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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.

Complainants

vs.

QWEST COMMUNICATIONS, INC.,

Respondent.

CASE NO. QWE-T-02-11

COMPLAINANTS' OPPOSITION TO
QWEST'S PETITION FOR
RECONSIDERATION AND MOTION
FOR STAY OF ORDER NO. 29219

Complainants Idaho Telephone Association ("ITA"), Citizens Telecommunications
Company of Idaho, Illuminet, Inc. ("Illuminet") and Intervenor Electric Lightwave, Inc.

(collectively the "Complainants"), by and through their attorneys of record hereby submit this

Opposition to Qwest's Petition for Reconsideration ("Petition") and Motion for Stay of Order No. 29219.

Introduction And Summary

In separate pleadings filed with the Idaho Public Utilities Commission ("Commission") on May 5 and 6, Qwest Communications, Inc. ("Qwest") attacks the Commission's Order No. 29219 (the "Order") alleging that the Commission lacks jurisdiction to adopt the Order, that purportedly "new" evidence suggests that the Commission's findings and conclusions were substantively in error, that application of the doctrine of "quasi estoppel" precludes Illuminet from complaining about application to it of the Signaling System No. 7 ("SS7") message charges filed by Qwest in its Southern Idaho Access Service Catalog (the "Catalog"), and that a stay of the Order should be issued.

Qwest's baseless challenges to the Order can and should be readily dismissed. Most of Qwest's allegations have already been raised and properly rejected by the Commission, and additional claims made by Qwest are based solely on a newly espoused (albeit misplaced) theory that cannot withstand even minor scrutiny. Accordingly, for the reasons stated herein, Complainants request that the Commission find that:

- (1) Qwest's purported assignments of error do not comply with the requirements for a petition for rehearing and should be dismissed;
- (2) Qwest waived any right to challenge the Commission's conclusion regarding the application of SS7 message charges related to Extended Area Service ("EAS") and local service because Qwest conceded that point before and during the hearing;
- (3) Qwest's jurisdictional arguments are without merit and were all considered and properly rejected by the Commission;
- (4) The Order's substantive conclusions regarding the application of SS7 message charges are correct and should not be reconsidered;

- (5) Qwest should be barred from raising the issue of quasi estoppel on reconsideration because it failed to raise the argument previously;
- (6) Qwest cannot establish any of the elements of quasi estoppel; and
- (7) Qwest has not shown irreparable harm nor established any other condition that would entitle it to a stay of the Order.

Qwest's Petition for Reconsideration Should be Denied

1. Qwest's purported assignments of error do not comply with the requirements for a petition for rehearing and should be dismissed.

Throughout its Petition, Qwest repeatedly insists that the Commission has erred in its findings of fact or conclusions of law without making any attempt to show why the challenged findings or conclusions are in error or how they are relevant to the Commission's decision. This failing is most conspicuous in Attachment A to the Petition, which contains a listing of essentially every finding and conclusion Qwest can identify in the Order under the heading "Assignments of Error." Qwest simply identifies these findings and conclusions without any discussion of the nature of the claimed error or its relevance to these proceedings. Furthermore, in its Petition, Qwest's states that "Qwest does not discuss all of its legal arguments in this Petition beyond those listed in Attachment A." Petition at 2, n.2.

This is not a proper pleading on reconsideration, and the Commission should dismiss it out of hand.

The purpose of an application for rehearing is to afford an opportunity to the parties to bring to the attention of the Commission in an orderly manner any question theretofore determined in the matter and afford the Commission an opportunity to rectify any mistake made by it before presenting the same to this Court.

Washington Water Power v. Kootenai, etc., 99 Idaho 875, 591 P.2d 122 (1979). To insure that this purpose is served, the Commission's rules require a petition for reconsideration to identify

alleged errors with sufficient specificity to enable the Commission to rule intelligently on the request for reconsideration.

Petitions for reconsideration must set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous or not in conformity with the law, and a statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted.

