

Conley Ward ISB #1683  
GIVENS PURSLEY LLP  
277 North 6<sup>th</sup> Street, Suite 200  
P.O. Box 2720  
Boise, ID 83701  
(208) 388-1200  
(208) 388-1300 (fax)

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IDAHO PUBLIC  
UTILITIES COMMISSION

Morgan W. Richards  
MOFFAT THOMAS  
US Bank Plaza Bldg.  
101 S. Capital Blvd., 10<sup>th</sup> Floor  
Boise, ID 83701  
(208) 385-5451  
(208) 385-5384 (fax)

Thomas J. Moorman  
KRASKIN, LESSE & COSSON, LLC  
2120 L Street, N.W., Suite 520  
Washington D.C. 20037  
(202) 296-8890  
(202) 296-8893 (fax)  
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**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

IDAHO TELEPHONE ASSOCIATION, )  
CITIZENS TELECOMMUNICATIONS )  
COMPANY OF IDAHO, CENTURYTEL OF )  
IDAHO, CENTURYTEL OF THE GEM STATE, )  
POTLATCH TELEPHONE COMPANY and )  
ILLUMINET, INC. )

CASE NO QWE-T-02-11

Complainants )

QWEST CORPORATION, )

Respondent. )

**COMPLAINANTS' REPLY BRIEF**

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## INTRODUCTION

The basic issue in this proceeding is relatively simple. Under the guise of “unbundling” its access charges into message and signaling components, Qwest Corporation (“Qwest”) has introduced entirely new Signaling System No. 7 (“SS7”) message charges within its Southern Idaho Access Service Catalog (“Catalog”), the implementation of which violates the basic principle that determines whether and how Idaho carriers must compensate each other for inter-company traffic. Although this inter-carrier compensation principle is embedded in a complex web of laws, regulations, contracts and industry traditions, it is in essence very simple: When traffic travels between two or more telecommunications carriers, the carrier whose retail end user customer originates the call must compensate all other carriers that transport and/or terminate that call because it is the carrier that serves the retail end user that causes the costs associated with the call to be incurred.<sup>1</sup> This inter-carrier compensation principle can, with equal validity, be stated in the negative—a telecommunications carrier does not charge another carrier for network access unless the other carrier’s end user customer initiates the call in question.

Even though modern technology now allows the transmission of call set up and tear down instructions out-of-band via the SS7 network, those signals are nevertheless a necessary and inseparable component of the underlying voice and data messages. Why? Because virtually no end user traffic would be completed without the SS7 messages being exchanged by the carriers who initiate those SS7 messages. Accordingly, applicable law and policy considerations compel the conclusion that inter-carrier compensation for SS7 signaling message costs should follow the same principle that governs compensation for the underlying end user call.

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<sup>1</sup> The sole exception is Extended Area Service (“EAS”) traffic, where the Commission requires “bill and keep” treatment for obvious policy reasons. See Complainants Post-Hearing Brief at 10-11.

Qwest's attempt to charge other companies for Qwest's SS7 signaling message costs, without regard to the origination or nature of the call, is totally at odds with this fundamental cost causation principle that governs all other aspects of inter-carrier compensation. Qwest initially attempted to defend its practice of imposing SS7 message charges on any message that "touches its system" by arguing that SS7 signaling is a separate network and thus not subject to the usual rules regarding inter-carrier compensation. Late in the proceedings, when it became obvious that there is no rational basis to support Qwest's position, Qwest adopted a significant and revealing shift in its position.

Qwest now concedes, as it must, that it is not appropriate to assess access charges for SS7 signaling that is required for the completion of local, EAS, and intraMTA CMRS traffic. This concession is not remarkable since the record and common sense would reach this result in any event. Yet Qwest ties this obvious conclusion to a requirement that is akin to taking a regulatory "hostage" – Qwest will agree not to assess these charges so long as it can keep the windfall from its past unlawful conduct and, on an ongoing basis, continue to reap a lesser degree of unlawful windfall. Specifically, Qwest would have this Commission bless Qwest's continued billing of its SS7 signaling message charges to all toll traffic irrespective of the nature of the traffic or its origination.

Thus, under Qwest's new proposal, the Catalog's SS7 message charges would apply to all toll traffic originating or terminating on Qwest's network as well as interexchange carrier ("IXC") end user traffic carried jointly by Qwest and one or more other Local Exchange Carriers ("LECs") ("jointly provided access" which is commonly referred to as "meet point billing traffic"). While this reduces the level of the injustice Qwest is seeking to perpetrate, it by no means eliminates it. Qwest's new proposal continues to violate both the existing inter-carrier

compensation principle and traditional cost causation principles by wrongfully imposing SS7 signaling message charges on other LECs and CMRS providers for two types of traffic they did not originate -- Qwest originated toll and jointly provided access/meet point billing traffic.<sup>2</sup>

Qwest's attempt to justify this perverse result is neither particularly coherent nor at all persuasive. Qwest first argues that the Commission lacks jurisdiction to grant the relief requested because access charges are "deregulated" and SS7 signaling is not a "telecommunication service." Qwest Post Hearing Memorandum (hereafter cited as "Qwest Memo") at 5-6; 8-10. With respect to the SS7 charges imposed prior to Qwest's change of position, Qwest contends the Commission lacks jurisdiction to order the cancellation or refund of such charges because the "filed rate doctrine" precludes such an order. As later sections of this Brief will demonstrate, however, Qwest's jurisdictional arguments are illogical, mutually contradictory, and irreconcilable with the relevant statutory provisions of the Idaho Code.

