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IDAHO PUBLIC  
UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IDAHO TELEPHONE ASSOCIATION,  
CITIZENS TELECOMMUNICATIONS  
COMPANY OF IDAHO, CENTURYTEL OF  
IDAHO, CENTURYTEL OF THE GEM  
STATE, POTLATCH TELEPHONE  
COMPANY and ILLUMINET, INC.

Complainants

QWEST CORPORATION<sup>1</sup>,

Respondent.

CASE NO.: QWE-T-02-11

**PETITION FOR ORDER TO CLARIFY  
THE SCOPE OF ORDER NOS. 29219  
AND 29310**

The Idaho Supreme Court has granted a joint motion and remanded this cause back to the Idaho Public Utilities Commission ("Commission") for the specific purpose of determining the precedential value to be placed on Order No. 29219 and Order No. 29310 (the "Orders"). Qwest Corporation ("Qwest") hereby requests, pursuant to Idaho Code §61-624 and equitable doctrines,

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

that the Idaho Public Utilities Commission (“Commission”) issue an order making plain that the Orders shall be binding only upon the named parties to this proceeding and that parties attempting to use these orders as precedent or as cited authority in other proceedings before the Commission, or otherwise should be cautioned that these orders arise out of the specific facts presented to this Commission and the policies and practices of this Commission in managing the relationships primarily concerning EAS traffic exchanged between Idaho incumbent carriers and should not be viewed as applicable to other disputes relating to the inter-carrier compensation. For example, the Commission did not receive any evidence or otherwise attempt to address the question of the applicability of per message rating for signaling to wireless carriers. Hence, the Orders should not be seen as precedent for resolution of the issues as they pertain to other carriers and especially wireless carriers.

Such an order is appropriate because: (1) all affected parties stipulated to remand the matter back to the Commission pursuant to Idaho Appellate Rule 13.5 in order to determine the scope and precedential impact of the Orders; (2) the Idaho Supreme Court entered an Order approving the stipulation and remanding to the Commission; (3) Qwest has agreed to forgo its rights to appeal and obtain a decision on the merits; and most importantly, (4) evidence uncovered after the Commission conducted the evidentiary hearing of this matter would make reliance by other parties on the Orders either as precedent or under the doctrine of collateral estoppel manifestly unfair to Qwest. The remaining parties to this case – Illuminet, ELI, Citizens and the ITA – take no position on this Motion.

**I. LEGAL STANDARD APPLICABLE TO THIS PETITION TO ALTER**

Idaho Code § 61-624 provides the Commission the authority to grant Qwest the relief it seeks. Specifically:

The commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.

Further, the Commission also has jurisdiction to enter the requested relief, because the Idaho Supreme Court remanded the matter based upon stipulation of all affected parties pursuant to Idaho Appellate Rule 13.5:

Upon stipulation of all affected parties that a . . . civil judgment of the . . . administrative agency may be . . . remanded for further hearings, the court may enter an order accomplishing the stipulated result without briefs, oral argument, or an opinion of the court. An order entered by the court pursuant to such a stipulation shall not be considered as precedent for any purpose other than a resolution of that appeal.

Given the substantial factual and legal issues presented in the appeal of this matter, which have been resolved by settlement, Qwest respectfully requests that the Commission enter an Order stating that the Orders shall be binding only upon the named parties to the proceeding in which the Orders were entered and cautioning their use as precedent or cited authority by parties to any other proceedings before the Commission, or otherwise.

## **II. PROCEDURAL POSTURE**

On May 20, 2002, the Idaho Telephone Association (“ITA”), Citizens Telecommunications of Idaho (“Citizens”), CenturyTel of Idaho, CenturyTel of the Gem State, Potlatch Telephone, and Illuminet Inc. (“Illuminet”) filed a complaint with the Commission, claiming that the SS7 message charges that Qwest charged Illuminet pursuant to Qwest’s Title 62 catalog were “contrary to tariff provisions and contractual obligations and in violation of the settled policy and precedents of the Commission.” The Commission allowed both CenturyTel entities and Potlatch to withdraw from the proceeding. *See* Order No. 29115. The Commission

also allowed Electric Lightwave, Inc. (“ELI”) to intervene in the proceeding. *See* Order No. 29074.

On April 15, 2003, the Commission entered Order No. 29219 based on the evidence presented in the proceeding and found for Complainants. In its decision, the Commission relied upon its knowledge of EAS and meet point billing arrangements that are unique to Idaho and placed heavy reliance on the “settled policy and precedents” of the Idaho Commission insofar as EAS is concerned. Both Qwest and the Complainants sought reconsideration. On August 27, 2003, the Commission entered Order No. 29310, which essentially upheld the Commission’s prior ruling with slight modifications.

