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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE STAFF'S PETITION)
TO INITIATE A COMMISSION INVESTIGATION) **CASE NO. GNR-T-04-4**
TO DETERMINE IF OCMC, INC. VIOLATED)
THE TERMS OF ITS PRICE LIST AND THE) **MOTION TO TERMINATE**
COMMISSION'S OPERATOR SERVICES AND) **INVESTIGATION**
PAY TELEPHONE RULE 104.04.)
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COMES NOW the Respondent, OCMC Inc., by and through its counsel of record, and respectfully moves the Commission to terminate this investigation upon the grounds and for the reasons set forth in the Memorandum in Support of Motion to Terminate Investigation filed herewith.

Oral Argument is requested.

Respectfully submitted this 4 day of April, 2004.

OCMC, Inc.

By: 
Dean J. Miller
Attorneys for OCMC, Inc.

CERTIFICATE OF SERVICE

I certify that the original and seven copies of the foregoing document were delivered on 7 April 04 to:

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
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IN THE MATTER OF THE STAFF'S PETITION)	
TO INITIATE A COMMISSION INVESTIGATION)	CASE NO. GNR-T-04-4
TO DETERMINE IF OCMC, INC. VIOLATED)	
THE TERMS OF ITS PRICE LIST AND THE)	MEMORANDUM IN SUPPORT
COMMISSION'S OPERATOR SERVICES AND)	OF MOTION TO TERMINATE
PAY TELEPHONE RULE 104.04.)	INVESTIGATION
)	
)	
)	

Statement of Facts

Staff's Petition to Initiate an Investigation (Staff Petition) alleges two causes of action. In the first Staff alleges that OCMC failed to comply with the Commission's Operator Service and Pay Telephone Rule 104.04 which was purportedly adopted in 2002 and which requires certain disclosures to consumers. The Petition further requests the Commission's attorney, pursuant to *Idaho Code 62-620*, be directed to file an action in district court to seek the imposition of penalties. (Staff Petition pg 10). Second, Staff alleges that OCMC violated the terms of its price list, claiming that OCMC failed to provide rate quotes on request.

As demonstrated in this Memorandum, the Commission should terminate the investigation with respect to the first cause of action because Rule 101.4 cannot be enforced under *Idaho Code 62-620*. The Commission should terminate the investigation with respect to the second cause of action because there are not any outstanding consumer complaints regarding price list non-compliance.

If this matter is fully litigated through evidentiary hearing, OCMC believes the evidence would show, among other things, that OCMC's alleged non-compliance was inadvertent; that upon being notified of an apparent violation OCMC promptly, and voluntarily, came into compliance with Rule 104.04; that OCMC has provided all information requested by Staff and has fully cooperated with Staff's informal investigation. As a factual matter, OCMC believes the evidence would not justify efforts to impose any substantial penalty.

As more fully set forth below, in this Memorandum in Support of Motion to Terminate Investigation, OCMC, with all due respect to the Commission, raises more fundamental questions. They are: Was the purported adoption of Rule 104.04 within the Commission's legal authority and may it be enforced pursuant to Idaho Code 62-620, and may the Commission exercise dispute resolution authority when there is not an outstanding subscriber complaint?

Argument

First Cause of Action

The Adoption Of Rule 104.04 Was Outside The Commission's Authority And It Cannot Be Enforced Under Idaho Code 62-620.

Idaho Code 62-620 provides in relevant part:

CIVIL PENALTY FOR VIOLATION. Any telephone corporation who violates or fails to comply with any final order, decision, rule or regulation *duly issued by the commission pursuant to this chapter* shall be subject to a civil penalty of not to exceed two thousand dollars (\$2,000) for each day that the violation continues. (emphasis added).

The language of section 62-620, requiring that a rule be "duly issued by the commission pursuant to this chapter," necessitates an examination of Chapter 6 of Title 62, Idaho Code, to determine if promulgation of Rule 104.04 was within the Commission's legal authority.

As the Commission is well aware, Chapter 6, known as the Telecommunications Act of 1988 (as amended) created a new framework for the regulation of telecommunications carriers in Idaho. Local exchange carriers were given the option of remaining fully regulated pursuant to

Title 61 or of electing to remove all service other than basic local exchange from traditional regulation. Idaho Code 62-605(1). If a local exchange carrier exercised its election, the Commission retained, "...continuing authority to review the quality of such service, its general availability, and the terms and conditions under which it is offered." Idaho Code 62-605(5), 62-616.