Qwest's remaining factual and legal arguments are no more convincing than its ill-conceived jurisdictional theories. Qwest begins its Memorandum with the assertion that its revised SS7 proposal is identical to its FCC tariff (*id.* at 4-5) and it concludes by insisting its application of the Catalog's SS7 message charges is appropriate. *Id.* at 29-33. Sandwiched between these two sections of its Memorandum, Qwest argues that: (1) existing contracts with other LECs do not govern the compensation arrangements for SS7 service, and even if they did they are not relevant because Illuminet is not the agent of its carrier/customers (*id.* at 13-19), (2) the Complainants could avoid the disputed charges by becoming Qwest customers (*id.* at 19-24), and (3) its Catalog overrules otherwise applicable inter-carrier compensation agreements. These

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<sup>2</sup> As the Complainants have repeatedly stated, they do not dispute the assessment of SS7 message charges where the toll traffic is being generated by one of their presubscribed end user toll customers and terminates on Qwest's system, because this charge is in accordance with the general cost causation compensation principle.

arguments are premised on misstatements of fact and are irreconcilable with applicable law and policy. Accordingly, Qwest's positions should be rejected by the Commission.

## **ARGUMENT**

### **I. The Commission has ample jurisdiction to grant the relief Complainants request.**

Qwest's argument that the Commission lacks jurisdiction over the subject matter of this Complaint rests on two different, but equally mistaken, premises. First, Qwest contends that, with the restriction of its SS7 charges to toll traffic, it is simply mirroring the FCC's order that allowed it to unbundle interstate access charges. Thus, according to Qwest, the Commission lacks jurisdiction because access charges are "deregulated." Second, Qwest contends that SS7 signaling is not a "telecommunication service" and the Commission therefore lacks jurisdiction to regulate the manner in which its SS7 Catalog charges are applied. This is simply a new spin on Qwest's argument, discredited during the hearings, that SS7 signaling constitutes a new network, separate and distinct from the Public Switched Telephone Network. Both contentions, however, are without merit and can readily be dismissed.

At the outset, it is obvious that Qwest's "unbundling" hypothesis is hopelessly irreconcilable with Qwest's "separate network" argument. It is fundamentally illogical for Qwest to contend, on the one hand, that it is merely unbundling pre-existing access service charges and, in the next breath, argue that the resulting unbundled charge has nothing to do with telecommunications service. "Access service" is expressly included in the statutory definition of "telecommunication service." *See* Idaho Code § 62-603(13). If SS7 charges are simply an unbundled element of access service charges, then there is no basis for Qwest to suggest that SS7 signaling is not a Title 62 telecommunications service.

Equally illogical is the ultimate consequence arising from Qwest's theory. If, as Qwest contends, the Commission has no subject matter jurisdiction over SS7 message charges because SS7 is not a "telecommunication service," then it necessarily follows that Qwest's Catalog filing of SS7 message charges is void *ab initio* because the Commission does not have general jurisdiction to determine or impose rates for activities other than those expressly regulated under Title 61 or Title 62 of the Idaho Code. *See e.g., Lemhi Tel. Co. V. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 571 P.2d 753 (1977). In the absence of Commission jurisdiction, Qwest would have no authority to collect SS7 message charges from anyone, because tariff filings that purport to set charges for services outside the Commission's ratemaking jurisdiction are a nullity and unenforceable. *See Boise Valley Traction Co. v. Ada County*, 38 Idaho 350, 222 P. 1035 (1923). In short, Qwest's assertion that the Complainants are legally bound to pay the SS7 message charges contained in its Catalog cannot be reconciled with Qwest's simultaneous insistence that the Commission does not have jurisdiction to determine if and how such Catalog revisions should be applied. Not only is Qwest's position inherently contradictory and contrary to law, it is also nonsensical. If the Commission were to accept Qwest's theory, Qwest would be free to file and collect Catalog charges from other companies for virtually anything, and the Commission would be powerless to intervene.

Despite the fact that a lack of Commission jurisdiction would effectively frustrate Qwest's attempt to assess the disputed SS7 message charges, Complainants cannot in good conscience agree that the Commission lacks jurisdiction over this matter because Qwest's position is clearly contrary to applicable Idaho statutes. Title 62 is replete with provisions that grant the Commission jurisdiction and authority to receive, hear and dispose of complaints such as this one. *See Idaho Code Sections 62-605, 62-608, 62-609, 62-614 and 62-615.* As the

Complainants pointed out in their Post Hearing Brief, Section 62-614 speaks directly to the type of case now before the Commission:

- (1) If a telephone corporation providing basic local exchange service which has exercised the election provided in section 62-604(2), Idaho Code, and any other telephone corporation subject to title 61, Idaho Code, or any mutual, nonprofit or cooperative telephone corporation, are unable to agree on any matter relating to telecommunication issues between such companies, then either telephone corporation may apply to the commission for determination of the matter.
- (2) Upon receipt of the application, the commission shall have jurisdiction to conduct an investigation, and upon request of either party, to conduct a hearing and, based upon evidence presented to the commission to issue its findings and order determining such dispute in accordance with applicable provisions of law and in a manner which shall best serve the public interest.

