

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.

**REPLY in support of [Docket 56] MOTION FOR INTERVENTION
and NOTICE OF OBJECTIONS
to [Docket 26] the AMENDED MOTION FOR CLASS CERTIFICATION**

INTERVENORS/OBJECTORS, **MARY M. HULL**, and **ASSOCIATION OF U S WEST RETIREES (AUSWR)**, by and through their counsel, hereby file their reply in support of their Motion to Intervene and Notice of Objections filed on January 27, 2006 as Docket 56. The motion is unopposed by Defendants (See Docket 63). However, Plaintiff Rathbun opposes HULL's and AUSWR's motion for intervention, while making no objection to intervention by the Communications Workers of America ("CWA"). (See Dockets 59 and 64).

1. It Cannot Be Disputed that Intervenor's Have An Interest Relating To The Subject Matter Of The Litigation.

Pursuant to Fed.R.Civ.Proc., Rule 24(a)(2), the proposed Intervenor's need merely show that the disposition of the action "may as a practical matter impair or impede [their] ability to protect [their] interest." FED. R. CIV. P. 24(a)(2). The proposed Intervenor's have met this requirement which requirement is to be construed liberally. "If any applicant would be substantially affected in a practical sense by the determination made in an action, [the applicant]

should, as a general rule, be entitled to intervene.” FED. R. CIV. P. 24(a)(2), Advisory Committee Note. See, e.g., *United States v. City of Los Angeles*, 288 F.3d 391, 399 (9th Cir. 2002) (“Whether an applicant’s interest would be impaired by disposition of a lawsuit depends on the range of dispositions open to a court about which an applicant is entitled to be concerned, not the specific disposition the original parties are seeking to have a court approve.”), quoting *Brennan v. Conn. State UAW Cmty. Action Program Council*, 60 F.R.D. 626, 631 (D.Conn. 1973); *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001).

Here, the Intervenors, just like the CWA, have an interest adverse to that of Rathbun and her counsel to see that the telephone retiree concession fringe benefit continues to be treated as non taxable. Any tax treatment on this fringe benefit would financially burden retirees, their spouses and lessen their enjoyment of the fringe benefit. In their opening brief, Intervenors cited ample legal authority for HULL’s and AUSWR’s legal position which is diametrically opposed to Rathbun’s legal position. Thus, Intervenors without a doubt have the right to assert these interests which should defeat Rathbun’s effort to obtain class certification.

2. Disposition Of This Action Will Impair And Impede Intervenors’ Ability To Protect Their Interests Which Are Not Adequately Represented by Rathbun and Her Counsel Who Have a Conflict With the Interests of Post-1994 U S WEST/Qwest Retirees. Likewise, Neither the CWA Nor Defendant Qwest Speaks For or Represents Either HULL’s or AUSWR’s Interests.

Rathbun and her counsel do not dispute that they don’t share in the interests of the Intervenors. In the opposition brief, Rathbun’s counsel go to great effort to show disagreement with other actions taken by AUSWR’s leaders, including a class settlement which benefitted almost 3,000 retirees, *most* of whom were over seventy (70) years of age, many quite elderly. Rathbun and her counsel do not dispute their display of self-interest conduct after the class

settlement had been reached in the state law case of *Colvin v. Qwest Communications, International, Inc.*, Civil Action No. 04-CV-039, Otero County District Court. Moreover, Rathbun and her counsel do not dispute that thousands of AUSWR's members are not supportive of the attempt being made in this case to have the historically provided tax free telephone concession fringe benefit reclassified as taxable. While HULL has daily regular contacts and communications with countless retirees, Rathbun and her counsel have not made any discernable effort to meet, confer, or listen to the retirees, the very people they contend they should be allowed to represent in this litigation.

Rathbun's counsel cites case law following the Tenth Circuit's ruling in *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986), wherein the appellate court upheld the trial court's decision not to allow another party to intervene less than two months before trial was set to begin. The proposed intervenor in the *Bottoms* case claimed a fifty-percent partnership interest in a patent held by the plaintiff which was the subject of the litigation. In *Bottoms*, the court concluded the plaintiff, a partner of the proposed intervenor, would adequately represent the proposed intervenor's interest. That is not situation here.

Rathbun's counsel speciously argue that either the CWA or Defendant Qwest will adequately represent the interests of HULL and the thousands of post-1994 U S WEST/Qwest retirees. Neither HULL nor AUSWR has ever retained either CWA's counsel or Defendant Qwest's counsel. Likewise, never before has the CWA represented the interests of either HULL or management retirees, persons who have never been included in the collective bargaining agreements and negotiating process. AUSWR's members and several key leaders have on-going litigation against Qwest, which fact makes all the case law cited by Rathbun's counsel

inapposite. In none of the cases cited by Rathbun's counsel were the proposed intervenors and one of the existing parties litigating against each other in other lawsuits. In the District of Colorado alone, there are at least two cases pending between retirees and Qwest, which cases are being fully supported by HULL and AUSWR. (See, e.g., *Phelps v. Qwest Employee Benefits Committee*, Civil Action No. 04-cv-02042-LTB-MEH, and *Kerber, et al. v. Qwest, et al.*, Civil Action No. 05-cv-00478-BNB-PAC. Certainly, the AUSWR group of retirees and Qwest leadership do not always share common positions and Defendant Qwest's objectives are not identical to the objectives of HULL and AUSWR. Intervenors exercise their right to choose their own counsel to protect their interests.

3. Intervenors Have No Desire to Delay This Litigation.

Rathbun's counsel contend in the opposition brief that they have "*not opposed the CWA's motion to intervene in this litigation because their counsel agreed to a schedule by which intervention would not delay this litigation.*" (See Docket 64, p. 14 n.9). Intervenors HULL and AUSWR have no desire to delay this litigation. As thoroughly explained to Rathbun's counsel, HULL and AUSWR seek intervention in order to oppose class certification because the fringe benefit being provided by Qwest to HULL and thousands of other AUSWR's post-1994 U S WEST/Qwest retirees should *not* be treated as taxable income. Thus, because HULL's and AUSWR's intervention will require no delay in the proceedings before this Court, and because the major issues in this case are still to be determined, intervention will not be prejudicial to the existing parties. Should this Court not grant HULL's and AUSWR's motion as of right, they respectfully request that this Court exercise its discretion to grant them permissive intervention pursuant to Fed.R.Civ.Proc., Rule 24(b). It would appear to be an abuse of discretion for this

Court to allow the CWA to intervene on behalf of *non*-management retirees, while not allowing HULL and AUSWR to intervene on behalf of management retirees.

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 in Docket 56 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 is being monitored by thousands of post-1984 U S WEST/Qwest retirees, the proposed Intervenors request an oral argument hearing on Docket 26, Rathbun's pending amended motion for class certification.

Respectfully submitted this 1st day of March, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2006, a true and correct copy of the above and foregoing document 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:

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