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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. Complainants QWEST CORPORATION[1], Respondent.	CASE No.QWE-T-02-11

QWEST CORPORATION'S REPLY BRIEF

INTRODUCTION

Throughout its Post Hearing Memorandum Qwest noted that the Complainants had failed to offer any authority for the various legal theories under which they hope to recover the extraordinary relief[2] they are requesting in this proceeding. Complainants' Post Hearing Brief ("Complainants' Brief") only serves to underscore this observation.

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[1] The Complaint names Qwest Communications, Inc. as the Respondent, but the proper party is Qwest Corporation.

[2] See section VI of this brief for a discussion of the impact of Complainants' requested relief.

Complainants' contend that Qwest's SS7 charges, "cannot be reconciled with applicable law, rational public policy and common sense," yet they fail to cite any laws that have been violated or offer any proof that the policies of the Federal Communications Commission (FCC) or of this Commission have been ignored. Nor do they offer proof that their version of "common sense" is superior to the FCC's explicit approval of the same rate structure in its tariff. Indeed, the only "authority" to which Complainants appeal is four "rules" of their own making, which, as Qwest demonstrates below, are either simply wrong or inapplicable.

Generally, the burden of proof is on the party asserting the affirmative issue in an adjudicatory administrative proceeding.[3] Here Complainants seek to have the Commission order Qwest to withdraw a Title 62 Catalog provision and eliminate charges for the Complainants' use of Qwest's SS7 network, as well as refund/credit all charges rendered to Illuminet under the Catalog since it was enacted. To grant this relief the Commission must (at a minimum) conclude that it has the authority[4] to regulate SS7 services under Title 61, and that the evidence presented here justifies these extreme measures. Qwest submits that the Complainants have totally failed to meet their burden of providing evidence that justifies such a result and that the law does not authorize the Commission to grant the relief requested.

Qwest recognizes that the subject matter of this proceeding is difficult and that it is sometimes not obvious how the parties' respective discussions of the issues relate to each other. In an effort to facilitate a clearer understanding, in this Reply Brief, Qwest

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[3] Reed v. Mountain States Tel. & T. Co. 5 P.U.C.1. 105, P.U.R. 1918D; *see also,* 2 Am. Jur. 2d § 360; *English v .Village of Northfield*, 172 Ill. App. 3d 344, 526 N. E. 2d 588, 590 (1988); *Norland v. Iowa Department of Job Service*, 412 N.W. 2d 904, 909 (1987).

[4] Discussion of the scope of the Commission's jurisdiction is found in Qwest's Post Hearing Memorandum in Section II A, pp. 4-12 and in this brief, immediately below.

will address the topics in the order they were presented in Complainants' Brief and discuss each argument as Complainants raised it. In going through this process Qwest is convinced the Commission will conclude that the record presented here and the legal authorities do not support Complainants' complaint.

COMMISSION JURISDICTION

Complainants' characterization of the Commission's jurisdiction offered in their Brief is typical of the kind of overstatement and mischaracterization that permeate their entire case. For example, at page five of their Brief, Complainants state that the legislature granted the Commission authority to "resolve industry disputes and determine the terms and conditions of traffic exchanged between companies", citing Idaho § 62-614. In fact section 62-614 is, by its terms limited to disputes between very specific complainants. That statute provides:

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

While Qwest would qualify under the first phrase of this statutory language, only certain of the Complainants, namely Idaho incumbent local exchange carriers (ILECs), would qualify as the other disputants under this language. Section 62-614 would not apply to most "industry disputes" including those between any ILEC and a CLEC and those between an ILEC and an interexchange carrier. This statute clearly does *not* apply to a dispute between Qwest and a non-telecommunications corporation, such as Illuminet.

Furthermore, the statute says nothing whatever about determining "the terms and conditions of traffic exchanged between the companies." Instead, the statute grants authority to the Commission to conduct investigations and hearings, to issue findings, and to issue orders determining the disputes *in accordance with applicable provisions of law*. Where, as here, the "terms and conditions" of the exchange of SS7 messages is a matter that has been deregulated under Idaho law, section 62-614 plainly does not confer jurisdiction on the Commission to reverse the de-regulated status of Title 62 services and bring their terms and conditions under the Commission's control.

The Commission has no authority other than that given to it by the legislature.[5] That jurisdiction is limited and nothing is presumed in favor of its jurisdiction.[6] As the Idaho Supreme Court has stated:

> As a general rule, administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves, although they may determine whether they have it. *If the provisions of the statutes are not met and compliance is not had with the statutes, no jurisdiction exists.* [7]

Hence, because the provisions of Idaho Code § 62-614 are not met, that statute does not confer jurisdiction on the Commission.

Similarly, the provisions of Idaho Code § 62-605(5), the other statute upon which Complainants rely, are not met here. That section allows the Commission, under the very limited circumstances spelled out there, to require that certain deregulated services be

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[5] *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P2d 122 (1979)

[6] Id.

[7] Id. (emphasis added)

subject to the requirements of Title 61, i.e. to come under the Commission's full regulatory control for such matters as terms and conditions of offering, including price. However, as Qwest pointed out in its Post-Hearing Memorandum,[8] this dispute fails to meet the provisions of that statute for a variety of reasons. To remind the Commission of only one critical provision that is not met here, section 62-605(5) is limited to "telecommunications services" which are defined in Idaho Code §62-603(13) as services offered to or for the public. By no stretch of the imagination can the SS7 signaling services offered by Qwest in its Catalog to interexchange carriers and third party SS7 providers like Illuminet be construed as services offered to "the public."

In determining the scope of its jurisdiction over Title 62 offerings, the Commission should carefully consider the language of the statutes and follow the guidance offered by the Idaho Supreme Court. Such analysis can yield but one result: this Commission lacks jurisdiction to grant the relief requested in by Complainants in this case.

ARGUMENT

I. Complainants' "Rules" do not prove Qwest's Catalog Changes are unlawful or contrary to policy

Complainants' so-called "rules" for "intercarrier compensation" do not support the contention that Qwest's charges for use of its SS7 network are unlawful.

Complainants contend that the "fundamental defect" in Qwest's position is that it is allowed to charge for the use of its SS7 network is that it "attempts to separate the inseparable."[9] By this Complainants mean that SS7 message charges must be part and parcel of the charges for the underlying traffic that the messages facilitate and cannot

[8] See, Qwest's Post Hearing Memorandum, pp. 8-10.
[9] Complainants' Brief, p. 7.

stand alone. This claim, though fundamental to Complainants' position, is not supported by any authority but is rather contradicted by the orders of the FCC, including the *Access Charge Reform Order*,[10] which permitted the unbundling of SS7 message charges. In that order the FCC noted that:

> SS7 networks are *separate from*, but interconnected with, the telecommunications networks used to carry voice and data communications between end users.[11]

Complainants' claim is also contradicted by the FCC's order on a U S WEST petition, which specifically authorized the same unbundled SS7 charges that are at issue here in the interstate jurisdiction.[12] In that order the FCC stated:

> 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. [13]

Complainants' reliance on the *Elkhart* case[14] for contrary authority is, at best, curious. Being decided in 1995, *Elkhart* predates both the Telecommunications Act of 1996 and the *Access Charge Reform Order*. Obviously, to the extent that it provides any authority contrary to that provided by Congress in the 1996 Act or given by the FCC in implementing the 1996 Act, it has been overruled.

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[10] *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*, First Report and Order, CC Docket No. 96-262; CC Docket No. 94-1; CC Docket No. 91-213; CC Docket No. 95-72, 11 FCC Rcd. 3839, May 16, 1997 ("*Access Charge Reform Order*")

[11] Id. para. 2. (emphasis added)

[12] *In the Matter of U S WEST Petition to Establish Part 69 Rate Elements for SS7 Signaling*, Order, DA 99-1474 (December 23, 1999) ("USWEST Order").

[13] Id. para. 7.

[14] *Elkhart Telephone Co. v. Southwestern Bell Co.,* 11 FCCRed 1051, DA 95-2342 (Rel. Nov. 13, 1995).

Read in context, however, *Elkhart* does not provide support for Complainants' position. Although the FCC did note that "telephone calls handled by Elkhart and SWB, and passed to IXCs, consist of two components"[15] (signaling and the actual communication), this comment merely provides background for the unique controversy between Elkhart Telephone Company and Southwestern Bell (SWB). That controversy was over how the actual physical "A-links" between Elkhart's lone switch and SWB's signaling network were to be paid for.[16] Contrary to the impression created by Complainants' the FCC does not suggest that the communications network and the signaling network are "inseparable," nor does the FCC analyze the issue of charges for the signaling network being congruent with the underlying "end user" traffic. Indeed, the FCC specifically recognizes that with SS7 the actual communications and the signaling that facilitates them, are separate:

> Until recent technological advances, most signalling was "in-band," meaning that the actual communication and its associated network control signals were transmitted over the same circuit and, therefore, delivered to the IXC at the carrier's point of presence ("POP"). An alternative signalling technology, "out of band" or common channel signalling, allows signalling to be transmitted over an additional system of switches and circuits.[17]

Thus even in *Elkhart*, the FCC recognized that the signaling network ("an additional system of switches and circuits") and the communications network are separate. Finally, the FCC limited any precedential value of *Elkhart* by stating that "our conclusion is limited to the specific facts before us."[18] The *Elkhart* case, is therefore, inapplicable to the current controversy.

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[15] Id. at 1051
[16] Id.
[17] Id.
[18] Id. at 1055.

A. Complainants' "Rule 1" is not a rule at all.

Qwest stated in its Post Hearing Memorandum that Complainants' position is unsupported by any legal authority. In obvious anticipation of this defect in their case, Complainants have manufactured four so-called "rules," based on nothing more than their own witnesses' conclusory testimony in the apparent hope that these propositions will be viewed as authority if labeled "rules." The first of these appears on page eight of Complainants Brief and states: "A telecommunications carrier is never allowed to charge other companies for the costs associated with the origination or termination of that carrier's own intrastate end user traffic."

Attempting to apply this "rule" to ordinary intrastate telecommunications traffic quickly reveals that this proposition is *not* the rule. For example, if Qwest is the "telecommunications carrier" in the scenario covered by the so-called rule, and its end user dials an intraLATA toll call that terminates to another Qwest customer, which call is carried by an interexchange carrier (IXC), Qwest may charge another company, namely the IXC, for the costs of *originating and terminating* that traffic.[19] This is permitted, of course, because the IXC uses Qwest's network in order to gain access to the end user customer who places the call and access to the network a second time to terminate the call.