IPUC Rules of Procedure § 331.01, IDAPA 31.01.01.331.01. A mere conclusory pleading that an order is erroneous and contrary to the evidence is not sufficient to present an alleged error to the Commission for reconsideration and will not preserve the issue for subsequent appeal. *See Idaho Underground Water User Ass'n v. Idaho Power Co.*, 89 Idaho 147, 404 P.2d 859 (1965). Thus, the purported assignments of error in Exhibit A are not properly before the Commission and should be dismissed.

2. Qwest has waived any right to object to the Commission's order with regard to EAS and local service.

Most of Qwest's assignments of error are irrelevant as well as improper in form. The simple fact is that the only traffic for which intrastate SS7 message charges are still at issue is Qwest-originated toll and SS7 messages associated with interexchange carrier ("IXC") meet point billed messages. With respect to local and EAS traffic, Qwest has conceded that SS7 charges are improper and waived any right to take a contrary position at this late date.

As the Commission is aware, Qwest filed supplemental testimony four days before the hearings for the express purpose of abandoning its prior position that its SS7 Catalog charges should apply to local and EAS traffic. *See e.g.*, Order at 3, 11. In the supplemental filing Qwest offered to modify its Catalog to eliminate charges on local traffic, including EAS, on a going forward basis. Qwest repeated this concession under cross-examination as well, acknowledging

that, as to local and EAS service, “If the Commission were to order us to change our catalog, we would comply with that Commission’s [sic] Order.” *Id.* at 12, *quoting* Tr. p. 528. Finally, in its Post Hearing Memorandum, Qwest contended that the elimination of SS7 charges on local and EAS was “being implemented” and that the complaint “as it relates to local traffic is now completely irrelevant.” *Id.* at 11, *quoting* Qwest’s Post-Hearing Memorandum, p. 30 and p. 14.

The Commission’s Order acknowledged Qwest’s concession and went on to explain clearly and logically why the application of SS7 charges to local and EAS traffic is unjust and unreasonable. The Commission then held that Qwest could not collect SS7 charges on local or EAS traffic, either prospectively or retroactively. *Id.* at 20. But now, despite its admission that the Catalog’s SS7 message charges should not apply to local and EAS end user traffic and despite its commitment to abide by a Commission decision that prohibits SS7 charges on such traffic, Qwest’s Petition contains numerous assignments of error objecting to both the Commission’s jurisdiction and its findings of fact with regard to the local and EAS issues. *See e.g.*, Petition at 6-8, 11-12.

The Commission need not, and should not, tolerate such a breach of faith. Qwest explicitly, deliberately, knowingly, and repeatedly waived any objections to the entry of an order prospectively excluding local and EAS traffic from SS7 charges. It is now estopped to argue to the contrary.

It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of litigation must act consistently with it; one cannot play fast and loose.

McKay v. Owens, 130 Idaho 148, 153, 937 P.2d 1222 (1997). Protection of the “dignity of the judicial process” requires that a party who has consented to a settlement of issues cannot thereafter advance a position inconsistent with that settlement. *Id.*

Furthermore, Qwest has implicitly waived any objections to the Commission's Order prohibiting retroactive collection of SS7 charges on local and EAS traffic. Despite its concession that local and EAS calls should be prospectively exempt from SS7 charges, Qwest attempted to preserve a claim for retroactive recovery of such charges by arguing that the filed rate doctrine required collection even for a tariff subsequently determined to be invalidly applied. The Commission's Order carefully considered this argument and rejected it for the reasons set forth at pages 21-22 of the Order. Qwest's Petition does not even make a colorable attempt to "set forth specifically the ground or grounds why" this portion of the Order is unreasonable or unlawful. *See* Commission Rule of Procedure 331. The only mention in the Petition of this portion of the Commission's Order is in Exhibit A, where the last summary item simply identifies the Commission's ruling on the filed rate doctrine without further comment or explanation. By failing to comply with Rule 331, Qwest has waived any objection to the Commission's decision concerning Qwest's claim for retroactive recovery of SS7 charge on local and EAS messages.

