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January 31, 2003

**VIA HAND DELIVERY**

Jean D. Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington  
Boise, ID 83702-5983

**RE: Docket No. QWE-T-02-11**

Dear Ms. Jewell:

Enclosed for filing with this Commission is an original and eight (8) copies of **QWEST CORPORATION'S POST HEARING MEMORANDUM**. If you have any questions, please contact me. Thank you for your cooperation in this matter.

Very truly yours,

Mary S. Hobson

:blg  
Enclosures

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IDAHO PUBLIC  
UTILITIES COMMISSION

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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<sup>1</sup>,

Respondent.

**QWEST CORPORATION'S POST HEARING MEMORANDUM**

Qwest Corporation (Qwest) respectfully submits the following post hearing memorandum in support of its positions in the above-referenced case.

**I. INTRODUCTION.**

**A. What Is This Case About?**

This case is about whether this Commission has the authority to regulate how Qwest charges for the use of its SS7 network in connection with deregulated toll traffic<sup>2</sup> and whether,

<sup>1</sup> The Complaint names Qwest Communications, Inc. as the Respondent, but the proper party is Qwest Corporation.

assuming for purposes of argument that such Commission authority exists, Complainants have met their burden of showing that the relief requested is legally justified.

There is no dispute among the parties about what the SS7 network is, or how it operates. It is sufficient for the purposes of this Memorandum to state that it consists of dedicated circuits and signaling apparatus that operate outside the traditional network that carries the voice and data calls. All agree that the SS7 network provides “out-of-band signaling”. Its purpose is to facilitate the call set-up establishing and closing of voice and data calls and it enables telephone corporations to provide other database-related features (such as Caller ID) to end users<sup>3</sup>. For a more detailed and technical explanation of exactly how the SS7 network is constituted and how it operates, the Commission need only consult the record produced by the prefiled testimony.<sup>4</sup> The fact is, however, that there is no real dispute among the parties about technical issues.

Rather, the dispute here is about what Qwest will be permitted to charge others for their use of Qwest’s SS7 network. Complainants have done their best to confuse and obfuscate this fundamental issue in the effort to persuade this Commission its only course is to step in and order Qwest to rewrite a Title 62 Catalog service offering. To justify this extreme measure Complainants make numerous allegations that Qwest’s actions are “unlawful”. What is conspicuously missing from all of these allegations is a citation to a single statute, rule, Commission order, FCC order or other legal authority that suggests Qwest cannot charge those who use Qwest’s SS7 network for that use. However, Qwest has provided the Commission with authority that finds that Qwest may charge others for their use of Qwest’s SS7 network<sup>5</sup>.

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<sup>2</sup> Qwest agreed not to charge for SS7 signaling associated with local traffic (Tr. 460) and that change to the Idaho Access Services Catalog is being implemented.

<sup>3</sup> See generally, Qwest’s Access Service Catalog, Section 15.1, “General Description” (“Catalog”).

<sup>4</sup> See, e.g., Tr. 303-314; Ex. 501(testimony of Joseph Craig)

<sup>5</sup> See *In the Matter of U S WEST’s Petition to Establish Part 69 Rate Elements for SS7 Signaling*, DA 99-1474, Order (Dec. 23, 1999) (“FCC SS7 order”), Paras. 6-9 (FCC Order), wherein the FCC found that granting U S

With Qwest's agreement not to levy SS7 message charges on signaling associated with local traffic much of the sound and fury raised by Complainants is silenced. With this change to the Access Service Catalog, Qwest will not be charging for signaling associated with local calling. With this agreement, Qwest will not be charging for signaling associated with EAS calling. With this agreement, Qwest will not be charging for signaling associated intraMTA wireless calling. Indeed, with this change *Qwest's SS7 per message charges are imposed only on signals associated with toll traffic.*

Thus, what this case is about is whether the Complainants have met their burden of showing that Qwest has violated some applicable legal prohibition against charging for the use of its SS7 signaling network in connection with set-up of intraLATA toll calls. Before examining that question, it is useful to itemize some of the things this case is *not* about.

**B. This Case is Not About Other Subjects that Were Discussed in or Alluded to in Testimony.**

Reviewing the prefiled submissions and hearing the arguments presented by the Complainants, it would be easy to gain the impression that this case is about local exchange service and impacts to long-standing practices relating to switched access charges. In fact, however, that these would be misimpressions. This case is *not* about:

- EAS, local, or intraMTA calling or the signaling associated with this calling<sup>6</sup>
- bills rendered to any Idaho CLEC or independent telephone company (there are none)
- charges imposed by Qwest upon Syringa Networks, LLP (there are none)

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WEST's petition to restructure SS7 was in the public interest because the recovery of SS7 costs from the users of the SS7 network on a per message basis more accurately reflects how such costs are incurred. *See also First Report and Order*, "In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges," CC Docket No. 96-262; CC Docket No. 94-1; CC Docket No. 91-213; CC Docket No. 95-72, 12 FCC Rcd 15982, (Rel. May 16, 1997).

<sup>6</sup> The only outstanding issue relating to signaling associated with local traffic, is the billing rendered to one Complainant, Illuminet, for its use of signaling associated with local calling in the past. This "back billing" issue is discussed in section II.A.4.

- whether other SS7 network owners can bill Qwest for use of their networks (such issues must be decided on a record providing facts relevant to any such charges)
- which local exchange companies may render switched access charges to carriers in connection with toll calls (apart from the voluntary reduction in access charges made by Qwest when it unbundled SS7 from access, there is no impact on any party's access charges)
- how revenues received from interexchange carriers for switched access are split between local exchange companies who are jointly providing access

## II. ARGUMENT AND AUTHORITIES.

### A. The Commission Lacks Jurisdiction to Provide the Relief Requested.

On June 1, 2002, Qwest's revised its Southern Idaho Access Service Catalog unbundling SS7 signaling charges from switched access became effective. The services provided under the Access Service Catalog are price-deregulated pursuant to Idaho Code § 62-605. As Complainants admit, "because Qwest has elected Title 62 regulation of services other than basic local exchange service, changes to its Access Catalog do not require formal Commission investigation and approval."<sup>7</sup> Nor are Title 62 services subject to the Commission's jurisdiction for purposes of after-the-fact rate regulation<sup>8</sup> as contemplated by Complainants' actions in this case.

With Qwest's agreement to limit its SS7 switching charges to signaling associated with toll traffic, Qwest's Title 62 service Catalog offering for SS7 services is identical to its FCC-approved tariff in the rates, terms, and application to call set up messages.<sup>9</sup> Furthermore, at present, these Catalog provisions are being applied to only one of the Complainants, the self-described, third-party non-common provider of "competitive" SS7 services, Illuminet. (Tr. 203).

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<sup>7</sup> Complaint, May 20, 2002, p.2.

<sup>8</sup> Complainants have cited the re-regulation provision found in I. C. § 62-605(5) in their complaint, but as discussed below Complainants cannot rely upon this section for such extreme Commission intervention.

<sup>9</sup> Compare Catalog Section 15.7.1, "Call Set-Up"; Section 15.8B, "Message Charge; and Tariff F.C.C. No. 1; Section 20.2.1, "Call Set-Up"; Section 20.3.1.G, "Message Charge".

Illuminet did not object when Qwest restructured SS7 at the FCC<sup>10</sup> (TR. 224) and Illuminet supports the concept of unbundling charges for SS7. (Tr. 228). In fact, with the unbundling of SS7 at the interstate level, Illuminet began paying Qwest's per-message charges for signaling associated with toll traffic following the effective date of the FCC tariff in May 2000.

Although Illuminet is the only entity that is subject to the Title 62 SS7 charges, the other Complainants allege injury because, either they are customers of Illuminet, or they are concerned about the eventual application of these charges to another third-party carrier, Syringa Networks LLC. The Complainants allege that Illuminet's arrangements with its customers permit it to pass along the increased costs it incurs as a result of the SS7 message charges to those customers.

Thus, bootstrapping the increased costs to Illuminet, the Complainant group alleges three statutory bases for Commission jurisdiction in this case: Idaho Code § 62-614, § 62-605(5) and § 62-609(2). In each case the Complainants' reliance on the statutory language is misplaced.