Qwest's attempts to remove the instant complaint from the purview of Section 62-614 are not persuasive. First, Qwest argues that Illuminet is the only company currently being assessed SS7 charges, and Illuminet is not a "telephone corporation" entitled to bring a complaint under Section 62-614. This argument ignores the obvious fact that the overwhelming majority of the Complainants are indisputably telephone corporations entitled to invoke the Commission's jurisdiction under this statute. Moreover, the statute does not, as Qwest implicitly suggests, restrict complaining parties to only those who receive bills directly from Qwest. Section 62-614 is not a "billing dispute" statute. Rather, this statute grants the Commission general jurisdiction and authority to resolve "any matter relating to telecommunication issues between such companies." *Id.* (emphasis supplied). Here the "matter" is before the Commission on the complaint of several telephone corporations. The fact that the matter involves a dispute about the improper assessment of charges passed through to those telephone corporations by their

intermediary agent does not deprive the Commission of jurisdiction to resolve “any matter” involving two or more telephone corporations.

Second, Qwest attempts to distinguish Section 62-614 from the present case by noting that Section 62-614 requires the Commission to determine such dispute “in accordance with applicable provisions of law.” Qwest then follows this observation with the conclusory allegation that

[t]he applicable provisions of law, however, *prevent* the Commission from regulating Qwest’s provision of SS7 signaling associated with toll traffic, i.e., a Title 62 service. In sum, § 62-614 does not confer jurisdiction on the Commission to override the law and regulate the terms under which Qwest provides Title 62 services to other telephone corporations.

Qwest Memo at 6 (emphasis original). Qwest provides no citation of authority for this remarkable assertion, but it apparently is based on the assumption that an election of price deregulation of toll traffic necessarily deprives the Commission of jurisdiction over the terms and conditions under which such services are provided. Qwest’s assumption is unfounded and insupportable.

The Idaho Legislature made it quite clear that the Title 62 deregulation option is confined only to price deregulation. Section 62-622(5) states:

The commission shall determine the non-economic regulatory requirements for all telephone corporations providing basic local exchange service or designated as an eligible telecommunications carrier pursuant to sections 62-610A through 62-610F, Idaho Code, including, but not limited to, such matters as service quality standards, provision of access to carriers providing message telecommunications service, filing of price lists, customer notice and customer relation rules. (Emphasis added).

As a provider of basic local exchange service, Qwest is obviously subject to this statute and to continuing Commission plenary jurisdiction over all regulatory issues other than the price of its Title 62 offerings.

Similarly, Section 62-605(5) provides as follows:

For any telecommunication service which was subject, on the effective date [July 1, 1988] of this act, to title 61, Idaho Code, and which at the election of the telephone corporation became subject to this chapter, the commission shall have continuing authority to review the quality of such service, its general availability, and terms and conditions under which it is offered. Upon complaint to the commission and after notice to the telephone corporation providing such service and hearing, the commission finds that the quality, general availability or terms and conditions for such service are adverse to the public interest, the commission shall have authority to negotiate or require changes in how such telecommunication services are provided. In addition, if the commission finds that such corrective action is inadequate, it shall have the authority to require that such telecommunication services be subject to the requirements of title 61, Idaho Code, rather than the provisions of this chapter.

Like Section 62-622(5), Section 62-605(5) makes it clear that the Commission has continuing authority to review the quality of telecommunication service, its general availability, and the terms and conditions under which it is offered, even after a telephone corporation elects Title 62 regulation. Section 62-605 not only retains general Commission jurisdiction over non-economic matters involving Title 62 carriers, it also provides for the more draconian option of effectively canceling a company's Title 62 election. If the Commission opts to exercise its authority to regulate Qwest pursuant to this statutory authority, there are numerous code sections in Title 61 that would establish jurisdiction in this case, including, but not limited to, Idaho Code Sections 61-307, 61-501, 61-502, 61-503, 61-504, 61-612, 61-622, 61-622A, 61-623, 61-624, and 61-641.

Qwest attempts to escape the purview of Section 62-605 by arguing that SS7 is a new service that was not in existence in 1988, and the statute therefore does not apply because SS7 was not previously subject to the Commission's Title 61 jurisdiction. This position ignores the fact that, when the act was passed, the Commission had plenary jurisdiction over all aspects of Qwest's services, and this certainly included signaling because signaling of some type has

always been used to ensure proper routing and completion of end user traffic. *See, e.g.*, Tr. 303, LL. 7 through 304, LL. 20.

Moreover, as Qwest admits in its Memorandum, SS7 was “‘unbundled’ from switched access service,” Qwest’s Memo at 9, which was clearly subject to Title 61 in 1988. Accordingly, the fact that Qwest has now imposed a separate rate element for intrastate SS7 messages does not make it any less a feature of switched access service. If the simple “unbundling” and renaming of services can unilaterally deprive the Commission of jurisdiction, the Commission could easily be deprived of virtually all of its authority, in direct contravention of the legislative intent expressed in Section 62-605 and other provisions. Such a result contradicts any rational public policy, let alone rational construction of the applicable statutes. Accordingly, Qwest’s theories regarding the lack of Commission jurisdiction should be rejected.

**II. There is no “filed rate doctrine” issue in this proceeding.**

Qwest’s contention that granting the relief requested by Complainants violates the “filed rate doctrine” or “constitutes unlawful retroactive ratemaking” is both illogical and contrary to the relevant law. In the first place, it suffers from the same defect inherent in Qwest’s argument that the Commission lacks jurisdiction to resolve the complaint. Qwest cannot simultaneously claim that the Commission has no jurisdiction over the subject matter, and at the same time argue that the Commission is bound by regulatory policies and doctrines, such as the filed rate doctrine, that are applicable only to services provided under regulated tariffs. Moreover, Qwest’s reliance upon the filed rate doctrine is based on a fundamental misconception about the nature of that rule of law.

