

WELDON B. STUTZMAN  
DEPUTY ATTORNEY GENERAL  
IDAHO PUBLIC UTILITIES COMMISSION  
PO BOX 83720  
BOISE, IDAHO 83720-0074  
(208) 334-0318  
ISB NO. 3283

RECEIVED   
FILED   
2003 MAY 19 AM 11:40  
IDAHO PUBLIC  
UTILITIES COMMISSION

Street Address for Express Mail:  
472 W. WASHINGTON  
BOISE, IDAHO 83702-5983

Attorney for the Commission Staff

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

<b>IN THE MATTER OF THE APPLICATION OF</b>	)	<b>CASE NO. QWE-T-02-25</b>
<b>QWEST CORPORATION FOR</b>	)	
<b>DEREGULATION OF BASIC LOCAL</b>	)	<b>STAFF'S REPLY</b>
<b>EXCHANGE RATES IN ITS BOISE, NAMPA,</b>	)	<b>MEMORANDUM TO QWEST</b>
<b>CALDWELL, MERIDIAN, TWIN FALLS,</b>	)	<b>CORPORATION'S ANSWER</b>
<b>IDAHO FALLS, AND POCA TELLO</b>	)	<b>AND CROSS PETITION FOR A</b>
<b>EXCHANGES.</b>	)	<b>DECLARATORY RULING</b>
	)	
	)	<b>MOTION TO VACATE</b>
	)	<b>HEARING DATES</b>

---

The Commission Staff, by its counsel of record, files this Reply Memorandum to Qwest Corporation's Answer to Petition for a Declaratory Ruling and Cross Petition. In its Petition for Declaratory Ruling, Staff asks the Commission to rule on the legal construction of *Idaho Code* § 62-622(3), it being clear from the prefiled testimony and exhibits that the parties substantially disagree on the interpretation of that statute. As the result, the parties defined the factual issues for an evidentiary hearing based on greatly differing understandings of the statute. On May 13, 2003, Qwest filed its Answer to Staff's Petition for Declaratory Ruling and also filed a Cross Petition asking the Commission to issue an Order approving its interpretation of *Idaho Code* § 62-622(3)(b).

STAFF'S REPLY MEMORANDUM TO  
QWEST CORPORATION'S ANSWER AND  
CROSS PETITION FOR A DECLARATORY RULING  
MOTION TO VACATE HEARING DATES

The initial point of disagreement is over the legislature's use of the term local services in Section 62-622(3)(b). In its Petition, Staff asks the Commission to issue a declaratory ruling stating that "the legislature did not intend the term basic local exchange service to be inserted into subparagraph (b) [of Section 62-622(3)] in place of the term local services." Staff Petition, p. 10. By its Cross Petition, Qwest asks the Commission to rule that "the term 'local service' as used in *Idaho Code* § 62-622(3)(b) is a shorthand reference to 'basic local exchange services' as that term is used in *Idaho Code* § 62-622(3) and defined in *Idaho Code* § 62-603(1)." Qwest Answer, p. 22. Clearly this issue most directly identifies the positions of the parties and their disparate approaches to the case.

Replacing the term local services with the term basic local exchange services, however, is only the first step in Qwest's restrictive interpretation of the statute. After inserting the new term, Qwest then narrows the definition of basic local exchange services; that is, Qwest contends it is no more than two-way interactive switched voice communication. Qwest thereby concludes an alternative service is functionally equivalent to basic local exchange service if it is capable of providing voice communication. Finally, Qwest isolates subparagraph (b) from the rest of paragraph (3) and the legislature's stated intent in order to strictly limit what it is required to show for its local rates to be deregulated. Thus, by injecting the term basic local exchange services into subparagraph (b), and then by applying a restrictive definition of that term, Qwest narrowly defines first the "functionally equivalent" requirement and ultimately the "effective competition" standard in Section 62-622(3). Qwest's interpretation results from the goal it seeks rather than from the canons of statutory construction. Application of the most fundamental principles of statutory construction requires a declaratory ruling against Qwest's interpretation of Section 62-622(3).