**1. The Commission cannot grant the relief requested under I.C. § 62-614.**

Idaho Code §62-614(1) states that if two telephone corporations "are unable to agree on any matter relating to telecommunications issues between such companies" either company can apply to the Commission "for determination of the matter". Initially it must be noted that Illuminet is not a "telephone corporation". Under Idaho Code § 62-603(14) telephone corporations provide "telecommunications services," a term defined in § 62-603(13) as, *inter alia*, services that are offered to "the public, or some portion thereof, for compensation." Illuminet admits that it does not offer services to the public, but only to other telecommunications carriers. (Tr. 203). Furthermore, since Illuminet is the only SS7 Complainant that is purchasing services from the Title 62 Catalog, this dispute is not "between" telecommunications carriers, despite the protestations of Illuminet's customers that ultimately

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<sup>10</sup> See FCC SS7 Order, Para. 1.

the price they pay for the SS7 services they receive from Illuminet is affected. It must be remembered that Illuminet is not reselling Qwest SS7 services, it is providing its own services in competition with Qwest-provided SS7 services. (Tr. 203). The Qwest per-message charges to Illuminet for use of Qwest's network to provide services to Illuminet's customers is just one element of Illuminet's cost structure.

However, even if the Commission were to conclude that one or more of the Complainants can properly bring the present issue before the Commission under Idaho Code § 62-614 (1), this statute does not confer authority upon the Commission to grant the relief requested. Under § 62-614(2) the Commission is granted jurisdiction to conduct an investigation and hearing concerning inter-telephone corporation disputes and to enter its order "determining such dispute in accordance with applicable provisions of law." The 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's provides Title 62 services to other telephone corporations. The Commission lacks the authority under § 62-614 to grant the Complainants' requested relief.

**2. Section 62-609 has no application to this case.**

Idaho Code § 62-609(2) does not confer jurisdiction on the Commission to address the present controversy. The first sentence of that rather obtuse subsection<sup>11</sup> provides that toll shall be made available for resale. The second sentence simply requires that switched and special

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<sup>11</sup> Subsection 62-609(2) provides in its entirety: "Telecommunication services which are subject to the provisions of this chapter and which services utilize special or switched access, shall be made available by the telephone corporation for resale. No telephone corporation shall, as to its prices or charges for or the provision of such services, make provider of services exempted from regulation under section 62-603(13), Idaho Code, or subject any telephone corporation or any provider of services exempted from regulation under section 62-603(13), Idaho Code, to any prejudice or competitive disadvantage with respect to its prices or charges for providing access to its local exchange network nor establish or maintain any unreasonable difference as to its prices or charges for access to its local exchange network.

access services be provided to other telephone corporations on a nondiscriminatory basis. The subsection states that a telephone corporation may not subject another telephone corporation “to any prejudice or competitive disadvantage with respect to its prices or charges for providing access to its local exchange network”, nor charge any “unreasonable difference . . . for access to its exchange network.”

The reasons that this statute is inapplicable are almost too numerous to be recounted here. Not only is Illuminet not a telephone corporation, but SS7 charges are not switched or special access charges<sup>12</sup>. Indeed, the whole point of the revision to the state and federal access charge provisions was to unbundle SS7 from switched access charges. Further, Illuminet is not gaining access to Qwest’s local exchange network, it is gaining access to and using Qwest’s out-of-band signaling network. Tr. 394-396.

But, perhaps the most important reason that this statute does not apply to the present controversy, is that there is no evidence whatsoever that Qwest has charged “unreasonably different” charges for its SS7 services under the Catalog. The Catalog provisions on their face apply equally to every purchaser of the service, and there is no evidence that this is not the way the Catalog is applied.

Illuminet attempts to argue that there is potential discrimination because “Qwest could engage in undetected and unreasonable discrimination by marketing its services at a less costly alternative to any other SS7 provider by simply failing to apply the SS7 Catalog Revisions structure to its direct connect SS7 customers.” (Tr. 217). Illuminet, however, offers no proof of any disparate treatment among similarly situated SS7 customers. Furthermore, as discussed in

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<sup>12</sup> See generally, Catalog 15.1A “Call Set-up”.

II.B.2.b. below, the Federal Act specifically envisions different options for differing classifications of purchasers. These options include access Qwest's S77 network.

**3. SS7 services are not subject to Idaho Code § 62-605(5).**

The final section cited by Complainants is the only section of the Idaho Code that arguably grants the Commission authority regulate the provision of a Title 62 service. That is the so-called "claw back" provision found in Idaho Code § 62-605 (5). That section provides that Commission has the continuing authority to review the quality, general availability and terms and conditions under which *certain* Title 62 services are offered. Section 62-605(5) provides in full:

(5) 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.

Once again, however, this section has no application to Qwest's provision of SS7 signaling to Illuminet, or any of the Complainants. First and foremost, SS7 signaling does not meet the definition of "telecommunications service" found in § 62-603(13) because, at a minimum, it is not offered to "the public, or some portion thereof, for compensation". Rather than being a service offered to the public, SS7 signaling is a wholesale service offered to other telephone corporations and to their vendors, such as Illuminet. Hence Complainants cannot rely on § 62-605 (5) for Commission authority to regulate SS7 signaling because it is not a "telecommunications service".

Nor was SS7 signaling offered as a service to any entity prior to July 1, 1988. That is because SS7 has only recently been “unbundled” from switched access services.<sup>13</sup> Indeed, the interstate tariff unbundling signaling only became effective in May, 2000 and the Idaho Catalog revision June 1, 2001. Prior to this recent development, SS7 was signaling not sold on a per message basis, and cost recovery was borne by interexchange carriers and achieved through inter- and intrastate access charges. (Tr. 393; FCC SS7 order, para.7).

These two distinctions between SS7 signaling and those telecommunications services that are potentially subject to the Commission’s “claw back” powers are far more than mere technicalities; they go to the very heart of the structure of Title 62. In 1988, the legislature decided that, with the exception of basic local exchange services, *all* services offered by Idaho’s regulated telephone corporations could, at the companies’ option, be exempted from Commission regulation. The potential limitation on that freedom built into the legislation was the claw back provision, whose language was carefully crafted to protect *the public* from abuse with regard to those services that had previously been subject to full regulation by the Commission.

Subsection 62-605 (5) was not intended to address services offered for the first time after the statute was enacted, nor was it intended to address the provision of services to other telephone corporations or competitors. Indeed, when this regulatory scheme was enacted, the Telecommunications Act of 1996 with its mandate to unbundle and make parts of the incumbent companies’ networks available to competitors was still years in the future. When Title 62 was enacted, the *only* major services offered by incumbent local exchange carriers to other carriers, as opposed to directly to the public, were switched and special access and these services were not

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<sup>13</sup> The FCC SS7 order, which permitted Qwest to unbundle SS7 was entered December 23, 1999. The effective date of the Idaho Catalog was June 1, 2002.

under the claw back provision. Instead, the continuing protections to purchasers of access services were written into a separate statute: Idaho Code § 62-609. Section 62-609 did not protect through the specter of regulation, but through a market-based provision requiring imputation of access rates in the deregulated company's retail toll rates. In addition, as we have already noted, § 62-609(2) contains language prohibiting discrimination among telephone corporations who purchase access services.

The only conclusion to be drawn from the statutory scheme in Title 62 as a whole is this: re-regulation or "claw back" of a new service offered only to telephone corporations and their vendors was never intended and is not authorized. Section 62-609 is limited to the provision of access services to telephone corporations and requires competitive pricing through imputation and nondiscrimination provisions, none of which are applicable here. While § 62-614 provides that the Commission can investigate inter-telephone company disputes, it does not authorize re-regulation of a service that is offered under Title 62.