Indeed, this common type of call—an intraLATA toll call carried by an IXC—presents a good analogy to the billing of SS7 messages that pass over Qwest's SS7 network. Illuminet uses Qwest's SS7 network to provide SS7 connectivity to its carrier customers just as an IXC uses the local networks of the LECs for its toll traffic. If

[19] Qwest asks that the Commission take administrative notice of its Access Service Catalog, Section 6 Switched Access Service

Illuminet did not have access to Qwest's signaling network, its customers' signaling messages would not go through. Just as the IXC obtains toll revenue from toll customers, Illuminet obtains revenue from its SS7 customers based on the premise it will provide connectivity. For Illuminet to claim that it is being charged under the Catalog for Qwest's SS7 costs[20] is just as off base as it would be for an IXC to claim that when a Qwest end user places a toll call, it is Qwest's access costs and not its own that are being paid by the IXC.

Complainants inaccurately characterize the application of SS7 message charges to all access traffic as a "perverse disregard of 'cost causation' principles."[21] Indeed it is interesting that Complainants' only source of authority for what it characterizes as a "rule in Idaho governing inter-company compensation" and "one of most important principles" is the conclusory comments contained in Mr. Lafferty's direct testimony. Furthermore, Mr. Lafferty's unsupported statement that "where intrastate inter-company charges are authorized, it is always the originating carrier that pays the terminating carrier and the originating carrier is <u>never</u> allowed to charge other transporters of the call"[22] is simply not accurate. In the intraLATA toll context, the "originating carrier" is the LEC whose end user customer places the toll call. That LEC does not pay the terminating carrier, the IXC pays the terminating carrier. In the case where the originating LEC is also the IXC, that combined company pays the terminating LEC for access, *not* because it is the "originating carrier" but because it is the IXC. Far from it being the case that originating carriers "never" charge "other transporters of the call," they routinely do so because they are providing access to their local networks to other companies who "transport" toll calls.

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[20] Complainants' Brief, p. 9.
[21] Complainants' Brief, p. 9.
[22] Id. at 9 (citing Tr. 39, L. 12 through 43, L. 5).

As these simple examples show, Complainants' descriptions of how "intercarrier compensation" operates in the intraLATA toll market are simply mistaken. The "rule" pertaining to exchange of traffic on the public switched network, is not a rule at all. Just as Complainants refuse to recognize the role of third party SS7 providers in the world of SS7 connectivity, they have overlooked the familiar role of third party IXCs in the world of interexchange traffic. What follows from this is that there is no support, or even credible argument that, Qwest is prohibited from charging for SS7 messages that pass over its network between Qwest and a third party SS7 provider to facilitate call set-up for an intrastate toll call originated by a Qwest local customer.

Of course, Complainants' may counter that their "rule" nevertheless applies in the context of the exchange of local traffic. As Qwest has already pointed out in its Post Hearing Memorandum, local traffic is not an issue in this case going forward since Qwest has agreed not to charge for SS7 messages associated with local traffic. But, because there remains the issue of Illuminet's unpaid SS7 charges under the Catalog prior to this revision, the question still merits some discussion.

In the context of the exchange of local calls between ILECs or between ILECs and CLECs, it is true that there is no third party carrier that facilitates the transport of the call itself as in the case of a toll call. However, for the SS7 network this is not necessarily the case. Where the terminating LEC in the exchange of local traffic uses a third party SS7 provider, that third party SS7 provider gains access to Qwest's SS7 network to provide the signaling connectivity to its customer that permits that message to go through. It is that use of its SS7 network by companies like Illuminet that Qwest is entitled to recover for in an SS7 message charge.

The only legal authority Complainants attempt to utilize to support their argument is 47 CFR § 51.703(b). However, Complainants' reliance upon 47 CFR 51.703(b) which precludes LECs from assessing "charges on any other telecommunications carrier for local communications traffic that originates on the LEC's network" is misplaced and taken out of context for several reasons. First, this provision, on its face, applies only to local communications traffic. Hence it lends no support to Complainants' arguments on Qwest-originated toll or meet-point billed toll. The FCC stated that its *Local Competition Order*[23] did not address access services:

> The rules that we adopt to implement the local competition provisions of the 1996 Act represent only one part of a trilogy. In this Report and Order, we adopt initial rules designed to [open the local exchange and exchange access markets to competitive entry by enabling] ... the states and the Commission to begin to implement sections 251 and 252. [This appears in a later paragraph] The third part of the trilogy is access charge reform.[24]

It is, of course, under access reform that the unbundling of SS7 usage charges came about.

Furthermore, section 51.703 (b) pertains to the exchange of local voice/data traffic pursuant to the FCC's interconnection order.[25] Specifically, section 51.703 is contained in the "reciprocal compensation for transport and termination" of local voice/data traffic portion of the FCC's rules discussing the section 251(b) interconnection obligations of the 1996 Telecommunications Act imposed upon local exchange carriers. Thus, this section governs local *traffic* compensated under interconnection agreements; it

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[23] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, 11 FCC Rcd 15499 (Rel. Aug. 8, 1996)("Local Competition Order")

[24] *Local Competition Order* at Paras. 6; 8.

[25] *See generally Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 61 FR 45476 (Rel. August 29, 1996)(Implementation of "Rules and Regulations").

does not govern access services. In fact, Complainants' Brief conveniently omits the critical fact that the FCC defined telecommunications traffic for purposes of application of section 51.703 as specifically excluding intrastate and interstate exchange access.[26] Nor does section 51.703 govern any other exchange of local traffic such as between incumbent LECs in EAS "bill and keep" arrangements.

Section 51.703(b) has nothing to do with SS7 or any other access service. FCC rules governing SS7 and other access services are found in Part 69 of the FCC's rules. The FCC has distinguished between SS7 and voice/data traffic.[27] Thus section 51.703 does not apply to prevent Qwest from charging third party SS7 providers for use of its network for call set up of local calls between carriers who have a reciprocal compensation agreement for the exchange of local traffic.

This point is obvious from the provisions of the Electric Lightwave, Inc. (ELI) interconnection agreement that were discussed at the hearing of this case. Under cross examination Mr. Lafferty admitted that ELI's interconnection agreement provides for separate pricing for SS7 (Tr. 124) but dismissed this as "an option that ELI feels is not required" because ELI is purchasing SS7 service from Illuminet. (Tr. 125) That SS7 interconnection agreement provision, section (E) 15, treats Qwest's SS7 network as a UNE and provides the terms and conditions for ELI's use of that SS7 network.[28] Those terms and conditions include per-message charges for messages traveling over Qwest's network.[29] Thus, had ELI chosen to use Qwest's network directly, instead of using a third party SS7 provider, ELI would directly incur per-message charges on SS7 signaling

[26] 47 CFR 51.701(b)(1)
[27] *See, Access Charge Reform Order*, para. 2.
[28] (Tr. 448); Exhibit 509
[29] Id.

messages associated with call set-up of local traffic. Complainant's case, therefore, rests on the absurd notion that if ELI connected directly with Qwest for purposes of SS7 signaling it would pay per-message charges but that since it is using Illuminet, Illuminet can use Qwest's network without charge. This absurdity is compounded by Illuminet's insistence that this result is mandated by the interconnection agreement itself.

Accordingly, neither 47 CFR 51.703(b) nor the Commission-approved interconnection agreements, upon which Complainants rely, constitute legal authority for their manufactured "Rule 1". Contrary to allegations and mischaracterizations made by the Complainants, "Rule 1" is not the rule for signaling on either intrastate toll traffic or on local traffic.

B. Complainants' "Rule 2" is not relevant to the present case.

Unlike their Rule 1, Complainants' "Rule 2", i.e. that "pursuant to longstanding Commission policies, EAS traffic is exchanged between LECs on a 'bill and keep' basis", is at least mostly accurate. It just does not have any application to the current controversy.

First, not only has Qwest agreed not to charge SS7 signaling charges on local traffic, but it has not charged *any* LEC (either ILEC or CLEC) any SS7 message charges under its Catalog in the past. The only Complainant that has been billed for SS7 messaging is Illuminet and Illuminet admits that it is not a telecommunications carrier, let alone a LEC. Thus, although "long standing Commission policies" may have addressed the exchange of EAS traffic between LECs, this Commission, as it is probably all too aware, has never addressed the role of third party signaling providers like Illuminet in the provision of signaling connectivity. This is important because the record shows that historically, where ILECs connected directly with Qwest for signaling, as well as for the exchange of traffic, Qwest had agreements with these ILECs that specifically permitted that use without per-message charges. (Tr. 355) Furthermore, it is Qwest's express intent to offer infrastructure sharing agreements (ISAs) to all qualifying ILECs (Tr. 401-402). These agreements will preserve this status quo going forward for SS7 signaling, including that associated with EAS, because these arguments are predicated on the notion of incumbent LECs "sharing" infrastructure, which is the apparent assumption underlying the Commission's EAS bill and keep policies. The ISA's are not, however, intended to benefit third party competitors, like Illuminet whose use of the network for its own profit is the subject of the present case. (Tr. 403)

It should also be noted that the Commission's "long standing policies" applied to the exchange of EAS traffic between *incumbent* LECs, not the incumbent and a CLEC like ELI. In the case of a CLEC, the terms under which it exchanges local traffic (including EAS) and gain access to the incumbent's signaling network are provided in the interconnection agreements approved by the Commission. As discussed in Section I A of this brief, the interconnection agreement of ELI, the only CLEC participating in this case, provides that ELI's use of the SS7 network is a separate, chargeable activity, regardless of the fact that Qwest and ELI negotiated to exchange local traffic on a reciprocal compensation basis (a basis that is, as a matter of fact, distinguishable from the "bill and keep" basis provided for under so-called "Rule 2").

Thus Complainants' suggestion that the Commission's "long standing policies" relating to EAS prohibit Qwest's assessment of SS7 signaling charges to third party SS7 providers is not well founded. Complainants fail to point to a single Commission order or other written expression of these policies that suggests that the Commission ever addressed the question of third party SS7 providers' use of Qwest's SS7 network for the provision of signaling for EAS calls, or in any other context. But even if this "rule" were extended to the third party EAS provider, its application must be limited to messages associated with call set-up for EAS traffic exchanged between incumbent LECs served by Illuminet and Qwest.

C. Complainants' "Rule 3" is incomprehensible.

Complainants allege that inter-carrier compensation for "interchanged" local traffic is governed by interconnection agreements and attempt (unsuccessfully) to stretch that allegation into relevant authority in this SS7 proceeding. Qwest initially brings to the Commission's attention a few fundamental flaws inherent in this alleged "rule's" application to this proceeding before responding to the argument itself.

