

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

RECEIVED
FILED

2003 MAY 20 PM 4: 32

IDAHO PUBLIC
UTILITIES COMMISSION

Morgan W. Richards
MOFFATT THOMAS
US Bank Plaza Bldg.
101 S. Capital Blvd., 10th 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)

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' OPPOSITION TO QWEST'S CROSS-PETITION FOR RECONSIDERATION OF ORDER NO. 29219
Complainants	
vs.	
QWEST COMMUNICATIONS, INC.,	
Respondent.	

Complainants Idaho Telephone Association ("ITA"), Citizens Telecommunications Company of Idaho ("Citizens"), Illuminet, Inc. ("Illuminet") and Intervenor Electric Lightwave, Inc. ("ELI") (collectively the "Complainants"), by and through their attorneys of record hereby

submit this Opposition to the May 13, 2003 Qwest's Answer to Complainants' Petition for Reconsideration and Clarification and Cross Petition for Reconsideration of Order No. 29219 ("Cross-Petition"). For the reasons stated herein, Complainants respectfully submit that the Idaho Public Utilities Commission (the "Commission") should grant the relief requested in the May 6, 2003 Petition for Reconsideration and Clarification filed by the Complainants in this proceeding (the "Complainants' Petition").

Introduction

The record evidence in this proceeding well exceeds 500 pages. Qwest, alone, has filed over 100 pages of testimony, a significant number of Exhibits, and over 85 pages of post-hearing legal briefs prior to the issuance of Order No. 29219 (the "Order"). Yet, in a clear effort to divert attention from the Commission's findings and conclusions that Qwest has acted unlawfully in implementing its intrastate Signaling System No. 7 ("SS7") signaling message rate structure in Idaho, Qwest continues to claim that additional evidentiary hearings are required. Qwest's current conjecture aside, no new facts are present that should deter the Commission from dismissing Qwest's Cross-Petition outright, and granting the Complainants' Petition in its entirety.¹

In its Cross-Petition, Qwest does not deny that a protested partial payment was made, nor could it since that fact has been part of the record evidence contained in an invoice Qwest sent to Illuminet. *See* Exhibit 402. Based on an apparent inadvertent oversight of the Commission in finding that refunds were not required because the disputed charges had not been paid (*see* Order at 20-21), the on-the-record fact that a protested payment had been made is the only fact necessary for the Commission to correct this oversight. Moreover, the payment by Illuminet

¹ In the Complainants' Opposition to Petition for Reconsideration and Motion for Stay of Order No. 29219, Case No. QWE-T-02-11, filed May 13, 2003 (the "Opposition"), Complainants have already addressed many of the same

does not affect Illuminet's status as transport agent for its carrier/customers, an issue already resolved on the record evidence. Accordingly, no further fact finding is necessary on this aspect of the Complainants' Petition.

The second aspect of the Complainants' Petition – the status of Illuminet as a non-telecommunications carrier – merely requires affirmation by the Commission. As such, no further evidentiary hearing is necessary with respect to this aspect of the Complainants' Petition – the record already includes the uncontroverted facts required for the Commission to take this action. *See e.g.*, Tr. at pp 203 and 426; *see also* Complainants Petition at 5-6.

Thus, Complainants respectfully request that the Commission grant their requested relief promptly and deny Qwest's Cross-Petition.²

The Qwest Cross-Petition should be Dismissed in Its Entirety

1. Qwest's Attacks on the Commission's Jurisdiction Continue to be Without Merit.

Qwest's continued attacks on the Commission's jurisdiction to resolve this Complaint are without merit. Qwest erroneously suggests that Illuminet's status as a non-telecommunications carrier leads to a conclusion that SS7 signaling is not a telecommunications service and thus the Commission is without jurisdiction to resolve the Complaint pursuant to Section 62-605(5) of the Idaho Code. *See* Cross-Petition at 8-9. Qwest's theory cannot be reconciled with the record facts. The SS7 signaling messages at issue in this proceeding are generated only by telecommunications carriers – Qwest and the carrier/customers of Illuminet. *See* Tr. pp. 328-

issues raised in the Qwest Cross-Petition that were initially raised in Qwest's petition for reconsideration of the Order. Rather than burden the record, Complainants incorporate their Opposition herein by reference.

² Qwest now confirms Complainants' position that Qwest has waived any right to object to the Commission's Order with regard to SS7 message charges associated with local and Extended Area Service ("EAS") end user traffic. *See* Opposition at 4-6. Qwest recognized that its proposal was intended "to eliminate message charges associated with local and EAS traffic. . ." (Cross-Petition at 8), and no legal objection was raised by Qwest regarding refunds with respect to any aspect of the underlying unlawful charges that have been paid.