3. Qwest's jurisdictional arguments are without merit and were all considered and properly rejected by the Commission.

Qwest's Petition mostly reiterates its prior jurisdictional arguments in somewhat different language. Qwest first argues that SS7 signaling was not in use prior to 1988, and all SS7 service is therefore by definition regulated only under Title 62. In the alternative, Qwest contends that, at the very least, SS7 signaling associated with toll traffic is a Title 62 service. Qwest then insists that, because the Commission lacks ratemaking authority over Title 62 services, it cannot prohibit the application of SS7 charges to specific types of traffic because doing so is tantamount to exercising the Commission's ratemaking function to set the level of rates at zero.

The Order carefully explains why these jurisdictional arguments cannot be reconciled with the applicable statutes or the legislature's intent, and the Complainants will not attempt to repeat the Commission's thoughtful analysis. But it is worth pointing out some additional reasons why Qwest's jurisdictional arguments must fail.

With respect to Qwest's arguments that SS7 signaling is a Title 62 service because it postdates the 1988 Act, it may be true that SS7 technology was deployed after 1988. But signaling as an element of the underlying Public Switched Telephone Network traffic is as old as the crank on the magneto telephones in museums. The record is clear that SS7 is simply a new and more efficient signaling technology that has largely replaced the in-band signaling that preceded it. In principle it is no different than other new telecommunications technologies that have come into widespread use after the 1988 Act.¹ If each of these technologies could be unilaterally disaggregated from local service into Title 62 "services" there would be precious little left of the Commission's authority over basic local exchange service, a result the Complainants submit is not contemplated under Idaho law.

Taking Qwest's alternative argument at face value--that SS7 signaling associated with toll service is price deregulated--this contention leads to logical consequences that are fatal to Qwest's case in chief. If, as Qwest is insisting, the regulatory status of SS7 signaling is determined by the nature of the end user traffic of which it is an integral component part, it logically follows that the ability to charge another carrier for SS7 must also depend on whether or not Qwest can charge for the associated traffic. This, of course, is the essential point of the Complaint. Qwest cannot be permitted to levy inter-carrier charges for SS7 in those instances where it is not permitted to charge for the underlying end user traffic.

¹ Two examples that come readily to mind are late generation digital switches and fiber in the loop.

Finally, Qwest's attempt to twist the Commission's ruling into a prohibited attempt to set toll rates is unsupportable as a matter of both law and logic. Qwest cites no legal authority for its contention that a determination whether a rate is validly applied is the same as setting a rate. The obvious reason for this omission is that the relevant legal authority refutes Qwest's argument. The Idaho courts have long recognized that there is a jurisdictional difference between setting rates, on the one hand, and enforcing or applying rates, on the other.

The leading Idaho case on this point is *Utah-Idaho Sugar v. Intermountain Gas Co.*, 100 Idaho 368, 597 P.2d 1058 (1979). In that case, Utah-Idaho Sugar filed a complaint with the Commission alleging that Intermountain's rates were unreasonable and discriminatory and that Intermountain improperly applied the demand charge component of its rate and improperly prorated Utah-Idaho's bill for the month of July, 1974. The Commission dismissed the Complainant's challenge to the reasonableness of the rates as an impermissible collateral attack on an un-appealed Commission order and it rejected the balance of Utah-Idaho's claims on their merits.

On appeal, the Idaho Supreme Court affirmed the Commission's order dismissing Utah-Idaho's claim that the rate was unreasonable. But the Court also concluded that Utah-Idaho could validly raise its argument that the rate was improperly applied and enforced even though it could not attack the underlying rate itself.

U & I argues that Schedule LV-1 is ambiguous, that Intermountain's application of Schedule LV-1 is improper, and that Intermountain's interpretation results in unjust rate discrimination against those gas customers served by Schedule LV-1 in violation of I.C. § 61-315. This claim is not an impermissible collateral attack on the Commission order in Case No. U-1034-38, but a request that the Commission enforce the terms of the rate tariffs adopted by Intermountain under authority of the order in Case No. U-1034-38. U & I has properly invoked our appellate jurisdiction in asking us to review that part of the

Commission's order in U & I's complaint case, Commission Order No. Y-1034-45, which held that Intermountain has properly interpreted Schedule LV-1 and that no illegal rate discrimination results from that interpretation.