The first fundamental flaw is that, just as for the previously alleged "rules," Complainants baldly assert "Rule 3" but fail to cite any legitimate state or federal statute, case law, order, or commission rule as authority for "Rule 3." In fact, the only authority that Complainants have cited is the reciprocal compensation rule, 47 CFR 703(b), which Qwest has shown is inapplicable to this proceeding in response to Complainants' alleged "Rule 1." Without any legal authority or precedent, Qwest submits that the alleged "Rule 3" is not a "rule of law" but in reality is nothing more than an unsupported "allegation" containing the Complainants' view of the world.

The second fundamental flaw with the application of "Rule 3" is the phrase "inter-carrier compensation for local traffic." As presented, "Rule 3" does not even apply to Illuminet, the purchaser of the SS7 services out of Qwest's Access Service Catalog. Mr. Florack admitted at hearing that Illuminet is not a telecommunications carrier, and further, that it does not have end user customers that generate local voice/data traffic.[30] (Tr. 358-259) Illuminet and Qwest do not exchange local voice/data traffic with one another and no compensation is exchanged between carriers. In that exchange, only Qwest is a telecommunications carrier. Thus, "Rule 3" in and of itself is inapplicable.

The third fundamental flaw is Complainants' contention that the reciprocal compensation provisions contained in the interconnection agreements of Illuminet's carrier/customers that govern the exchange of local traffic between Qwest and Illuminet's carrier/customers also govern the SS7 services that Illuminet has purchased out of Qwest's Idaho Access Service Catalog. Complainants state the following:

> The ELI-Qwest ICA provides a typical example of the rule governing SS7 signaling for local traffic. The agreement mandates that, where possible, trunks used for transport and termination by both parties will be equipped with SS7. See Section (C) 2.2.8.5 of the ELI-Qwest ICA, Exhibit 205. The ICA further indicates that SS7 will be provided as part of the standard terms of the interconnection arrangement for the transport and termination facilities. Therefore, SS7 is clearly considered an inseparable part of the traffic on the interconnection trunks, (Tr. 69, L.9-23), and it is only reasonable to assume that the ICA's reciprocal compensation rate covers each party's cost for SS7 signaling, without which the end-user call could not be completed. (Tr. 43, L.11-17).[31]

Complainants have taken Section (C) 2.2.8.5 of the ELI-Qwest interconnection agreement ("Agreement') completely out of context, trying to use it as authority for their alleged "Rule 3." Section (C) 2.2.8.5 does not state that SS7 is "provided as part of the standard terms of the interconnection agreement", contrary to Complainants' allegation. SS7 cannot be part of the "standard terms of the interconnection agreement" if Section (C) 2.2.8.5 provides that parties will equip their trunks with SS7 "where possible." Furthermore, if the parties had intended SS7 to be part of "standard terms of the

[30] *See also*, (Tr. 203)
[31] Complainants' Brief, pp. 11-12.

interconnection agreement," Section (C) 2.2.8.5 or some other provision in the Agreement would "mandate," or at the very least indicate, *how* the parties will equip their trunks with SS7. Neither Section (C) 2.2.8.5, nor any other provision in the Agreement does that. Section (C) 2.2.8.5 states that "[t]he Parties will provide Common Channel Signaling (CCS) to one another…."[32] Accordingly, Section (C) 2.2.8.5 does nothing more than express the intent of ELI and Qwest to use SS7. Nowhere in that Section or in any other section of the Agreement does it indicate how the parties will obtain SS7 services, nor does the Agreement "mandate" that SS7 is part of the "standard terms of the interconnection arrangement." It is incomprehensible to Qwest that Complainants attempt to base their "Rule 3" upon language that is not present in the Agreement.

Rather than reading the Agreement as it is, Complainants take the language of Section (C) 2.2.8.5 expressing the parties' intent to use SS7 and twist it into something it does not say, i.e., that SS7 is "an inseparable part of the traffic on the interconnection trunks". Based on that mischaracterization, Complainants conclude, "it is only reasonable to assume that the ICA's reciprocal compensation rate covers each party's cost for SS7 signaling, without which the end-user call could not be completed."[33] Complainants do not, and cannot, point to any provision in the Agreement that states "each party's cost for SS7 signaling" is covered under the "reciprocal compensation rate." Complainants just "assume" it is. Under Idaho law, the Complainants cannot just

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[32] Exhibit 205, Local Interconnection Agreement between US WEST Communications, Inc. and Electric Lightwave, Inc. for Idaho (effective Oct. 11, 2000) at Section (C) 2.2.85.

[33] Complainants' Brief at P. 12.

"assume" contract provisions into existence that do not appear there. When construing contracts, the plain language controls. [34]

Contrary to Complainants' allegations it is not reasonable to assume that reciprocal compensation rates of interconnection agreements cover each party's SS7 usage costs. Reciprocal compensation provisions contained in interconnection agreements cover the exchange of local traffic.[35] SS7 is an access service. In its *Access Charge Reform Order,* the FCC did not conclude that carriers were recovering their SS7 usage costs through reciprocal compensation provisions; the FCC recognized that SS7 usage costs were recovered through access "per-minute-of-use charges."[36] Just as the FCC recognized, Qwest was recovering its SS7 usage costs through its switched access minutes of use. The whole point of Qwest's Catalog restructure was to take SS7 usage cost recovery out its per-minute switched access charges and recover such costs directly from the cost causers.[37]

The fact that "Rule 3" is incomprehensible becomes even more clear when examining footnote 5 of Complainants' Brief. In that footnote Complainants dismiss the fact that ELI's bargained for Agreement with Qwest provides that ELI will incur per-message charges when ELI uses Qwest's SS7 network saying, "common sense dictates that no carrier offers a rate that does not recover all components of the service being provided."[38] Thus, Complainants' argument boils down to this: Complainants insist that

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[34] *Taylor v. Browning,*129 Idaho 483, 489, 927 P 2d 873, 879 (1996) ("If a contract's terms are "clear and unambiguous, the determination of the contract's meaning and legal effect are questions of law, [citation omitted], and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words")

[35] *See generally, Local Competition Order;* 47 CFR. 703.

[36] *Access Charge Reform Order,* para. 247.

[37] *See* (Tr. 396-398)

[38] Complainants' Brief, p. 12.

SS7 message charges are "inseparable" from the charges for the traffic they facilitate because that is what the "inter-carrier agreements" provide; then complainants tell us that is what inter-carrier agreements provide (even though these agreements don't contain any such language) because "common sense" sense dictates that the charges are inseparable. This is nothing more than sophistry.

Thus, Complainants make the illogical leap from the ELI-Qwest agreement referencing the parties' intent to utilize SS7 in Section (C) 2.2.8.5, to the conclusion that the reciprocal compensation provisions governing the exchange of local traffic must also govern SS7. Complainants then take the even further leap that the reciprocal compensation provisions govern *Illuminet's* purchase of SS7 services rather than Qwest's Access Services Catalog. In their attempts to "shoe horn" the interconnection agreements into a governing role, Complainants, however, conveniently forget to bring to the Commission's attention that none of the purchased SS7 services were purchased out of and pursuant to *any* interconnection agreement. Thus, it is irrelevant that Illuminet's carrier/customers have interconnection agreements ("contracts") in place with Qwest. These facts are undisputed: (1) Illuminet did not purchase SS7 services out of any of its carrier/customers' interconnection agreements (Tr. Pp. 128-129 and p. 262); (2) Illuminet does have an interconnection agreement of its own with Qwest because Illuminet is not a telecommunications carrier subject to Section 251/252 options;[39] (3) Complainant Illuminet is a SS7 competitor of Qwest that purchased SS7 services out of Qwest's Access Service Catalog (Tr. p. 262); (4) Qwest is imposing SS7 message usage charges upon Illuminet are pursuant to a purchase out of the Access Service Catalog (Tr. pp. 128-

[39] (Tr. 203). 47 U.S.C. §§ 251 and 252; 47 U.S.C. § 153(44); *Local Competition Order* at paras. 33, 26, and 985-998.

129); (5) Complainants Citizens and ELI have options and chose not to purchase SS7 out of or pursuant to their interconnection agreements (Tr. pp.124-125); and (6) Citizens and ELI chose to purchase SS7 services from Qwest's SS7 competitor, Complainant Illuminet (Tr. pp. 124-125).

The bottom line is that Complainants have not presented any argument or cited to any authority[40] that supports "Rule 3's" application to this case. All of the Complainants have options.[41] Because Illuminet purchased SS7 services out of Qwest's Access Service Catalog, the terms and conditions of the Catalog govern Illuminet's SS7 purchase, not the reciprocal compensation provisions of ELI's interconnection agreement or any other carrier/customer's interconnection agreement.[42]

D. Complainants' "Rule 4" is inapplicable .

As with the previous alleged "rules" Complainants have failed to present to the Commission any legal authority for its view of the world, citing only to their own testimony presented at hearing. Complainants incorrectly allege that compensation for Illuminet's Catalog purchase of SS7 services for messages associated with meet-point billed traffic is governed by "inter-company agreements" rather than the terms and

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[40] Qwest notes that Complainants' Brief does cite to 47 CRF § 51.703(b) as authority, Qwest has already addressed this FCC rule and explained why it is inapplicable in its discussion concerning Complainants' Rule 1. Qwest will not repeat those arguments here.

[41] *See* Qwest Post Hearing Memorandum, Section II.B.2.a, pps. 19-21.

[42] For a more detailed discussion, see Qwest is Post Hearing Memorandum, Section II.B 2.c, pp. 24-29. Qwest notes that the filed rate doctrine prevents complaints that seek to enforce agreements outside the tariff and that the FCC has held that interconnection agreements may not implicate any fundamental aspect of the tariff's interpretation. Certainly Complainants' are seeking to enforce agreements (interconnection agreements in this case) that are outside the Catalog. Furthermore, Complainants' allegation that the reciprocal compensation provisions of the interconnection agreements control the assessment of SS7 charges to Illuminet implicates a fundamental aspect of the Catalog's interpretation, specifically who Qwest may charge and what Qwest may charge.

conditions of the Idaho Catalog.[43] Complainants suggest that these "inter-company agreements" could be interconnection agreements or meet point billed agreements. Again, because Complainants inaccurately quote the agreements and ignore the law, the alleged "Rule 4" is not a "rule of law" at all but rather a mere unsupported statement of what Complainants would like to be a "rule" of law.