#### **The Parties Agree on the Established Rules for Statutory Construction.**

Principles for construing a statute are well established by the courts and the parties apparently agree on the principles to be applied. For example, Qwest agrees that "statutory interpretation begins with the words of the statute and should give the language used its plain, obvious and rational meaning." Qwest Answer, p. 8. Qwest also concedes "that the purpose of statutory construction is to ascertain and give effect to the legislative purpose." *Id.* Qwest did not mention, but apparently does not disagree, that 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). Similarly, if the statute is not ambiguous, there is no need to engage in statutory construction. *Inama*, \_\_\_ Idaho \_\_\_, 63 P.3d 450, \_\_\_ (“If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written”). The Supreme Court also concludes that “[a]mbiguity is not established merely because differing interpretations are presented to the Court; otherwise, all statutes would be considered ambiguous.” *Id.* Finally, if a statute is ambiguous, then it must be interpreted to accomplish the intent and purpose of the legislature. *State v Dewebre*, 133 Idaho 663, 991 P.2d 388 (Ct. App. 1999).

Qwest does not argue that the statute is ambiguous, but nonetheless interprets Section 62-622(3) without applying the basic principles of statutory construction. For example, Qwest rejects the specific words used by the legislature, but makes no attempt to demonstrate the statute is ambiguous or that the result of using the words selected by the legislature is palpably absurd. Likewise, while putting its own interpretation on the statute, Qwest completely disregards the legislature’s stated intent for application of Section 62-622(3), as well as a Commission precedent applying the statute in light of the legislature’s purpose and intent. In contrast, Staff’s interpretation accepts the words used by the legislature in Section 62-622(3). In addition, Staff acknowledges the expressed intent of the legislature and explains how the language of the statute is consistent with the legislature’s intent. If the words of Section 62-622(3)(b) are accepted as written and are given their plain, obvious and rational meaning, and if effect is given to the legislative intent and purpose, Qwest’s interpretation of the statute must be rejected. Application of these principles requires the declaratory ruling requested by Staff.

**Section 62-622(3)(b) Does Not Contain the Term Basic Local Exchange Services and There Is No Basis for Adding It to the Paragraph.**

It must be noted first that Qwest seeks to change or add to the words selected by the legislature, in derogation of the first principle of statutory construction. Qwest rejects the term local services used by the legislature and instead inserts the term basic local exchange services in its place, without explaining how Section 62-622(3) is ambiguous or the result palpably absurd by the legislature’s use of the term it selected. In fact, the legislature’s use of the term local

services rather than basic local exchange services is entirely logical and consistent with the legislature's purpose and intent for Section 62-622(3).

By Section 62-622(3), the Commission is to cease regulating Qwest's basic local rates only when *effective competition exists*. The legislature recognized by subparagraph (b) that competition for local service customers might arise from something other than a facilities-based provider. Under that scenario, a company providing functionally equivalent, competitively priced local services might in fact be directly competing for Qwest's basic local service customers.

Use of the term local services is consistent with the notion that the alternative service, although not identical, may nonetheless be functionally equivalent to basic local exchange service. The legislature is inviting a comparison of the different products to determine whether they are functionally equivalent, and ultimately, whether they effectively compete for customers. It simply is not possible to determine whether two products are functionally equivalent without understanding the various functions of the two products. Likewise, it is not possible to determine whether the products are actually competing for customers without evaluating whether customers are buying them for different purposes. The legislature wisely did not restrict the "functionally equivalent" comparison by defining that term because to do so might artificially narrow the necessary comparison. Far from being ambiguous or palpably absurd, the legislature's use of the term local services is entirely logical, reasoned, and consistent with the purpose of the statute.

Qwest's goal is to limit the functionally equivalent review, so Qwest restricts the definition of basic local exchange services after inserting it into subparagraph (b). By describing basic local exchange services as no more than voice communication, Qwest claims "that data-related services, being excluded from the definition of "basic local exchange services" under *Idaho Code* § 62-603(1), are irrelevant to the evidence Qwest must offer in this docket." Qwest Answer, p. 2. By replacing the term local services with the term basic local exchange services, Qwest believes it can restrict the functionally equivalent test to a determination that the alternative product provides voice communication.

Of course, basic local exchange service does more than provide voice communication, and the definition is not as limited as Qwest contends. The statutory definition

begins with “the provision of access lines,” and its functions include data-related services via the access lines. In fact, Qwest’s Basic Local Exchange Tariff currently on file with the Commission provides a rate for single lines “connected to customer-provided computer and/or computer systems equipment capable of information processing and/or storage.” Qwest Corporation Basic Local Exchange Tariff, Southern Idaho, Section 5, Page 37. The identified rate for a single, flat rate access line connected to a customer’s computer is “1FA,” a small business rate fully regulated by the Commission under Title 61 as part of Qwest’s basic local exchange service. A copy of page 37 of Qwest’s Basic Local Exchange Tariff is attached to this memorandum.