**4. Granting a refund or credit to Illuminet regarding the back balance violates the filed rate doctrine and constitutes unlawful retroactive ratemaking.**

While Qwest's SS7 product is deregulated and Commission approval was not required under Title 62, Complainants have alleged in their Complaint that the Commission has jurisdiction to order a refund or credit concerning the back balance of SS7 charges Qwest assessed to Illuminet in accordance with the Idaho Access Service Catalog. As the Commission considers this issue, it is important to note that Qwest provides SS7 pursuant to its Access Service Catalog to several other customers in Idaho and these customers have, in fact, paid their bills (which includes SS7 call set up charges associated with local and toll traffic).

Consistent with federal law and the law of almost all other states, the Idaho Commission has recognized the common law rule of the filed rate doctrine as established by the United States

Supreme Court.<sup>14</sup> Pursuant to the “century-old filed rate doctrine, “the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext.” *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 222, 118 S.Ct. 1956, 1962, 141 L.Ed. 2d 222 (1998). See also *Emerick*, Case NO. IPC-E-00-3, Order No. 28329 (2000). The filed rate or “tariff” constitutes “the law”, binding both carrier and customer.<sup>15</sup> See *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 2930, 69 L.Ed. 2d 856 (1981). See also *In re Illinois Bell Switching Station Litigation*, 161 Ill.2d 233, 204 Ill. Dec. 216, 641 N.E.2d 440, 444 (1994); *Waters v. Pacific Telephone Co.*, 12 Cal.3d 1, 114 Cal. Rptr. 753, 523 P.2d 1161 (1975).

A necessary corollary of the filed rate doctrine is that, just as the filed rate is binding on carriers and customers, so to is it binding on the regulatory agency that approved the filed rate. See *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. at 578, 101 S.Ct. at 2930 (“Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself had no power to alter a rate retroactively”). The Idaho Commission stated in *Hayden Pines* that in order to prevent utilities from circumventing the filed rate doctrine, “the rule further prohibits the refunding or remitting of any rates, tolls, rentals, or charges specified in the rates on file with the Commission. Thus, the filed rate doctrine, with its companion prohibition against rebates, is designed to ensure that utility customers pay uniform and non-discriminatory charges.” *In the Matter of the Investigation of Certain Property and HPN-W-89-*

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<sup>14</sup> The filed rate doctrine is also codified in Idaho Code § 61-313. Nevertheless, the Commission found the common law filed rate doctrine as a separate legal authority for its holding. The Commission stated, “we are compelled by the filed rate doctrine and Idaho Code § 61-313 to find that Mr. Emerick was billed the appropriate tariff charges. . . .” *Emerick v. Idaho Power Company*, Idaho Public Utilities Case No. IPC-E-00-3, Order No. 28329 (2000) (quoting *AT&T v. Central Office Telephone*, 524 U.S. 214, 118 S.Ct. 1956 (1998)).

<sup>15</sup> Further, Qwest notes that the Idaho Commission favorably cited the Supreme Court’s definition of the filed rate doctrine as “an obligation on the part of the utility to only collect the rates set out in its *tariffs and schedules*...” *Emerick v. Idaho Power Company*, Idaho Public Utilities Case No. IPC-E-00-3, Order No. 28329 (2000) (quoting *AT&T v. Central Office Telephone*, 524 U.S. 214, 118 S.Ct. 1956 (1998)) (emphasis added).

*1 Contributions of Hayden Pines Water Company*, Idaho Public Utilities Commission, Case NO. PHN-W-89-1, Order No. 23362 (1990). See also *Matanuska Electric Association, Inc. v. Chugach Electric Association, Inc.*, 53 P.3d 578, 583 (Alaska 2002) (“A fundamental rule of ratemaking is that rates are exclusively prospective in nature . . . . If commissions could retroactively change rates willy-nilly . . . serious questions would arise concerning the legitimacy of the ratemaking process”); *Farmers Union Livestock Commission v. Union Pac. R. Co.*, 283 N.W. 498, 505 (1939) (“[The practice of retroactively altering a filed rate] would be odious to the generally established notions of justice, and would, moreover, be utterly subversive of the policy and utility of any system of rate regulation; for no rate could be relied upon as stable, and neither carrier nor shipper could ever be certain of the basis upon which the business was being conducted.”)

While Qwest recognizes that its Access Service Catalog does not undergo the same level of scrutiny as a regulated tariff prior to becoming effective, there is no dispute here that the subject Catalog revisions were made in conformance with the appropriate legal standard for deregulated services. Nor is there any evidence that Qwest has failed to impose the charges according to the Catalog terms to all customers of the service. Considering that the other customers have paid those charges, Illuminet’s request for retroactive relief from valid Catalog charges is a request to be granted special treatment. Thus, if the Commission should determine that it somehow has ratemaking jurisdiction, it must consider the ramifications on other customers and on Title 62 services generally. Granting Illuminet a refund or credit would violate the principles of the filed rate doctrine and would constitute retroactive ratemaking in the context of Title 62 services.

**B. Qwest's SS7 Catalog Charges Do Not, as Complainants Allege<sup>16</sup>, Violate Tariff Provisions, Contractual Obligations or Policy and Precedent of the Idaho Public Utilities Commission.**

**1. Complainants Claim that Illuminet Is the "Agent" of its ILEC and CLEC Customers Fails to Reposition Complainants to Successfully Argue Qwest's Catalog is Unlawful.**

All of the arguments upon which Complainants rely for the claim that Qwest's Access Catalog provisions violate some existing policy, practice or arrangement— i.e. "bill and keep" agreements, interconnection agreements, meet-point billing arrangements—are predicated on a direct agreement between Qwest and the complaining ILEC or CLEC, and all of the arguments pertain to telecommunications traffic itself (the voice or data call), not to signaling and not to any agreement or arrangement with the third party provider. To get around the obvious problem that the third party providers of SS7 services are just that, i.e. third parties to all of the contracts and relationships they seek to rely on, the Complainants have developed the fiction that Illuminet<sup>17</sup> is the "agent" of the various ILECs and CLECs to which it provides SS7 services.

This fiction is used to support the notion that Illuminet, as a result of this alleged "agency", stands in the same relation to Qwest as those ILECs and CLECs with regard to the contractual obligations Qwest is alleged to owe those companies. As Illuminet's witness, Paul Florack, characterized the claim, Illuminet's rights are "derivative" of the rights of its carrier/customers. (Tr. 226). Qwest submits that this claim, and the argument it attempts to support, are fatally flawed on both factual and legal grounds.

**a. Qwest has no contracts with Illuminet's customers that pertain to the provision of SS7 services.**

The initial point on which Qwest takes issue with the agency argument is the premise that Qwest has contractual duties to Illuminet's customers that prohibit Qwest from charging for use

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<sup>16</sup> Complaint, p. 2.

<sup>17</sup> Presumably the Complainants would also argue that Syringa Networks LLC acts as the agent of the ILECs and CLECs to whom it provides SS7 services.

of Qwest's SS7 network. All of the arrangements to which Complainants refer, e.g. "bill and keep" arrangements, refer to the exchange of the underlying voice or data *traffic* itself and not to the *signaling* used to set up and tear down those calls.

To attempt to gloss over this critical distinction, Complainants repeatedly contend that "charges, terms and conditions for each type of traffic are determined pursuant to the rules applicable to that type of end user traffic". (Tr. 226). Not only does this confuse the concepts of "traffic" on the one hand and signaling on the other, but Complainants cite no statute, rule, order or contract provision that supports that claim. In other words, even though it is central to their case, Complainants offer no authority for the claim that "when and how SS7 signaling will be charged is determined by the type of voice or data traffic it is facilitating." This precept is simply Complainants' view of how the world should be; it is not supported by authority.

Furthermore, even if the Commission were inclined to agree with Illuminet's argument that charging for signaling follows the charges for voice traffic, the argument is largely moot. Nearly all<sup>18</sup> of the contracts and other arrangements to which Illuminet points in the attempt to show Qwest cannot charge for signaling associated with certain traffic -- bill and keep, EAS arrangements and interconnection agreements -- pertain to *local* traffic. Since Qwest has eliminated charges on local traffic, this issue as it relates to local traffic is now completely irrelevant.