Id., 100 Idaho at 374-375. The Court then reversed the Commission on the proration issue and remanded the matter for further proceedings.

This proceeding falls squarely within the rule announced in *Utah-Idaho*. Complainants are not challenging the level or reasonableness of Qwest's SS7 message rate. What the Complainants are challenging is Qwest's application of the rate to specific types of traffic and the enforceability of the rate with respect to that traffic. The Commission's jurisdiction over this Complaint has nothing to do with ratemaking authority or the lack thereof. Rather, as the Order states, "The simple logic Qwest used to implement its Access Catalog revisions was fundamentally flawed, resulting in SS7 message charges that are unfair and unreasonable." Order at 11.

Thus, the Order confirms that Qwest cannot misapply its tariff and impose charges on other carriers where those carriers have not in fact caused Qwest to incur any costs whatsoever. Qwest attempts to obscure this fact by repeatedly insisting that Illuminet is its SS7 "customer" and it is "purchasing through the SS7 Catalog." *See* Petition at 21.² In the case of Qwest-originated or IXC toll, Illuminet is doing no such thing. It has no obligation to pay such charges, it is not purchasing any SS7 message services from Qwest, and it is not causing any costs to be incurred by Qwest or anyone else for the SS7 signaling being exchanged between the providers of the underlying end user traffic.³ In fact, the record reflects that Illuminet generates none of

² Qwest contends that Complainants admit to this in Paragraph 11 of their Complaint. Paragraph 11 contains no such admission.

³ All parties agree that the charges Qwest assesses for the physical connection to Qwest's SS7 network—the B-links and ports—continue to be paid by Illuminet. *See* Tr. pp. 225-226.

the SS7 messages for which Qwest has assessed charges under the Catalog. Illuminet is simply transporting SS7 messages between Qwest or the IXC and the Illuminet carrier/customers.

Under these circumstances, where Illuminet is not causing Qwest to incur any costs, it defies common sense to suggest that the Commission is powerless to prevent Qwest from improperly assessing a charge where no service has been rendered.

4. The Commission's Substantive Conclusions Regarding the Application of SS7 Message Charges Are Correct

On pages 14 and 15 of its Petition, Qwest argues that it would produce new evidence to show the Commission erred in characterizing Qwest's application of its SS7 Catalog message charges as a double recovery of SS7 costs. The Commission did not err. With regard to Qwest's Title 61 services, the Commission must establish rates that cover all the utility's costs, and they are conclusively presumed to do so until the rates are changed upon a proper showing of increased costs by the utility. Similarly Title 62 rates must cover all of Qwest's costs associated with a competitive service. *See* Idaho Code § 62-609(1). Thus, as a matter of law, Qwest's Title 61 and 62 rates recovered SS7 signaling costs prior to Qwest's filing of its Catalog charges. But when Qwest imposed the new SS7 charges on other parties, it did not reduce its rates that contained a signaling cost recovery element -- it reduced access charges. Consequently, the post filing rates charges by Qwest do contain a double recovery--one from the customer paying the underlying rate and one from the third party on whom Qwest is imposing SS7 charges.⁴

Similarly, Qwest's insistence that it previously applied SS7 charges to Qwest originated toll in the interstate jurisdiction is, if not demonstrably wrong on its face, at least dubious. Until

⁴ As explained by Complainants in their post-hearing brief, federal cost recovery policies require that SS7 costs are to be treated as a "general network upgrade" because SS7 "will be used for a wide variety of both intrastate and interstate services." Complainants Post-Hearing Brief at 18, *citing Access for 800 Service*, Report and Order, 4 FCC Rcd 2824, 2832-2833 (1989); *see also* Tr. at 235, L. 10-14. Qwest has not contended that it violated these principles. Thus, the Commission's conclusions with respect to double recovery are entirely appropriate. *See* Order No. 29219 at 2.

very recently, Qwest was not permitted by law to provide inter-LATA toll service. If Ms. Kuder's affidavit meant to say that Qwest imposes SS7 charges on interstate IXC traffic that originates in Qwest's service territory, that allegation is not inconsistent with the Commission's Order. In any case, the whole question is irrelevant because, as the Commission's Order points out in considerable detail, the interstate carrier compensation system is far different than the *intrastate* compensation system addressed in the Order.