Qwest mischaracterizes Staff’s interpretation to mean “the legislature intended that to prove the existence of effective competition for basic local exchange service, an incumbent must prove that customers have ‘functionally equivalent’ and ‘competitively priced’ access to the internet.” Qwest Answer, p. 9. The point is the legislature by the language selected recognized a full review of functions must take place to determine whether two products are actually competing for customers. Staff accepts the language adopted by the legislature to enable a meaningful review of functions, and thus a meaningful review of whether effective competition exists.

Qwest, on the other hand, proposes to change the statutory language, and its adjustment to the statute is not based on principles of statutory construction. Qwest merely asserts the legislature used the term local services in subparagraph (b) as a “short-hand” reference to basic local exchange services. To make its argument, Qwest points out that the legislature several times used abbreviated references in Section 62-622, stating “the legislature used more short-hand references (12) to ‘basic local exchange services’ than it used the long-hand form of that term (11).” Qwest Answer, p. 11.

Staff acknowledged in its initial memorandum that the legislature uses a short-hand reference to basic local exchange services in paragraph (2) of Section 62-622. In two separate sentences, each containing the full term basic local exchange services, the legislature later in each sentence used the terms “*such* local service” or “*such* services,” clearly referring to basic local exchange services used earlier in the same sentence. At other points in the statute, the legislature’s use of a shorter term must refer to something other than basic local exchange

services, as is evident from the context. The legislature's frequent use of the term basic local exchange services throughout Section 62-622 generally demonstrates it used the complete term when intending to reference those services. The more important point is that determining the legislature's intent requires that the words selected be read in the particular context in which they appear, and it must be assumed that the words used were deliberately selected by the legislature.

Significantly, the context and purpose of the language selected by the legislature for paragraph (3) itself demonstrates the legislature's use of local services in subparagraph (b) was deliberate. Paragraph (3) is the only part of Section 62-622 that addresses deregulation of basic local exchange rates, subparagraph (b) describing one of the means by which competitive services may appear. If the term basic local exchange services is inserted into subparagraph (b) a ridiculous redundancy occurs. In addition to being functionally equivalent and competitively priced, the legislature provides that the alternative local services must be "reasonably available to both residential and small business customers." Part of the definition of basic local exchange service is "the provision of access lines *to residential and small business customers.*" *Idaho Code* § 62-603(1) (italics added). If the definition is read into subparagraph (b), as Qwest advocates, the paragraph would require, in part, access lines "to residential and small business customers" that are also "reasonably available to both residential and small business customers." Logically, the legislature's use of the term local services required it to add the phrase "reasonably available to both residential and small business customers" because that is not part of a definition for local services.

There is no basis for Qwest to assume the legislature intended the term basic local exchange services be inserted into Section 62-622(3)(b) where it instead used the term local services. In fact, the first canon of statutory construction prevents that assumption. The language specifically adopted by the legislature must be accepted and applied. Only if application of the specific words used by the legislature creates an absurd result can a good faith attempt be made to differently interpret the words selected by the legislature. If that step is reached, the legislature's language must be interpreted to be consistent with and to apply the intent of the legislature in the statute.

**Qwest's Interpretation Contravenes the Intent and Purpose of the Legislature.**

Application of the fundamental principle of statutory construction, that the legislative intent and purpose of the statute be given effect, also defeats Qwest's constrained interpretation of Section 62-622(3). Qwest acknowledges the purpose of statutory construction is to ascertain and give effect to the legislative purpose, and purportedly agrees the interpretation of Section 62-622(3)(b) must be in harmony "with the remainder of Title 62." Qwest Answer, pp. 8-9. Notably however, Qwest completely ignores the specific, directly relevant, expressed intent of the legislature for the Commission's interpretation and application of Section 62-622(3). In contrast, Staff's interpretation of the statute fully recognizes and furthers the legislature's intent, both as expressed in Section 62-622(3) as well as in *Idaho Code* § 62-602(2).

The directive of Section 62-622(3) is for the Commission to cease regulating Qwest's basic local rates only when *effective competition exists*. Lest there be any question that the legislature intended actual, effective competition to exist before local service rates are deregulated, the legislature reaffirmed its intent in Section 62-602(2). There the legislature states "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).

