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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF)	CASE NO. QWE-T-02-25
QWEST CORPORATION FOR)	
DEREGULATION OF BASIC LOCAL)	STAFF'S PETITION FOR A
EXCHANGE RATES IN ITS BOISE, NAMPA,)	DECLARATORY RULING
CALDWELL, MERIDIAN, TWIN FALLS,)	
IDAHO FALLS, AND POCATELLO)	MEMORANDUM IN
EXCHANGES.)	SUPPORT OF PETITION

The Commission Staff, by its counsel of record, Weldon B. Stutzman, Deputy Attorney General, files this Petition for a Declaratory Ruling pursuant to Commission Rule of Procedure 101. The Staff is a party in this case and opposes the application filed by Qwest Corporation for deregulation of its basic local exchange rates in seven specific local exchanges in southern Idaho. It is clear from the prefiled testimony and exhibits that the parties substantially disagree on the application of *Idaho Code* § 62-622(3)(b). As a result, each party filed its evidence and exhibits based on its own interpretation of the statute, leading to confusion and inconsistency that would be resolved by the Commission providing a ruling on the interpretation of Section 62-622(3). Accordingly, Staff requests the Commission issue a declaratory ruling on the legal construction of *Idaho Code* § 62-622(3) so that all parties will have the same understanding of the legal standards applicable to a case filed under Section 62-622(3). As the

result, the evidentiary hearing will be much more efficient and useful, focusing on relevant facts rather than on witness statements of the legal analysis of Section 62-622(3).

**MEMORANDUM IN SUPPORT OF
PETITION FOR A DECLARATORY RULING**

Qwest filed its application in this case on December 17, 2002, seeking price deregulation of its basic local services in seven specific exchanges in southern Idaho. The application was filed pursuant to *Idaho Code* § 62-622(3), which provides as follows:

62-622. Regulation of basic local exchange rates, services and price lists.

(3) The commission shall cease regulating basic local exchange rates in a local exchange calling area upon a showing by an incumbent telephone corporation that effective competition exists for **basic local exchange service** throughout the local exchange calling area. Effective competition exists throughout a local exchange calling area when either:

(a) Actual competition from a facilities-based competitor is present for both residential and small business basic local exchange customers; or

(b) There are functionally equivalent, competitively priced **local services** reasonably available to both residential and small business customers from a telephone corporation unaffiliated with the incumbent telephone corporation.

Qwest filed its application claiming it meets the legal requirement for cessation of Commission regulation under subparagraph (b). Specifically, Qwest alleges that telecommunication services provided by wireless companies are “functionally equivalent, competitively priced local services reasonably available to both residential and small business customers from a telephone corporation unaffiliated with [Qwest].” Staff and Qwest fundamentally disagree on the construction of Section 62-622(3). For the purposes of this Petition for a Declaratory Ruling, however, Staff need not point out the factual differences identifiable in the parties’ prefiled testimony.

Qwest's Interpretation of Section 62-622(3)

Drawing upon the definition of **basic local exchange service** stated at *Idaho Code* § 62-603(1), Qwest contends Section 62-622(3)(b) severely limits the determination for the Commission when an application is filed under that section. The term **basic local exchange service** is defined as “the provision of access lines to residential and small business customers with the associated transmission of two-way interactive switched voice communication within a local exchange calling area.” *Idaho Code* § 62-603(1). The term **basic local exchange service** is used in paragraph (3) of Section 62-622, but is *not* used in subparagraph (b). Instead, the legislature used the term **local services** in subparagraph (b) when identifying a potential source of competition to Qwest’s **basic local exchange service**. The term **local services** is not defined in any Idaho statute.

