

Mary S. Hobson (ISB #2142)  
Stoel Rives LLP  
101 South Capitol Boulevard - Suite 1900  
Boise, ID 83702  
Telephone: (208) 387-4277  
Facsimile: (208) 389-9040  
[mshobson@stoel.com](mailto:mshobson@stoel.com)

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Stephanie Boyett-Colgan  
Qwest Service Corporation  
1801 California Street – 47<sup>th</sup> Floor  
Denver, CO 80202  
Telephone: (303) 896-0784  
Facsimile: (303) 896-8120  
[scolgan@qwest.com](mailto:scolgan@qwest.com)

Charles W. Steese  
Steese & Evans, P.C.  
6400 S. Fiddlers Green Circle, Suite 1820  
Denver, CO 80111  
Telephone: (720) 200-0677  
Facsimile: (720) 200-0679  
[csteese@s-elaw.com](mailto:csteese@s-elaw.com)

**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<sup>1</sup>,

Respondent.

CASE NO.: QWE-T-02-11

**QWEST'S ANSWER TO COMPLAINANTS'  
PETITION FOR RECONSIDERATION AND  
CLARIFICATION AND CROSS PETITION  
FOR RECONSIDERATION OF ORDER NO.  
29219**

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

**I. INTRODUCTION**

Qwest Corporation (“Qwest”), pursuant to Idaho Code § 61-626 and Commission rule of procedure 331, I.D.A.P.A 31.01.01.331, files this *Answer and Cross Petition for Reconsideration* in response to the *Petition for Reconsideration and Clarification* (“Petition”) filed by Idaho Telephone Association, Citizens Telecommunications Company of Idaho (“Citizens”), Illuminet, Inc. (“Illuminet”), and Electric Lightwave, Inc. (“ELI”) (collectively “the Complainants”) on May 6, 2003. Complainants’ submission goes a long way to establishing the need for the supplemental evidentiary hearing requested by Qwest in its Petition for Reconsideration. Complainants’ Petition establishes that the taking of additional evidence is necessary; that the historical relationship between Qwest and Illuminet; raises additional questions about whether Illuminet is acting as an agent for its customers; and that the Commission is without jurisdiction to order Qwest to refund monies paid under the tariff.

Qwest respectfully requests that the Idaho Public Utilities Commission (“Commission”) reconsider its decision in this matter as set forth in Order No. 29219 (“Order”). Qwest requests reconsideration be granted by means of a supplemental evidentiary hearing on the issues raised by Complainants, as well as on the issues raised in Qwest’s *Petition for Reconsideration of Order No. 29219* filed on May 6, 2003. Qwest further requests that the Commission reconsider legal issues on written briefs.

## II. LEGAL ARGUMENT

### A. The Parties Agree that Reconsideration by Means of a Supplemental Hearing is Required

Illuminet, like Qwest<sup>2</sup>, seeks reconsideration of Order No. 29219 (“the Order”) and the opportunity to present new evidence bearing on the history parties’ interactions with regard to the implementation of the intrastate message charges under the Idaho Access Services Catalog. Although Illuminet suggests that reconsideration is only required on the narrow point of whether Illuminet is entitled to a refund, in fact the allegations contained in Complainants’ Petition and the attached affidavit of Paul Florack raise a number issues identified by Qwest in its Petition for Reconsideration.

For example, the Complainants’ petition states that the alleged “partial payment” was made “under protest” and reflected “the first three months” of Idaho intrastate SS7 message charges. Petition, at pp. 3-4. These allegations suggest that, contrary to the implication of the Order,<sup>3</sup> and consistent with the affidavit of Char Kuder filed as Attachment B to Qwest’s Petition, Illuminet understood Qwest’s plan to charge for SS7 messages prior to implementation of the Idaho Access Services Catalog on June 1, 2001, yet waited nearly a year to initiate the current case before the Commission. Thus, it appears even Illuminet would agree that Qwest did not act “unilaterally” and “without notice.”