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<sup>18</sup> The sole exception is the so-call "meet-point-billing" arrangements that occur when two LECs provide terminating access to an interexchange carrier. For the reasons stated in II.B.3. the argument pertaining to meet-point-billing fails for other reasons.

**b. Even if there were relevant contractual relationships with Illuminet's customers that pertained SS7, Illuminet cannot take advantage of those provisions.**

The second problem with regard to Illuminet's agency argument is that, as a factual matter, all of the evidence weighs against Illuminet's being its customers' agent for purposes of use of Qwest's SS7 network. To put the issue another way, Illuminet cannot be treated as an ILEC or a CLEC with regard to use of Qwest's SS7 network simply because it has customers who are ILECs and CLECs.

The Idaho Supreme Court has defined "agency" as "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. Bothof Dairies, Inc.*, 110 Idaho 971, 973, 719 P.2d 1231, 1233 (Idaho Ct. App. 1986) (quoting Restatement (Second) Agency § 1, at 7 (1958)); *see also Hilt*, 122 Idaho at 616, 836 P.2d at 562 ("Agency is a fiduciary relationship in which the principal confers authority upon the agent to act for the principal."). The burden of proving the existence or extent of an agency rests on the party alleging it. *Gissel v. State*, 111 Idaho 725, 729, 727 P.2d 1153, 1157 (1986). Applying these legal precepts, the question here is whether Illuminet has borne the burden of proving that it is acting in an agency capacity as it uses Qwest's network to provide SS7 services to its customers.

Illuminet's agency argument is predicated on the Letter of Agency (LOA) required by Qwest to prove Illuminet is authorized to use the "point codes" associated with the switches of its carrier customers. (Ex. 201). There is no dispute that Illuminet acts as an agent for its customers on this limited point.<sup>19</sup> However, this explicit grant of authority to "issue orders"

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<sup>19</sup> Nor is there dispute about whether Illuminet acted as the agent of its customers for purposes of negotiating other contract relationships with Qwest, because Illuminet admits that it did not negotiate any of the Qwest/ ILEC agreements it is relying upon. *See e.g.*, Tr., p. 128. (Illuminet did not negotiate the ELI interconnection agreement or meet-point-billing agreements upon which it attempts to rely.)

affecting the “point codes” of its customers does not support Illuminet in the argument that this “agency” extends to giving Illuminet rights in contracts its customers may have with Qwest. *See Hieb v. Minnesota Farmers Union*, 105 Idaho 694, 698, 672 P.2d 572, 576 (Idaho Ct. App. 1983) (“[A]n agent with actual authority for one purpose does not thereby become an apparent agent for all other types of transactions.”); *New York Life Ins. Co. v. Horton*, 9 F.2d 320, 323 (5th Cir. 1925) (“Where the power of an agent is special and limited, it must be strictly construed, with the result that neither the agent nor a third person dealing with him as such can claim that the agent had a power which they had not a right to understand was conferred by the language authorizing the agent to act.”).

Not only is Illuminet’s grant of agency limited in scope, when it comes to providing SS7 services to its customers, Illuminet is not acting as an agent at all. Instead, Illuminet is providing its own SS7 services to its customers *in direct competition* with Qwest. (Tr. 217). This is not a case, for example, where Illuminet is acting as its customers’ agent for purposes of obtaining SS7 services from Qwest. This became very clear in the hearing during the cross examination of Mr. Lafferty who was testifying on behalf of ELI. At that time he admitted that, although the interconnection agreement between Qwest and ELI permitted the latter to purchase SS7 services directly from Qwest as an unbundled network element, ELI did not choose that option. (Tr. 121). ELI had instead decided to purchase SS7 from Illuminet. (Tr. 125). Mr. Lafferty stated, “Illuminet is independent of all of its carrier customers or certainly the vast majority of them as an independent company that’s in business to sell SS7 services.” (Tr. 132). Hence, when Illuminet uses Qwest’s network in providing services to its customers, it is pursuing its own business interest of supplying a competitive service.

Because Illuminet is business independent of its customers and competitive with Qwest, there is no legal basis to conclude that Illuminet somehow accedes to the rights of its customers under separate contracts with Qwest.

**c. Illuminet's argument that it can enforce rights in contracts to which it is not a party is not supported in law by agency or any other theory.**

In the final analysis Illuminet is not really arguing that it is an "agent" of its customers, it is arguing that it has the same rights as its customers under their separate contracts with Qwest. As we have seen, Idaho law defines "agency" in terms of the authority granted by a principal to act on its behalf. However, the issue here is not how Illuminet is authorized to act, it is what Illuminet is entitled to receive in terms of benefits under agreements to which it is not a party. To establish rights in contracts to which it is not a party, Illuminet must go beyond agency and prove that it is either an assignee or a third party beneficiary to the Qwest/LEC contracts on which it hopes to rely.

In Idaho, "if a party can demonstrate that a contract was made expressly for his benefit, he may enforce that contract, at any time prior to rescission, as a third party beneficiary." *Baldwin v. Leach*, 115 Idaho 713, 715, 769 P.2d 590, 592 (Idaho Ct. App. 1989). The test for determining a party's status as a third party beneficiary is whether the transaction reflects an intent to benefit the party. *See id.*; *Stewart v. Arrington Construction Co.*, 92 Idaho 526, 532, 446 P.2d 895, 901 (1968). The third-party must show that the contract was made for his direct benefit and that he is not merely an incidental beneficiary. *Baldwin*, 115 Idaho at 715, 769 P.2d at 592; *Adkison Corp. v. American Bldg., Co.*, 107 Idaho 406, 409, 690 P.2d 341, 344 (1984). In this case the record is devoid of evidence that the Qwest meet-point-billing, bill and keep or other Qwest/LEC agreements affecting local and toll traffic were formed with an intent to benefit

Illuminet. Indeed, in the case of the interconnection agreements, provisions were included in the written contracts that specifically exclude the possibility of any third party beneficiary.<sup>20</sup>

Complainants may attempt to argue that regardless of Qwest's intent, it was Illuminet's customers' intent to assign their rights under these various agreements to Illuminet. If such an argument were advanced, however, it would fail because there is no evidence that Illuminet's customers intended to trade away their own contract rights. The Restatement (Second) of Contracts § 317 (1979) (cited with approval in *Lockhart Co. v. B.F.K., Ltd.*, 107 Idaho 633, 635, 691 P.2d 1248, 1250 (Idaho Ct. App. 1984) provides a legal definition of assignment:

(1) An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.

While the ILEC and CLEC Complainants in this case may have wished to *share* their contract rights with Illuminet, there is no evidence that they intended to forgo those rights for themselves and assign them to Illuminet. Obviously ELI does not intend to start paying Qwest for termination of its local traffic because it assigned its "bill and keep" agreement to Illuminet. Nor is it likely that Project Mutual expects to forgo receiving access revenue in the "meet-point-billing" context because it assigned those rights to Syringa. However, without the intent that the assignor's rights to performance is extinguished with the transfer, there can be no valid assignment under Idaho law.

**d. Conclusion regarding Complainant's agency argument.**

The agency argument is a key piece of the Complainants' advocacy. It is used in the attempt to mask a fatal flaw in the Complainants case, i.e. that despite their claim to the contrary

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<sup>20</sup> See e.g. Exhibit No. 501 Sec. (A) 3.23 "this Agreement does not provide and shall not be construed to provide third parties with any remedy, claim, liability, reimbursement, cause of action, or other privilege." (ELI interconnection agreement.)

there is no law, rule, Commission order, policy or contract obligation that prevents Qwest from billing third party SS7 providers like Illuminet per-message charges for the use of its SS7 network. Complainants have tried to deal with this flaw by attempting to ascribe the alleged rights of Illuminet's customers to Illuminet itself. However, as we have shown, for factual and legal reasons, Illuminet is not the agent of its customers, nor would such a relationship entitle Illuminet to accede to its customers' rights.

**2. Complainants are Governed by Their Choices.**

Complainant Illuminet seeks to rely on third-party providers to purchase SS7 services out of Qwest's Access Services Catalog and yet have the terms and conditions of its carrier customers' interconnection agreements, rather than the terms of the Catalog, govern that purchase. Complainant carriers admit they have not purchased SS7 services out of their interconnection agreements and have no desire to do so. (Tr. 121 and 125). Complainants are trying to mix apples and oranges.