Qwest’s interpretation of Section 62-622(3)(b) is a two-step process. First, Qwest assumes the legislature meant something other than what it said in subparagraph (b). Second, Qwest nullifies the purpose of Section 62-622 by placing undue emphasis on the application (as Qwest would apply it) of subparagraph (b). To accomplish the first step, Qwest inserts a new phrase in subparagraph (b). In its prefiled testimony, Qwest contends the legislature meant to say **basic local exchange services** in subparagraph (b) where it instead said **local services**. Thus, a Qwest witness states his belief that “the only logical interpretation of the term ‘local service,’ as used in section 62-622(3)(b), is as a short-hand reference to ‘basic local exchange service,’ defined as two-way interactive switched voice communications services provided by non-incumbent service providers.” *Souba Rebuttal*, p. 6-7. Because, according to Qwest, the legislature meant to say **basic local exchange services** in subparagraph (b), the Commission can only consider whether the alleged source of competition provides two-way interactive switched voice communication services. If so, Qwest asserts the functionally equivalent standard in subparagraph (b) is met.

To accomplish the second step in its interpretation of Section 62-622(3)(b), Qwest assumes the legislature intended subparagraph (b) to control, and strictly limit, the showing required for deregulation of basic local rates. By Qwest’s interpretation, it need only show that wireless service is functionally equivalent (narrowly defined) to its basic local service, and that it is competitively priced (not defined) and reasonably available throughout the local exchange calling area. It is not required to show, and the Commission cannot even inquire, whether

wireless service is *actually* competing for customers with Qwest for basic local telecommunication services.

Applying the Actual Language of the Statute

Qwest's assumption that the term **basic local exchange services** should be inserted in place of **local services** in subparagraph (b) is inconsistent with rules of statutory construction and thus is invalid. When interpreting a statute, the Commission applies the same principles established by the courts for giving effect to statutory terms. Qwest's interpretation of Section 62-622(3)(b) fails all relevant statutory interpretation guidelines.

Statutory interpretation begins with the words of the statute, giving the language used its plain, obvious and rational meaning. The point of statutory construction is to ascertain and give effect to the legislative purpose and to give force and effect to every word and phrase employed. *Potlatch Corp. v. U.S.*, 134 Idaho 912, 12 P.3d 1256 (2000). In interpreting the language used, "the plain, obvious, and rational meaning is always preferred to any hidden, narrow, or irrational meaning." *Wilson v. State*, 133 Idaho 874 (Ct. App. 2000), quoting *State v. Arrasmith*, 132 Idaho 33, 40, 966 P.2d 33, 40 (Ct. App.1998). When the legislature enacts a statute, it must be assumed the legislature means what is clearly stated unless the result is palpably absurd. *Inama v. Boise County ex rel Bd. of Commissioners*, ___ Idaho ___, 63 P.3d 450 (2003); *Wilder v. Miller*, 135 Idaho 382, 17 P.3d 883 (2001); *Marmon v. Marmon*, 121 Idaho 480, 825 P.2d 1136 (1992). If the statute is not ambiguous, the statute is to be followed as written, without adding to or taking away language used by the legislature. *Id.* Where the legislature uses a particular term throughout a statute and then omits it in another part of the statute, it is presumed the legislature had a different intent than if the first term had been used. See, e.g., *Stroud v. Dept. of Labor and Ind. Services*, 112 Idaho 891, 736 P.2d 1345 (Ct. App. 1987); *Kopp v. State*, 100 Idaho 160, 164, 595 P.2d 309 (1979) ("Where a statute with respect to one subject contains a certain provision, the omission of such provision from a similar statute covering a related subject is significant to show that a different intention existed").

In construing Section 62-622(3), the Commission must first look at the words selected by the legislature, assuming the language was deliberately selected and that the legislature meant what is clearly stated. By this first, basic principle of statutory construction, Qwest's attempt to change subparagraph (b) must fail. The legislature used the term **basic local exchange service** eight times in Section 62-622, both before and after its use of the term **local**

services in subparagraph (b). The only place the legislature used a short-hand reference to **basic local exchange service** occurs in paragraph (2) of the statute, where the phrase **such services** is used to refer to **basic local exchange services** appearing earlier in the same sentence. Clearly the legislature had no problem using the complete term each time it intended a reference to **basic local exchange service** and it readily could have inserted that term in subparagraph (b) if reference to those services was intended. Since the complete term is so often recited by the legislature in Section 62-622, there is no reasonable basis to conclude it was merely saving ink by using the term **local services** in subparagraph (b). Instead, to give effect to all parts of the statute, it must be assumed the legislature intended *not* to use **basic local exchange service** in subparagraph (b) where it used the term **local services**.