Qwest’s Memorandum contains a long string of citations supporting the proposition that neither a utility nor its customer can enforce a contract for rates other than those approved by the

Commission and in effect at the time.<sup>3</sup> Qwest further contends that the Commission cannot alter a filed tariff rate except prospectively and that neither a carrier nor its customer can enforce terms and conditions that deviate from those filed in a tariff. *See* Qwest Memo at 10-12. What Qwest fails to recognize, however, is that these decisions are not relevant to this complaint.

First, the filed rate doctrine restricts regulatory review only where there has been an active regulatory determination of a just and reasonable rate that binds the regulated utility and its customers with the force of law. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S. Ct. 2925 (1981). The Commission obviously made no such determination with respect to Qwest's SS7 signaling charges. Qwest merely filed its Catalog SS7 message rate structure and it went into effect.

Second, since the proper implementation of the Catalog's SS7 message rate structure is the essence of this proceeding, there is no "deviation" from the rates under a properly implemented Catalog SS7 message structure. *See* Qwest Memo at 26. Thus, Qwest's reliance on *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998) is misplaced.<sup>4</sup>

Third, Complainants are not challenging the unbundling of SS7 signaling charges or the level of Qwest's rates. Rather, the Complainants are alleging that the Catalog/tariff charges are not applicable to local, EAS and intraMTA CMRS end user traffic (as Qwest now concedes) as well as to Qwest-originated toll and meet point billing traffic. Under these circumstances, the

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<sup>3</sup> As Qwest notes, the filed rate doctrine is codified in Section 61-313, Idaho Code. Qwest fails to point out, however, that it contains an explicit provision that allows telephone and cable companies to enter into contracts with other common carriers that deviate from the tariff rates, so long as those rates are "common to all common carriers of like class."

<sup>4</sup> Qwest argues that because other "customers" have paid the rate and not complained, Complainants are seeking "special treatment." *See* Qwest Memo at 10, 12. Qwest presented no evidence as to the identity of these other "customers." Clearly the fact that other customers may have suffered an injustice in silence or in ignorance that they were wrongly charged is no reason to reject an otherwise valid complaint, and, in any event, there is no evidence in the record to support a finding of discrimination.

filed rate doctrine is not implicated because that rule of law does not preclude a regulator from finding either that the rates were unlawful *ab initio*, or that the rates do not apply in a particular situation.

One of the cases cited by Qwest in its Memorandum, in fact makes precisely this point. In *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (2002), the plaintiff argued “that there is no authorization within the tariff to charge the \$10 fee, and that the fee therefore violated the tariff.” *Id.* at 1173 (*citation omitted*). The court therefore concluded that, “Brown’s claim is not precluded by the filed-rate doctrine.” *Id.* As the court explained, while “[t]he filed-rate doctrine precludes courts from deciding whether a tariff is reasonable . . . it does not preclude courts from interpreting the provisions of a tariff and enforcing a tariff.” 277 F.3d at 1171-72.

The distinction drawn by the court in *Brown* is also codified in the Idaho statutes.

Section 61-641 states:

When complaint has been made to the commission concerning any rate, fare, toll, rental or charge for any product, or commodity, furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount for such product, commodity or service, the commission may order that the public utility make due reparation to the complainant therefore, with interest from the date of collection; provided, no discrimination will result from such reparation.

This section also clearly refutes Qwest’s argument that the Commission cannot correct past billing errors without running afoul of the filed rate doctrine. The Commission can not only determine whether a tariff has been properly applied in the past, it can also order reparations for prior billing errors. Thus, the relief that Complainants seek falls squarely within the rule announced in *Brown* and codified in Section 61-641. As in *Brown*, the Complainants are contending that there is “no authorization in the tariff” for the charges Qwest has assessed. This

is doubly true of the prior charges on local, EAS, and intraMTA CMRS traffic, where Qwest has now publicly conceded in effect that these charges were improper.

Accordingly, for the foregoing reasons, Qwest's arguments regarding the filed rate doctrine are baseless. The Commission has ample jurisdiction to entertain this Complaint, to order Qwest to correct its abusive misapplication of its Catalog, and to order reparations with interest, and the filed rate doctrine does not bar this proper result.

**III. Qwest's SS7 Catalog charges are not "identical" to its FCC tariff, nor are they being properly applied.**

Qwest insists that its "Catalog offering for SS7 services is identical to its FCC-approved tariff in the rates, terms, and application to call set up messages." Qwest Memo at 4. Qwest's assertion is patently false.

The FCC's order only allowed LECs to "unbundle" pre-existing access charges into a per-minute switched access charge and a per-message SS7 signaling component.<sup>5</sup> Applying this same principle to Idaho intrastate traffic would confine SS7 charges to those messages that are otherwise subject to access charges. In the case of interchanged traffic with other LECs, Qwest would only be permitted to bill SS7 charges for that LEC's pre-subscribed toll end user messages that terminate on Qwest's system, and Complainants do not object to the application of SS7 charges to this specific class of intrastate end user toll traffic. But Qwest is not, in fact, following the principle embedded in the FCC's decision. Instead, Qwest is assessing SS7 signaling charges on traffic where it is not permitted to charge other LECs access charges, i.e., on Qwest originated toll and meet point billed traffic (and, prior to its concession, local, EAS and

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<sup>5</sup> In fact, the FCC made clear in its decision allowing Qwest' to implement its interstate SS7 message structure that Qwest' itself limited its unbundling to exchange access. See *US West Petition to Establish Part 69 Rate Elements for SS7 Signaling*, Order. CCB/CPD 99-37, DA 99-1474, released December 23, 1999 ("*Qwest SS7 Waiver Order*"). That FCC discussion specifically notes Qwest's ability "to assess rate elements on *each switched access originating or terminating call attempt . . .*" *Id.* at para. 6 (emphasis added).