Complainants have various options available for purchasing SS7 depending upon the classification of the purchaser. Qwest submits that Complainants must pick their option and be governed by the terms and conditions of that option.

**a. Complainants have choices regarding their purchase of SS7 services.**

The Complainants that are Idaho ILECs and CLECs protest that the imposition of charges on their third-party SS7 providers impacts them directly and, in some cases, violates longstanding arrangements between Qwest and these companies. This is a complete misimpression. *Whether ILECs or CLECs face the economic impact of signaling charges passed through from a third-party SS7 provider is entirely a matter of their choice.* As the record

demonstrates,<sup>21</sup> CLECs and wireless providers who choose to purchase SS7 as an unbundled network element from Qwest under the terms of their interconnection agreements may do so at the rates to which they have agreed and which have been approved by this Commission. (Tr. 400). CLECs and wireless providers may also purchase SS7 from Qwest as a finished service from Qwest's FCC tariff or the Idaho Access Services Catalog, or they may purchase SS7 from a third party provider. (*Id.*) As Mr. Lafferty made clear, ELI has chosen to purchase SS7 from Illuminet, rather than as an unbundled network element (UNE) out of its interconnection agreement from Qwest or the Idaho Access Services Catalog. (Tr. 121 and 125).

Similarly ILECs have the opportunity to enter interconnection agreements with Qwest to obtain UNEs or purchase SS7 services from the Idaho Access Services Catalog. (Tr. 401). Further, under the Telecommunications Act of 1996<sup>22</sup>, ILECs also have the unique opportunity to purchase SS7 services from Qwest under the infrastructure sharing agreements (ISAs) that enable them to avoid paying signaling charges altogether. (Tr. 433).

The Complainant ILECs and CLECs that here complain about the Catalog charges imposed on third party SS7 carriers have obviously made the choice that the economic and business advantages of purchasing from a company like Illuminet outweigh the Qwest-provided options that avoid the very problems they have brought before this Commission. As Mr. Lafferty testified, "Illuminet's carrier customers have already made arrangements for SS7 network services. Therefore, they have no use for Qwest's tariffed service (*sic*), UNE arrangements, or infrastructure sharing arrangements." (Tr. 91). Certainly the record reflects reasons why customers might wish to choose a company like Illuminet or Syringa. These range from the variety of other beneficial services offered by Illuminet (Tr. 203), to its ability to serve

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<sup>21</sup> See *e.g.*, Tr., p. 122.

<sup>22</sup> 47 U.S.C. § 259.

customers with broad geographic needs (Tr. 146), to allegations that Qwest may not provision or operate to the satisfaction of some customers. (Tr. 197). Nevertheless, in each case the original decision to go with Illuminet or another third-party provider was made before Qwest's unbundling of the SS7 and imposition of message charges on users of its network.

The fact is, rather than take advantage of opportunities to avoid the charges of which they complain, the Complainants in this case have made the economic and business decision that their needs are better served, not by buying these services from Qwest but buying them from third party providers under other undisclosed terms and then bringing this regulatory litigation to preserve their providers' ability to use Qwest's SS7 network without charge. They are essentially seeking to have the best of both choices by seizing the advantages of using a third party provider (or creating one of their own, in the case of Syringa) yet retaining (or improving) the pricing advantages they would have if they purchased SS7 services directly from Qwest. In doing so they distort the structure of the telecommunications market created by the federal Telecommunications Act of 1996 that provided different regulatory requirements on how ILECs, CLECs, and others would be permitted to use Qwest's facilities.<sup>23</sup>

**b. The 1996 Telecommunications Act specifically envisions that different SS7 options are available depending upon the classification of the purchaser.**

While the Complainants have implied that they are at a competitive disadvantage by the availability of SS7 options, the fact that different SS7 options are available to CLECs and wireless providers, ILECs, and third party providers is in complete accord with the Telecommunications Act of 1996 ("the Act"). In fact the Act specifically carves out exceptions for ILECs that are not available to CLECs, and exceptions that are available to telecommunications carriers that are not available to non-telecommunications carriers.

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<sup>23</sup> Compare e.g. 47 U.S.C. § 251 (c) with 47 U.S.C. § 259.

For example, Section 259 of the Act creates an exception for ILECs to share an incumbent local exchange carrier's infrastructure, such as Qwest's SS7 network.<sup>24</sup> An ILEC may qualify for an Infrastructure Sharing Agreement (ISA) if it is eligible to receive federal universal service support and lacks economies of scope and scale.<sup>25</sup> ISAs, however, are not available to all telecommunications carriers, specifically CLECs. The FCC stated in its *Report and Order* that Section 259 "limits the telecommunications carriers that may obtain access to an incumbent LEC's network . . . ." Promulgating rules for Section 259, the FCC stated, "In contrast to sections 251 and 252, which grant rights to requesting carriers irrespective of whether the requesting carrier intends to compete with the incumbent LEC, section 259 does not permit 'qualifying carriers' to use an incumbent LEC's public switched network infrastructure, technology, information, and telecommunications facilities and functions obtained pursuant to section 259 to offer services or access to the incumbent LEC's customers in competition<sup>26</sup> with the incumbent LEC."<sup>27</sup> Thus, the Act envisioned that an ISA option for SS7 services would apply to ILECs but not to CLECs. Clearly the Act, whose sole purpose was to promote and create competition within the telecommunications industry, contemplated that CLECs would have other options and that excluding such carriers from ISAs would not competitively disadvantage CLECs such as Complainant ELI.

Complainant Citizens qualifies for an ISA pursuant to Section 259 of the Act, as do the majority of Complainant ITA's members. Qwest has initially offered ISAs to all ILECs that are currently SS7 customers of Qwest. Citizens and the qualifying ITA members that are not current

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<sup>24</sup> 47 U.S.C. § 259(a). See also, 47 CFR § 59.1.

<sup>25</sup> 47 U.S.C. § 259(d). See also 47 CFR § 59.4.

<sup>26</sup> 47 U.S.C. § 259(B)(6) provides that an incumbent LEC is not required to enter into an ISA "for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area." See also, 47 CFR § 59.2(e).

<sup>27</sup> "Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996", 63 FR 9704 (March 4, 1997), Para. 1.

SS7 customers of Qwest may chose to pursue an ISA with Qwest, which would allow them to take advantage of Qwest's economies of scope and scale regarding its SS7 network by not imposing SS7 call set up message charges. Complainant ILECs, however, have chosen instead to purchase SS7 either from third party SS7 provider Illuminet (or Syringa in the case of the ITA members). (Tr. 91, 121, 125).

Pursuant to the Act, the last option that is available to some purchasers but not others is the purchase of SS7 services on an unbundled network element (UNE) basis. Section 251 of the Act obligates incumbent LECs to interconnect with any requesting telecommunications carrier and offer that requesting telecommunications carrier network elements on an unbundled basis.<sup>28</sup> The Act defines telecommunications carrier as "any provider of telecommunications services," except that such term does not include telephone operator services; telecommunications carrier is treated as a common carrier.<sup>29</sup> Telecommunications services is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."<sup>30</sup> Thus, the Act strictly limits this obligation to telecommunications carriers, which term would include CLECs, ILECs, and wireless providers. The obligations to interconnect and to offer UNEs, however, are not extended to non-telecommunications carriers such as third party SS7 providers. By Mr. Florack's own admission, Illuminet is not a telecommunications carrier or common carrier. (Tr. 258 and 259). Accordingly, Illuminet is not entitled to negotiate and enter into an interconnection agreement with Qwest nor may Illuminet purchase SS7 services as an UNE<sup>31</sup>. Further, since Illuminet is not an agent or entitled to the rights under the Complainant CLEC or

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<sup>28</sup> 47 U.S.C. § 251(c).

<sup>29</sup> 47 U.S.C. § 153(44).

<sup>30</sup> 47 U.S.C. § 153(46).