Even if it is assumed the term **basic local exchange service** should be inserted into subparagraph (b), it is only by also ignoring part of the term's definition that Qwest accomplishes its statutory interpretation. Qwest unduly focuses on only part of the definition to restrict the comparison of functions between two different products in assessing whether they are functionally equivalent. The definition of **basic local exchange service** is "*the provision of access lines to residential and small business customers with the associated transmission of two-way interactive switched voice communication within a local exchange area.*" By focusing only on the "two-way interactive switched voice communication" part of the definition, Qwest argues the statute prevents consideration of other uses of wireline service, such as Internet connection and data (facsimile) transmission.

The definition of **basic local exchange service** is primarily "the provision of access lines." It is the access lines themselves that make the switched voice communication possible, just as it is the access lines that make data transmission and Internet connection possible. A comparison of the functionality of basic local exchange service, then, must consider all that is available by "the provision of access lines," not merely that switched voice communication is provided over the access lines. The legislature recognized by enacting Section 62-622(3)(b) that a service technically distinct from wireline service nonetheless might provide all the same services available through the provision of access lines. Nothing in the language selected by the legislature, however, restricts the functionally equivalent review to determine only whether the allegedly competitive product provides two-way interactive switched voice communication.

Staff requests that the Commission issue a declaratory ruling that the language used by the legislature in Section 62-622(3)(b) does not limit the “functionally equivalent” comparison to determine only that the allegedly competitive product provides two-way interactive switched voice communication. By the first principle of statutory construction, requiring that the language selected by the legislature be given its plain, ordinary meaning, the Commission should enter a declaratory ruling that the term **local services** in subparagraph (b) is not really a reference to **basic local exchange services**. In addition, the Commission should issue a declaratory ruling that the functionally equivalent review is not solely to determine whether another product provides two-way interactive switched voice communication. It is only by first inserting the definition of **basic local exchange service** into subparagraph (b) and then by ignoring a significant part of the definition that Qwest achieves the statutory interpretation it seeks.

Ascertaining and Giving Effect to the Legislative Intent

Qwest’s construction of Section 62-622(3) also fails by all other applicable rules of statutory interpretation, as the Commission already concluded in a previous case filed by Qwest’s predecessor. Application of statutory construction principles leads to the conclusion that the legislature intended a serious showing of effective competition before basic local rates are deregulated. Section 62-622(3) requires the Commission to *cease regulating* basic local exchange rates when an incumbent telephone company establishes “that *effective competition exists* for basic local exchange service throughout the local exchange calling area.” There can be no dispute that the legislature intends regulatory oversight by the Commission to end only when, and no sooner than, an effective, competitive market is strong enough to replace the customer protection traditionally provided by regulation. Subparagraph (b) identifies one of the means by which that “effective competition” may appear, that is, through “functionally equivalent, competitively priced local services reasonably available to both residential and small business customers from [an unaffiliated telephone company].” Qwest focuses on the means by which competition might appear, set forth in subparagraph (b), to the exclusion of the requirement that effective competition must actually exist. Bearing in mind that the goal of statutory interpretation is to ascertain and give effect to the purpose intended by the legislature, Qwest’s interpretation of Section 62-622(3) must fail as inconsistent with the intent of the legislature.

Qwest's interpretation of Section 62-622(3) ignores the language as well as the purpose of that section. The language deliberately chosen by the legislature *requires* a showing "that effective competition exists" for basic local service before prices are deregulated. This is not an idle requirement or standard, since the purpose is to determine whether marketplace attributes will adequately protect customers historically protected by the Commission's regulatory oversight. To emphasize the high standard required for price deregulation under Section 62-622, the legislature added a statement of its intent in a separate section, *Idaho Code* § 62-602(2). That paragraph provides:

It is the intent of this legislature that effective competition throughout a local exchange calling area will involve a significant number of customers having both service provider and service option choices and that *actual competition means more than the mere presence of a competitor*. Instead, *for there to be actual and effective competition there needs to be substantive and meaningful competition* throughout the incumbent telephone corporation's local exchange calling area.

