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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF THE COMMISSION'S)
INVESTIGATION TO DETERMINE IF OCMC,) CASE NO. GNR-T-04-4
INC. VIOLATED THE TERMS OF ITS PRICE)
LIST AND THE COMMISSION'S OPERATOR) COMMISSION STAFF'S
SERVICES AND PAY TELEPHONE RULE) RESPONSE TO OCMC'S
104.04.) MOTION TO TERMINATE
) INVESTIGATION
)**

COMES NOW the attorney for the Commission Staff ("Staff"), John R. Hammond, Deputy Attorney General, and files this Response to OCMC, Inc.'s Motion to Terminate the Commission's investigation into whether the Company violated the terms of its Price List and the Commission's Operator Services and Pay Telephone Rules, IDAPA 31.51.01.001 *et seq.* As set out in greater detail below, OCMC's Motion to Terminate should be denied.

BACKGROUND

On March 15, 2004, pursuant to *Idaho Code* §§ 62-616 and 62-620, Staff filed a Petition requesting that the Commission initiate an investigation to: 1) resolve subscriber complaints; 2) determine if OCMC is providing service in compliance with its Price List; and 3) to decide if OCMC, Inc. has violated the Commission's Operator Services and Pay Telephone Rules, IDAPA 31.51.01.001 *et seq.* Staff alleged that OCMC, Inc. is an operator services provider ("OSP"), operating in the State of Idaho as itself or under the assumed business names

COMMISSION STAFF'S RESPONSE TO
OCMC'S MOTION TO TERMINATE
INVESTIGATION

of OPTICOM, Inc., One Call Communications, Inc., AdvantTel, LiveTel, SuperTel, RegionTel or 1-800-MAX-SAVE (hereinafter "OCMC"). Staff further alleged that OCMC violated the Commission's Operator Services and Pay Telephone Rule 104.04 and the terms of its own Price List between the dates of March 15, 2002 and July 29, 2003. OCMC provided operator services to 12,893 intrastate collect phone calls by its own admission during this time frame. Staff maintains that each of these calls processed by OCMC violated OSP Rule 104.04. Rule 104.04 requires that every OSP disclose to the called party on all collect calls how to obtain the total cost of the call. IDAPA 31.51.01.104.04. In addition, Staff contends that 9,021 of these calls were processed by OCMC's automated operator system and for collect calls the called party was not provided a means to obtain rates upon request as provided for in the Company's Price List.

OCMC'S MOTION

OCMC contends that this investigation should be terminated because: 1) the Commission did not have authority to adopt Rule 104.04 and therefore cannot enforce its requirements through *Idaho Code* § 62-620; and 2) there are no outstanding consumer complaints about OCMC's failure to comply with its Price List. The Staff asserts that the Commission has jurisdiction over this matter and that there are consumer complaints that have not been resolved.

JURISDICTION

Although the Commission is a tribunal of limited jurisdiction once jurisdiction is established it is allowed all power necessary to effectuate its purpose. *United States v. Utah Power & Light Co.*, 98 Idaho 665, 667, 570 P.2d 1353, 1355 (1977). "Every power expressly granted, or fairly to be implied from the language used, where necessary to enable the commission to exercise the powers expressly granted should be afforded. *Id.* at 1355-56 quoting 64 Am.Jur.2d, Public Utilities, § 232.

Idaho Code § 62-604 provides that any telephone corporation that "did not, on January 1, 1988, hold a certificate of public convenience and necessity issued by the commission and, which does not provide basic local exchange service, shall, on and after the effective date of this act, be subject to the provisions of [Chapter 6, Title 62.]" OCMC did not hold a CPCN on January 1, 1988, and provides telecommunication services in Idaho for compensation. *See Idaho*

Code § 62-603(13). *See also OCMC Price List* at Original Sheets No. 6 and 12. OCMC is a Title 62 telephone corporation.

Staff asserts that there are two reasons why the Commission has jurisdiction over this matter. First, the Commission is authorized to administer the Idaho Telecommunications Act of 1988 (*Idaho Code* §§ 62-601 *et seq.*) by a balanced program of regulation and competition. *Idaho Code* § 62-602(1) and (5). Second, *Idaho Code* § 62-606 requires that Title 62 companies file price lists with the Commission that “reflect the availability, price, and terms and conditions for those services.” *Idaho Code* § 62-616 states that the Commission “shall have the authority to investigate and resolve [consumer] complaints made by subscribers to telecommunication services which are subject to the provisions of this chapter which concern . . . whether price and conditions of service are in conformance with filed tariffs or price lists.” (emphasis added). Staff asserts that there are still many unresolved consumer complaints for the Commission to investigate and resolve.

