202
Tele: 303-299-8458
Fax: 303-298-0940
ckoenigs@sah.com (Chris Koenigs, Esq.)
mcarroll@sah.com (Mike Carroll, Esq.)
Counsel for Defendant Qwest

John F. Head, Esq.
HEAD & ASSOCIATES, P.C.
730 17TH Street, Suite 740
Denver, CO 80202
Tele: 303-623-6000
Fax: 303-623-4211
jfhead@headlawyers.com (John Head, Esq.)
Counsel for Plaintiff Rathbun

Also, a copy of the same was delivered via email to Intervenors/Objectors:

Mary M. Hull, President
ASSOCIATION OF U S WEST RETIREES
678 Clarkson St.
Denver, CO 80218-2302
MM5Hull@msn.com (Mimi Hull)

ASSOCIATION OF U S WEST RETIREES
c/o Nelson Phelps, Executive Director
1500 S. Macon Street
Aurora, CO 80012- 5141
nbphelps@woldnet.att.net (Nelson Phelps)

s/ Curtis L. Kennedy