By Notice of Appeal dated October 8, 2003, Qwest appealed the Commission’s decision to the Idaho Supreme Court. On December 23, 2004, pursuant to Idaho Appellate Rule 13.5, all remaining parties to the proceeding submitted a Stipulated Motion to Dismiss the Appeal and Remand to the Idaho Public Utilities Commission (the “Stipulation”). In the Stipulation, the parties stated:

The parties request that the Court remand this matter to the Commission for further proceedings; specifically for the Commission to determine whether it should provide the Parties, the industry at large, and other judicial and quasi-judicial bodies such as other state regulatory commissions and the American Arbitration Association (AAA) with clarity concerning the scope and precedential impact of its order.

Other non-parties to this case are citing the Commission’s Order as having preclusive effect upon Qwest. The parties to this appeal have reached a settlement that will eliminate the need or ability of this Court to issue a decision on the merits. The Parties request the Court dismiss the appeal and remand the matter to allow the Commission to determine whether it is appropriate to provide the Parties and the telecommunications industry with additional clarity as to the scope and precedential impact of its Orders.

*See Attachment 1.* The Idaho Supreme Court approved the Stipulation, dismissed the appeal and remanded the matter to the Commission for further proceedings. *See Attachment 2.*

### **III. OTHER PROCEEDINGS**

Shortly after the Commission issued the Orders, Illuminet and some of its carrier customers initiated similar proceedings in the states of New Mexico, Iowa and North Dakota. The parties to those proceedings then participated in extensive document and deposition discovery. Qwest produced over 10,000 pages of new material, gathered substantial new documentation from Illuminet, and took a Rule 30(b)(6) deposition of Illuminet. Over the course of this discovery, Qwest uncovered many new facts that previously had not been uncovered or presented to this Commission. Specifically:

- a. That Ameritech, Bellsouth bill for signaling messages associated with local traffic out of intrastate tariffs;
- b. That the entire telecommunications industry was well aware from a series of FCC decisions that incumbents such as Qwest planned to begin separately billing for signaling messages;
- c. That the FCC specifically found that signaling should not be part of reciprocal compensation;
- d. That the FCC specifically found that BOCs, such as Qwest, should create message rating for signaling;
- e. That signaling messages that cross LATA lines are by definition interLATA traffic, not local traffic, and therefore are not paid for out of interconnection agreements;
- f. That Qwest developed a form interconnection agreement with the industry that specifically excluded signaling from reciprocal compensation;
- g. That Qwest's SGAT and many interconnection agreements specifically state that local traffic (including signaling traffic) delivered to Qwest from a third-party is to be billed and paid for out of tariffs;
- h. How the terms of Qwest's interconnection agreements evolved, and that no one ever planned to have signaling included as part of reciprocal compensation;

- i. That the rates for reciprocal compensation do not include any component of signaling; and,
- j. Unless a CLEC orders unbundled signaling, Qwest is not getting compensated for the use of its signaling network when it provides signaling to carriers to complete local calls.<sup>2</sup>

*See* Affidavit of Charles W. Steese, attached hereto as Exhibit 1.

Despite the uncovering of all of this new evidence, various parties including Nextel Communications (a wireless carrier)<sup>3</sup> sought to bind Qwest to the Idaho Commission's decision even though (1) Nextel was not a party to this proceeding, (2) neither the record presented in this case nor the Orders addressed the question whether wireless carriers were already compensating Qwest for use of its SS7 network; and (3) Nextel had an entirely different interconnection agreement; and (4) the body of facts relating to the issue of whether compensation may be required of some carriers using Qwest's SS7 facilities had substantially changed and expanded. Qwest submits that it is manifestly unfair of others to rely on this Commission's Orders to attempt to bind Qwest through the offensive use of the doctrine of collateral estoppel. Nevertheless, Qwest is being subjected to this challenge in other jurisdictions. Qwest simply seeks this Commission's clarification of its prior Orders, which were based only on the facts and circumstances presented to the Commission, so that their value as precedent will not be overstated. Doing so will grant Qwest the ability to obtain future decisions based on a review of the full complement of facts and without misapplication of this Commission's Orders.

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<sup>2</sup> Qwest is precluded from giving the full scope of the facts – indeed some facts altogether – due to protective orders issued in other proceedings. Thus, this is anything but a complete list.

<sup>3</sup> Other wireless carriers and/or their signaling provider have threatened legal action; however, no formal matter is yet filed.

#### IV. LEGAL ARGUMENT

As noted previously, the Commission's authority extends to altering or otherwise clarifying any order or decision it has issued. Idaho Code §61-624. The Commission should clarify the Orders to limit their precedential effect to the instant proceeding so that non-parties cannot endeavor to use the Orders as a bar to Qwest litigating similar claims on their merits before courts or other quasi-judicial bodies such as other state commissions and arbitration panels. To allow the Orders to be used without such clarification would be manifestly unfair to Qwest.

