

ORIGINAL

DEAN J. MILLER (ISB No. 1968)
McDEVITT & MILLER LLP
420 WEST BANNOCK STREET
BOISE, ID 83702
Tele: (208) 343-7500
Fax: (208) 336-6912
Attorneys for OCMC, Inc.

RECEIVED
FILED
2004 MAY 12 PM 2:43
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) **REPLY TO STAFF RESPONSE**
COMMISSION'S OPERATOR SERVICES AND)
PAY TELEPHONE RULE 104.04.)
)
)
)
)

COMES NOW OCMC and Replies to Staff's Response dated April 28, 2004 as follows:

Introduction and Summary of Proceedings

Staff's Petition to initiate this investigation, dated March 15, 2004, contained two causes of action: first, to seek the imposition of monetary penalties under Idaho Code 62-620 for alleged violation of Operator Service Rule 104.04, and second to investigate and resolve subscriber complaints under Idaho Code 62-616.

On April 7, 2004 OCMC filed a Motion to Terminate Investigation. In its Motion OCMC argued that the first cause of action could not be maintained because the Commission lacked legal authority to adopt Rule 104.04 and therefore it could not be enforced under Idaho Code 62-620. OCMC further argued there was nothing to investigate under the second cause of action because there were not any outstanding subscriber complaints, a pre-requisite for jurisdiction under Idaho Code 62-616.

Staff filed its Response to OCMC's Motion on April 29, 2004. There, Staff advanced various reasons for the validity of Rule 104.04 and claims there are outstanding subscriber complaints.

In this Reply, OCMC again demonstrates that Rule 104.04 cannot be enforced through Idaho Code 62-620 and the first cause of action should therefore be dismissed. With respect to outstanding subscriber complaints, OCMC states that if there are in fact outstanding subscriber complaints that OCMC failed to comply with its price list by failing to provide rate quotes on request, OCMC is willing to work with Staff to resolve those complaints to the satisfaction of the complaining subscriber.

While OCMC is willing to voluntarily comply with Rule 104.04, it cannot be penalized for past non-compliance through monetary fines.

As noted previously, when non-compliance was called to its attention, OCMC promptly and voluntarily brought itself into compliance. And, as a matter of regulatory accommodation OCMC is willing to comply on a prospective basis. Over a period of several months OCMC attempted to reach a settlement with staff for an appropriate resolution of prior non-compliance¹. Settlement efforts proved to be unsuccessful and OCMC thus has no choice but to raise the issue of Rule 104.04's validity.

The general rule applicable to this case, which Staff does not dispute is:

The Idaho Public Utilities Commission has no authority other than that given to it by the legislature. It exercises a limited jurisdiction and nothing is presumed in favor of its jurisdiction. *United States v. Utah Power & Light Co.*, 98 Idaho 665, 570 P.2d 1353 (1977); *Lemhi Tel. Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 571 P.2d 753 (1977); *Arrow Transp. Co. v. Idaho Public Utilities Comm'n*, 85 Idaho 307, 379 P.2d 422 (1963). As 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

¹ The settlement discussions were pursuant to written understandings of confidentiality. If, pursuant to IPUCRP 273 the Commission wishes to inquire about settlement, OCMC is willing to waive the mutual agreement of confidentiality.

of the statutes are not met and compliance is not had with the statutes, no jurisdiction exists. *Arrow Transp. Co. v. Idaho Public Utilities Comm'n, supra. Washington Water Power v. Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 112 (1979).

As OCMC demonstrated in its Motion to Terminate there is nothing in Title 62 that gives the Commission authority to regulate conditions of service for Title 62 companies, and under the *Kootenai* doctrine Rule 104.04 cannot be enforced through Idaho Code 62-620.

In its Response, Staff makes several attempts—each unsuccessful—to bring itself within the *Kootenai* doctrine, as discussed below.