330. Illuminet generates none of these SS7 messages; it only transports those messages as the transport agent of its carrier/customers.³

Similarly, Qwest's conveniently narrow interpretation of Section 62-614 to deprive the Commission of jurisdiction to resolve this Complaint disregards the fact that Citizens and other ITA members are telephone corporations. Qwest cites to no authority to suggest that Section 62-614 prohibits other aggrieved parties from joining such Complaint. Qwest also conveniently fails to explain how its theory can be reconciled with the full panoply of Idaho statutes that grant the Commission the authority to resolve the instant dispute. *See* Order at 3-8; *see also* Idaho Code Sections 62-605(5), 62-608, 62-609(2) and (3), and 62-615.⁴ For example, with respect to ELI in particular, the Commission had approved the interconnection agreement at issue, and Qwest's unlawful assessment of SS7 message charges pursuant to the Catalog effectively altered the terms of the agreement. *See e.g.*, Order at 11. Section 62-615 and 47 U.S.C. Section 252 clearly provide the Commission with the authority to resolve this aspect of the Complaint.

Apparently, Qwest continues to harbor the misassumption that Illuminet is the "customer" of the SS7 messages under the Catalog. This assumption, however, was rejected outright in the Order. Again, the record demonstrates that the SS7 messages at issue are generated by either Qwest or by an Illuminet carrier/customer, and the Commission has jurisdiction over these entities and, in particular, the agreements that establish whether and how

³ This has been demonstrated by the Complainants and summarized by them in their Post Hearing Brief in this proceeding. *See* Complainants' Post Hearing Brief, Case No. QWE-T-02-11, filed January 31, 2003 (the "Post Hearing Brief") at 19-22. Rather than burden the record, the Post Hearing Brief is incorporated herein by reference.

⁴ As demonstrated by its statements found on page 7 of the Cross-Petition, Qwest's arguments that the Commission lacks jurisdiction are simply a "house of cards." Presented as if it were a fact (which it is not), Qwest states that "[s]ince the Commission lacks jurisdiction to hear or resolve any dispute between Illuminet or ELI under section 62-614, the question that immediately presents itself is, what claims, if any, remain for the Commission's resolution?" Cross-Petition at 7. Since Qwest has not demonstrated that the Commission lacks jurisdiction under Section 62-614 to resolve the Complaint, then what it believes is "immediately present[ed]" is irrelevant. Even if Qwest were correct, however, Qwest has failed to address the remaining jurisdictional bases articulated by the Commission at pages 6-8 of the Order. Thus, the Commission need not waste effort engaging in Qwest's debate-styled arguments. Affirming the Order's conclusions with respect to Commission's jurisdiction accomplishes the same result.

proper charges are to be assessed for intrastate SS7 signaling associated with (and an integral component of) the end user traffic. *See* Order at 3-8.

To be sure, there is a strong presumption that jurisdiction exists in a case where a contrary finding would deprive the Complainants of the Commission's expertise and a meaningful forum in which to seek a redress of grievances. *See e.g., State ex rel. Spire v. Northwestern Bell Telephone Co.*, 233 Neb. 262, 283 445 N.W.2d 284 (1989). Absent the application of the very same general property right and due process principles expressed in *State ex rel. Spire*, the illogical result of Qwest's misplaced theories would be to deprive the Commission of the opportunity to ensure that a telephone corporation subject to its jurisdiction (*i.e.* Qwest) is not able to reap an ill-gotten windfall arising directly from its unlawful conduct. Accordingly, for all of these reasons, and those previously determined by the Commission, Qwest's jurisdictional arguments are without merit and should be dismissed.

2. The Fact that Illuminet Paid Qwest Under Protest is Not a New Fact and is Not Inconsistent with the Basic Conclusions of the Order.

Qwest attempts to make much of the fact that Illuminet made a disputed payment. *See* Cross-Petition at 3-5. That is no new fact. The unlawful charges were invoiced by Qwest to Illuminet (*see e.g.*, Exhibit 402), and the record is clear that charges are passed through to the Illuminet carrier/customer. *See e.g.*, Tr. pp. at FLORACK TESTIMONY at 227 (lines 4-10) and Citizens Telecommunications Company of Idaho's Responses to Qwest's First Set of Production Requests, Exhibit B. Despite Qwest's incorrect claim to the contrary (*see* Cross-Petition at 7-8), nothing has changed. The relevant facts are already known -- that a protested payment was made by Illuminet on behalf of its carrier/customers (*see* Exhibit 402), that the charges are subject to the flow-through provisions of the contracts between Illuminet and its carrier/customers (*see Id.*); that the charges remained under dispute (*see id.*; Tr. pp. at FLORACK TESTIMONY at 206

(lines 1-5)), and the Commission has properly found that Qwest engaged in unlawful, and unreasonable conduct. *See e.g.*, Order at 11 (“The simple logic Qwest used to implement its Access Catalog revisions was fundamentally flawed, resulting in SS7 message charges that are unfair and unreasonable.”) Thus, Qwest’s tortured efforts to convince the Commission that additional factual inquiries are necessary in order to afford Qwest a “second bite of the apple” are baseless and can and should be readily dismissed.

3. Qwest has Inaccurately Portrayed the Complainants’ Positions and of the Record.

Finally, and unfortunately, Qwest now expands its baseless claims by fabricating statements and so-called facts that simply do not exist.