5. Qwest should be barred from raising the issue of quasi estoppel on reconsideration because it failed to raise the argument previously.

For the first time in this proceeding, Qwest now argues in its Petition that Illuminet should not be allowed to complain of the SS7 message charges arising from Qwest's misapplication of its Catalog's intrastate SS7 message rate structure because the doctrine of quasi-estoppel bars this Complaint. Qwest bases this theory on its proposition that Illuminet allegedly knew of Qwest's intent at the time of filing, but did not file the Complaint until a year later, thus leading Qwest to somehow change its legal position to its detriment. However, because this issue was not raised at any time prior to submission of the case to the Commission for decision, Qwest has waived any rights it might have had to raise this issue. *See Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352 at 358, 48 P.3d 1241 (2002) ("As an affirmative defense, the burden is on (the person alleging it) to prove the elements of quasi-estoppel by a preponderance of the evidence...."); *see also* Commission's Rules of Procedure Rule 57.02.a and Rule 57.02.b, IDAPA 31.01.01.57.02.

Complainants respectfully submit that the Commission is well within its authority to find that Qwest is barred from raising any new theories on reconsideration in an effort to thwart the reasoned decision making that the Commission has already undertaken in this proceeding. Fundamental fairness to all parties and the efficient conduct of the Commission's proceedings

requires that, absent extraordinary circumstances, parties are provided “one bite at the apple.” Any other rule would lead to unending litigation, waste of the Commission’s scarce resources, and allow large corporations to grind smaller ones into submission by excessive litigation costs. Thus, Qwest should not be permitted to extend this proceeding unnecessarily simply because of claims that so-called “new” evidence has been discovered.

Qwest has established no extraordinary circumstances for this newly created (but erroneous) theory, and none exist. The essential facts regarding the pre-Complaint interactions between Qwest and Illuminet that Qwest alleges support its estoppel claim are contained in the record. Even if the Commission considered these purported “new” facts, they simply extend the record that the Commission considered when it entered the Order. Such a result would reward Qwest for its lack of diligence and case preparation. That result is clearly contrary to fundamental fairness, let alone the efficient conduct of Commission proceedings.

Apparently believing that repetition creates credibility, Qwest’s Petition asserts countless times that the Commission should reconsider its Order because of Qwest’s belief that purportedly “new” evidence will otherwise support Qwest’s belated “estoppel” theory and will lead the Commission to a different conclusion than that enunciated and explained in the Order – that Qwest unlawfully applied its intrastate SS7 message rate structure to Complainants. Qwest is wrong.

All of the purported “new” facts relate to events occurring before the hearing in which Qwest was a participant. Further, most of the cited events were identified on the record by Complainants. For example, Illuminet witness Florack stated as follows:

- Q. Have you raised your concerns with Qwest?
- A. Yes. Illuminet has had a number of discussions with Qwest on this issue. Moreover, in November of 2000, Illuminet provided to Qwest a position

paper (See Exhibit E) outlining the position that Illuminet now requests the Commission adopt here. Unfortunately, no substantive resolution of the issues raised in the position paper or the SS7 Catalog Revisions have been made.

Tr. At 227, L. 22-27. Further, as this excerpt makes clear, Complainants attached the very document (Exhibit 406 – the Illuminet position paper that was sent to Qwest in November, 2000) that Qwest implies is somehow a “new” fact. Regardless of its mischaracterization, however, it is clear that Qwest was provided the opportunity to advance its “new” theories based on this testimony and Exhibit 406 and it is equally clear from the record developed and relied upon by the Commission in its Order that Qwest waived that opportunity.