Idaho Code § 62-602(2) (italics added).

By Qwest's interpretation of Section 62-622(3), subparagraph (b) subsumes the language of paragraph (3). By focusing exclusively on subparagraph (b), coupled with a very narrow interpretation of that subparagraph, Qwest contends it is necessary only to show that strictly limited, technical requirements of subparagraph (b) are met. Qwest's construction of Section 62-622(3)(b) thus prevents any meaningful evaluation of whether "effective competition" actually exists to replace the consumer protection historically provided through regulation.

Qwest's erroneous interpretation of Section 62-622(3) might be understandable if it were being presented for the first time to the Commission. It is not. In July 1999, Qwest (then U S WEST) filed an application under Section 62-622(3) seeking deregulation of its basic local rates in the Burley, Idaho exchange. Qwest filed its application pursuant to subparagraph (a), rather than subparagraph (b), but the Company argued for the same interpretation of Section 62-622(3) it argues in this case.

The Commission in the earlier case unequivocally, convincingly rejected Qwest's interpretation of Section 62-622(3), stating Qwest's application of the statute "would lead to absurd results." Order No. 28369, p. 6. The Commission noted that, by the Company's analysis, "the only operative language in Section 62-622(3) is that contained in subparagraph (a)." By

that interpretation, according to the Commission, “the legislature’s express requirement that competition be effective, actual, substantive, meaningful . . . is all rendered meaningless.” *Id.* The Commission also stated that “[Qwest’s] construction has the legislature using language to create a certain standard and then reversing that standard by redefining the same words in a subparagraph.” In the Commission’s view, “[t]hat would be an absurd result, and is contrary to what the legislature intended.” *Id.* In reviewing the legislature’s intent, the Commission reviewed the expressed intent in Section 62-602(2) and the Commission’s role “to ensure that high-quality basic service remains available at just and reasonable rates for all classes of customers.” Order No. 28369, p. 8. The Commission concluded, “it is entirely logical that the legislature required a high level of competition before all regulatory pricing control of basic service rates is removed.” *Id.*

Qwest demands the same interpretation of Section 62-622(3) in this case it attempted in the Burley case. By Qwest’s interpretation, the only operative part of Section 62-622(3) is contained in subparagraph (b). There would be no requirement to show that competition is effective, actual, substantive, and meaningful. Qwest’s interpretation has the legislature creating a certain standard in paragraph (3) (that effective competition actually exist), and then reversing that standard by redefining the same words in subparagraph (b) (requiring only that something functionally equivalent and competitively priced exist).

Qwest’s interpretation derogates the language and purpose of Section 62-622(3). By strictly limiting the review on the “functionally equivalent” requirement, and then focusing only on the provisions of subparagraph (b), Qwest contends it need only show that another product may be available to provide two-way interactive switched voice communication at prices competitive with Qwest’s rates. By Qwest’s interpretation, it does not matter whether real, effective competition for basic local exchange service actually exists. So, for example, it would not matter that not a single customer is replacing Qwest’s basic local exchange service with the other product, or that the other product is entirely being purchased in addition to Qwest’s basic local exchange service. If strictly limited standards of subparagraph (b) are met, Qwest asserts, all requirements to show that effective competition actually exists are also met. That interpretation is at odds with the legislature’s intent regarding the removal of regulatory controls only where an actual competitive market exists.