1. Title 62

As stated correctly by OCMC the Idaho Telecommunications Act of 1988 created a new framework for the regulation of telecommunication carriers in Idaho. However, contrary to OCMC’s argument, the Act’s primary thrust is to generally remove the Commission’s ratesetting authority over incumbent telephone corporations Title 62 services upon their election. *See Idaho Code* § 62-605. It did not remove the Commission’s authority to review the quality of such service, its general availability or the terms and conditions under which Title 62 services are offered. The intent of Title 62 is codified in *Idaho Code* § 62-602 and provides the Act was intended to “protect and maintain high-quality universal telecommunications at just and reasonable rates for all classes of customer and to encourage innovation within the industry by a balanced program of regulation and competition.” *Idaho Code* § 62-602(1) (emphasis added). Moreover, the Commission was authorized to administer the statutes under Title 62 “with respect to telecommunications rates and services in accordance with these policies and applicable federal law.” *Idaho Code* § 62-602(5).

Although Title 62 companies are not rate regulated they are still subject to the Commission’s jurisdiction and must comply with certain requirements. They must provide to the Commission for informational purposes a price list or tariff filing of the services offered in

Idaho. *Idaho Code* § 62-606. This price list must reflect “the availability, price and terms and conditions for those services.” *Id.* They must also pay a regulatory fee and theoretically contribute to the State’s Universal Service Fund. *Idaho Code* §§ 62-610A-F and 62-611. In addition, the Commission retained jurisdiction to resolve complaints and to establish certain customer relations rules. *Idaho Code* §§ 62-616, 62-602(1), (4) and (5), and 62-615(3). *See also Commission Report to the Legislature on the Telecommunications Act of 1988* (January 1991). To ensure that the Title 62 telecommunications services provided to consumers were of high quality and provided at just and reasonable rates the Commission promulgated non-economic regulation and rules for Title 62 companies and Operator Service Providers. These Rules are intended to provide the consumer with information about service providers and their services that fall under this chapter so that informed consumers can make choices in the competitive telecommunications marketplace. *Commission Report* at 27. This is consistent with the intent of the Act as stated in *Idaho Code* § 62-602.

2. The Commission’s Operator Services Rules

Contemporaneous with the enactment of Title 62 in 1988, the Commission received several inquiries from alternate operator service (“AOS”) providers regarding the status of regulatory oversight for these telecommunications providers.¹ Order No. 21855 (Case No. GNR-T-88-3).² The Commission had also received complaints from consumers concerning AOS provider charges. *Id.* at 2. These consumers reported that they were unaware that their call was being processed by the AOS rather than by the long distance company they thought they were using. *Id.* In addition, the Commission noted that the Federal Communications Commission (“FCC”) and several states had issued warnings to telephone customers regarding the practices and rates of AOS providers. *Id.* In addition, the FCC had noted it had seen a surge in complaints about AOS providers since January 1988. *Id.*

In response to these complaints the Commission found the public safety and convenience required that the performance of operator services in Idaho be governed by certain

¹ At the time of this rulemaking the Bell Companies were largely providing these services until new entities began competing for this segment of the market. They were defined as Alternate Operator Services Providers. Today they are simply known as OSPs.

² Order No. 21855 and subsequent General Orders No. 178 and 178A adopting the AOS or OSP Rules were issued by Dean J. Miller, President of the Commission at the time and Commissioners Swisher and Nelson.

rules. *Id.* Among the proposed rules was the requirement that, “[a]ll operator assisted calls must be preceded by a disclosure of the name of the Company handling the call and the charge for making the connection.” Order No. 21855 at 4. The proposed rule also provided that “[t]he AOS provider or its agent is responsible for conformance with all rules and regulations that apply to the provision of this service.” *Id.* After conducting a rulemaking proceeding, the Commission issued General Order Nos. 178 and 178A that adopted AOS rules. Specifically, at that time, Rule 9.4 of these AOS Rules required:

[a]ll calls routed to an AOS provider must be preceded by disclosure of the AOS company’s name prior to completing the connection. The notification must clearly identify the AOS provider. Upon the caller’s request, the company handling the call must also quote the charge for making the connection and all other related operator-service charges.