Other issues raised by Qwest’s petition for reconsideration are implicated by the Complainants’ Petition as well. Complainants state, “while the Commission is correct that Syringa Networks, LLC, Citizens and ELI have not paid any charges, [citations omitted]

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<sup>2</sup> See Qwest’s *Petition for Reconsideration of Order No. 29219*, filed May 6, 2003, pp. 15-25. (“Qwest’s Petition”).

<sup>3</sup> The Order repeatedly criticizes Qwest for failing to discuss its proposed Catalog signaling charges with its customers and for acting “unilaterally” with regard to the implementing those charges. See e.g., Order, at pp. 16 & 22. See also, Qwest’s *Petition for Reconsideration of Order No. 29219*, at pp. 15-20.

*Illuminet* has, in fact, made such payments.” Petition, at p. 3 (emphasis added). Complainants close with the plea that the Commission’s “inadvertent oversight”<sup>4</sup> not be used “as a means to refuse making a refund *to Illuminet*.” (emphasis added). These characterizations of the flow of payments and potential refunds are not consistent with the Complainants’ position that Illuminet is merely the “agent” of its customers through whom SS7 charges pass on their way to those who actually generate/receive the messages and who have the arrangements with Qwest (or, in the case of EAS, with the Commission<sup>5</sup>) that allegedly prohibit the charges.<sup>6</sup> Now we are told that Illuminet paid for the SS7 services and Illuminet deserves a refund. Qwest asks that the Commission grant a supplemental evidentiary hearing on this point and allow Qwest to develop a record that clarifies the implications of this allegation.

The implications of this revelation affect both the jurisdictional issues discussed below and in Qwest’s Petition, and the “agency” argument that underlies Complainants’ recovery in this case.<sup>7</sup> The factual questions inherent in these issues abound. Under its customer agreements, can Illuminet choose which charges are passed on, or is Illuminet’s ability to pass charges through to customers limited in some way, not previously revealed? Do any of the charges allegedly paid by Illuminet relate to messages generated or received by the two Illuminet customers participating here (Citizens and ELI) or do they relate to other customers? Do some or all of the message charges paid relate to other customers (such as wireless companies or

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<sup>4</sup> Complainants are not overly generous in characterizing the Commission’s alleged “oversight” in failing to order a refund to Illuminet as “inadvertent” in light of the fact that apparently the only evidence of the alleged over payment contained in the record is the “confidential”, and exceedingly obscure, Exhibit 402.

<sup>5</sup> See, Order, at p. 14.

<sup>6</sup> The effect of these arguments is clearly demonstrated at page 19 of the Order, where the Commission characterized a LEC’s purchase of SS7 services from entities like Illuminet as self-provisioning: “Qwest failed to consider adequately in what way, if any, SS7 charges could be imposed on LECs that provide their own SS7 capability, *whether owned by the LEC or a third party*.” (emphasis added)

<sup>7</sup> Qwest contends Illuminet’s claim it is merely the “agent” for its customers should be reconsidered. See, Qwest’s Petition, at pp. 20-25.

interexchange carriers) who do not have “meet point billing”, “bill and keep” or other arrangements that complainants claim prohibit Qwest’s per-message SS7 charges?

**The bottom line is this: Qwest and Complainants agree that the Order should be reconsidered by means of an additional evidentiary hearing to explore the facts relating to the course of business between Qwest and Illuminet. Although Complainant’s request for review is relatively narrow, the factual allegations made in support of Illuminet’s claim for refund implicate several additional issues raised in Qwest’s petition for reconsideration.<sup>8</sup>**

**B. The Parties Agree the Commission Erred in its Characterization of Illuminet as a Telephone Corporation. This Error of Fact Establishes that the Commission’s Analysis of its Jurisdiction Must be Reconsidered.**

**1. The Complainants’ admit Illuminet is not a “telecommunications carrier” and that it does not provide a “telecommunications service” to its customers.**

Complainants seek clarification or, alternatively, reconsideration<sup>9</sup> of the Order on the grounds that “isolated references” to Illuminet’s provision of telecommunications services to its customers, and to its being a proper party under Idaho Code § 62-614, are factually incorrect based on the uncontroverted record. Complainants state, “Illuminet is not a telecommunications carrier and provides no services to end users.” Petition, at p. 5. Furthermore, Complainants insist, “Illuminet does not provide ‘telecommunications services’ to its carrier/customers nor is it a telephone corporation.” Id. Finally, Complainants clarify that “the arrangements between Illuminet and its carrier/customers are contractual and are offered solely under contract to telecommunications carriers.” Id., at pp.5-6.