Carriers other than local exchange carriers (now referred to as "Title 62" companies) were given broader freedoms. Their rates were de-regulated, subject only to a requirement for filing of price lists. Idaho Code 62-606. More importantly, for purposes of this case, the Commission's authority to regulate quality of service and terms and conditions of service was cut back when compared to local exchange companies. Idaho Code 62-616 is the remaining source of Commission authority. It provides:

COMMISSION AUTHORITY TO RESOLVE SUBSCRIBER COMPLAINTS. The commission shall have the authority to investigate and resolve complaints made by subscribers to telecommunication services which are subject to the provisions of this chapter which concern the quality and availability of local exchange service, or whether price and conditions of service are in conformance with filed tariffs or price lists, deposit requirements for such service or disconnection of such service by telephone corporations subject to the provisions of this chapter.

The same distinction is set forth in Idaho Code 62-605(5) wherein quality of service regulation is preserved for local exchange companies exercising the Title 62 election, but not for other Title 62 companies. Pursuant to these sections the Commission's authority is limited to a determination of whether conditions of service are in conformance with filed tariffs or price lists. The Commission does not have authority to prescribe, by rule or otherwise, conditions of service for Title 62 companies that are not local exchange companies. Its authority is limited to determining whether the conditions of service conform with such conditions as a Title 62 company may include in its price lists.

Rule 104.04 requires that companies:

Disclose, audibly and distinctly to the consumer (caller for non-collect calls, called party for collect calls), at no charge, and before connecting any intrastate operator service call, how to obtain the total cost of the call, including any aggregator surcharge, or the maximum possible total cost of the call, including any aggregator surcharge, before providing further oral advice to the consumer on how to proceed to make the call. The oral disclosure required in Rule 104.04 shall instruct consumers that they may obtain applicable rate and surcharge quotations either, at the option of the provider of operator services, by dialing no more than two (2) digits or by remaining on the line.

The rule is clearly an attempt to impose conditions of service. Because Rule 104.04 is an attempt to prescribe a condition of service it was promulgated without Commission authority. It was not “duly issued by the commission pursuant to this chapter,” as required by Idaho Code 62-620. Accordingly, Rule 104.04 may not be enforced through a civil action for penalties under Idaho Code 62-620.

The Idaho Supreme Court has made clear that the Commission may only adopt administrative rules that are authorized by the state legislature. In the case of *Idaho Power v. Idaho Public Utilities Commission*, 102 Idaho 744, 639 P.2d 442 (1981), the Court considered the Commission’s attempted adoption of rules authorizing grants of intervenor funding.¹ In *Idaho Power*, in the context of implementing the Public Utility Regulatory Policy Act of 1978, the Commission adopted administrative rules allowing it to award costs of intervention. The utility companies challenged the Commission’s authority to adopt the rules and appealed, arguing that the rules were not authorized by any statute adopted by the legislature.

The Court began its analysis with the well-known general observation that, “Because the Commission was created by statute, the Commission has no jurisdiction other than that which the legislature has specifically granted to it. The Commission therefore exercises limited jurisdiction, with nothing presumed in favor of its jurisdiction.” 102 Idaho at 750. Quoting from

¹ The case arose prior to the enactment of Idaho Code 61-617A which authorized the Commission to adopt intervenor funding rules.

(1979), the Court said:

"[a]s a general rule, administrative authorities are tribunals of limited jurisdiction and their *jurisdiction is dependent entirely upon the statutes reposing power in them* and they cannot confer it upon themselves, although they may determine whether they have it. If the provisions of the statutes are not met and compliance is not had with the statutes, no jurisdiction exists." (Emphasis in original.) *Id.*

The Court then examined Title 62 to find a source of legislative authority to adopt the rules and concluded that its examination "reveals the complete absence of any section which would empower the Commission to... adopt rules governing compensation consumer intervenors." *Id.*

The Court also made clear that generalized legislative authorizations will not do—a specific grant of authority is required. The court rejected arguments that Idaho Code 61-501² and 61-601³ provide adequate authority, concluding, "...it would be inappropriate to construe these provisions to authorize the Commission to compensate consumer intervenors in the absence of a specific statute to that effect." *Id.*

Federal Statutes and Rules Are Not a Source of Authority.

Staff's Petition to Initiate an Investigation contains a lengthy discussion of federal laws—The Telecommunications Act of 1996 (TRA) and the Telephone Operator Consumer Service Improvement Act of 1990 (TOCSIA) along with a discussion of various FCC proceedings implementing those laws. Staff apparently contends that these federal laws, when linked to state law, create a source of authority for the adoption of Rule 104.04. Specifically, the Petition (pg 1)

² "The public utilities commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this act."