If Qwest’s hearing preparation did not involve discussion of the issues with its own employees and former employees, the Commission and the Complainants should not be put through another hearing to evaluate facts that Qwest could readily have produced at the original hearing. The price of Qwest’s lack of ordinary diligence should not be paid by the Commission and Complainants. Accordingly, Qwest’s efforts to boot strap new theories under the guise of “new” facts has no merit.

6. Even if Qwest’s argument is not barred, Qwest cannot establish any of the required elements of quasi estoppel.

Idaho courts have characterized “quasi-estoppel” as “essentially a last-gasp theory under which a defendant who can point to no specific detrimental reliance due to plaintiffs’ conduct may still assert that plaintiffs are estopped from asserting allegedly contrary positions where it would be unconscionable for them to do so.” *Thomas*, 137 Idaho at 357-358 (citation omitted).

(T)he doctrine of quasi-estoppel requires that the offending party must have gained some advantage or caused a disadvantage to the party seeking estoppel; induced the party seeking estoppel to change its position to its detriment; and, it must be unconscionable to allow the offending party to maintain a position that is inconsistent from a position from which it has already derived a benefit.

Id. (citations omitted) However, Qwest has not made such claim nor could it meet its burden to do so. *See id.* at 358

At the outset, Qwest's claim that it was somehow led to believe Illuminet would not challenge implementation of SS7 charges in Idaho strains credibility to the breaking point. Contrary to Qwest's implication, Illuminet's failure to challenge Qwest's SS7 charges on the federal level could not have been interpreted by Qwest as a concession that Illuminet would fail to contest similar charges elsewhere. In fact, the record conclusively establishes that Illuminet conveyed to Qwest its objections to the intrastate SS7 message charges and sought a solution short of litigation. At no time did it waive any rights to litigate if necessary, and Qwest does not contend to the contrary. Additionally, Qwest was well aware that Illuminet and other parties had, in fact, challenged the intrastate SS7 message rate structure that was filed in Idaho in other States.

A: Well, while Qwest may have access catalog or tariff revisions in place in eight states identical to that at issue here, clearly Illuminet does not believe that the structure is "improved" since Qwest cannot possibly implement that structure properly. I also note that whether states have "adopted" the tariff structure may be an overstatement if, like Idaho, Qwest merely needs to file the Catalog revisions. Most importantly, however, is the fact that Qwest has not implemented the tariff structure in the four (4) jurisdictions within which Illuminet was able to challenge the revision. Specifically, Illuminet opposed the approval of the tariff in the States of Arizona, Utah, Minnesota and Washington. After increased opposition to its tariff, Qwest withdrew its tariff proposal in Arizona, Utah, and Washington. Similarly, in Minnesota, after the Minnesota Department of Commerce had issued over seventy data requests to Qwest concerning the proposed tariff and at least one party having filed a motion to dismiss Qwest's proposed tariff application, Qwest likewise withdrew that tariff filing as well. Thus, when confronted with challenges, Qwest has withdrawn its filings that attempted to put in place the same intrastate SS7 message signaling structure that is at issue here.

Tr. at 247, L. 5-23.

In light of these facts, Qwest could not have reasonably relied on Illuminet's conduct of any sort as a basis for assuming the application of its SS7 message charges would not be held invalid if challenged. Qwest is surely sophisticated enough to know that Illuminet cannot predict or give any assurances about the outcome of regulatory proceedings, nor could it prevent other parties from raising the issue even if Illuminet did not choose to do so. In the present case, the ITA for one would surely have raised the issue on its own if necessary because of the implications for Syringa Network, LLC and its carrier/customers, and Qwest has made no claim that either the ITA or any of the other Complainants are estopped from bringing this case.