Idaho Code 62-602(1)

Staff implicitly concedes that it cannot find in Title 62 any specific grant of authority to adopt the OSP rules and thus Staff is forced to rely on vague declarations of legislative intent. First it turns to Idaho Code 62-602(1) which provides in part that one purpose of Title 62 is to “protect and maintain high-quality universal service at just and reasonable rates for all classes of customers and to encourage innovation within the industry by a balanced program of regulation and competition.”

This argument fails for two reasons. First, legislative declarations of intent, while useful in construing a statute are not a delegation of authority. Second, to come within the *Kootenai* doctrine specific grants of authority are required. The Idaho Supreme Court made this clear in *Idaho Power v. Idaho Public Utilities Commission*, 102 Idaho 744, 639 P.2d 442 (1981). There, the Commission relied on Idaho Code 61-501² and 61-601³ as its authority to adopt intervenor funding rules. The Court held these generalized grants of authority were insufficient. If sections

² 61-501. INVESTMENT OF AUTHORITY. 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 61-601. PRACTICE -- EVIDENCE. 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.

61-501 and 61-601 were insufficient in *Idaho Power* it is inconceivable that 62-601(1) is sufficient here.

Idaho Code 62-615(3)

Staff also relies on 62-615(3) 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 elements charges in accordance with the act." Staff then turns to section 276 of the act (the only section of the act dealing with payphone service) which provides in full:

(a) NONDISCRIMINATION SAFEGUARDS- After the effective date of the rules prescribed pursuant to subsection (b), any Bell operating company that provides payphone service--

- (1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and
- (2) shall not prefer or discriminate in favor of its payphone service.

(b) REGULATIONS-

(1) CONTENTS OF REGULATIONS- In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that--

- (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;
- (B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);
- (C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a), which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding;
- (D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission

determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

(2) PUBLIC INTEREST TELEPHONES- In the rulemaking conducted pursuant to paragraph (1), the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably.

(3) EXISTING CONTRACTS- Nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment of the Telecommunications Act of 1996.

(c) STATE PREEMPTION- To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

(d) DEFINITION- As used in this section, the term 'payphone service' means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.

Exactly how Staff thinks section 276 aids its cause is unclear because it has nothing to do with consumer disclosures, and even if it did it does not purport to require or authorize adoption of rules by state commissions.

The Federal Operator Service Act

Staff also points to the Federal Operator Service Act (1990) (TOSCIA). Staff observes that the Idaho Rules adopted in 2002 were intended to make the state regulatory scheme consistent with the federal scheme, following a FCC rule making under TOSCIA. Jurisdictional consistency is, no doubt, a reasonable regulatory policy, but it is not a legislative grant of authority. As the Court said in *Kootenai*, "...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..." The Commission cannot confer power upon itself in the name of regulatory consistency.

Idaho Code 62-616 is a dispute resolution provision. It does not confer broad investigative powers.

Staff appears to view section 62-616 as authority for broad scale investigation into a carrier's practices. OCMC views the statute more narrowly as a source of authority to resolve individual disputes between a subscriber and a Title 62 company. And, by its express language it is limited to disputes as to whether "prices and conditions of service are in conformance with filed tariffs or price lists."

OCMC's view of the statute is confirmed by this sentence of the statute:

The commission may, by order render its decision granting or denying in whole or in part the *subscriber's* complaint. (Emphasis added).

The tense of the word "subscriber" is singular possessive, implying quite clearly that the Commission authority is to resolve complaints made by individual subscribers. It is not a source of authority to launch broad scale investigations into a carrier's practices generally.

As noted, the provision of OCMC's price list as a statement that "rate quotes will be provided upon request." If there are complaints from individual subscribers that have been submitted to the Commission and that remain unresolved wherein subscribers have complained about the failure to provide a rate quote after a request, OCMC is willing to work cooperatively to resolve them. Otherwise, the second cause of action should also be terminated.

Respectfully submitted this 17 day of May, 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 May 12, 2014 to:

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

Steph S. By legal assist.