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<sup>8</sup> If the Commission finds that Qwest did not raise these issues with sufficient clarity in its May 6, 2003 Petition, it hereby raises them in this cross petition. Commission Rule of Procedure 331.02 , I.D.A.P.A 31.01.01.331.02.

<sup>9</sup> Footnote 2 of the Complainants’ Petition states that should the Commission find that reconsideration, rather than clarification, is necessary, the Order should be reconsidered because its is “unreasonable, unlawful, erroneous or not in conformity with the law” consistent with Rule 331.01. Qwest agrees.

Qwest agrees that the Order contains these errors of fact. However, Qwest submits these errors are not “isolated statements” of no consequence, but instead justify reconsideration of the Commission’s decision that it has jurisdiction to grant the relief provided in Order No. 29219 via a supplemental evidentiary hearing.

2. **Section 62-614 does not confer jurisdiction on the Commission to enter Order No. 29219 because its scope is limited to disputes brought by ILECs.**

The Order appears to rely primarily on section 62-614 as the statutory grounds for jurisdiction in this matter. Order, at pp. 3-7. The statutory language is clear that the only disputes that come within its purview are those between a Title 62 company like Qwest and “other **telephone corporation[s]** subject to title 61, Idaho Code, or any mutual, nonprofit or cooperative **telephone corporation.**” Idaho Code § 62-614 (emphasis added). Nonetheless, the Order states: “There can be little doubt that the Complainants, including Illuminet, are proper parties able to file a Complaint under Idaho Code § 62-614.” Order, at p. 5. In fact there is every doubt, particularly in light of Complainants’ admission that Illuminet is not a telephone corporation.

The Idaho Supreme Court emphasized that the requirements of the Commission’s enabling legislation must be satisfied before the Commission can exercise jurisdiction:

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 on 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.**<sup>10</sup>

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<sup>10</sup> *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P 2d. 122, 126 (1979) (emphasis added).

Given the unequivocal language of the statute and the guidance provided by the Idaho Supreme Court, it is plain that the Commission has no jurisdiction under Idaho Code § 62-614 to hear or resolve any complaint of Illuminet.

It is equally plain that the Commission has no jurisdiction under Idaho Code § 62-614 to hear or resolve any complaint of ELI or any other CLEC. Section 62-614's scope is limited to disputes between Qwest and telephone corporations that are "subject to title 61, Idaho Code", or between Qwest and "any mutual, nonprofit or cooperative telephone corporation." CLECs are by statute, exempt from regulation under Title 61. Idaho Code § 62-604 (1)(a). Nor does the record contain any evidence to support the conclusion that ELI, the only participating CLEC, is a mutual, nonprofit or cooperative telephone corporation.

**3. The question of which disputes may be properly brought before the Commission under section 62-614 requires further analysis.**

Since the Commission lacks jurisdiction to hear or resolve any dispute between Illuminet or ELI and Qwest under section 62-614, the question that immediately presents itself is, what claims, if any, remain for the Commission's resolution? Clearly the Commission cannot consider Illuminet's claim for a refund.