When one seeks to impose the Commission's Orders on Qwest and they were not a party to this docket, it is called "non-mutual offensive collateral estoppel." The Idaho Supreme Court has explained that before one can assert "non-mutual offensive collateral estoppel", a court (or commission) must consider several factors, including:

"The most important factors are whether the doctrine of collateral estoppel is used offensively or defensively, whether the party adversely affected by collateral estoppel had a full and fair opportunity to litigate the relevant issues effectively in the action resulting in the judgment, *whether it would be generally unfair in the second case to use the result of the first case*, and whether assertion of the plea of estoppel by a stranger to the judgment would create anomalous results." More specifically, important questions are whether the party adversely affected by collateral estoppel offers a sound reason why he should not be bound by the judgment; and whether the first case was litigated 'strenuously' or 'with vigor,' for instance, whether the former judgment was appealed . . . ."

*Idaho State Univ. v. Mitchell*, 97 Idaho 724, 731, 552 P.2d 776, 783 (1976) (quoting *Mutuality of Estoppel as Prerequisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment*, 31 A.L.R.3d 1044, 1052 (1970)) (emphasis added). Thus, fairness is one critical element that this Commission should consider in determining the precedential impact of its

decision. Here Qwest has uncovered many new facts that justify a decision on the merits after full and complete consideration of all of the facts.

Moreover, limiting the precedential impact of the decision is wise because it prompts others to move quickly and participate in the original proceeding, rather than lying in wait to see the outcome of the proceeding. The United States Supreme Court has explained that offensive use of collateral estoppel allows a litigant “to adopt a ‘wait and see’ attitude, in the hope that the first action by another plaintiff will result in a favorable judgment.” *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 330 (1979). Thus, because a potential litigant “will have everything to gain and nothing to lose by not intervening in the first action” another factor to consider is whether the litigant “could easily have joined in the earlier action . . . .” *Id.* at 331 and 332. Just as ELI intervened, others could have easily done the same. It is for this and other reasons that the Idaho Supreme Court noted particular reluctance to apply non-mutual offensive collateral estoppel. *Idaho State Univ. v. Mitchell*, 97 Idaho at 732 (use of collateral estoppel “offensively” is a factor that has “ordinarily prompted the courts not to apply the doctrine . . . .”).

Similarly, courts in other jurisdictions emphasize that when evaluating the offensive use of collateral estoppel the tribunal must be mindful that the doctrine is susceptible to abuse. *Southern Pacific Communications Co. v. AT&T Co.*, 740 F.2d 1011, 1019, n.9 (D.C. Cir. 1984); *Silva v. State*, 106 N.M. 472, 475-76, 745 P.2d 380 (1986) (“parties may apply issue preclusion offensively . . . when the court deems it fundamentally fair to the parties.”); e.g., *In re Air Crash Disaster at Stapleton Int’l Airport*, 720 F. Supp. 1505, 1522 (D. Colo. 1989); *rev’d on other grounds, sub nom. Johnson v. Continental Airlines Corp.*, 964 F.2d 1059 (10<sup>th</sup> Cir. 1992). Thus, offensive collateral estoppel must be applied only when it is fair to the respondent – here Qwest. *Safeco Insurance Co. of America v. Yon*, 118 Idaho 367, 372, 796 P.2d 1040, 1045 (Id. App.

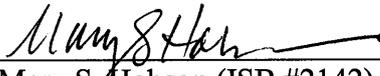
1990) (“When applying this rule, we are mindful of equitable factors . . . .”); *Parklane Hosiery*, 439 U.S. at 226.

It would be unfair for the Commission to allow others to apply the Orders to offensively collaterally estop Qwest in other proceedings. Qwest has agreed to forgo judicial review of the Orders in order to effectuate settlement on the merits with the parties to this proceeding. Qwest has not taken full advantage of its appeal rights thereby leaving it in a vulnerable and unfair position. Qwest has uncovered a plethora of new facts that in its opinion would serve, at a minimum to persuade the Commission that it must address the position of each carrier group individually and that the claims of CLECs and wireless carriers cannot be analyzed in the same manner as, for example, those of the ITA members. By clarifying the Orders to limit and clarify their precedential impact, the Commission can uphold its decisions and avoid misapplication by others of its Orders through reliance on language that is taken out of context or misinterpreted. These are all sound reasons why the Commission should clarify the Orders to limit their use in subsequent proceeding.

## V. CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Commission enter an Order clarifying the Orders to state that the Orders shall be binding only upon the named parties to the proceeding in which the Orders were entered and cautioning their use as precedent or cited authority by parties to any other proceedings before the Commission, or otherwise.

Respectfully requested this 7<sup>th</sup> day of February, 2005.



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