³ "All hearings and investigations before the commission or any commissioner shall be governed by this act and by rules of practice and procedure to be adopted by the commission, and in the conduct thereof neither the commission nor any commissioner shall be bound by the technical rules of evidence."

refers to Idaho Code 62-603 (the correct citation is 62-602(5)) which generally directs the Commission to “administer these statutes with respect to rates and services in accordance with these policies and applicable federal law.” Staff also refers to Idaho Code 62-615(1) which provides, “The commission shall have full power and authority to implement the federal telecommunications act of 1996, including, but not limited to, the power to establish unbundled network element charges in accordance with the act.”

There is, however, nothing in either the TRA or TOSCIA that purports to authorize or direct state commissions to promulgate rules of the nature of Rule 104. With respect to the TRA, the best Staff can do is a reference to 47 U.S.C. 276, which is part of the act. That section directs the FCC to promulgate rules for the interstate jurisdiction that:

- establish per call compensation
- discontinue access charge payphone service elements
- prescribe nonstructural safeguards for BOCs
- provide for negotiations with location providers

There is nothing in section 276 or the TRA generally authorizing or directing states to adopt rules on disclosures to customers.

TOSCIA, and rules promulgated there under do relate to consumer disclosures. Neither TOSCIA nor its rules, however, purport to authorize or direct state commissions to adopt companion rules for the intrastate jurisdictions. Staff’s Petition does not point to any portion of TOSCIA that requires state adoption of rules.

More fundamentally, even if TRA or TOSCIA were thought somehow to authorize state activity, that authorization would only be valid if there was pre-existing state authority created by state legislative authority. Federal law, in the absence of a clear federal intent to pre-empt state law, cannot expand the jurisdiction of a state commission beyond the jurisdiction conferred

by the state legislature. This issue was also addressed in *Idaho Power*. There, the federal PURPA act contained provisions purporting to authorize state commissions to award costs of intervention. The Court held that because there was no explicit attempt to preempt state law a permissive grant of authority was effective only if there was “preexisting State authority” to adopt such rules. 102 Idaho at 753—754.

This Motion Is Not An Impermissible Collateral Attack.

It may be suggested that this Motion constitutes a collateral attack, in violation of Idaho Code 61-625, on the adoption of Rule 104 and that Respondent should have challenged the rule by direct appeal. The *Idaho Power* case addresses this issue as well. There, the Court held that the prohibition against collateral attack is not applicable when the challenge is jurisdictional. “...an administrative order may generally be collaterally attacked when the issuing agency lacks jurisdiction over the matter considered.” 102 Idaho at 749.

Second Cause of Action

The Commission’s Authority Regarding Price List Non-Conformance Is Limited To Resolution Of Subscriber Complaints.

Staff’s second cause of action is premised on OCMC’s alleged non-conformance with its price list on file with the Commission in that OCMC allegedly failed to provide a rate quote on request. OCMC’s price list provides in part, “Rate quotes will be provided on request.” Idaho Code 62-616 defines the Commission’s authority regarding a carrier’s alleged non-conformance with its filed price lists. The section provides in relevant part:

The commission shall have the authority to investigate and resolve complaints made by subscribers...whether price and conditions of service are in conformance with filed tariffs or price lists, deposit requirements for such service.

The obvious predicate for commission authority under section 62-616 is the existence of one or more complaints by subscribers. Staff’s Petition does not allege the existence of

any unresolved subscriber complaints having to do with providing a rate quote on request and, in fact, there are none. Section 62-616 gives to the Commission a limited amount of dispute resolution authority to resolve subscriber complaints. In the absence of a complaint there is nothing for the Commission to resolve.

Conclusion

Companies subject to the Commission's jurisdiction are understandably reluctant to challenge the Commission's authority to undertake any particular course of action. In this case, however, Staff is leading the Commission into error and to proceed further with this investigation would be without a reasonable basis in law. *See* Idaho Code 12-117(1).⁴

Oral Argument Requested

Pursuant to IPUCRP 256, oral argument is requested.

Respectfully submitted this 7th day of April, 2004.

OCMC, Inc.

By: 

Dean J. Miller
Attorneys for OCMC, Inc.

⁴“ Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.”

CERTIFICATE OF SERVICE

I certify that the original and seven copies of the foregoing document were delivered on 7 Apr 04 to:

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83702

Christy K. H. [Signature]