A. Qwest erroneously states that “Qwest and Complainants agree that the Order should be reconsidered by means of an additional evidentiary hearing to explore the facts relating to the course of business between Qwest and Illuminet.” Cross-Petition at 5 (emphasis added).

Complainants have made no such statement. Complainants’ Petition stated – “[R]econsideration can and should be afforded them based . . . on the briefs and attachments hereto.” Complainants’ Petition at 4. The Complainants’ Petition merely corroborated the fact of a protested partial payment by Illuminet that, contrary to Qwest’s rhetoric, was not “exceedingly obscure.” Cross-Petition at 4 n.4. The fact was demonstrated in an *actual invoice prepared and sent to Illuminet by Qwest* -- where the partial payment was noted. *See* Exhibit 402, page 3 of 26; *see also* Complainants’ Petition at 3-4.

B. Qwest wrongly states that “As Illuminet concedes, SS7 signaling is not offered to the public.” Cross-Petition at 9.

Neither Illuminet, nor any of the Complainants, ever made such concession and Qwest did not cite any such statements by any of the Complainants. The fact that Qwest attempted (albeit unlawfully as found in the Order) to “unbundle” its rate structure within a generally available Catalog service offering directly contradicts Qwest’s statements. The record and the

Order's explanation of that record are clear that SS7 signaling is an integral component of the end user service – voice and data traffic – which are offered by Qwest and by the Illuminet carrier/customers to the public. As the Commission properly found, “Qwest did not consider the different payment structures in place for the different types of traffic (*and the signaling that is a necessary part of it*) involved in the intrastate domain, nor did it consider that a variety of arrangements were already in place that were intended to compensate Qwest for its signaling costs.” Order at 11 (emphasis added).

C. Qwest improperly states that “third party providers then sell the signaling to their customers. . . .” (*Id.*)

This statement is contradicted and directly refuted by the record that demonstrates Illuminet does not generate the SS7 messages the charges for which are at issue in this proceeding, and Qwest agreed. The record is clear that the SS7 messages charges at issue are passed through by Illuminet to its carrier/customers and are not “sold” to them. Moreover, and as already demonstrated in the record Illuminet does not “sell” SS7 messages; Illuminet is the transport agent of its carrier/customers thus enabling the Illuminet carrier/customer and, in this case, Qwest, to initiate the required SS7 messages necessary to set-up and tear-down end user voice traffic.

Conclusion

The time has come for Qwest to admit its unlawful conduct, comply with the Order's directives and end this litigation. Accordingly, for the reasons stated herein and the Complainants' Petition, Complainants respectfully request that the Commission grant the relief they request, and dismiss in its entirety the Qwest Cross-Petition.

Respectfully submitted this 20th day of May, 2003.

By: Conley Ward Givens
Conley Ward ISB #1683
GIVENS PURSLEY LLP
277 North 6th Street, Suite 200
P.O. Box 2720
Boise, ID 83701
(208) 388-1200
(208) 388-1300 (fax)
Counsel for Idaho Telecommunications Association

Morgan W. Richards
Morgan W. Richards, ISB No. 1913
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS,
CHARTERED
101 S. Capital Blvd., 10th Floor
Boise, ID 83701
(208) 385-5451
(208) 385-5384 (fax)
Counsel for Citizens Telecommunications Company
of Idaho, Electric Lightwave, Inc, and
Illuminet, Inc.

Thomas J. Moorman
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)
Counsel for Illuminet, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of May, 2003, I caused a true and correct copy of the foregoing **COMPLAINANTS' OPPOSITION TO QWEST'S CROSS-PETITION FOR RECONSIDERATION OF ORDER NO. 29219** to be served by the method indicated below, and addressed to the following:

Mary S. Hobson
STOEL RIVES LLP
101 S. Capitol Blvd., Suite 1900
Boise, ID 83702-5958

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Stephanie Boyett-Colgan
QWEST SERVICES CORP.
1801 California St., 47th Floor
Denver, CO 80202

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Conley Ward
GIVENS PURSLEY LLP
Post Office Box 2720
Boise, ID 83701

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Clay Sturgis
Senior Manager
MOSS ADAMS LLP
601 W. Riverside, Suite 1800
Spokane, WA 99201-0663

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Lance A. Tade, Manager
State Government Affairs
CITIZENS TELECOMMUNICATIONS OF IDAHO
4 Triad Center, Suite 200
Salt Lake City, UT 84180

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Thomas J. Moorman
KRASKIN, LESSE & COSSON
2120 L St. NW, Suite 520
Washington, D.C. 20037

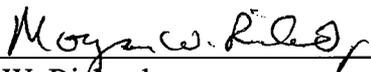
- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Richard Wolf, Director
Contracts & Regulatory
ILLUMINET, INC.
Post Office Box 2909
Olympia, WA 98507

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

F. Wayne Lafferty
LYKAM SERVICES, INC.
2940 Cedar Ridge Dr.
McKinney, TX 75070

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile



Morgan W. Richards