General Order No. 178A, Appendix at 3. The Commission ordered AOS providers to not conduct intrastate business in Idaho except in conformance with these rules. *Id.*

3. The Federal Operator Services Act

In 1990 Congress responded to widespread consumer dissatisfaction over high charges and certain practices of many OSPs arising from calls made from payphones when it enacted the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), codified at 47 U.S.C. § 226.³ Under TOCSIA and FCC rules enacted at its direction, OSPs were required to “brand” calls, allow consumers to terminate calls without incurring a charge before connection, and to disclose immediately to the consumer certain information regarding rates and charges.⁴ 47 C.F.R. § 64.703(a) (1991). Section 64.703(3)(i) (1991) required the OSP to “disclose immediately to the consumer, upon request and at no charge to the consumer – (i) A quotation of its rates or charges for the call.”

4. The 1991 Idaho OSP Rules

Following the enactment of TOCSIA the Commission initiated a new rulemaking. Order No. 23278. On July 30, 1991, the Commission issued General Order No. 181A that

³ The FCC noted in TOCSIA that competition was developing in the telecommunications market as a result of OSPs, however, it also noted that OSPs were only effective in making the market effective when consumers were able to make informed choices from among those service providers. *Congressional Findings*, PL 101-435, 104 Stat 986 (1990).

⁴ “Brand” is a term used for an OSP identifying itself to a caller.

adopted amendments to its Operator Services Rules.⁵ These new rules generally adopted the wording of the FCC's TOCSIA rules in order to minimize instances of dual regulatory schemes.

The Commission's new Rule 9.4iii(A) required OSPs to:

[d]isclose immediately to the telephone caller, upon request and at no charge to the telephone caller: (A) a quote of the total rates and charges (including surcharges) to be billed by OSPs and MTS companies for the call.

5. The Federal Telecommunications Act of 1996.

In 1996 Congress enacted the federal Telecommunications Act of 1996 and fundamentally changed telecommunication regulation by creating a "procompetitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all markets to competition." S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996). Included in the Act was 47 U.S.C. § 276 that addressed pay telephone service. This section advanced the twin goals of promoting competition among payphone service providers and promoting the widespread deployment of payphone services to the benefit of the general public. 47 U.S.C. § 276(b)(1). In the proceeding to implement the goals of this provision, the FCC recognized that in the absence of minimal regulatory oversight, competition could be impaired by certain practices.⁶ Specifically, the FCC stated:

[I]n some locations, because of the size of the location with an exclusive PSP contract or the caller's lack of time to identify potential substitute payphones, the PSP may be able to charge an inflated rate for local calls based on its monopoly, pursuant to an exclusive contract with the location provider, on all payphones at the location. We conclude that such monopoly arrangements, in the absence of regulatory oversight, could impair competition.⁷

Thus, the FCC found that § 276 of the 1996 Act did not prevent states from enacting certain competitively neutral regulations. In particular, the FCC observed:

⁵ On August 17, 1990, the Commission issued Order No. 23278, in Case No. 31.D-R-89-1 establishing a proceeding to amend its Operator Services Rules. All Orders in this proceeding were issued by Dean J. Miller, President of the Commission and Commissioners Ralph Nelson and Marsha H. Smith.

⁶ *In the Matter of the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Notice of Proposed Rulemaking*, CC Docket 96-128, DCC 96-254 at ¶¶ 16, 49, 59 and 60 (1996).

⁷ *Id.* at 35, ¶ 60.

[F]or purposes of ensuring fair compensation through a competitive marketplace, the states should remove only those regulations that affect payphone competition; the states remain free at all times to impose regulations, on a competitively neutral basis, to provide consumers with information and price disclosure.⁸

On June 6, 1996, the FCC released the OSP Reform Notice seeking comment on whether, consistent with the requirements of the 1996 Act, it should require all OSPs to disclose their rates to consumers on all 0 + calls.⁹ On January 29, 1998 the FCC issued its decision and stated it was addressing the problem of widespread consumer dissatisfaction concerning high charges by many OSPs for calls from payphones.¹⁰ The FCC noted that:

Consumer education initiatives by the industry, government, and the media appear to have helped produce a favorable downward trend over recent years in the number of complaints received by the Commission about high OSP rates. Nevertheless, more than five years after enactment of TOCSIA, the high rates of many OSPs and surcharges imposed by aggregators continue to be a concern. In 1995, the second largest category of complaints processed by the Commission's Common Carrier Bureau consisted of complaints directed against OSPs, and the vast majority of these concerned rates and charges that consumers thought were excessive. In 1996; the Commission processed 4,132 written complaints about the level of interstate rates and services of OSPs. Accordingly, we examine in the next sections what additional steps we can and should take to foster greater competition by OSPs.¹¹