intraMTA CMRS calls). This practice is not in any sense “identical” to the FCC approved tariff because the FCC did not envision nor have reason to consider the creation of new SS7 charges on traffic that previously was not subject to access charges.<sup>6</sup>

Qwest’s misapplication of its SS7 charges is also at odds with the FCC tariff in one other critical aspect. The FCC’s order rigorously followed the cost causation principles discussed in the introductory section of this Reply Brief. The FCC’s order authorizes Qwest to collect SS7 charges from IXCs when the origination or termination of their traffic makes demands on Qwest’s system. Such requirement is entirely reasonable since an IXC whose customer places a call causes the SS7 message costs to be incurred, and the IXC is the party collecting the revenue for that call. Under these circumstances, it is entirely appropriate for Qwest to demand from the IXC compensation for the all of Qwest’s SS7 message costs incurred by Qwest on that IXC’s behalf.

These same considerations simply do not apply in the case of Qwest originated toll or meet point billed traffic. Qwest attempts to gloss over this obvious fact by repeatedly characterizing Illuminet as its “customer” who “purchases” SS7 services out of the Catalog. *See e.g.*, Qwest Memo at 33. Accordingly, Qwest argues that it is only fair that Illuminet “should

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<sup>6</sup> Qwest implies that the FCC’s *Qwest SS7 Waiver Order* permitted Qwest to implement a Percent Interstate Use factor rather than installing the necessary metering and measurement equipment required by the FCC’s *Access Charge Reform Order* at para. 253. *See Qwest Memo* at 33. As explained by Complainants, however, the FCC’s requirements, while instructive, do not address the issues before the Commission because of the distinct types of *intrastate* end user traffic types at issue in this proceeding (*see Complainants Post-Hearing Brief* at 15-16) and clearly do not preempt the Commission’s independent consideration of the issues raised in this proceeding. Moreover, Qwest’s current argument cannot be reconciled with either the FCC’s statements that Qwest “made investments to provide its network with the capability to assess rate elements on each switched access originating or terminating call attempt, rather than the duration of the call.” (*Qwest SS7 Waiver Order* at para. 6) or Qwest’s testimony in this proceeding that “. . . Qwest made a substantial investment to update its systems so that signaling costs could be assessed and recovered based on a customer’s *actual usage of the SS7 signaling network*.” McIntyre Testimony at 5 (12-14)(emphasis added). Tr. 394, LL. 12-14. Further, Qwest’s apparent post-hoc efforts to justify its improper implementation of the Catalog’s SS7 rate structure cannot be reconciled with the FCC’s customer-impact analysis requirement. *See Access Charge Reform Order*, 12 FCC Rcd 15982, 16090 (para. 253). *See Complainants Post-Hearing Brief* at 16.

pay for that use,” *id.* at 31, because Qwest has no other alternative to recover its costs. *Id.* at 33. Qwest is wrong in all respects.

The standard dictionary definition of a “customer” is “a person who buys goods or services from a shop or business.” Fowler & Fowler, *The Concise Oxford Dictionary* (8<sup>th</sup> ed. 1991) at 286. As the record demonstrates, Illuminet’s sole function is to transport SS7 signals to and from its carrier/customers. With respect to its actions being addressed in the instant complaints, Illuminet is in fact nothing more than a conduit. Illuminet has no independent use for the SS7 messages that are required to complete end user traffic because Illuminet provides no end user service. Thus, when a Qwest presubscribed toll end user initiates a toll call to one of Illuminet’s carrier/customers, Illuminet does nothing more than accept the associated SS7 signal for transport. The same thing occurs in the case of meet point billed traffic, except that in these cases it is the IXC who generates the call and causes signaling costs to be incurred. In both cases, Illuminet purchases no SS7 message services whatsoever from Qwest (and for that matter neither do the Illuminet carrier/customers). Nor does Illuminet, or its carrier/customers, use Qwest’s facilities<sup>7</sup> or collect any revenue from such calls. To characterize Illuminet as a “customer” under these circumstances is therefore erroneous and misleading, and to charge Illuminet for its uncompensated assistance to Qwest in transporting the SS7 messages required to complete a third party IXC’s toll traffic or Qwest-originated toll calls is patently unfair and unreasonable.<sup>8</sup> If Qwest is not, in fact, receiving sufficient compensation from these calls to

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<sup>7</sup> Other than the links and ports, which all parties acknowledge are not at issue in this case.

<sup>8</sup> Qwest avers that the Commission should somehow ignore this unlawful result because the charges at issues are “smaller than the access charges that Qwest must pay the Idaho ILECs for terminating access” and thus do not “disproportionately burden ILECs.” Qwest Memo at 29. Not only is Qwest’s effort to misfocus attention from its unlawful behavior disturbing, but the over \$1,000,000 worth of SS7 message unlawfully assessed by Qwest to Illuminet and all of its carrier/customers (which include ILECs) (*see* Tr. 206, LL. 1-6) hardly be considered insignificant as Qwest implies.

recover its SS7 costs, it should adjust its end user and IXC charges in an appropriate manner, rather than seek to foist its costs off on to third parties.