Nor can Qwest establish any of the other necessary elements of quasi-estoppel discussed by the Supreme Court in *Thomas*. First, it has not been shown that the Complainants gained some advantage or caused a disadvantage to Qwest prior to filing the action in Idaho. In fact, the record evidence noted above establishes that Illuminet repeatedly raised concerns regarding the proper application of a SS7 message rate structure directly to Qwest and in multiple state proceedings, and otherwise disputed the charges with the first billing after the Catalog revisions went into effect and continued that dispute even when a payment had been made by Illuminet under protest. *See generally* Exhibit 402 (Proprietary Version); *see also* Complainants' Petition for Reconsideration and Clarification, Case No. QWE-T-02-11, filed May 6, 2003. Even the cases cited by Qwest establish that pursuing rights are not a violation of the quasi-estoppel doctrine. *See e.g. Lupis v. People Mortgage Company*, 107 Idaho 489, 491, 690 P. 2d 944, 946 (1984); *Willig v. State Dept. of Health and Welfare*, 127 Idaho 259, 261, 899 P. 2d 969, 971 (1995). Because Qwest was never entitled to the money it sought to collect from Complainants (*see e.g.*, Order at 23), so too Complainants never "caused a disadvantage" to Qwest. Rather, any disadvantage incurred by Qwest was because of actions Qwest took unilaterally.

Second, there is absolutely no allegation or evidence that Complainants "induced" Qwest "to change its position to its detriment." Qwest filed the Catalog revisions notwithstanding that, as demonstrated by Exhibit 406, Qwest was formally placed on notice in November, 2000 of Illuminet's concerns regarding the proper construct for assessing SS7 message charges. Those concerns were ultimately proved correct by the Commission's Order.

Third, it can hardly be "unconscionable" to allow the Complainants to maintain a position first articulated by Illuminet that the Complainants have uniformly and consistently articulated *throughout* this proceeding. Clearly, Illuminet cannot be criticized for making inquiries and attempting to resolve this dispute without the need to seek intervention from the Commission.

Fourth, Complainants did not derive any benefit from the attempts by Qwest to charge for SS7 messages. The Commission properly found that the Qwest misapplied its SS7 message charges that allowed it a "double recovery." Order at 2. Rather than a benefit, Qwest's unlawful conduct imposed a detriment upon the Complainants. Thus, Qwest cannot establish that it has suffered an unfair detriment or disadvantage as a result of anyone's actions except those it took when it filed its Catalog revisions rather than working through the issue outside of the complaint process. Being required to forego or disgorge unlawful charges is not an unreasonable detriment or disadvantage in this context. Moreover, there is no showing whatsoever that Qwest is actually at risk for the \$1.5 million it has allegedly collected from other carriers under the Catalog. The Commission's Order makes clear that, "Not all the signaling charges set forth in the Access Catalog are erroneous," *Id.* at 20, and it is *solely* within Qwest's control how to rectify its unlawful conduct, including the filing of revised access rates and/or new terms and conditions to isolate properly charged SS7 messages under the Catalog. Qwest's failure to undertake these remedial measures undercuts its reliance upon some form or "quasi-estoppel" theory.

Qwest has no basis for complaining that Complainants did not file this case until nearly a year after the SS7 Catalog charges were implemented. Except in cases where a statute of limitations applies, Complainants have no general duty to immediately file a Complaint upon discovering an objectionable action by another. In fact, public policy encourages attempts to negotiate solutions before resorting to litigation, and Illuminet had attempted to do just that. Regardless, the record reflects that Illuminet was actively pursuing the issue in other States.

In summary, Qwest's effort to bootstrap a "quasi-estoppel" theory proffered in an effort to dislodge the rational findings and conclusions of the Order amounts to nothing more than a "last gasp" theory. As the record makes clear, Qwest had its opportunity to raise any information already in its possession based on the Complainants' testimony in this proceeding, and it chose not to. Accordingly, even if Commission considers Qwest's quasi estoppel argument and the purported "new" facts, the Commission will conclude that Illuminet is not barred from complaining about the application of intrastate SS7 message charges to it and its carrier/customers. Finally, Qwest does not contend, nor can it contend, that the other Complainants are barred from bringing this Complaint by any type of estoppel.