Initially, Qwest brings to the Commission's attention that meet-point traffic is access traffic, not local traffic. Meet-point traffic also is traffic that is originated by some carrier other than Qwest. In a meet-point billing situation, the independent LEC or CLEC and Qwest have agreed to meet at a designated location and jointly hand off the access traffic to, or receive traffic from, an IXC. This type of intrastate traffic is identical to meet-point traffic in the interstate world. In both scenarios, Qwest charges the IXC the appropriate switched access rate. For the SS7 usage, however, Qwest charges Illuminet pursuant to its FCC Access Tariff for every message associated with meet-point interstate traffic, which Illuminet has not disputed. Assessment of meet-point access traffic pursuant to Qwest's Idaho Access Service Catalog is no different, and it should not be any different. Illuminet witness Mr. Florack admitted at hearing that in a meet-point access intrastate situation, Illuminet uses Qwest's SS7. (Tr. 269) However, Complainants' "Rule 4" seeks to shift all costs to the IXC so that Qwest charges the IXC not only an appropriate switched access charge but also for the SS7 costs that Qwest incurs from Complainants' use of Qwest's SS7 network.

As an example of an "inter-company" agreement, Complainants put forth the ELI-Qwest Agreement. Complainants cite to Sections (C) 2.1.1, (C) 2.2.3.5, (C) 2.3.7, (C) 3.1

[43] Qwest submits that, similar to "Rule 3," Complainants' "Rule 4" is contrary to the filed rate doctrine, which prevents complaints that seek to enforce agreements outside the tariff. See the preceding footnote.

and (C) 3.3 as precluding the assessment of SS7 charges for messages associated with the termination of third party IXC traffic. A careful review of these sections, however, indicates that the cited sections have nothing to do with SS7 services, let alone SS7 services Illuminet has purchased pursuant to the Access Service Catalog. Again, Complainants have taken interconnection agreement provisions out of context and attempted to twist their language into something it does not say. The referenced provisions express the intent of Qwest and ELI to each bill the IXC for switched access rates. Qwest has billed and is billing all IXCs for the appropriate switched access rates in accordance with the meet-point billing arrangement the parties established in the Agreement.

Complainants also inaccurately contend that meet-point billing contracts between Qwest and various ITA member LECs apply here. The only agreement presented at hearing by Complainants is Exhibit 203, "Agreement to Implement Meet Point Billing of Jointly Provided Feature Group B Switched Access Service" executed between Qwest and Citizens on June 1, 1989. None of the language used by the parties to evidence their intent indicates that the agreement covers SS7 services; SS7 is not mentioned at all. This agreement merely indicates that Qwest and Citizens desire to "meet-point-bill jointly provided Feature Group B Switched Access Service…."[44] Furthermore, Qwest notes that this agreement was executed in 1989, several years before Qwest even installed STPs in its network. The parties obviously could not have intended this agreement to cover SS7 services when Qwest had not even implemented its SS7 network. Qwest also notes that this agreement was never amended, and Complainants have not presented further

[44] Exhibit 203, Agreement to Implement Meet Point Billing of Jointly Provided Feature Group B Switched Access Service (June 1, 1989).

evidence indicating any subsequent change in the parties' intent or the scope of the agreement to cover SS7 services.

In addition, the Commission must assume that any other meet-point billing contracts and arrangements that ITA members have are also of the same caliber as Exhibit 203. The burden of proof rests with the Complainants to produce any meet point billing agreement which states that the ITA member and Qwest intend for the agreement to also govern any purchases of SS7 services. Complainants have failed to produce any such agreements.

Qwest is not billing and cannot bill IXCs for the Complainants' usage of Qwest's SS7 network. To do so is counter to the SS7 restructure and would violate the FCC's *Access Charge Reform Order*. The whole point of the FCC's *Access Charge Reform Order* was to eliminate subsidies in the access rate structures and ensure that "charges more accurately reflect the manner in which the costs are incurred" so that each cost causer pays for its own costs.[45] Yet, Complainants seek to have Qwest bill IXCs for the costs resulting from their usage. Regardless whether the LEC is ELI with an interconnection agreement or Citizens with a meet point billing contract, both are bound by Illuminet's admission at hearing that it utilizes Qwest's SS7 network for SS7 messages associated with meet-point access traffic. Accordingly, even where an interconnection agreement contains meet-point billing provisions or a meet-point billing contract exists, Qwest would bill the IXC for the switched access charges but cannot bill the IXC for Illuminet's use. Qwest notes that the only authority Complainants cite for "Rule 4" is *Elkhart* case,[46] discussed under "Rule 1" above. This case was adopted not

[45] *Access Charge Reform Order,* paras. 13, 28, and 35.
[46] Complainants' *Brief*, pp. 13-14.

only prior to the FCC issuing is *Access Charge Reform Order,* but also well before the enactment of the 1996 Telecommunications Act.

II. Complainant's alleged rules governing inter-carrier compensation do not govern Illuminet's SS7 purchase out of the Access Service Catalog.

Complainants' contention that Qwest does not seriously dispute their claim that the alleged "general rules" pertaining to "intercarrier compensation" govern SS7 signaling charges[47] is entirely erroneous, as the discussion of Complainants' four alleged rules in the preceding section demonstrates. In part II of Complainants' Brief, they attempt to bolster the nonexistent authority contained in part I with a series of arguments filled with mischaracterization. Qwest will respond to each of Complainants' arguments in turn.

A. Qwest's Title 62 SS7 charges are consistent with its approved interstate tariff.

Qwest's restructure of its Idaho Access Service Catalog mirrors the restructure of Qwest FCC Access Service Tariff. First, the restructure in both the FCC Tariff and the Idaho Catalog unbundled the SS7 usage charges out of switched access to create stand alone SS7 charges, simultaneously reducing switched access rates. Second, both the FCC Tariff and the Idaho Catalog assess SS7 message usage costs directly on the parties that use Qwest's SS7 network. Third, both the FCC Tariff and the Idaho Catalog assess SS7 usage charges on a per-message basis for all messages that utilize Qwest's SS7 network.

Complainants do not dispute this. Rather, their allegation that Qwest's Idaho SS7 restructure fails to mirror the federal restructure is premised upon their characterization of the voice/data traffic associated with the SS7 messages utilizing the SS7 network. Complainants characterize interstate voice/data traffic as toll traffic that is carried by

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[47] Complainants' Brief p.14

IXCs, and intrastate voice/data traffic as being comprised of local, EAS, meet-point billed and toll traffic. Complainants further characterize Qwest's restructure as "the assessment of SS7 charges on messages on intrastate traffic not previously subject to SS7 charges" and state that this did not occur for interstate traffic. However, neither of these characterizations is relevant or correct. Nor do such characterizations support Complainants' allegations.

Until Qwest restructured its FCC Access Tariff, Qwest did not assess charges for utilizing its SS7 network on its SS7 customers for any message associated with toll or meet-point-billed traffic. Qwest charged its interstate SS7 customers for links and ports only and recouped its usage costs only from those that were assessed switched access rate charges. The same is true at the intrastate level. Qwest only charged its intrastate SS7 customers links and ports but did not assess any SS7 usage charges regardless of whether the SS7 message was associated with local, EAS, intra-MTA, meet-point billed, or toll traffic. Recovery for using the SS7 network was recovered through Idaho switched access rates.

Complainants' characterizations are also inaccurate in that Qwest charges for messages associated with all interstate traffic, which includes toll traffic and meet-point billed traffic (not just toll traffic as alleged by Complainants) in accordance with its FCC Access Tariff. Under the current Idaho Catalog offering, Qwest charges for messages associated with all intrastate traffic, including local, EAS, meet-point-billed, and toll traffic. SS7 messages associated with all traffic types is charged because SS7 messages for all traffic types utilize Qwest's SS7 network. Complainants would have this

Commission believe that SS7 messages associated EAS, local, and meet-point-billed traffic do not use Qwest's network. They do.

Qwest notes that with the proposed Idaho Catalog structure the assessment of SS7 message charges is identical to that of the FCC Tariff. The FCC Tariff assesses SS7 charges on messages associated with all types of interstate traffic, i.e., toll and meet-point-billed access. Under Qwest's proposal, the Idaho SS7 Catalog offering would no longer assess SS7 charges on messages associated with EAS, local, and intra-MTA traffic, leaving the assessment of SS7 message charges only on the intrastate toll traffic and intrastate, meet-point-billed access traffic.

Furthermore, contrary to Complainants' allegation of improper unbundling, Qwest restructure of its Idaho SS7 Catalog offering is consistent with the federal restructure and the FCC's *Access Charge Reform Order*. Complainants' citations to the FCC *Access Charge Reform Order* are conveniently selective and fail to give the Commission a clear understanding of the FCC analysis and ruling. Complainants inaccurately leave the Commission with the impression that a carrier has improperly unbundled SS7 if that carrier has not acquired and implemented "measuring equipment" that identifies the jurisdiction of the associated voice/data traffic.[48] The FCC never placed any such conditions upon carriers desiring to unbundle SS7. Rather the FCC specifically stated that it would not require incumbent LECs to install "metering or other equipment needed to measure third party usage of signaling facilities ... [because] the costs of mandating the installation of metering equipment may well exceed the benefits of doing so."[49] The FCC further stated:

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[48] Complainants' Brief pp. 15-16.
[49] *Access Charge Reform Order,* para. 252.

> Instead, we will permit incumbent LECs to adopt and acquire the appropriate measuring equipment as needed to implement such a plan. Specifically, incumbent LECs may implement the same unbundled rate structure for SS7 services that we approved in the Ameritech SS7 Waiver Order. We recognize, however, that other signaling rate structures may achieve the same benefits that are available under the Ameritech rate structure. Hence, an incumbent LEC may implement an unbundled signaling rate structure that varies from the approach implemented in the Ameritech SS7 Waiver Order by filing a petition demonstrating that the establishment of new rate elements implementing such a service is consistent with the public interest.[50]

Complainants' gross mischaracterization that Qwest admitted "that it filed its Idaho SS7 signaling message structure prior to deploying the proper measuring equipment" completely ignores the above cited paragraph.[51] Qwest made no such admission. In restructuring its FCC Access Service Tariff, Qwest determined that the cost of implementing a plan identical to Ameritech's and installing metering equipment to identify the jurisdiction of the associated voice/data traffic exceeded the benefits of doing so as predicted by the FCC. Qwest subsequently chose to implement a different approach, although based upon the Ameritech waiver. The FCC found Qwest's plan to be in the public interest.[52] Qwest implemented this same structure in Idaho, mirroring the Idaho SS7 offering to that contained in its FCC Tariff. There is no doubt that Qwest properly unbundled SS7.