**IV. Qwest's agreements with other carriers govern the proper method of recovering SS7 costs associated with inter-company traffic.**

Qwest's contention that SS7 cost recovery is not subject to the contractual arrangements that govern all other inter-company charges is a common theme throughout its Memorandum. Complainants have demonstrated the fallacy of Qwest's contentions in considerable detail at the hearings and in Complainants' Post Hearing Brief, and Complainants are confident the Commission will give those demonstrations proper consideration without their repetition in this Brief. However, one new argument advanced by Qwest requires a brief response. At page 32 of its Memorandum, Qwest observes that Complainants do not cite a single instance of a meet point billing agreement that "states that SS7 call set up charges will not be assessed on messages associated with meet-point-billing traffic." While this may be true, it does not support Qwest's ultimate hypothesis that Complainants have cited no authority to support their position.

The reason why meet point billing agreements do not specifically address SS7 message charges is that Complainants could not have reasonably anticipated Qwest's attempts to impose new SS7 message charges, and they certainly could not have envisioned an unreasonable extension of these charges to LECs that participate in meet point billing arrangements. Contrary to Qwest's mistaken view, Complainants' assumption that traditional compensation arrangements include signalling costs was, and is, well founded.

SS7 messaging has been traditionally acknowledged to be an indispensable and integral component of the public switched network, *see Elkhart Tel. Co., Inc. v Southwestern Bell Tel. Co.*, Opinion and Order, 11 FCC Rcd 1051 (¶ 3) (1995), and, in fact, the Idaho definition of "telecommunication service" specifically includes signaling. *See Idaho Code § 62-603(13)*.

Moreover, the FCC's cost-recovery principles that require the costs of SS7 to be treated as a "general network upgrade" (see Complainants' Post Hearing Brief at 18, citing *Access for 800 Service*, Report and Order, 4 FCC Rcd. 2824, 2832 (1989)) would be rendered meaningless if the treatment of SS7 signaling does not, as Qwest contends, follow the regulatory treatment of the end user traffic that an SS7 message supports.

Consequently, since SS7 signaling is an indispensable component of the end user traffic, simple logic and common sense dictate that existing regulatory directives and agreements should apply to inter-carrier compensation for SS7 signaling costs. To suggest, therefore, that the Complainant's have provided no "authority" to support their argument is meaningless.

**V. Qwest's suggestion that Illuminet is not the transport agent for its carrier/customer's SS7 signalling is without merit.**

Qwest further argues that, even if existing contractual relationships govern SS7 compensation arrangements, those agreements cannot bar its charges to Illuminet because Illuminet's status as SS7 transport agent for its carrier/customers is a "fiction." See Qwest Memo at 13. Qwest's argument is defective in two respects. First, it mistakenly assumes that Illuminet's agency status is crucial to Complainants' case. Second, it rests on a fundamentally mistaken view of agency law.

With respect to the first point, even assuming, *arguendo*, that Qwest is correct that Illuminet is not an agent (an assumption that the record does not support), the proper assessment of SS7 messages should nonetheless be determined in accordance with the rules governing inter-carrier compensation for costs associated with the associated message, without regard to the method by which the signals are transported. Thus, Complainants would be entitled to the requested relief even if Illuminet transported its carrier/customers' SS7 signals as an independent contractor. *Accord, Provision of Directory Listing Information under the Telecommunications*

*Act of 1934, As Amended*, First Report and Order, 16 FCC Rcd 2736, 2748 (n.73)(2001).

Illuminet is simply providing transport that its carrier/customers could provide for themselves. But by using Illuminet they can transport their SS7 signals more efficiently and at a lower cost to society as a whole. The underlying traffic, including the associated signals, nevertheless remains the carrier/customers' regardless of the means of transport. Under these circumstances, "the agency/independent contractor distinction is not relevant and . . . the rights of the [agent/independent contractor] are derivative of its carrier principal." *Id.*

Furthermore, Qwest's insistence that Illuminet is not the agent of its carrier/customers is simply wrong as a matter of law. Under Idaho law, agency is "a relationship resulting from the 'manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'" *Herbst v. Both of Dairies, Inc.*, 110 Idaho 971, 973; 719 P.2d 1231, 1233 (Idaho Ct. App. 1986). The overt act necessary to create an agency relationship is completed when the "principal confers authority upon the agent to act for the principal" *Hilt v. Draper*, 122 Idaho 612, 616, 836 P.2d 558, 562 (Idaho Ct. App. 1992). The scope of the agency depends on the agreement between the principal and agent and cannot be altered by third parties who have dealings with the agent. *See E.S. Harper Co. v. General Insurance Co. of America*, 91 Idaho 767, 430 P.2d 658 (1967). Thus, Qwest's suggestion (*see* Qwest Memo at 14) that it can determine the scope of agency between Illuminet and its carrier/customers is wrong. *See also Landvik by Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Idaho Ct. App. 1997).

In the present case, it is difficult to envision a more complete expression of the parties' intention to create an agency relationship, and the evidence of that relationship could hardly be a "fiction" created for litigation purposes because it predates the present proceedings. The

Complainants have provided multiple forms of evidence in addition to the direct testimony of the principals-- e.g., the LOAs, the actions of Complainants during the past two years and the letter from Illuminet in November, 2000 to Qwest (Exhibit 406) – that collectively demonstrate the existence and scope of the agency. Moreover, there is nothing unusual about the agency concept in the telecommunications industry. For example, the ELI/Qwest ICA (Exhibit 205) approved by this Commission, mentions the word “agent” numerous times, which is testament to the fact that Qwest knew ELI would, like many new entrants, use agents to handle many of its needs. According to Mr. McIntyre, Qwest’s SGAT also liberally allows agency and Qwest recognizes that telephone companies use agents. Tr. 495, LL. 15-18.

Finally, this agency relationship was repeatedly confirmed in open hearings. On direct examination and in response to Qwest’s cross-examination, the agency between Illuminet and its carrier/customers was acknowledged both by the principal carrier/customers and by the agent, Illuminet:

Illuminet is the “. . . SS7 service provider agent in Idaho . . .” for the other complainants. (Tr. 22, LL. 13-15.)