Qwest's Motion to Stay Does Not Demonstrate Irreparable Damage or Any Other Grounds for a Stay of the Order

Qwest's Motion to Stay Order No. 29219 (the "Motion") suffers from many of the same infirmities discussed in above in the response to Qwest's estoppel claims. The essential test for the granting of a stay of a Commission order is contained in Section 61-633, Idaho Code, which provides:

No court of this state shall enjoin or restrain the enforcement of any order of the commission or stay the operation thereof . . . [except upon]. . . a specific finding based upon the evidence submitted to the court and identified by reference thereto that great

and irreparable damage would result to the petitioner and specifying the nature of the damage.

Although this statutory test is, by its terms applicable only to a judicial stay, the same rules apply to a request for a stay by the Commission. *See Utah Power & Light v. Idaho Public Utilities Commission*, 107 Idaho 47, 685 P.2d 276 (1984).

Qwest's Motion fails to make a legitimate attempt to meet this statutory test. Qwest's Motion simply argues that it has billed and collected more than \$1.5 million under the Catalog from 9 unnamed intrastate customers, 4 of whom Qwest identifies as IXCs. Qwest implies, without actually stating, that the Commission's Order might require the refund of these sums, but Qwest makes no attempt to show that it has been served with a refund demand, nor does it specify why the Commission's Order would compel this result. The reason for this conspicuous omission is obvious.

As noted above, the Commission's Order specifically states that not all the SS7 Catalog charges are invalid. By its terms, the Order prohibits only the collection of specific SS7 charges identified in the Order, none of which would appear to apply to IXC traffic. Whether the other unnamed carriers have paid any invalid charges is a matter known only to Qwest and the affected carriers, but it is significant that Qwest has not in fact made any such allegation. Consequently, on this score there is no showing that Qwest has been injured at all, let alone that the injury is either great or irreparable.

Nor can Qwest establish a "great and irreparable injury" as a result of future losses attributable to the Commission's Order to withdraw the Catalog. The Commission specifically stated that Qwest is free to refile the Catalog at any time, provided that it confine its application to the end user traffic that is legitimately subject to the Catalog's SS7 message charges. Thus, Qwest has within its sole power the ability to address any perceived injury by properly

implementing the intrastate SS7 message rate structure as suggested by Complainants initially and affirmed by the Commission's Order. Qwest's inaction cannot, therefore, represent a "great and irreparable injury."

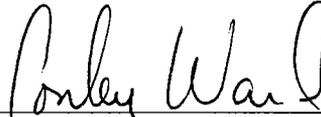
Finally, as a matter of Idaho law the mere allegation that a utility might not collect all the revenues that it would have received under its proposed rates does not demonstrate the "great and irreparable damage" necessary to justify a stay. *See Mountain View Rural Tel. Co. v. Interstate Utils. Co.*, 50 Idaho 86, 38 P.2d 40 (1934). This is particularly true in the present case where Qwest has it in its sole power to revise its rates in order to avoid any potential loss of revenue. Qwest can, at any time, revert to the situation that existed prior to the filing of its Catalog by reversing the reduction in access charges that it took to offset the new SS7 charges. If Qwest chooses to forego these access charge revenues, it does so voluntarily, and any harm it suffers is self inflicted.

Conclusion

For the reasons stated above, the Complainant's respectfully submit that the Commission should deny both Qwest's Petition for Reconsideration and Motion to Stay Order 29219.

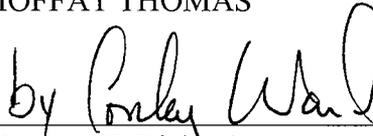
Respectfully submitted this 13th day May, 2003.

GIVENS PURSLEY LLP



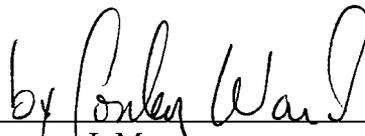
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of May 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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