B. The SS7 network is separate from the voice/data network.

Contrary to arguments present by the Complainants, the SS7 network is completely separate from the voice/data network. Both Complainants and Qwest agree that SS7 is an out of band signaling network.[53] Nevertheless, despite admitting that the

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50 Id., para. 253.
51 Complainants' Brief, p. 16.
52 *USWEST* Order paras. 7 and 9.
53 (Florack) (Tr. 303-304) (Craig) (Tr. 206).

two networks are separate,[54] Complainants allege the networks are inseparable, citing Idaho Code § 62-603(13). Complainants' reliance, however, is misplaced. While section 62-603(13) may have defined "telecommunication service" as including "signals" and "messages," it does not follow that the SS7 network and the voice/data network are not separate networks.

Further, the FCC has recognized that the SS7 network is separate and distinct from the voice/data network.[55] Complainant's reliance upon *Elkhart* and the *Report and Order for Access for 800 Service* for their contention that the FCC has "repudiated"[56] that SS7 message signaling is part of a separate network is also misplaced and inaccurate. Qwest initially notes that again Complainants are being selective in their citation to legal authority. Rather than squarely repudiating the separateness of the SS7 network and the voice/data network, *Elkhart* recognizes that in-band SS7 technology transmits the signaling and the actual voice communication over the same circuit network but that the new out-of-band or common channel signaling "allows signaling to be transmitted over an additional system of switches and circuits."[57] Thus, the FCC recognized the separateness of signaling from the voice/data network. Additionally, as Qwest noted in

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[54] Complainants statements that Illuminet built its own SS7 network and is a SS7 competitor of Qwest's and yet does not carry end user traffic or, in other words, did not build a voice/data network, are admissions that Complainants recognize the existence and separateness of the SS7 network and the voice/data network.

[55] *In the Matter of Ameritech Operating Companies Petition for Waiver of Part 69 of the Commission's Rules to Establish Unbundled Rate Elements for SS7 Signaling,"* DA 96-446, 11 FCC Rcd 3839 (Rel. Mar. 27, 1996) para. 2...(SS7 networks are separate from, but interconnected with, the telecommunications networks used to carry voice and data communications between end users.")("*Ameritech Order").*

[56] Complainants' Brief, p. 17.

[57] *See, Elkhart at 1055.*

the introduction to its Section I, the FCC limited future application of its ruling when it stated that "our conclusion is limited to the specific facts before us."[58]

Elkhart's precedential value of this FCC decision is further limited in that it was issued prior to the enactment of the 1996 Telecommunications Act and the FCC's *Access Charge Reform Order*. The only other authority cited by Complainants' allegation that Qwest's Idaho SS7 charges are inconsistent with its FCC Tariff is *Report and Order for Access for 800 Service*, which, just like *Elkhart,* was issued prior to the 1996 Telecommunications Act and the FCC's *Access Reform Order*. Clearly, any legal holdings or repudiations made in either of these authorities cited by Complainants have been superceded by the FCC's *Access Charge Reform Order* as they pertain to SS7. In the *Access Charge Reform Order*, the FCC not only recognized that the SS7 network is separate from the voice/data network[59] but stated that the costs of SS7 should be borne by the users of the SS7 network.[60]

Complainants final argument that the SS7 network and the voice/data network are inseparable is their allegation that "Qwest's suggestion that the 'jurisdiction' of the SS7 message is also baseless."[61] Complainants state:

> Such a contention is inconsistent with its own Catalog that relies upon the jurisdiction of the voice traffic to determine the jurisdiction of the SS7

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[58] 59 Id.

[59] *See generally, Access Charge Reform Order* at para. 244 ("SS7 is a network protocol used to transmit signaling information over common channel signaling networks. … [S]signaling networks like SS7 establish and close transmission paths over which telephone calls are carried.")

[60] *FCC Access Reform Order,* para. 35 ("First, we reform the current rate structure to bring it into line with cost-causation principles, phasing out significant implicit subsidies."); para. 36 ("In this Order, we reshape the existing rate structure in order to eliminate significant implicit subsidies in the access charge system. To achieve that end, we make several modification to ensure that costs are recovered in the same way that they are incurred."); para. 249 ("Unbundling of SS7 services from transport and local switching ensures that transport and local switching customers do not pay for SS7 services they do not use.")

[61] Complainants' Brief, p.18.

> signaling messages vis-à-vis the voice traffic they support. Qwest's own FCC filing, which unbundled SS7 signaling message charges from its interstate access rates, necessarily implies that it allocated its SS7 message costs between intrastate and interstate jurisdiction.[62]

Complainants have misconstrued Qwest's position. Obviously Qwest must separate interstate from intrastate SS7 messages so that both Qwest and its SS7 customer knows whether it is the FCC Access Tariff or the Idaho Access Catalog governs its SS7 purchase. What Qwest has said regarding its position that the jurisdiction of the associated voice/data is irrelevant is that the jurisdiction of the *associated call* does not control or govern how SS7 messages are charged. Qwest has also said that for the purpose of assessing charges under the Idaho Access Catalog, or the FCC Access Tariff, the jurisdiction of the associated call is irrelevant because each and every message uses the SS7 network and, thus, results in usage costs to Qwest. Qwest's responses to Complainants' alleged "Rules" in the preceding Section show this to be true.

Complainants "inseparable" argument, therefore, is not really that the SS7 network is not separate and distinct from the voice/data network. Rather, Complainants argument is that Qwest may not charge SS7 services separately from voice/data services. Such argument is not supported by the FCC's *Access Charge Reform Order*. The purpose of permitting incumbent LECs to unbundle SS7 from switched access rates was to allow incumbent LECs to charge separately for SS7 services. The FCC concluded that incumbents may implement Ameritech's SS7 unbundled rate structure or petition for a different rate structure, as discussed in Section II.A above. The FCC further concluded that a rate differential would not be imposed between the different types of SS7

[62] Id. (citation omitted).

messages, i.e., SS7 call set up/take down messages and SS7 database messages.[63] Clearly, the FCC intended for incumbent LECs to separately charge for the usage costs incurred on the separate SS7 network.

Thus, while Qwest disagrees with Complainants' characterization that the SS7 message is an integral component of the voice/data traffic, the record indicates that the SS7 network is a separate and distinct network from the voice/data network. Legal precedent indicates that the FCC intended for incumbent LECs to charge separately for SS7 services.[64]

C. Illuminet is using Qwest's network; its "agency" relationship with its carrier/ customers does not eliminate its responsibility to pay for its use.

Qwest discussed the legal and factual defects of Complainants' "agency" argument at length in its Post-Hearing Memorandum [65] and will not repeat that discussion here. However, in their Brief Complainants raise some new theories that require reply.

Complainants' latest theory in its ongoing effort to ignore the fact that Illuminet is not a telecommunications carrier and not a party to any of the so-called "inter-carrier agreements" that Complainants (erroneously) claim govern how Qwest must charge for SS7, is that Illuminet is merely its carrier/customers' "transport agent".[66] Under this theory *Illuminet* does not use Qwest's SS7 network, *messages* use the network. Since the messages are generated by its customers, Illuminet claims it, should not pay for use of the SS7 network.

The defect of this argument is that it totally ignores the reality of the important business relationship at the heart of Complainants' complaint: Illuminet sells SS7

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[63] *Access Charge Reform Order* at para. 254.
[64] *See generally, Access Charge Reform Order; Ameritech Order; and USWEST Order.*
[65] See Qwest's Post Hearing Memorandum, Section II B 1, pp.13-19
[66] Complainant's Brief, p. 19

services, not "transport" services to its carrier/ customers.[67] As Illuminet's witness, Mr. Florack explained:

> The service Illuminet provides is a hubbing function that allows its carrier/ customers access to Qwest's SS7 network along with access to SS7 networks throughout the country. Illuminet bears all the costs of the signaling links and STP resources including ongoing network administration and maintenance. Illuminet is not reselling or repackaging Qwest's SS7 messages and charges for its carrier/customers, but charging only for the Illuminet SS7 network services its provides. [68]

Not only does Illuminet provide SS7 capability to its carrier/customers, it does so in competition with Qwest (Tr. 217). If Illuminet did not exist, its customers could not simply "transport" their own messages, they would have to either buy SS7 services from another provider, such as Qwest, or deploy their own STPs , B-links and ports[69]. For Illuminet to now claim that it does nothing more than "transport" messages is not even consistent with the record its created through its witness.

Again the analogy to interexchange carriers is useful. IXCs do not sell "transport" services to their end users, they sell "long distance" or "toll" services for which they receive compensation--just as Illuminet receives compensation for its SS7 services. For Illuminet to say "I am not using Qwest's network, *messages* use Qwest's network" is like an IXC arguing it doesn't use the ILECs networks to originate and terminate toll calls, *calls* use those networks. Qwest is confident that Illuminet's carrier/customers would be among the first to reject such an argument if an IXC tried to use it to avoid paying their tariffed access charges.

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[67] *See*, e.g., Complaint, para. 9 (" Carriers require SS7 signaling capability to ensure that their own end user traffic can be efficiently carried over the PSTN. Carriers can either establish their own SS7 network or utilize the economies of scale and scope offered by third party SS7 providers such as Illuminet.")

[68] (Tr. 218).

[69] Complainants' Brief, p. 3.

Nor is Complainants' position supported by the FCC's decision in the directory assistance context. Complainants incorrectly lead the Commission to conclude that the FCC has adopted "the general rule" that "inter-carrier obligations are not affected by the use of agents or intermediaries". An exhaustive search of the FCC's decisions, orders, and reports will reveal no such general rule. Rather the FCC's order in the *Directory Listing* case, cited by Complainants[70], is an anomaly. No other FCC decisions, orders, or reports addressing the interplay between agency and interconnection agreements exist. Furthermore, no FCC decisions, orders, or reports addressing the interplay between agency and tariff or catalog provisions exist at all.

Complainants' reliance on the *Directory Listing* case for any purpose in this case is misplaced. In the *Directory Listing* case, the FCC recognized an agency relationship for purposes of subpart (3) of Section 251(b) only. That is the subpart that describes the incumbent LEC's duty to provide access to directory assistance databases to competing providers. In its order, the FCC, in effect, expanded the scope of a "competing provider," to allow agents of competing providers to take advantage of Section 251(b)(3) if the principal competing provider has an interconnection agreement with the incumbent LEC.

While Complainants admit that the *Directory Listing* case is not direct authority, they are incorrect that "the policy nonetheless applies."[71] In construing the duty to interconnect under Section 251 of the Act, at no time has the FCC expanded the scope of "telecommunications carrier" to include alleged agents or any other entities.[72] In its *Local Competition Order*, the FCC specifically addressed the definition of

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[70] *Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended,* First Report and Order, 16 FCC Rcd 2736 (2001) ("*Directory Listing* case")

[71] Complainants' Brief, p. 32.