To foster competition consistent with the 1996 Act and provide consumers with rate information, the FCC added language to 47 C.F.R. § 64.703 requiring OSPs, like OCMC, to provide price disclosures on interstate calls orally to the away-from home caller. This was intended to ensure consumers receive sufficient information about the rates they will pay for operator services at public payphones and other locations. 47 C.F.R. 64.703(a)(3) and (4). In refining and clarifying

⁸ *Id.* at p. 36, ¶ 60 (emphasis added).

⁹ *Billed Party Preference for InterLATA 0 + Calls*, CC Docket No. 92-77, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 7274 (1996).

¹⁰ *Second Report and Order and Order on Reconsideration, In the Matter of Billed Party Preference for InterLATA 0+ Calls*, CC Docket No. 92-77, FCC 98-9, 13 F.C.C.R. 6122, 13 FCC Rcd. 6122 (1998).

¹¹ *Id.* at 13 F.C.C.R. 6122 at ¶ 9 (emphasis added).

the requirements of § 64.703 the FCC ruled that the “consumer” for the purposes of collect calls meant the caller and the called party and that rate disclosures had to be made available to both.¹²

6. Idaho’s Current OSP Rule 104.04

In this historical context, the Commission amended its OSP Rules by adopting Rule 104.04 on March 15, 2002.¹³ Rule 104.04 requires OSPs like OCMC to:

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 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 (2) digits or by remaining on the line.

IDAPA 31.51.01.104.04 (emphasis added).

Rule 104.04 was created in a rulemaking for the purpose of adopting recent federal law particularly in the area of rate disclosure to consumers/customers. *See* Notice of Proposed Rulemaking, Case No. 31-5101-0101 (“The proposed substantive changes to these Rules are made so that the Rules are consistent with recent changes in federal law.” *See generally, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order No. 96-388 (September 20, 1996)). These changes are consistent and authorized by the federal Telecommunications Act of 1996, the Telephone Operator Consumer Improvement Act of 1990 and FCC Rules. *See* 47 U.S.C. §§ 276, 253 and 226; 47 C.F.R. §§ 64.703(a)(3)(i) and (4) and 64.708(f). OCMC was served with the proposed changes as the notices demonstrate.¹⁴ The Company neither

¹² *In the Matter of Billed Party Preference for InterLATA 0+ Calls, Second Order on Reconsideration*, CC Docket No. 92-77, FCC 01-355, 16 FCC Rcd. 22,314 (2001).

¹³ It could be argued that Rule 104.04 is consistent with the intent of *Idaho Code* § 62-606 because it similarly requires the Company to disclose the rates and conditions of service. However, Rule 104.04 requires direct disclosure to the consumer unlike a price list filed with the Commission. One important reason for this is many times the OSP customer is captive (i.e., has only the pay telephone available) and has no contract with the OSP providing services at that location.

¹⁴ *Notice of Public Workshop and Negotiated Rulemaking*, Order No. 28746, Service List. *See also Notice of Proposed Rulemaking Service List*, Case No. 31-5101-0101.

commented nor challenged the Commission's jurisdiction to promulgate these rules in that proceeding. Finally, Rule 104.04 was enacted properly under the authority granted to the Commission by *Idaho Code* § 62-615(3) ("The Commission may promulgate rules and/or procedures necessary to carry out the duties authorized or required by the federal telecommunications act of 1996.") *See also Idaho Code* § 62-602(1)(4) and (5).

OCMC argues that the Commission may only adopt administrative rules that are authorized by the state legislature. OCMC relies on *Idaho Power v. Idaho Public Utilities Commission*, 102 Idaho 744, 639 P.2d 442 (1981) the Court found that the Commission did not have statutory authority to adopt rules for intervenor funding to provide for the recovery of attorney fees. In *Idaho Power* the Court reasoned that the general rule was that attorneys fees cannot recovered in an action unless authorized by statute or by express agreement of the parties. 102 Idaho at 750, 639 P.2d at 448. However, this case is not applicable here as the Commission has explicit statutory authority to promulgate and enforce Rule 104.04. *Idaho Code* §§ 62-615(3), 62-620, and 62-602(4) and (5).