<sup>31</sup> 47 U.S.C. § 251.

ILEC carriers, Illuminet cannot purchase SS7 out of its carrier customers' interconnection agreements.<sup>32</sup>

Clearly, Complainants are not disadvantaged by the variety of options available for the purchase of SS7 services. All entities regardless of their classification may purchase SS7 from Qwest's Access Services Catalog. Further, as the Act specifically allows some entities to purchase SS7 out of an ISA and/or as an UNE out of an interconnection agreement.

**c. Complainants' SS7 purchases are governed by the terms and conditions of Qwest's Access Services Catalog.**

Qwest is not aware of any authority from the FCC interpreting the Act that allows a party to combine the terms and conditions of a Catalog with those of an interconnection agreement. Nor is Qwest aware of any precedent of the Idaho Commission that would allow a party to pick and choose provisions of a deregulated Catalog on the one hand, and an interconnection agreement on the other, to tailor its own unique product offering. Yet, merely because Complainants do not like certain terms and conditions contained in either the Catalog or their interconnection agreements, they attempt to do just that.

Generally, when a party purchases a tariff or Catalog product, the terms and conditions of that tariff control the total relationship.<sup>33</sup> The FCC has held that interconnection agreements may not implicate any fundamental aspect of the tariff's interpretation.<sup>34</sup> In *Global NAPs I*, Global NAPs filed a tariff that referenced its customers' interconnection agreements. The FCC found that a tariff must be complete in and of itself and that it was improper for the terms and

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<sup>32</sup> See Section II.B.1. above.

<sup>33</sup> See generally, *First Report and Order*, "In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers," CC Docket No. 96-98; CC Docket No. 95-185, 11 FCC Rcd 15499 (Rel. Aug. 8, 1996).

<sup>34</sup> In the Matter of Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc., 15 FCC Rcd 5997 (2000).

provisions of the interconnection agreements of Global NAPs' customers to control the interpretation of the tariff. The FCC stated,

[I]f we are to reconcile the Tariff language with Global NAPs' statements about deferring to the state negotiation/arbitration processes, then to determine whether Global NAPs' Tariff applies, Bell Atlantic must consult the terms of its interconnection agreement to ascertain whether compensation for the delivery of ISP-bound traffic is required. Consequently, the Tariff's cross-reference to the interconnection agreement constitutes far more than a technical defect; it constitutes a fundamental flaw in the Tariff clarity.

Accordingly, even assuming, *arguendo*, that a tariff's reference to an exogenous document is improper only if the exogenous document contains information necessary to understand the tariff, the tariff's bare cross-reference to an "interconnection agreement" violates section 61.74(a) of our rules and renders the tariff unlawful.<sup>35</sup>

While this Commission does not have a rule similar to FCC rule 61.74(a)<sup>36</sup> that forbids cross-reference to extraneous documents and requires that the tariff be complete in and of itself, the practice does exist in Idaho that tariffs (and Catalogs) must be self-contained and not reference extraneous documents.

Even though Qwest's Access Service Catalog does not reference any other extraneous document or instrument, the FCC rule and Idaho's similar practice is relevant because Complainants seek to impose an impermissible cross-reference between Qwest's Access Services Catalog and their interconnection agreements. Complainants would have this Commission find that even though Illuminet has purchased SS7 services out of the Access Services Catalog, the terms and conditions of its customers' interconnection agreements – rather than the terms and conditions of the Catalog – govern the SS7 purchase.<sup>37</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> FCC rule 61.74(a) states, "Except as otherwise provided in this and other sections of this part, no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument."

<sup>37</sup> Qwest further notes that Complainants seek to stretch the impermissible cross reference between the Catalog and interconnection agreements even further than that in *Global NAPs I*. In *Global NAPs I*, Global NAPs

The Ninth Circuit Court of Appeals also addressed this issue in *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (9<sup>th</sup> Cir 2002). In *Brown*, the plaintiff alleged that MCI violated its tariff by seeking to enforce extraneous agreements. The court found that the filed rate doctrine forbids both the carrier and the customer from deviating from the tariff<sup>38</sup>. The court stated:

In addition to barring suits challenging filed rates and suits seeking to enforce rates that differ from the filed rates, the filed rate doctrine also bars suits, challenging services, billing, or *other practices when such challenges, if successful, would have the effect of changing the filed tariff.*<sup>39</sup>

The *Brown* court further found that the filed rate doctrine prevents suits seeking to enforce agreements outside the tariff<sup>40</sup>. The Ninth Circuit noted in its opinion that the Supreme Court addressed this issue in *AT&T Corp. v. Central Office Tel, Inc.*, 524 U.S. 214, 141 L. Ed.2d 222, 118 S.Ct. 1956 (1998). In *Central Office*, the plaintiff alleged that the filed doctrine did not apply because it was not challenging the rates but rather sought to enforce contracts for services and billing. The Supreme Court held that “rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as claim for inadequate services and vice versa” and that “all pertain to subjects that are specifically addressed by the filed tariff.”<sup>41</sup>

Here, Complainant ILEC and CLEC carriers seek to enforce interconnection agreement outside Qwest’s Catalog, which was properly filed with the Commission. While Complainants

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was attempting to cross reference the interconnection agreements of its Catalog customers. Here, Complainants seek to have the purchase of Complainant Illuminet out of the Catalog cross reference interconnection agreements of its Complainant customers, of which it is not even a party or a third-party beneficiary. Complainants seek to accomplish this impermissible cross reference through a flawed allegation of agency. See Section II.B.1 above, wherein Qwest shows the fallacies of Complainants alleged agency argument.

<sup>38</sup> *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1170 (9<sup>th</sup> Cir 2002) (quoting from *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9<sup>th</sup> Cir 2000) “a carrier is forbidden from changing rates other than as set out in its filed tariff, [and] customers are also charged with notice of the terms and rates set out in that filed tariff.”)

<sup>39</sup> *Id.* (emphasis added).

<sup>40</sup> *Id.* at 1171.

<sup>41</sup> *Id.* (quoting *AT&T Corp. v Central Office Tel, Inc.*, 524 U.S. 214, 223-225 (1998)).

claim they are challenging the application of the Catalog rather than the rates, such claim is in reality a claim regarding the SS7 message rate to certain types of call set up messages, as well as a claim that certain call set up messages that Illuminet sends Qwest are exempt from Catalog rates because of their interconnection agreements. Such claims violate the Ninth Circuit's holding in *Brown*.

Thus, Complainant Illuminet's purchase of SS7 services out of Qwest's Access Service Catalog is governed by the terms and conditions of the Catalog, not the terms and conditions of its carrier customers' interconnection agreements. Since *Global NAPs I* and the rule and practice referencing extraneous documents definitively provide that the Qwest's Catalog may not reference outside documents, such as Illuminet's carrier customers' interconnection agreements, it follows that the SS7 services offered in Qwest's Catalog are only governed by the terms and conditions of the Catalog. Further, the Ninth Circuit decision in *Brown* is clear that the Complainant's claims are merely cloaked allegations attacking the Catalog rates through impermissible references to interconnection agreements, and that the filed rate doctrine precludes suits that seek to enforce agreements outside the Catalog.<sup>42</sup>

With the development of competition in the local and switched access markets, it was necessary for SS7 billing to evolve and more closely reflect the actual costs of the SS7 network. (Tr. 394-395). Prior to meaningful signaling competition in the access services market, the majority of out-of-band network signaling was generated by interexchange carriers (IXCs). The costs of SS7 were recovered in the switched access rate. As competition increased, however, more signaling costs were generated by CLECs, wireless providers, and third party SS7

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Qwest would also like to bring to the Commission's attention that in other proceedings before the FCC, the FCC has held that interconnection agreement provisions (specifically unbundled network elements) may not be commingled or combined with tariffed access services. See generally, *Memorandum Opinion and Order*, "In the Matter of Net2000 Communications, Inc. v. Verizon", 17 FCC Rcd 1150 (Rel. Jan. 9, 2002).

providers whose traffic was entering Qwest's network. There was no existing mechanism to bill the corresponding increases in SS7 call set message costs to the CLECs, wireless providers, or third party providers. Qwest was unable to recover the costs associated with those call set up messages because the CLECs, wireless providers, and third party SS7 providers were generally not paying switched access rates. As a result, those carriers paying the access charges (i.e., IXCs) bore a disproportionate and arguable unfair amount of the signaling costs. Accordingly, Qwest made a substantial investment to restructure SS7 rates so that the signaling cost to a Qwest customer was based on the actual usage of the SS7 network, which included both flat-rate and message usage sensitive rate components. (*Id.*)

Qwest first established these message sensitive rates for SS7 in the access rate tariff at the federal level for interstate traffic. In order to do this, Qwest developed message usage rate elements that captured the costs for the actual SS7 messages and petitioned the FCC for permission to restructure its federal Access Tariff.<sup>43</sup> The FCC approved the usage sensitive message rate and specifically found it was in the public interest to assign costs to the providers that use the separate signaling network.<sup>44</sup> Qwest subsequently implemented this same revised SS7 rate structure at the state level, including Idaho. (Tr. 393-395).