[72] *Local Competition Order,* paras. 33 and 985 – 998.

"telecommunications carriers" and affirmed the definition contained in 47 U.S.C. § 153(44).[73] The FCC subsequently reaffirmed its definition of telecommunications carriers to include only those entities that offer telecommunications for a fee directly to the public.[74] Because only telecommunications carriers (and not their "agents") are entitled to enter interconnection agreements under the Act, Illuminet cannot succeed to the terms of those agreements under federal law, even if it is found to be a telecommunications carrier's "agent". The contractual equivalent of this prohibition is found in the ELI interconnect agreement in this case, which specifically provides that "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." [75] Given that explicit prohibition, is difficult to understand how Illuminet can argue that it can benefit from the provisions of that agreement.

In the end, Complainants' agency argument is fatally defective. As Qwest has previously shown in its Post Hearing Memorandum, the argument does not comport with the facts presented in this case by Complainants themselves and its is not supported by Idaho law.[76] The variation of the agency argument presented in Complainants' Brief is even more defective from a factual standpoint and is repudiated by federal law.

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[73] Id; 47 U.S.C. § 153(44) defines "telecommunications carrier" as meaning any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 [47 USC § 226]). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage. 47 USC § 153(46) defines "telecommunications service" 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.

[74] "*Internet Over Cable: Defining the Future in Terms of the Past*," OPP Working Paper No. 30, 1998 FCC LEXIS 4518 (Rel. Sept. 3, 1998).

[75] Exhibit No. 501 Sec. (A) 3.23 (ELI interconnection agreement).

[76] Qwest's Post Hearing Memorandum, pp 13-19.

D. Qwest is not receiving an " unlawful windfall" as the result of its unbundling of SS7 charges.

Complainants' allegation that Qwest is experiencing an "unlawful windfall" as a result of its unbundling of SS7 charges is completely unsupported in the record of this case Complainants simply make this allegation and then resort to their totally discredited claim that other "intercarrier agreements" already include SS7 signaling costs.[77] As the discussion in Section I of this brief demonstrates, there is no evidence that other agreements[78] cover the SS7 signaling costs incurred by Qwest when Illuminet uses its network. In fact, in the most developed agreement between an Illuminet carrier customer and Qwest for the exchange of local traffic, the ELI interconnection agreement, the explicit agreement terms call for the imposition of SS7 charges for messages traveling over Qwest's SS7 network.[79]

Complainants' claim further lacks credibility in that under their theory, in every case where some "agreement" controls, Qwest has apparently agreed that Complainants' can use Qwest's SS7 network *without charge.* In no case where Complainants say agreements control, do revenue ever flows to Qwest for signaling costs. Since Complainants do not dispute that Illuminet uses Qwest's network to provide SS7

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[77] Complainants' Brief, p. 23.

[78] There are actually only two types of agreements to which Complainants ever refer in these proceedings, the interconnection agreements between Qwest and CLECs (or in some cases, ILECs) that pertain only to the exchange of local traffic and the so-called "meet-point-billing" agreements between Qwest and certain ILECs pertaining the split of switched access revenues received from interexchange carriers. In no case have Complainants successfully demonstrated that any of these agreements support their contention that signaling costs were addressed as part of the exchange of communications traffic.

[79] See, discussion contained in Section I A of this brief, above.

connectivity to its customers, it follows that Complainants argue that Qwest has "agreed" to free use by a competitor[80] of its network.

Complainants attempt to avoid this implausible conclusion by arguing the Qwest's "own end users" are covering these costs in their rates.[81] It must be noted that Complainants argue this point, but they have made absolutely no effort to prove it. The contention that Qwest will be enjoying a "double recovery" of its SS7 costs if the Commission allows its Title 62 Catalog charges to be collected is simply one more unsupported allegation offered up by Complainants in lieu of evidence or legal authority.

Complainants' lack of record evidence is but one of the fatal defects in Complainants' windfall argument. Their complete mischaracterization of the history of Qwest's rates is another. Unbelievably Complainants rely on the direct testimony of Mr. Lafferty, for the proposition that, "in a rate case, rates to recover all prudent investment and expenses allocated to the state jurisdiction, including a portion of SS7 facilities and signaling costs, were established by the Commission."[82] It would be hard for Mr. Lafferty to be more wrong in the case of Qwest's cost recovery of its SS7 investment.

In the last rate case for Qwest's predecessor,[83] U S WEST Communications, Inc., the Commission engaged in an unprecedented cost allocation exercise pursuant to Idaho Code § 61-622A to remove all costs that were not directly associated with the provision of "basic local exchange service" to local customers from the rate base. The rates that resulted from that rate case were designed to recover *only* the costs of provision of basic

[80] Illuminet's self-proclaimed status as a competitor of Qwest in the provision of SS7 services to other carriers is well documented. *See e.g.* (Tr. 217).

[81] Complainants' Brief, p. 23.

[82] Complainants' Brief, p. 23, citing (Tr. 68).

[83] *In the Matter of the Application of U S WEST Communications, Inc. for Authority to Increase Its Rates and Charges for Regulated Title 61 Services*, Case No. USW-S-96-5 (filed June 28, 1996).

local exchange service to U S WEST customers and a handful of auxiliary services, not at issue here. Thus the SS7 costs associated with Qwest local customers placing local calls to other Qwest local customers may be included in local rates. However, under section 61-622A the Commission excluded costs associated with the provision of toll and access services, as well as optional services such as the CLASS features supported by SS7. The commission did not establish rates for any of those services. Assuming that the Commission accomplished what it set out to do in that rate case (and certainly Complainants have offered nothing to suggest that it did not) there are *no* costs associated SS7 signaling for toll calls (either placed or received by regulated Title 61 customers) contained in regulated rates. Nor are costs of use of the SS7 network by customers other than Qwest's local customers contained in regulated rates[84].

Therefore, Complainants are simply wrong when they contend that the SS7 costs Qwest seeks to recover are already being recovered in Commission-approved rates. Of course Qwest did previously seek to recover them from Title 62 customers in the form of its intrastate switched access rates (Tr. 394). It is those rates that were unbundled and reduced, creating the new SS7 signaling charges at issue here. The fact that Qwest has restructured its Title 62 rates in an effort to see that the actual users of the SS7 network pay for that use, hardly amounts to a "double recovery" or an "unlawful windfall".

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[84] It should be noted that the majority of the EAS routes between Qwest and the ILECs in this case were established after the last rate case. The final rate case order was entered November 18, 1997. Various Qwest/ ILEC EAS cases resolved following that date include GNR-T-96-6, (EAS between Swan Valley, Irwin and Palisades to Idaho Falls - final order April 13, 1998); GNR-T-97-3 (EAS from Gray's Luke, Wayan and Freedom to the eastern Idaho EAS region - final order April 13, 1998); GNR-T-97-8(Teton County EAS request - final order April 13, 1998);GNR-T-96-5 (EAS for Arbon and Rockland - final order April 10, 1998)and GNR-T-97-7 (Bear Lake County EAS request - final order April 10, 1998)

Furthermore Complainants' half-hearted attempt[85] to suggest that Qwest's changes to its Title 62 Catalog are not "revenue neutral", even if proved, amount to nothing more than a claim that Qwest's rates for SS7 signaling are too high—an allegation that Complainants themselves repudiate (Tr. 81), and Title 62 clearly carves out of the scope of the Commission's jurisdiction[86].

III. Complainant's allegations concerning Qwest's Supplemental Proposal are "flawed" and incorrect.

Qwest's Supplemental Proposal not to assess SS7 charges for messages associated with local, EAS, and intra-MTA traffic speaks for itself, and it was offered in an attempt to address the major concerns of its SS7 Catalog customers. It is ridiculous that Complainants take Qwest's Supplemental Proposal and leap to the conclusion that Qwest has somehow conceded (1) that SS7 message should not be charged separately; (2) that Illuminet is the agent of its carrier/customers; and (3) that Qwest should not have charged for SS7 messages associated with those types of traffic. Qwest refuted Complainants' contention that the SS7 message is an integral component of end user traffic and, thus, should not be charged separately in Section II.B of this brief. Qwest refuted Complainants' contention that Illuminet is the transport agent of the Illuminet carrier/customer's SS7 messages in Section II.C of this brief. Finally, Qwest refuted Complainants' contention that there are categories of SS7 messages associated with intrastate voice/data traffic that should not have been assessed SS7 message charges under the Catalog in Section II.A of this brief, as well as the arguments presented below.

The Supplemental proposal maintains the assessment of SS7 messages associated with all types toll and access traffic. Assessment of SS7 messages associated with Qwest

[85] Complainants' Brief, footnote 10.

[86] *See* Idaho Code § 62-605(5)

originated intrastate toll traffic is consistent with the FCC's *Access Charge Reform Order* and is consistent with its FCC approved interstate tariff under which Illuminet purchases interstate services today.

As Complainants are fully aware, Illuminet purchased a bi-directional SS7 link to facilitate the connection to and the utilization of Qwest's SS7 network. The SS7 link was bi-directional before Qwest restructured SS7 services in Idaho and it is still bi-directional, meaning that Illuminet knowingly purchased a SS7 link over which it transmitted and received SS7 messages. This bi-directional link is the same bi-directional link contained in Qwest's FCC Access Tariff. Pursuant to the FCC's *Access Charge Reform Order*, Qwest charges Illuminet and any other purchaser under its FCC tariff for messages associated with originated and terminated interstate toll traffic. The FCC found Qwest's SS7 rate structure to be in the public interest.[87] The fact that the Idaho SS7 rate structure also charges for SS7 messages associated with originated and terminated toll traffic is entirely consistent with the FCC tariff to which Illuminet does not object. Complainants' allegation that a carrier may not charge for originating and terminating traffic is merely an unsupported statement, as Qwest demonstrated in its response to Complainant's alleged "Rule 1." Accordingly, Qwest's proposal to continue billing for SS7 messages associated with originating and terminating toll traffic would not result in Qwest unreasonably profiting from its Catalog SS7 service.[88]

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[87] *U S WEST Order,* paras. 7 and 9.

[88] Qwest notes that it does assess charges for originating and terminating traffic on its Feature Group products. Qwest requests that the Commission take judicial notice of Section 6, Switched Access Service, contained in its Access Service Catalog. For example, after stating that customers using Feature Groups are charged per access minute for communications to and from the end users in Section 6.1.1.A.3 and 6.2.4.A.5 of the Catalog, Section 6.7.6 provides that "[o]riginating and terminating calls will be measured (i.e., recorded or assumed) by the Company to determine the basis for computing chargeable access minutes.").