Because the intent of Section 62-622(3) is to ascertain whether effective competition for basic local exchange service exists – that is, whether an effective, actual, substantive, meaningful competitive marketplace exists – it is necessary to consider the extent to which the product alleged to be functionally equivalent is actually competing with Qwest’s basic local exchange service. It is not possible to make that evaluation without looking at the reasons customers may be choosing to purchase the other product. If the product alleged to be equivalent offers features or functions different from those available from Qwest’s basic local exchange service, customers may be purchasing the other product for those different features, rather than to replace Qwest’s basic local exchange service. Similarly, if basic local exchange service offers features important to customers that are not available from the other product, customers may be compelled to retain their wireline service for the features it provides. If so, the conclusion must be that the other product in fact is not functionally equivalent to basic local exchange service, or that the other product is not actually competing for customers so that “effective competition” does not really exist.

The absurd result of Qwest’s interpretation is readily observed by applying it to another utility experiencing the same type of “competition” Qwest encounters with wireless providers. Just like with cellular service, there has been an explosion in the amount of bottled water purchased by consumers over the last five years. Numerous bottled water companies compete for customers, and make their product readily available in almost every type of retail store. Advertisements for bottled water regularly appear on television, in newspapers and magazines, and bottled water prices have declined as more companies enter the market. Certainly consumption of tap water has declined as more and more bottled water is purchased. Bottled water and tap water no doubt meet a narrow standard as being functionally equivalent: both quench your thirst, both are potable and can be used for cooking and watering plants. It would even be possible to disconnect your tap water service and replace it entirely with bottled water, although few choose to do it. No doubt some inconvenience would result, but bottled water provides advantages of mobility and convenience that tap water cannot provide.

Qwest’s application of Section 62-622(3)(b) to a water utility would require the Commission to cease regulating water rates by virtue of the competition presented by bottled water companies. As with its application of Section 62-622(3) to telephone service, Qwest would have us believe the legislature intended, if competition exists for *drinking water*, that

“effective competition” exists for utility provided water, ignoring that customers use their domestic water for showering, laundry and irrigation. Tap water and bottled water are functionally equivalent, narrowly defined, and bottled water is available at competitive prices to tap water. That is enough, according to Qwest’s interpretation of Section 62-622(3)(b). It is not enough, according to the language of Section 62-622(3) and the expressly stated intent of the legislature, as the Commission previously concluded in Order No. 28369.

CONCLUSION

Qwest and the Commission Staff have significantly different interpretations of Section 62-622(3), and each approached the case consistent with its own interpretation of the statute. As the result, the prefiled evidence does not focus on the same factual issues and also contains arguments regarding the interpretation of Section 62-622(3). The interpretation of a relevant statute presents a legal issue solely for the Commission’s resolution. Because the issues for hearing would be greatly clarified, resulting in a meaningful, efficient hearing, the Commission should issue a declaratory ruling establishing the legal interpretation of Section 62-622(3). In that way, only differences of relevant fact on which the parties disagree will be presented during the evidentiary hearing.

Staff requests that the Commission issue a declaratory ruling stating that:

- (1) The legislature did not intend the term **basic local exchange service** to be inserted into subparagraph (b) in place of the term **local services**;
- (2) A review of the features of a product alleged to be “functionally equivalent” under Section 62-622(3)(b) is not limited to a determination that the product provides two-way interactive switched voice communications;
- (3) An applicant filing under Section 62-622(3) must show that effective competition for the applicant’s basic local exchange service actually exists. The applicant must show the competition is “actual, effective, substantive and meaningful.” Order No. 28369, p. 3.

Unless Qwest states a willingness to have the Commission rule on Staff’s Petition for Declaratory Ruling without oral argument, Staff requests the Commission set this matter for oral argument on Thursday, May 22, 2003 at 9:30 a.m. or on Wednesday, May 28, 2003 at 2:30 p.m.

Respectfully submitted this 30th day of April 2003.



Weldon B. Stutzman
Deputy Attorney General
for the Commission Staff

Vld/N: QWET0225_ws6

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 30th DAY OF APRIL 2003, SERVED THE FOREGOING **STAFF'S PETITION FOR A DECLARATORY RULING AND MEMORANDUM IN SUPPORT OF PETITION**, IN CASE NO. QWE-T-02-25, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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