Based on the foregoing, it is clear that OCMC's argument that the Commission is without authority to promulgate and enforce Rule 104.04 is without merit and should be denied.

7. The Commission Authority to Investigate and Resolve Consumer Complaints

The second basis for the Commission's jurisdiction flows from *Idaho Code* §§ 62-606 and 62-616. As stated previously *Idaho Code* § 62-606 requires Title 62 companies to file price lists that "reflect the availability, price, and terms and conditions for those services." *Idaho Code* § 62-616 provides the Commission with "authority to investigate and resolve complaints made by subscribers to telecommunication services which are subject to the provisions of this chapter which concern . . . whether price and conditions of service are in conformance with filed tariffs or price lists[.]" (emphasis added). Section 62-616 also provides that "the commission may, by order, render its decision granting or denying in whole or in part the subscribers complaint or providing such other relief as is reasonable based on the evidence presented to the commission at hearing." These two statutes vest the Commission with the authority and jurisdiction to determine whether OCMC's conduct is in compliance with its price lists. This reason alone is sufficient for the Commission to conduct its investigation.

OCMC's Price List states that "[r]ates will be disclosed upon request." *Original Sheet No. 42*. Staff alleges that based on information obtained from OCMC the Company was not able to meet this condition of service stated in its Price List for at least 9,021 intrastate collect phone calls that were processed by OCMC's automated system. The Company admitted in correspondence with Staff that the Company did not makes changes to its system July 2003 that would allow the called party to obtain rate information from its automated operator system. This assertion clearly warrants and investigation.

Contrary to OCMC's assertions there are numerous unresolved consumer complaints regarding the operator services OCMC's provided between March 15, 2002 until July 29, 2003. In filing this Petition Staff reviewed the consumer complaints it had received. This review revealed that many complaining consumers did not and have not received a full or partial credit from the Company despite the fact that OCMC's services violated its Price List and the Commission's Rule 104.04. Furthermore, through discovery Staff learned that OCMC received over 600 consumer complaints about its services. Half of these complainants did not receive any credit from the Company despite its failure to meet the terms of its Price List or the Commission's Rules. Staff contends that these complaints represent the unresolved consumer complaints discussed in Staff's Petition.

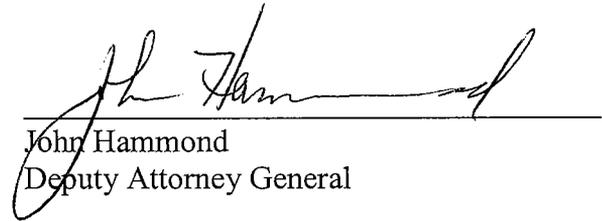
Finally, it should be noted that in 1995 One Call Communications, OCMC's predecessor in Idaho, entered into a Consent Agreement with Staff resolving the Company's alleged violations of the Commission's Operator Services and Pay Telephone Rules. In this Agreement the Company agreed "that it will not engage in any future acts, practices or omission which would constitute violations of Idaho Code, Title 62 or the Commission's rules."

CONCLUSION

Staff asserts that there are two reasons why the Commission has jurisdiction over this matter. First, the Commission is authorized to administer the Idaho Telecommunications Act of 1988 (*Idaho Code* §§ 62-601 *et seq.*) by a balanced program of regulation and competition and had authority to enact Rule 104.04. *Idaho Code* §§ 62-602(1) and (5), 62-615(3). Second, *Idaho Code* § 62-616 states that the Commission "shall have the authority to investigate and resolve [consumer] complaints made by subscribers to telecommunication services which are subject to the provisions of this chapter which concern . . . whether price and conditions of service are in

conformance with filed tariffs or price lists.” (emphasis added). Staff asserts that there are still many unresolved consumer complaints for the Commission to investigate and resolve. Based on the foregoing Staff requests that the Commission deny OCMC’s Motion to Terminate this Investigation.

Respectfully submitted this 28th day of April 2004.



John Hammond
Deputy Attorney General

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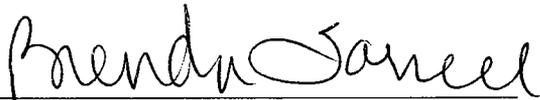
CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 28TH DAY OF APRIL 2004, SERVED THE FOREGOING **STAFF'S RESPONSE TO OCMC'S MOTION TO TERMINATE INVESTIGATION**, IN CASE NO. GNR-T-04-4, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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