Illuminet “. . . serves as their agent with respect to SS7 signaling services contemplated under the ICA with Qwest.” (Tr. 32, LL. 11-13.)

“. . . Illuminet stands in the shoes of ELI for SS7 message signaling . . . .” (Tr. 33, L. 6.)

“. . . Illuminet represents its carrier/customers in all matters regarding SS7 . . . .” (Tr. 62, LL. 8-9.)

“However, the agency relationship goes beyond the verification of point codes. Illuminet conducts all negotiations and issues all orders for the services required from other parties to provide SS7 services for its customers . . . .” (Tr. 87, LL. 13-15.)

Illuminet is ELI’s agent “for SS7 network services.” (Tr. 127, LL. 8-10.)

The scope of the agency is not “limited to the utilization of point codes.” (Tr. 127, LL. 7-19.)

“Arranging for the LOA from its carrier/customers designating Illuminet as that carrier/customer’s agent to conduct all negotiations and issue orders for ISUP signaling.” (Tr. 211, LL. 2-6.)

“Illuminet is the SS7 network signaling agent for its carrier/customer.” (Tr. 229, LL. 26-27.)

Thus, the clear evidence demonstrates that Illuminate is the SS7 transport agent for its carrier customers, and is entitled to assert the inter-company compensation rights of its carrier/customer principals.<sup>9</sup>

**VI. The FCC’s tariff filing requirements are not at issue in this case.**

In a misguided attempt to refute Complainants’ contention that the existing inter-carrier agreements govern whether and how SS7 message charges should be assessed, Qwest’s suggests that Complainants are seeking “to impose an impermissible cross-reference between Qwest’s Access Service Catalog and their interconnection agreements.” Qwest Memo at 25. This suggestion cannot be reconciled with the facts or applicable law.

First, Qwest has not shown, nor could it, that the FCC’s tariffing rules are relevant to this proceeding. And, in fact, Qwest has admitted the same. *See* Qwest Brief at 25 (“[t]his Commission does not have a rule similar to FCC rule 61.74(a) . . .”) (footnote omitted).

Second, the relief being sought by Complainants need not require any “cross-referencing” of other agreements that Qwest has in place with certain of the Complainants. Complainants

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<sup>9</sup> Qwest also devotes considerable attention in its Memorandum to an attempt to show that Illuminet is not a third party beneficiary of its carrier/customers’ contracts. This is a “strawman” argument. Complainants never contended that Illuminet is a third party beneficiary, and the doctrine has no bearing on Complainants’ contention that inter-carrier compensation for SS7 signaling is governed by the contractual relationship between the carriers, regardless of the manner in which the signals are transported. Illuminet gains no benefit from one of its carrier/customer’s agreements with Qwest independent of the benefits that the Illuminet carrier/customer receives, and those benefits are derived from the agency relationship in existence between Illuminet and its carrier/customers. Accordingly, whether Illuminet is a third party beneficiary is irrelevant.

point to the agreements which are on the record, or may be officially noticed, as evidence that those agreements provide for the complete compensation between Qwest and the Illuminet carrier/customers for the covered traffic, including the necessary components of such traffic (e.g. the SS7 messages), and that here the Catalog does not apply to such traffic. In addition, Qwest's own actions contradict its argument because Qwest's suggestion that local, EAS and intraMTA CMRS SS7 messages are to be excluded from the Catalog's rates on a going-forward basis necessarily concedes that the tariff must be implemented in a manner that honors existing contracts and regulatory constraints. *See* Qwest Memo at 2, n.2.

Finally, Qwest's argument rests on a complete misunderstanding of the law. The very FCC decision that Qwest cites actually supports the conclusion that Qwest cannot file a tariff that unilaterally alters the terms and conditions of its pre-existing agreements. *See also* Complainants Post-Hearing Brief at 11-13. In fact, the FCC twice specifically affirmed this conclusion:

Using the tariff process to circumvent the section 251 and 252 processes cannot be allowed. In this respect, we find the tariff to be unreasonable in another respect.

*Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. E-99-22, FCC 99-381, 18 C.R. 1213, 1221 (para. 23) (1999).

As the *Order* observes, “[u]sing the tariff process to circumvent the section 251 and 252 processes cannot be allowed.

*Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. E-99-22, FCC 00-107, \_\_ FCC Rcd \_\_, 19 C.R. 1333, 11337 (para. 14)(2000). Thus, Qwest's analogy to FCC actions actually supports rather than questions the action Complainants request the Commission to take.

The FCC's rulings are, of course, merely an application of the *Sierra Mobile* doctrine, which prevents utilities and commissions from altering a utility contract, unless an extremely difficult public interest test is met. In Idaho, this doctrine is known as the *Agricultural Products*

rule, after the case in which the Idaho Supreme Court adopted the *Sierra Mobile* doctrine. See *Agricultural Products Corp. v. Utah Power & Light Co.*, 98 Idaho 23, 557 P.2d 617 (1976). As applied to the present case, the *Agricultural Products* rule clearly prohibits Qwest's attempt to abrogate its inter-company compensation agreements by the filing and implementation of the Catalog's SS7 message rate structure. Accordingly, the Commission should dismiss Qwest's suggestions that it is an impermissible cross referencing to cite the relevant contracts in these circumstances.