The Commission previously construed Section 62-622(3) in light of the legislature's specific intent in Section 62-602(2). Staff discussed in its previous memorandum that the Commission already rejected part of Qwest's interpretation of Section 62-622(3) as inconsistent with the legislature's intent. As a quick reminder, the Commission concluded in Order No. 28369 entered in Case No. USW-T-99-15 (the *Burley* case), that a subparagraph of Section 62-622(3) cannot be interpreted to defeat the legislature's intent that competition be actual, effective, substantive and meaningful before local rates are deregulated. Qwest not only advocates the same interpretation the Commission rejected in the *Burley* Order, it does so without making any attempt to explain how its interpretation is different here or to convince the Commission to overrule the conclusion it reached in the earlier Order. It is noteworthy that

Qwest's Answer does not make any attempt to explain its interpretation of Section 62-622(3) in light of the Commission's previous decision.

Any good faith effort to interpret a statute *must* be based on the purpose and intent of the legislature. That is, after all, the very goal in construing a statute. Inexplicably, although purporting to interpret Section 62-622(3) to further the legislature's purpose, Qwest fails to address or even acknowledge the legislature's stated intent in Section 62-602(2). Likewise, Qwest ignores the Commission's existing interpretation of Section 62-622(3) in the *Burley* Order. It is fair to assume Qwest ignores the legislature's intent because it does not fit its own narrow purpose and interpretation of Section 62-622(3)(b). That approach defies a fundamental tenant of statutory construction; that is, to ascertain and give effect to the intent and purpose of the legislature. Far from diligently attempting to interpret the statute to further the legislative intent, Qwest's interpretation is contrary to the legislature's stated purpose, and seems calculated to defeat it.

### CONCLUSION

In matters brought before it, this Commission is functionally equivalent to a court of law. Like any court, it is the duty of the Commission to accept and enforce the statutes as enacted by the legislature, to construe them as written and to further the intent of the legislature. Cases filed under relevant statutes are to be decided according to the law as written, not by gamesmanship or a marketing campaign.

The Staff's interpretation of Section 62-622(3) is simply a straightforward application of the statute as enacted by the legislature. Qwest's interpretation, on the other hand, amounts to a significant re-write of the statute. By Qwest's interpretation, subparagraph (b) would read:

- (b) There is competitively priced voice communication service reasonably available to both residential and small business customers from a telephone corporation unaffiliated with the incumbent telephone corporation.

In addition, the legislature's stated intent in Section 62-602(2), that competition be actual, effective, substantive and meaningful before local rates are deregulated, would be a nullity. If that is what the legislature intended, drafting it that way is a simple matter.

A good faith interpretation of a statute begins with the language of the statute, accepting it as written, construing it to accomplish the intent and purpose of the legislature. Qwest changes the words of the statute and ignores the stated legislative intent. Application of the canons of statutory construction require a declaratory ruling that (1) the legislature did not intend the term basic local exchange services to be inserted into Section 62-622(3)(b) in place of the term local services, (2) a review of the features of a product alleged to be “functionally equivalent” is not limited to a determination that the product provides voice communications, and (3) an applicant filing under Section 62-622(3) for deregulation of basic local rates must show that actual, effective, substantive and meaningful competition exists for the applicant’s basic local exchange service.

### **MOTION TO VACATE HEARING DATES**

The Commission Staff, by its counsel of record, moves for an Order from the Commission vacating the hearing dates in this case currently set for June 4-5, 2003. Staff represented in its Petition for Declaratory Ruling that the parties substantially disagree on the interpretation of *Idaho Code* § 62-622(3), resulting in confusion and inconsistency that would be resolved by the Commission providing a ruling on the legal construction of the statute. Since Staff filed its Petition and Memorandum, Qwest filed a Cross Petition for Declaratory Ruling and Memorandum, asking the Commission to issue an Order approving its interpretation of Section 62-622(3).

It is clear from the Petition and Cross Petition the parties substantially disagree on the legal interpretation of Section 62-622(3), and that a declaratory order from the Commission will resolve the dispute. It is equally clear at least one party’s case will be significantly affected by the Commission’s Order. That is a positive result, however, because “the evidentiary hearing will be much more efficient and useful, focusing on relevant facts rather than witness statements of the legal analysis of Section 62-622(3).” Staff Petition, p. 2.

The interpretation of a statute is solely a legal issue for the Commission’s determination, and both parties are asking the Commission to provide a ruling in this case. Because the parties’ prefiled testimony was prepared with vastly different understandings of the

relevant law, the Commission's decision will significantly affect the case. In fact, counsel for Qwest stated to Staff counsel the Company would not proceed to hearing on June 4 if the Commission rules against Qwest's interpretation of Section 62-622(3). Likewise, if the Commission rules against Staff's interpretation, Staff will withdraw its prefiled testimony and exhibits in order to prepare them consistent with the legal guidance provided by the Commission.