Similarly, Qwest's application of SS7 message charges associated with toll calls for which Qwest and another LEC jointly provide access (i.e., meet-point-billed toll calls) is also consistent with Qwest's FCC tariff. Should an interstate toll call originate or terminate in a meet-point-billed access environment, the FCC tariff imposes the SS7 message charges on the messages associated with call set-up for that call, just as in the intrastate context.

Furthermore, contrary to Complainants' contentions, Qwest never maintained that SS7 facilities could not be subject to meet-point-billing principles.[89] Rather, Qwest has maintained that because Illuminet purchased SS7 out of Qwest's Catalog and not pursuant to any meet-point-billing agreement (or interconnection agreement for that matter), such principles do not apply and are, in fact, irrelevant to this proceeding.[90]

Further, Complainants' reliance upon the FCC's 1995 *Elkhart* case is misplaced. As discussed earlier, the FCC issued its decision in *Elkhart* prior to the enactment of the 1996 Telecommunications Act and the FCC's subsequent orders. Thus, any legal holdings or conclusions reached in *Elkhart* regarding SS7 and meet-point-billing principles have been superceded. Furthermore, *Elkhart* dealt with facilities not message charges. In fact, *Elkhart*, predated the *Access Charge Reform Order*, which first authorized unbundling of SS7, by two years.

It is ridiculous for Complainants to suggest that application of SS7 message charges to meet-point-billed traffic is not consistent with the principles of cost causation. Meet-point-billed traffic is access traffic and, thus, SS7 messages associated with such traffic are properly subject to the FCC's *Access Charge Reform Order.* One of the

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[89] This is the point of the *Elkhart* case, discussed in Section I of this brief.
[90] *See*, Section I.D of this brief.

overriding principles in the *Access Charge Reform Order* is that the costs of SS7 should be borne by the users of the SS7 network[91] Since Illuminet admitted at hearing that it uses Qwest's SS7 network in a meet-point-billed scenario, (Tr. p. 269), Qwest is at a loss at how Complainants can possibly contend that they should not have to pay for that use. Assessing SS7 charges for messages associated meet-point-billed traffic obviously does not result in unreasonable profiting on the part of Qwest.

Finally, Qwest notes that it is entitled to receive payment in full from Illuminet for assessment of all SS7 charges pursuant to the filed rate doctrine. Granting a refund or credit to Illuminet regarding the back balance constitutes unlawful retroactive ratemaking.[92] While Qwest will not unduly repeat its arguments presented in its Post Hearing Brief, Qwest briefly addresses contentions made by Complainants that its Supplemental Proposal allows Qwest to unreasonably profit.[93] There are numerous United States Supreme Court decisions holding that the filed rate is binding upon the carrier, the customer and the regulatory agency and that the tariff constitutes the law.[94] The Commission has recognized that the tariff is the law under which purchased services are governed. The Commission has stated that the filed rate doctrine precludes "refunding or remitting of any rates, tolls, rentals, or charges specified in the rates on file with the Commission."[95] In addition, the Ninth Circuit has held that the filed rate

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[91] *See* footnote 45 above.

[92] *See* Qwest's Post Hearing Memorandum, Section II.A.4, at pp. 10-13 and Section II.B.2.c at pp. 26-27.

[93] *See* Qwest's Post Hearing Memorandum, Section II.A.4, at pp.10-13.

[94] *See generally, Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981); *AT&T v. Central Office Telephone*, 524 U.S.214 118 S.Ct. 1956, 141 L.Ed.2d 222 (1988).

[95] *In the Matter of the Investigation of Certain Property and HPN-W-89-1 Contributions of Hayden Pines Water Company*, Idaho Public Utilities Commission, Case No. PHN-W-89-1, Order No. 23362 (1990).

doctrine also precludes attempts to interpret the terms and conditions of the tariff or Catalog by the use of extraneous agreements.[96] FCC has a rule that operates the same as the filed rate doctrine in that it precludes the reference to extraneous documents, like interconnection agreements.[97] The FCC has stated that the tariff would be rendered unlawful if the interconnection agreement must be consulted to ascertain whether compensation is required under the tariff.[98] Similarly, the practice certainly exists before the Commission that Catalogs must be self-contained and not cross-reference extraneous documents, although the practice has not been formally codified into a Commission rule. Accordingly, the filed rate doctrine operates to bar Complainants' alleged "Rules" and contentions that the terms, conditions, and provisions of interconnection agreements and meet point billing agreements govern the assessment of SS7 charges to Illuminet. It also bars Illuminet's attempts to avoid payment for SS7 service. Qwest assessed all charges to Illuminet in accordance with the terms and conditions of its Idaho Access Service Catalog. Qwest is entitled to recover all charges assessed under the current SS7 offering and the Supplemental Proposal.

IV. Complainants' requested relief is not only not "necessary"--- granting relief is contrary to the law of the State of Idaho and will itself lead to lengthy and difficult proceedings.

Having completely failed to demonstrate that Qwest's Title 62 charges are unlawful or precluded by any agreement or Commission policy, Complainants resort to the ridiculous claim that granting their relief is "necessary" to avoid a "chaotic and

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[96] *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002). For a more detailed discussion, see II.B.2.c of Qwest's Post Hearing Memorandum.

[97] 47 CFR 61.74(a). *See also, In the Matter of Bell Atlantic-Delaware v. Global NAPs, Inc.*, 15 FCC Rcd 5997 (2000).

[98] *In the Matter of Bell Atlantic-Delaware v. Global NAPs, Inc.*, 15 FCC Rcd 5997 (2000).

inequitable pricing structure that will spawn years of litigation."[99] Not only does this proposition assume the correctness of Complainants' discredited arguments, this latest claim backs any record evidence to support it and relies instead on mischaracterization.

One such mischaracterization is the claim that Qwest will recover Qwest's own SS7 message costs, "even when Qwest's retail end user customer initiated the call and Qwest is the only company that receives any revenue from that call." [100] Under Qwest's SS7 Catalog the only time Illuminet is charged is when a message passes over Qwest's network connection with Illuminet. Illuminet is not charged unless its carrier customers are involved in the underlying communications traffic. Messages associated with Qwest to Qwest calls are not charged to Illuminet.

To put it another way: Illuminet is *never* charged when Qwest is the only company receiving revenue for the calls. In the case of toll calls originated by a Qwest customer and terminating to an Illuminet ILEC customer, the terminating ILEC receives terminating access revenue. In the case of the EAS or local call, the terminating ILEC or CLEC receive exactly the same revenue from the call that Qwest does, i.e. the local service revenue from its end user customer. Furthermore, Illuminet receives revenues from its carrier/customer for providing them with SS7 services on all of these calls. Although the record is not clear whether Illuminet's charges are volume sensitive, it is clear that Illuminet is in the business of providing SS7 to carrier/customers because it is a business that generates revenues. At bottom, the reason this case was brought is because Illuminet seeks to preserve its free use of Qwest's network so that it can go on generating SS7 revenues from its carrier/customers.

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[99] Complainants' Brief, p. 27.
[100] Complainants' Brief, p. 27.

Complainants' attempt to rely on the objections of Qwest's counsel to questions beyond the scope of the present case for the purpose of demonstrating that "utter chaos" will ensue if Qwest's charges stand is even more inappropriate. Complainants' have offered nothing to show what costs they may wish to recover, or how they may choose to do so. Those topics must wait for an appropriate proceeding in which a record is developed that permits analysis of these claims for cost recovery, if they are ever made. If the requirement that new cases be filed and evidence produced is the "utter chaos" to which Complainants' refer, that overstatement speaks for itself.

However, one further observation about Complainants' bringing their own cases for SS7 charges may help to put Complainants' overblown rhetoric into perspective. Many of the Complainants, unlike Qwest, are fully regulated Title 61 companies. For them, as Mr. Lafferty erroneously argued for Qwest, the costs of SS7 service are captured in regulated rates. If those costs increase because these Title 61 companies continue to use third party providers instead of opting for Infrastructure Sharing Agreements, they may seek a rate increase from the Commission. The Commission will authorize such an increase if it determines that the SS7 costs incurred by these regulated companies are prudent in light of the options available to them, and if the Commission finds that those costs are not offset by other revenues or efficiencies that have been gained since the last rate case for each individual company. While that process may be time consuming and expensive, it is the process; it is not "chaos" and it is not a "pernicious effect" of Qwest recovering its costs.

Complainants would prefer to short-cut the regulatory process by simply persuading this Commission to force Qwest to abandon the attempt to recover its costs.

To do so, however, the Commission must take dramatic and unprecedented steps toward the regulation of Qwest's deregulated services and investments. At the opening of this brief Qwest explained that the Commission does not have regulatory authority to grant the relief requested here. If the Commission attempts to take jurisdiction, it will be re-regulating a Title 62 charge, a step that has never been taken by the Commission since the Telecommunications Act of 1988 was enacted.

What is the "wrong" that is alleged to require this drastic move? It is only this: a third party SS7 provider will experience increased costs, which, we are told, will be passed on to its customers. Its customers, however, have choices that may reduce or avoid these increases. Furthermore, the customers that are ILECs have the option of seeking relief in the form of revenue increases from the Commission. CLEC customers have the option of renegotiating their interconnection agreements with Qwest[101].

Meanwhile if the Commission does choose to re-regulate SS7, contrary to the legal authority that it lacks the jurisdiction to do so, the Commission will have to take investments that were allocated to Title 62 in the last rate case back into Title 61. Idaho Code §61-622A. Since no current Title 61 rate covers the SS7 network usage by third parties, a Title 61 rate will have to be established. How will the Commission decide to whom that rate applies? Should it be borne by Qwest's traditional Title 61 customers? Or will the Commission ultimately conclude, as the FCC and Qwest have done, that those who actually use the SS7 network should pay?

These questions are not the product of exaggerated rhetoric, these are the practical considerations that flow from a Commission decision to re-regulate a Title 62

[101] It should be noted however that the FCC and Idaho-approved SGAT contains provisions for per message charges for SS7. *See* Idaho SGAT, Section 9.13.3

technology. These matters must be considered before the Commission concludes that the way to avoid "lengthy and expensive litigation" is to grant the relief Complainants here seek.

V. Qwest's SS7 Service Offering was Restructured in Accordance with the Competitive Principles Articulated in the FCC's *Access Charge Reform Order*

Complainants spend two and a half pages complaining about the alleged anti-competitive impacts of Qwest's SS7 service offering upon Illuminet and its carrier/customers. The truth of the matter is that prior to Qwest restructuring its SS7 offering, IXCs were competitively disadvantaged because IXCs were subsidizing those carriers, such as Illuminet and others, that utilized Qwest's SS7 network but did not pay switched access rates. The FCC issued its *Access Charge Reform Order* to address this subsidy problem.