**VII. Qwest's argument that the Complainants can choose to avoid Qwest's unlawful conduct and the imposition of unreasonable charges is irrelevant, unreasonable and anticompetitive on its face.**

Qwest's Memorandum repeats at considerable length its arguments advanced during the hearings to the effect that the Complainants, other than Illuminet, have options available to them that would enable them to avoid the SS7 charges in question. As Qwest states the proposition in its Memorandum,

If they no longer find that the benefits of purchasing services from Illuminet outweigh the costs, they can either negotiate interconnection agreements to purchase SS7 as a UNE or, in the case of the ILECs who qualify, can enter into infrastructure sharing agreements directly with Qwest.

Qwest's Memo at 34

The Complainants have previously explained in their testimony and Post Hearing Brief why the "choices" offered by Qwest are unacceptable and unworkable, and that discussion will not be repeated here. See Complainants Post-Hearing Brief at 29-30. Suffice it to say that the "choices" Qwest offers are, as a practical matter, illusory.

Furthermore, the alleged "choices" are completely irrelevant to these proceedings. It is self evident that unlawful conduct cannot be defended by asserting that the victim could avoid

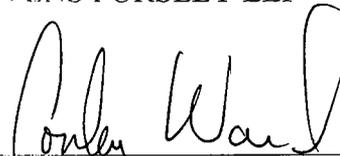
the consequences by reconfiguring its business in the manner desired by the perpetrator. Such a proposition is not only unjust and unreasonable, it is also doubly reprehensible in this case because it is clearly anti-competitive.

### CONCLUSION

This proceeding poses a straightforward issue – has Qwest properly implemented its intrastate SS7 message rate structure so that the charges it has assessed and will continue to assess are lawful. The only reasonable answer to this question must be “no.” Qwest cannot seriously defend its misconduct when it is clear that Qwest’s implementation of the SS7 message rate structure at issue ignores the fact that: (1) the SS7 message rate structure is an integral component of the end user traffic it supports, and (2) that it is imposing Catalog SS7 message rates on entities that are not serving the end user who causes the SS7 messages to be generated and the SS7 costs to be incurred. Regardless of Qwest’s efforts to suggest otherwise, this is the essence of this proceeding and it has nothing to do with Qwest’s SS7 message rates. It does, however, have everything to do with Qwest’s improper implementation of the Catalog’s SS7 message rates and the lawful exercise of the Commission’s jurisdiction to redress Qwest’s unlawful conduct. Accordingly, the Commission can and should reject outright Qwest’s arguments and grant the relief Complainants request.

Respectfully submitted this 20<sup>th</sup> day February, 2003.

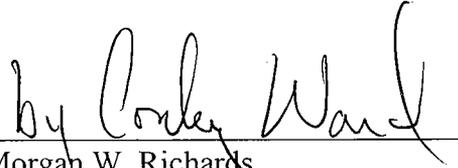
GIVENS PURSLEY LLP



Conley Ward

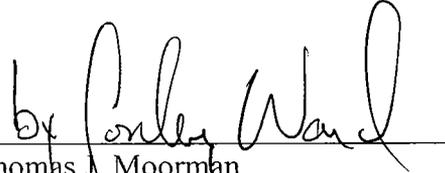
Attorneys for Complainants

MOFFAT THOMAS

by *Morgan W. Richards*

Morgan W. Richards  
Attorneys for Complainants

KRASKIN, LESSE & COSSON, LLC

by *Thomas J. Moorman*

Thomas J. Moorman  
Attorneys for Complainants

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20<sup>th</sup> day of February 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jean Jewell  
Idaho Public Utilities Secretary  
472 W. Washington Street  
P.O. Box 83720  
Boise, ID 83720-0074  
 U.S. Mail  Fax  By Hand

Mary S. Hobson, Esq.  
Stoel Rives LLP  
101 S. Capitol Blvd., Suite 1900  
Boise, ID 83702-5958  
 U.S. Mail  Fax  By Hand

Thomas J. Moorman  
KRASKIN, LESSE & COSSON, LLC  
2120 L Street, N.W., Suite 520  
Washington, D.C. 20037  
 U.S. Mail  Fax  By Hand

F. Wayne Lafferty  
LKAM Services Inc.  
2940 Cedar Ridge Drive  
McKinney, TX 75070  
 U.S. Mail  Fax  By Hand

Ms. Gail Long  
Manager, External Relations  
TDS Telecom  
P.O. Box 1566  
Oregon City, OR 97045-1566  
 U.S. Mail  Fax  By Hand

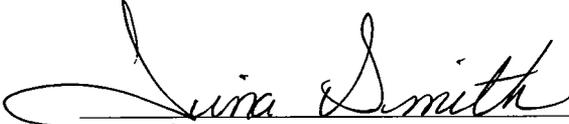
Mr. Ted Hankins  
Century Telephone Enterprises, Inc.  
P.O. Box 4065  
Monroe, LA 71211-4065  
 U.S. Mail  Fax  By Hand

Mr. Lance Tade  
Citizens Telecommunications  
4 Triad Center, Suite 200  
Salt Lake City, UT 84180  
 U.S. Mail  Fax  By Hand

Morgan W. Richards  
Moffatt Thomas  
101 South Capitol Blvd 10<sup>th</sup> Floor  
Boise, ID 83701  
 U.S. Mail  Fax  By Hand

Clay Sturgis  
Moss Adams LLP  
601 West Riverside, Suite 1800  
Spokane, WA 99201-0663  
 U.S. Mail  Fax  By Hand

Richard Wolf  
Illuminet, Inc.  
4501 Intelco Loop SE  
P.O. Box 2909  
Olympia, WA 98507  
 U.S. Mail  Fax  By Hand

  
Tina Smith