Once the Commission issues its declaratory Order, the issues for hearing will be simplified and the parties will be able to agree on what facts are relevant for an evidentiary hearing. Evidence will focus on relevant factual disputes rather than on different witness opinions about the statute's interpretation. The hearing scheduled for June 4-5, 2003 should be vacated to allow both parties time to reassess their case in light of the Commission's decision and refile testimony and exhibits to be consistent with the Commission's declaratory Order.

Staff requests the Commission hear argument on its Motion to Vacate Hearing Dates during the oral argument on the Petitions for Declaratory Order set for Thursday, May 22, 2003, at 10:00 a.m.

Respectfully submitted this 19<sup>th</sup> day of May 2003.



---

Weldon B. Stutzman  
Deputy Attorney General  
for the Commission Staff

b1s/N:QWET0225\_ws8

**Qwest Corporation  
Basic Local Exchange  
Tariff**

IDAHO PUBLIC UTILITIES COMMISSION  
APPROVED EFFECTIVE

SECTION 5  
Page 37  
Release 1

SEP 29 '00

AUG 18 '00

SOUTHERN IDAHO  
Issued: 8-14-2000

Effective: 8-18-2000

*Thyra J. Shalters* SECRETARY

**5. EXCHANGE SERVICES**

**5.2 LOCAL EXCHANGE SERVICE**

**5.2.5 LOCAL SERVICE OPTIONS (Cont'd)**

**B. Computer Port Access**

1. The following rates and charges will apply to CO access lines connected to customer-provided computer and/or computer systems equipment capable of information processing and/or storage.
2. Foreign Central Office, FX, Exchange Service Extension, or other incremental charges will be applied in addition to the following rates and charges.
3. The following rates and charges are in addition to the equipment with which the lines are associated.

	USOC	NONRECURRING CHARGE	MONTHLY RATE
• Flat rate access line, each	1FA	[1]	[1]
• Additional flat rate access line, each	AFV	[1]	[1]
• Measured rate access line, each	B4Q	[2]	[2]
• Additional measured rate access line, each	A4Q	[2]	[2]

[1] Rates and charges same as 1FB in 5.2.4.

[2] Rates and charges and measured usage charge same as LMB in 5.2.1.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 19TH DAY OF MAY 2003, SERVED THE FOREGOING **STAFF'S REPLY MEMORANDUM TO QWEST CORPORATION'S ANSWER AND CROSS PETITION FOR A DECLARATORY RULE AND MOTION TO VACATE HEARING DATES**, IN CASE NO. QWE-T-02-25, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

MARY S HOBSON  
STOEL RIVES LLP  
SUITE 1900  
101 S CAPITOL BLVD  
BOISE, ID 83702

ADAM L SHERR  
QWEST  
1600 7<sup>TH</sup> AVE, ROOM 3206  
SEATTLE, WA 98191

CONLEY WARD  
GIVENS PURSLEY LLP  
277 N 6<sup>TH</sup> ST, SUITE 200  
PO BOX 2720  
BOISE, ID 83701-2720

CLAY R STURGIS  
MOSS ADAMS LLP  
601 W RIVERSIDE, SUITE 1800  
SPOKANE, WA 99201-0663

DEAN J MILLER  
McDEVITT & MILLER LLP  
PO BOX 2564  
BOISE, ID 83701

BRIAN THOMAS  
TIME WARNER TELECOM  
223 TAYLOR AVE NORTH  
SEATTLE, WA 98109

SUSAN TRAVIS  
WORLDCOM INC.  
707 17<sup>TH</sup> STREET, SUITE 4200  
DENVER, CO 80202

MARY JANE RASHER  
AT&T COMMUNICATIONS OF THE  
MOUNTAIN STATES INC.  
10005 S GWENDELYN LANE  
HIGHLANDS RANCH, CO 80129-6217

MARLIN D ARD  
WILLARD L FORSYTH  
HERSHNER, HUNTER, ET AL  
180 E 11<sup>TH</sup> AVE PO BOX 1475  
EUGENE, OR 97440-1475

DEAN RANDALL  
VERIZON NORTHWEST INC.  
17933 NW EVERGREEN PKWY  
BEAVERTON, OR 97006-7438

JOHN GANNON  
ATTORNEY AT LAW  
1101 W RIVER, SUITE 110  
BOISE, ID 83702

BEN JOHNSON  
BEN JOHNSON ASSOCIATES INC.  
2252 KILLEARN CENTER BLVD  
TALLAHASSEE, FL 32308

  
SECRETARY