While the net result is that entities like Illuminet pay more under the revised rate structure because such entities never before paid for usage of the SS7 network and IXCs now pay less, each user of the SS7 network pays equally. In granting the petition filed by U S WEST (Qwest's

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<sup>43</sup> *In re U S WEST Petition to Establish Part 69 Rate Elements for SS7 Signaling*, Order, DA 99-1474 (Rel. Dec. 23, 1999).

<sup>44</sup> *Id.* at Para. 7 (We also find that the U S WEST proposed restructure is in the public interest because it will permit U S WEST to recover its SS7 costs in a way that reflects more accurately the manner in which those costs are incurred.)

predecessor), the FCC approved this shift of costs.<sup>45</sup> It should be noted, however, that shifting the SS7 call set up costs from the IXCs does not disproportionately burden ILECs. Further, on any given toll call, the cost of the associated call set up message changes assessed to the ILEC (or CLEC, wireless provider, or third party provider) is significantly smaller than the access charges that Qwest must pay the Idaho ILECs for terminating access. Qwest pays the ILEC terminating access on a per minute basis whereas the ILEC only pays SS7 on a per call set up basis.

**3. Qwest's Assessment of SS7 Charges Under the Terms and Conditions Offered by Qwest in its Catalog is Appropriate.**

Despite the fact that the revised SS7 rate structure more accurately reflects how SS7 costs are incurred, Complainants are asking the Commission to find that a portion of the SS7 services should be provided to it for free. For example, Complainants allege that "Qwest has effectively assessed SS7 message charges on incumbent local exchange carriers ('ILECs') and competitive local exchange carriers ('CLECs') for the origination and termination of non-toll telecommunications traffic."<sup>46</sup> This statement is inaccurate and misleading in a number of respects. First, Qwest has not assessed SS7 charges directly against any ILEC or CLEC. (Tr. 430). The only Complainant against whom charges have been levied is Illuminet, a third party non-common carrier provider of SS7 services<sup>47</sup> who apparently provides SS7 services to three (3) Idaho ILECs, Citizens Telecommunications Company of Idaho (Citizens), Fremont Telcom, and Farmers Mutual and one Idaho CLEC, Electric Lightwave, Inc. (ELI). (Tr. 423). Neither the remaining Idaho ILECs nor their SS7 provider, Syringa Networks, LLC., have been charged for SS7 call set up services. Furthermore, while it is true that Illuminet has been charged SS7

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<sup>45</sup> *Id. See also FCC Access Reform Order*, Paras. 252-255 (wherein the FCC encourages incumbent LECs to unbundled SS7).

<sup>46</sup> Complaint, May 20, 2002, p.2.

<sup>47</sup> Complaint, p. 6.

signaling charges for local messages, in the prefiled supplemental testimony of Scott A. McIntyre, filed December 6, 2002, Qwest offered to modify the current SS7 Catalog to eliminate charges for messages associated with local traffic. (Tr. 460). That change to the Catalog is now being implemented. Hence the issue of charging for signaling pertaining to “non-toll telecommunications traffic” is limited to the issue of collecting the lawful Catalog rate for such signaling levied prior to the change. Again this issue does not impact the ILECs represented by the Idaho Telephone Association or CLECs other than the indirect impact on ELI as a customer of Illuminet.

With Qwest’s offer not to assess SS7 charges on messages associated with local, EAS, and intra-MTA traffic, the revised SS7 offering would only assess SS7 charges to messages associated with toll traffic, i.e., Qwest originated toll traffic, ILEC/CLEC/wireless provider originated toll traffic, and meet-point-billing. It should be noted that “Complainants do not take issue with Qwest’s decision to recover its set up costs for the termination of intrastate toll calls through separate access charge rate elements. Nor do Complainants challenge the Access Catalog price for these elements or the decision to structure them as a per-call charge”.<sup>48</sup> In other words, the Complainants do not dispute the assessment on messages associated with toll traffic initiated by their end user customers. (Tr. 225).

Accordingly, the question before the Commission is how Qwest charges for the use of Qwest’s own SS7 network in connection with toll traffic. Call set up charges are imposed only when a signal passes over a Qwest facility, i.e., a Common Channel Signaling (CCS) link, purchased out of the Idaho Access Service Catalog.<sup>49</sup> Messages pass over the third party providers’ CCS link into Qwest’s SS7 network when traffic passes between Qwest and the ILEC

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<sup>48</sup> Complaint, p. 8.

<sup>49</sup> Idaho Access Service Catalog, §§ 15.2.1.A, “CCS Link”; 15.7.1, “Call Set-Up;” and 15.8.B, “Message Charge.”

or CLEC customer of the third party SS7 provider. Further, because of the structure of the public switched telephone network (PSTN), signals also pass over the third party provider's CCS link when traffic originates outside both the Qwest and ILEC or CLEC network but transgresses Qwest's network to terminate at the called number.

The Idaho Access Services Catalog clearly states that the CCS link purchased to access Qwest's SS7 network is bi-directional link.<sup>50</sup> As a bi-directional link, the CCS link provides service for SS7 messages associated with originating and terminating toll traffic. Thus, because the CCS link is bi-directional, messages associated with toll traffic – whether originating or terminating – travel along the SS7 link and port. Qwest notes that, the bi-directional link service offered in Qwest Idaho Catalog mirrors the link service offered in Qwest's FCC Access Tariff. At hearing Complainant Illuminet stated that it did not dispute the fact that it purchased link and port SS7 services from Qwest. (Tr. 262). Nor does Illuminet dispute the fact that SS7 messages travel along the link and port and access Qwest's SS7 network. (Tr. 255 and 260). Illuminet wants to be able to *access* Qwest's SS7 network via the link and port but not pay for its *use* of Qwest's network. In granting Qwest's restructure application, the FCC specifically found that entities that use the SS7 network should pay for that use.<sup>51</sup>

As with SS7 messages associated with originating and terminating toll traffic, Qwest charges Complainant Illuminet for SS7 messages associated with meet-point-billing traffic. Complainants contend that they should not be assessed SS7 messages for meet-point-billing traffic because under their interconnection agreements the parties do not charge one another for such traffic. (Tr. 139-140). However, the meet-point-billing provisions in the interconnection agreements have nothing to do with signaling; such agreements contain provisions addressing

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<sup>50</sup> Idaho Access Service Catalog § 15.2.1.A, "CCS Link."

<sup>51</sup> FCC SS7 Order, Paras. 6-9.

how the parties will handle traffic but do not discuss SS7 messages associated with meet-point-billing traffic. (Tr. 504-505). Further, not only does the meet-point-billing agreement between Qwest and Citizens not provide for the purchase of SS7 services, but it does not even discuss SS7 services, and would not govern SS7 relationship between Qwest and Citizens.<sup>52</sup> (Tr. 534-535). Complainants have failed to cite one reference in the interconnection agreements, to any meet-point-billing arrangement or to any term or condition in the Catalog that states that SS7 call set up charges will not be assessed on messages associated with meet-point-billing traffic.