The record is clear that only the Complainant that has been billed under the Access Services Catalog for SS7 messages is Illuminet. Thus, if the Commission is to take jurisdiction under section 62-614 of a dispute over the past SS7 message charges,<sup>11</sup> it can do so only if the dispute arises out of charges that, although billed to Illuminet, are the legal responsibility of an Idaho ILEC. Now, with Illuminet's revelation that it has paid three months' of the disputed SS7

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<sup>11</sup> Even if the Commission has jurisdiction to hear a dispute under section 62-614 by virtue of the fact that the disputants are proper parties under the language of that section, the Commission's jurisdiction is limited to resolving any such dispute "in accordance with applicable provisions of law." Idaho Code § 62-614 (2). Qwest contends this language does not accord jurisdiction to set prices for Title 62 services. See, *Qwest's Petition for Reconsideration of Order No. 29219*, at pp.5-10.

charges and has apparently *not* passed those charges along to its customers<sup>12</sup> it is clear that no Idaho ILEC has any claim for past due charges, even if one otherwise accepts the Complainants “agency” theory.<sup>13</sup> Qwest respectfully requests that the Commission grant reconsideration and allow Qwest to conduct discovery and present evidence on which past SS7 charges, if any, are properly disputed by Idaho ILECs who are eligible to bring a claim under section 62-614.

Furthermore the Commission’s Order granting prospective relief to Complainants under section 62-614 on the basis that Idaho ILECs “potentially are obligated to pay [SS7 message charges] under Qwest’s Access Catalog,” (Order, at p. 5) must be reconsidered. To the extent that the Commission relies upon that its jurisdiction over local and EAS traffic<sup>14</sup> to grant prospective relief, that reliance is misplaced. Under Qwest’s proposal to eliminate message charges associated with local and EAS traffic, all Complainants, including Idaho ILECs, would be charged only for messages related to intraLATA toll traffic. The Commission’s authority enter Order No. 29219 to prohibit Qwest from imposing those charges is one of the subjects of Qwest’s petition for reconsideration.

4. **Illuminet’s clarification that it does not provide “telecommunications services” to its customers demonstrates that the Commission lacks jurisdiction of this matter under Idaho Code § 62-605 (5).**

Complainants’ Petition states that, contrary to the findings of the Order at page five, “Illuminet does not provide ‘telecommunications services’ to its carrier/customers” and that Illuminet’s services are “offered solely under contract to telecommunications carriers”. Petition, at pp. 5-6. These declarations make plain that the Commission cannot take jurisdiction over Qwest’s SS7 signaling services under Idaho Code § 62-605.

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<sup>12</sup> The claim in the Petition is that Illuminet, not its customers, is entitled to a refund.

<sup>13</sup> Qwest has disputed Complainant’s agency theory throughout these proceedings and has petitioned for reconsideration of this topic in its *Petition for Reconsideration of Order No. 29219*, see footnote 7, *infra*.

<sup>14</sup> See, e.g., *Order*, at pp. 5&7.

Section 62-605(5) grants limited authority to the Commission only over those “telecommunications service[s]” that were previously subject to Title 61, Idaho Code, and that have become subject to Title 62 regulation through the provider’s election. Qwest’s Petition points out that SS7 services cannot be subject to regulation under this section because, as a matter of historical fact, they were never offered under Title 61.<sup>15</sup> Illuminet’s admission that it does not provide telecommunications services to its customers, highlights yet another reason the statute is inapplicable to this case: SS7 signaling is not a telecommunications service. This fact is also clear from statute. Idaho Code § 62- 603(13) provides:

“Telecommunications service” means the transmission of two-way interactive switched signs, signals, writings, images, sounds, messages, data or other information of any nature by wire, radio, lightwaves, or other electromagnetic means (which includes message telecommunications service and access service), which originate and terminate in this state, are **offered to or for the public, or some portion thereof, for compensation.** (emphasis added).

As Illuminet concedes, SS7 signaling is not offered to the public. Instead it is offered by Qwest in its Access Services Catalog to interexchange carriers and third party SS7 providers and in interconnection agreements to CLECs such as ELI. These third party providers then sell the signaling to their customers, who, Illuminet admits, are “telecommunications carriers.” Petition, at p. 6. As a result, Section 62-605(5) on its face does not grant authority to the Commission to regulate services like SS7 signaling that are offered only to industry participants.