The FCC's *Access Charge Reform Order* contains numerous paragraphs discussing competition and the reasons why access charges needed to be reformed to comply with cost causation principles. The FCC initially noted that Congress enacted the 1996 Telecommunications Act because it sought to establish "a pro-competitive, deregulatory national policy framework" for the telecommunications industry.[102] The FCC's *Access Charge Reform Order* is the "third part in a trilogy of actions collectively intended to foster and accelerate the introduction of competition into all telecommunications markets, pursuant to the mandate of the 1996 Act."[103] Some of the FCC's analysis regarding access charge reform and competition follow:

> [T]he congressional mandate that *we implement pro-competitive, deregulatory policies* is a continuing reminder that, wherever feasible, *we*

[102] *Access Charge Reform Order,* para. 1 (citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151 et. seq.)).
[103] Id.

> *should select competition instead of regulation* as our means of accomplishing the stated statutory goals. Reliance on competition is the keystone that unifies our … access reform orders.[104]
>
> Our decision also fulfills the congressional intent that we eliminate the rules that have helped sustain de facto or de jure monopolies in access markets and instead create the conditions for competitive entry on a sustainable, long-term basis. ... Consequently, this Order sets forth a plan for removing distortions and inefficiencies in both the current "rate structures" (the term used to describe the manner in which a particular charge is assessed, such as through a per-minute-of-use fee or a flat-rated fee) and "rate levels" (the term used to describe the aggregate size of a particular access charge.) *By rationalizing the access charge rate structure, we ensure that charges more accurately reflect the manner in which the costs are incurred, thereby facilitating the movement to a competitive market.*[105]

> In light of Congress's command to create secure and explicit mechanisms to achieve universals service goals, *we conclude that implicit subsidies embodies in the existing system of interstate access charges cannot be indefinitely maintained* in their current form. In this Order, therefore, we take two steps with respect to the rules governing the interstate access charges of price cap incumbent LECs. First, *we reform the current rate structure to bring it into line with cost-causation principles*, phasing out significant implicit subsidies. Second, we set in place a process to move the baseline rate level toward competitive levels.[106]

> In this Order, *we reshape the existing rate structure in order to eliminate significant implicit subsidies in the access charge system*. To achieve that end, *we make several modifications to ensure that costs are recovered in the same way that they are incurred.*[107]

> The Ameritech waiver [adopting a rate structure for SS7 signaling that unbundles SS7 signaling functions] was *granted to allow Ameritech to realign its charges for SS7 services more closely with the manner in which such costs are incurred. ... Unbundling of SS7 services ... ensures that customers do not pay for SS7 services they do not use.*[108]

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[104] Id. at para. 10 (emphasis added).
[105] Id. at para. 13 (emphasis added).
[106] Id. at para. 35 (footnote deleted)(emphasis added).
[107] Id. at para. 36 (emphasis added).
[108] Id. at paras. 65 and 249 (emphasis added).

It is clear that unbundling SS7 services out of switched access rates is far from being anti-competitive as Complainants allege. In fact, the unbundling furthers the stated competitive goals of the Act as the FCC carefully articulated in the above-cited paragraphs of its *Access Charge Reform Order*. There can be no doubt that Qwest's SS7 restructure that was implemented in accordance with Part 69 and the FCC's *Access Charge Reform Order,* is pro-competitive. The fact that Qwest's SS7 offering is not anti-competitive and instead promotes competition was implicitly recognized by the FCC's declaration that the restructure was in the public interest.[109] The FCC also recognized that Qwest's SS7 offering concerning the utilization of its SS7 network was not anti-competitive when it further stated:

> Therefore, we find that U S WEST's proposed rate structure would more accurately reflect the manner in which signaling costs are incurred.

This language is the exact same language that the FCC used in its FCC *Access Charge Reform Order*, which Qwest previously cited. Thus, assessing SS7 message charges for meet-point-billed access traffic and all types of toll traffic is not anti-competitive.

Nor is it anti-competitive or selectively discriminatory to offer various SS7 service options. As Qwest pointed out Section II.B.2.b of its Post Hearing Brief, the 1996 Telecommunications Act specifically envisions that different SS7 options are available depending upon the classification of the purchaser. Section 259 creates an exception for independent LECs to share an incumbent LECs SS7 infrastructure.[110] Section 251(C)(3) provides for the provisioning of SS7 on an unbundled network element basis to telecommunications carriers, but not to non-telecommunications carriers.[111]

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[109] *USWEST Order* at paras.7 and 9.
[110] *See* Qwest Post Hearing Memorandum, Section II.B.2.b, pp. 21-24.
[111] Id.

Offering Infrastructure Sharing Agreements to ILECs for SS7 services and SS7 as UNEs to CLECs and wireless providers are not examples of anti-competitive behavior. The fact that the 1996 Act provides for special exceptions does not make Qwest's compliance with such provisions to be anti-competitive. If anything, Qwest is furthering the competitive goals of the 1996 Act as recognized by the FCC by offering such options.

Finally, Qwest's actions regarding Syringa do not constitute evidence that Qwest can "engage in undetected and selective discrimination" regarding its SS7 service offering. There was no intent on the part of Qwest to discriminate in favor of Syringa against Illuminet. Rather Qwest actions were based upon a desire to treat Syringa consistently with its contention that it was simply an ILEC consortium. (Tr. p. 354). Qwest chose to maintain the old SS7 contract with Syringa for an interim period of time only while it assessed what options were available to entities (and particularly ILECs) under the new SS7 regime instead of unilaterally and immediately cutting off service to Syringa. (Tr. pp. 356-357, 371 and 378) Once the SS7 assessments were completed, the old SS7 contract with Syringa was terminated and Syringa was notified of its SS7 options . (Tr. pp. 360 and 375-376)

VI. The public interest is not served by granting the Complainants' requested relief.

The final part of Complainants' argument, found in part VI at page 30 of their Brief simply rehashes their earlier arguments and then spells out the relief Complainants' seek in specific terms. First, they request that the Commission "direct Qwest to refund and credit, <u>as soon as possible</u>, all unlawfully assessed SS7 message charges." (emphasis original). Second, Complainants request that the Commission, "direct Qwest not to refile any SS7 rate or rate structure changes until and unless Qwest first coordinates such filing in advance with the affected third party SS7 providers and their carrier/customers". Complainants contend that this measure is necessary to promote the "public interest benefits associated with the efficient use of Commission and party resources."

The total departure from precedent and authority represented by these requests is extraordinary. First, as even Complainants would have to admit, for the Commission to grant any rate-related relief in this case, it must somehow gain jurisdiction over a service it does not regulate. Although Qwest asserts that Idaho Code § 62-605 (5) cannot be used for this purpose, even if the Commission were to attempt it, there is nothing in that statute or any provision of the Idaho Code that permits the Commission to engage in *retroactive* revision of Title 62 rates (or Title 61 rates for that matter). Complainants' total disregard for the extraordinary nature of this demand is underscored by the fact that they did not bother to cite a single authority to support the notion that they can expect retroactive relief from deregulated rates. Under Complainants' theory, apparently the entire statutory framework provided Title 62 can be ignored if the Commission can be persuaded that there is an "inter-carrier dispute" that requires resolution. Not only that but, apparently Complainants also believe that the freedoms granted to Title 62 companies can be wiped away *retroactively* leaving the Title 62 Company with no compensation for the use of its network.

Complainants' request that the Commission direct Qwest to "coordinate" any re-filing of SS7 charges with third SS7 providers and their customers likewise demonstrates a complete lack of understanding of the regulatory process in which they are now attempting to meddle. If SS7 remains a Title 62 service, as it should under the legal authorities presented here, the Commission will have no authority to require Qwest to meet the demands of Complainants in a future Title 62 offering[112]. If the Commission is to grant any relief, it must find a way to regulate SS7 under Title 61. Should that occur, then the Commission is itself faced with the task of developing a rate design that recovers the costs of the former Title 62 assets that must be reabsorbed into the Title 61 rate base. Idaho Code §61-622A.

Qwest suggests that it is naïve of Complainants to claim that granting their relief here promotes efficient use of the Commission's and parties' resources. In fact, if the Commission is convinced that Qwest's Title 62 SS7 charges can be and should be "clawed back" under § 62-605(5) it must take upon itself the responsibility of setting new rates under Title 61. That process may well involve Complainants as intervenors, but it will not spare anyone's resources.

VII. Complainants' reliance upon the Nebraska Order in misplaced.

Complainants attached the recent order issued by the Nebraska Public Service Commission relating to SS7 as authority and a roadmap for the Idaho Commission in this proceeding. Qwest submits that the Commission cannot rely upon any analysis and holdings contained in the Nebraska Commission's SS7 order because that order was issued on a different record and applying the law of another state. Although Complainants may attempt to declare that the record was the same there, they have offered nothing upon which this Commission can rely for that conclusion.

Furthermore, the Idaho Commission cannot rely upon the Nebraska order because it was entered contrary to the record presented in that case, and contrary to law, and applicable federal law. These are just some of the reasons why reliance upon the

[112] Of course the Commission can suggest Qwest try to work with its customers, and Qwest would attempt to be responsive to such a suggestion. However, negotiations in the past have failed to reach a result satisfactory to Complainants.

Nebraska SS7 order is a mistake. The faulty legal and factual conclusions contained in the Nebraska SS7 order are too numerous to list.

Furthermore, Qwest notes that any decision similar to that of Nebraska would most likely not resolve the dispute between the parties in this matter. Qwest brings to the Commission's attention that its notice of appeal was filed with the Nebraska Commission on February 7, 2003, requesting that the Nebraska Commission prepare the necessary transcripts and record for appeal to the Nebraska Court of Appeals. Pursuant to Nebraska law, the Nebraska Commission's SS7 Order is stayed pending appeal.

This Commission should render its decision upon the record here presented, and as such the Nebraska SS7 order lacks value as precedent on all of these bases. Qwest further submits that the Nebraska SS7 order is not even persuasive legal authority because, as stated above, the issues in that proceeding were not decided upon the record presented in that case, and contrary to Nebraska law, and applicable federal law. While Complainants might allege that many of the issues in the Nebraska SS7 proceeding are the same issues before the Commission in this proceeding, the Commission is bound by the law in Idaho.

CONCLUSION

Based on the foregoing authorities and arguments, Qwest respectfully requests that the Commission dismiss Complainants' complaint and deny the relief requested therein.

RESPECTFULLY SUBMITTED this 20th day of February, 2003,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2003, I served **QWEST CORPORATION'S REPLY BRIEF** as follows:

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