The fact is that meet-point-billing arrangements are nothing more than agreements about how to share the access revenues received from an IXC.<sup>53</sup> The "Meet Point" is a point of interconnection between two networks, designated by the network owners at which one Carrier's responsibility for traffic begins and the other Carrier's responsibility ends. The SS7 charge assessed under the Catalog does not affect arrangement pertaining to sharing access revenues. Rather the use of Qwest's SS7 network by the third-party SS7 provider enables the ILEC or CLEC to receive the access revenue, in that, as all parties agree, today's network would not function without SS7 signaling.

Accordingly, it is proper for Qwest to assess SS7 message charges associated with meet-point-billing traffic for Complainant Illuminet's use of the SS7 network. Mr. Florack admitted that SS7 messages associated with meet-point-billing pass through the SS7 link that Illuminet purchased from Qwest. (Tr. 269) Despite admitting Qwest's SS7 network is utilized and, thus, incurs cost associated with meet-point-billed traffic, Complainant Illuminet seeks to avoid

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<sup>52</sup> See also Exhibit 203.

<sup>53</sup> See Qwest's Idaho approved Statement of Generally Available Terms, Section 4.0 Definitions: "Meet-Point Billing" or "MPB" or "Jointly Provided Switched Access" refers to an arrangement whereby two LECs (including a LEC and CLEC) jointly provide Switched Access Service to an Interexchange Carrier, with each LEC (or CLEC) receiving an appropriate share of the revenues from the IXC as defined by their effective access Tariffs.

payment of such costs. Illuminet should be required to pay for that use.<sup>54</sup> Qwest does not recover its costs associated with meet-point-billing messages from the interconnection agreements and the meet-point-billing agreement. The terms of the Catalog, however, explicitly provide for the recovery of such costs. Illuminet is bound by the terms and conditions of the Catalog, not the interconnection agreements or the meet-point-billing agreement, because it purchased SS7 services out of the Catalog.<sup>55</sup>

Finally, Qwest submits that the mechanism it proposes to implement to identify messages associated with toll traffic is in complete compliance with the FCC's Access Reform Order.<sup>56</sup> The FCC does not require that Qwest institute specific metering equipment that identifies the jurisdiction of each and every SS7 message.<sup>57</sup> Rather, the FCC decided to "permit incumbent LECs to adopt unbundled signaling rate structures at their discretion and acquire the appropriate measure equipment as needed to implement such a plan."<sup>58</sup> The FCC stated that an incumbent LEC may choose to implement an unbundled signaling rate structure and not install metering equipment by "filing a petition demonstrating that the establishment of new rate elements implementing such a service is consistent with the public interest."<sup>59</sup> In accordance with the FCC's Order, Qwest decided to unbundle SS7 services but chose percentage methodology rather than install specific metering equipment. The FCC found that Qwest's petition was in the public interest.<sup>60</sup> This is the same methodology Qwest implemented in Idaho.

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<sup>54</sup> FCC SS7 Order, Para. 7. *See generally*, *FCC Access Reform Order*, Paras. 247-252.

<sup>55</sup> See Section II.B.2.c.

<sup>56</sup> *FCC Access Reform Order*, Paras. 244-255.

<sup>57</sup> *Id.* at Para. 252 ("We will not require incumbent LECs to implement such an approach and incur the associated equipment costs of doing so. The record indicates that, as a general matter, the costs of mandating the installation of metering equipment may well exceed the benefits of doing so.")

<sup>58</sup> *Id.* at Para. 253.

<sup>59</sup> *Id.*

<sup>60</sup> *See* FCC SS7 Order, Paras. 7 and 9.

### III. CONCLUSION.

The Complainants' case hinges on their ability to demonstrate that Qwest has violated some applicable legal standard by unbundling SS7 signaling services and imposing charges for messages that traverse Qwest's SS7 network. The record demonstrates their complete failure to surmount this hurdle. In fact, all that Complainants have succeeded in showing is that purchasers of SS7 services from Qwest's Catalog, are being billed for use of Qwest's SS7 network and that they pass those charges along to their customers. There is no showing that Qwest's Catalog violates any statute, rule order, contract or precedent. Without such a showing, it is difficult to understand how Complainants' could expect to receive any relief from this Commission. The Complainants' problem is compounded by the fact that SS7 services are offered under Title 62 and are not subject to Commission regulation. All attempts by the Complainants to try to establish Commission jurisdiction over this cause fail as a matter of law<sup>61</sup>.

Initially it may appear to be harsh that Complainants do not have remedy in this Commission. On closer analysis, however, it is apparent that this a reasonable result in the modern competitive market in which all of these companies operate. Illuminet is a self-proclaimed competitor of Qwest who sells SS7 services, among other services, to its customers. Until the service was unbundled, Illuminet did not pay for use of Qwest's SS7 network although Illuminet used it to provide SS7. At the same time, CLECs who purchased SS7 under their interconnection agreements did pay for such use. Now Illuminet's price structure is changing but it admits -- indeed proclaims -- that it will pass increased costs along to its customers. Meanwhile, Illuminet's customers have choices. 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 ILECs who qualify, can enter into infrastructure sharing agreements directly with Qwest.

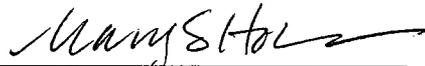
Finally it should be noted that Qwest has not been unresponsive to Complainants' concerns. Even a cursory review of the Complaint and the Complainants' prefiled testimony

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<sup>61</sup> See, Section II.A. above.

reveals that their primary concern was with the application of SS7 message charges to signals associated with local traffic, including intraMTA and EAS traffic. Qwest has agreed to eliminate those charges in an effort to respond to these concerns. While it may be true that Qwest has not offered perfect solutions to every customer, it has offered the end users choices and the third-party providers a major concession. Nonetheless, Complainants would have the Commission direct Qwest to rewrite its Title 62 Catalog to precisely match their view of how Qwest should offer a deregulated service. Given that the Commission lacks jurisdiction to regulate in this area and given that Qwest has offered commercially reasonable terms to all Complainants, granting the relief requested is neither appropriate nor necessary.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of January, 2003.



Mary S. Hobson  
Stephanie Boyett-Colgan

Attorneys for Qwest Corporation

## CERTIFICATE OF SERVICE

I hereby certify that on this 31<sup>st</sup> day of January, 2003, I served **QWEST CORPORATION'S POST HEARING MEMORANDUM** as follows:

Ms. Jean Jewell, Secretary	<input checked="" type="checkbox"/>	Hand Delivery
Idaho Public Utilities Commission	<input type="checkbox"/>	U. S. Mail
472 West Washington Street	<input type="checkbox"/>	Overnight Delivery
Boise, Idaho 83720-0074	<input type="checkbox"/>	Facsimile

Conley Ward	<input checked="" type="checkbox"/>	Hand Delivery
Givens Pursley	<input type="checkbox"/>	U. S. Mail
277 North 6 <sup>th</sup> Street – Suite 200	<input type="checkbox"/>	Overnight Delivery
P.O. Box 2720	<input type="checkbox"/>	Facsimile
Boise, ID 83701		

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Moffatt Thomas	<input type="checkbox"/>	U. S. Mail
101 South Capitol Boulevard – 10 <sup>th</sup> Floor	<input type="checkbox"/>	Overnight Delivery
Boise, ID 83701	<input type="checkbox"/>	Facsimile

Thomas J. Moorman	<input type="checkbox"/>	Hand Delivery
Kraskin, Lesse & Cosson LLP	<input checked="" type="checkbox"/>	U. S. Mail
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Moss Adams LLP	<input checked="" type="checkbox"/>	U. S. Mail
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Spokane, WA 99201-0663	<input type="checkbox"/>	Facsimile

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State Government Relations	<input checked="" type="checkbox"/>	U. S. Mail
P.O. Box 4065	<input type="checkbox"/>	Overnight Delivery
Monroe, LA 71211-4065	<input type="checkbox"/>	Facsimile

Gail Long, Manager	<input type="checkbox"/>	Hand Delivery
External Relations	<input checked="" type="checkbox"/>	U. S. Mail
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