### **III. CONCLUSION**

Qwest supports Complainant’s petition for reconsideration to the extent it seeks a supplemental evidentiary hearing to explore the facts underlying Illuminet’s dealings with Qwest

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<sup>15</sup> See, Qwest’s Petition for Reconsideration of Order No. 29219, at pp. 6-8 and Attachment D, Affidavit of Philip Linse.

and Illuminet's rights and those of its customers, if any, to refund. Qwest submits that the facts relating to these topics are relevant to the areas for which it independently sought reconsideration including, but not limited to, the parties' historical course of dealing and the question of whether Illuminet truly acts as the "agent" of its customers. In addition, Complainants' request for clarification or reconsideration of several of the findings in the Order's jurisdiction discussion supports Qwest's contention that the Commission should grant reconsideration to look more closely at the statutory requirements for Commission jurisdiction in a case of this kind.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of May, 2003.

  
Mary S. Hobson  
Stoel Rives, LLP

Stephanie Boyett-Colgan  
Qwest Service Corporation

Charles W. Steese  
Steese & Evans, P.C.

Attorneys for Qwest Corporation

## CERTIFICATE OF SERVICE

I hereby certify that on this 13<sup>th</sup> day of May, 2003, I served **QWEST'S ANSWER TO COMPLAINANTS' PETITION FOR RECONSIDERATION AND CLARIFICATION AND CROSS PETITION FOR RECONSIDERATION OF ORDER NO. 29219** as follows:

Jean Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington Street  
P.O. Box 83720  
Boise, Idaho 83720-0074  
[jjewell@puc.state.id.us](mailto:jjewell@puc.state.id.us)

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

Weldon Stutzman  
Deputy Attorney General  
Idaho Public Utilities Commission  
472 West Washington Street  
Boise, ID 83702

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

***Executed Protective Agreement***

Stephanie Boyett-Colgan  
Qwest Services Corporation  
1801 California Street - 47th Floor  
Denver, CO 80202  
Telephone: (303) 896-0784  
Facsimile: (303) 896-8120  
[scolgan@uswest.com](mailto:scolgan@uswest.com)

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

***Executed Protective Agreement***

F. Wayne Lafferty  
LKAM Services, Inc.  
2940 Cedar Ridge Drive  
McKinney, TX 75070  
***Executed Protective Agreement***

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

Thomas J. Moorman  
Kraskin, Lesse & Cosson LLP  
2120 L Street NW – Suite 520  
Washington DC 20037  
Phone: (202) 296-8890  
Fax: (202) 296-8893  
[tmoorman@klctele.com](mailto:tmoorman@klctele.com)

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

***Executed Protective Agreement***

Morgan W. Richards  
Moffatt Thomas  
101 South Capitol Boulevard – 10<sup>th</sup> Floor  
Boise, ID 83701  
[mwr@moffatt.com](mailto:mwr@moffatt.com)

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

***Executed Protective Agreement***

Charles W. Steese  
Steese & Evans, P.C.  
6400 S. Fiddlers Green Circle, Suite 1820  
Denver, CO 80111  
Telephone: (720) 200-0677  
Facsimile: (720) 200-0679  
[csteese@s-elaw.com](mailto:csteese@s-elaw.com)

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

***Executed Protective Agreement***

Clay Sturgis  
Moss Adams LLP  
601 West Riverside – Suite 1800  
Spokane, WA 99201-0663

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

***Executed Protective Agreement***

Lance Tade  
Citizens Telecommunications  
4 Triad Center – Suite 200  
Salt Lake City, UT 84180

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

***Executed Protective Agreement***

Conley Ward  
Givens Pursley  
277 North 6<sup>th</sup> Street – Suite 200  
P.O. Box 2720  
Boise, ID 83701  
[cew@givenspursley.com](mailto:cew@givenspursley.com)

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

***Executed Protective Agreement***

Richard Wolf  
Illuminet, Inc.  
4501 Intelco Loop SE  
P.O. Box 2909  
Olympia, WA 98507

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

***Executed Protective Agreement***



Brandi L. Gearhart, PLS  
Legal Secretary to Mary S. Hobson