

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

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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

**IN THE MATTER OF THE APPLICATION OF)
QWEST CORPORATION FOR)
DEREGULATION OF BASIC LOCAL)
EXCHANGE RATES IN ITS BOISE, NAMPA,)
CALDWELL, MERIDIAN, TWIN FALLS,)
IDAHO FALLS, AND POCATELLO)
EXCHANGES.)**

**CASE NO. QWE-T-02-25
STAFF'S RESPONSE TO
QWEST CORPORATION'S
MOTION TO REOPEN THE
RECORD**

The Commission Staff, by and through its counsel of record, files this response to Qwest Corporation's Motion to Reopen the Record in Case No. QWE-T-02-25. Qwest filed its Motion on August 14, 2003, apparently due to its dawning awareness "that the other parties remain hesitant to support Qwest's request for price deregulation in the seven exchanges." Qwest Motion p. 2. Qwest seeks with its motion to file new testimony, in which it makes a proposal for the first time in this case: "Qwest now proposes that the Commission approve Qwest's application in the form of a provisional Pilot Project, the terms of which are more fully set out in Mr. Schmit's proposed testimony." Qwest Motion p. 3. Qwest's "Pilot Project" would include a new, non-statutory "claw-back" provision, as well as a cap on rate increases Qwest calls a "universal service assurance cap." The case was fully submitted and the record closed after the hearing on June 4-5, and final post-hearing briefs were filed on July 11, 2003.

Staff objects to Qwest's Motion to Reopen for the following reasons:

STAFF'S RESPONSE TO QWEST
CORPORATION'S MOTION TO
REOPEN THE RECORD

1. Qwest's recommendation that the Commission approve a "provisional Pilot Project" is inconsistent with the issues formulated by Qwest's Application and thus presents issues not addressed by any party.

2. Qwest does not provide a legitimate reason to reopen, it merely seeks an opportunity for an extra response to the evidence presented by the Staff and intervenors.

3. Qwest's proposed new testimony does not address the deficiencies in its case, it is just an attempt to divert attention from the real issues.

(a) Qwest seeks to propose a new, alternative regulatory scheme that is not a legally permissible resolution to a case filed under *Idaho Code* § 62-622(3)(b).

(b) Qwest's newly proposed "pilot project" includes a "claw-back" provision without legal authority.

(c) Other than the extra-legal "claw-back" provision, the only new provision in Qwest's proposed pilot project is a commitment by Qwest to put a cap on its rate increases through 2007.

There being no legal justification provided by Qwest to reopen, no issue of fairness or due process, nor any sound public policy reason to reopen, the Commission should deny Qwest's Motion to Reopen the record in Case No. QWE-T-02-25.

**QWEST PROPOSES TO PRESENT EVIDENCE ON ISSUES
NOT FRAMED BY THE PLEADINGS**

The pleadings of any case serve several purposes, the primary one being to establish the issues to be litigated and presented at hearing. The opening sentence of Qwest's Application that initiated this case states it is filed pursuant to *Idaho Code* § 62-622(3)(b). In paragraph 9 of its Application, Qwest alleges "*Idaho Code* § 62-622(3) mandates that the Commission must '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.'" Further identifying the issues set forth in Section 62-622(3)(b), Qwest alleges in paragraph 10 that it "is experiencing effective competition from a multitude of unaffiliated wireless competitors providing local voice service to small business and residence customers throughout the seven exchanges," and that wireless service "is functionally equivalent to and competitively priced with Qwest's basic local exchange service and is reasonably available." Based on these factual allegations, Qwest's Application

requested “that this Commission enter an order within 90 days if possible deregulating Qwest’s basic local exchange service rates for the Boise, Caldwell, Idaho Falls, Meridian, Nampa, Pocatello and Twin Falls exchanges based upon the fact that effective competition exists in those seven exchanges.” Qwest Application p. 9.

Nowhere in Qwest’s Application is there any hint of a suggestion that Qwest would seek approval of a “provisional Pilot Project” for deregulation of its local service rates. There is no mention of a new claw-back provision Qwest would propose, no suggestion that a price freeze or cap would be part of the relief Qwest would seek. Nor did Qwest ever ask to amend its Application to broaden the issues, as would be permissible under Commission Rule of Procedure 66. See IDAPA 31.01.01.066. In short, every allegation in Qwest’s Application, as well as the issues reasonably derived from an application filed under *Idaho Code* § 62-622(3)(b), informed the Commission and parties that Qwest was solely seeking unconditional price deregulation of its local services in seven specific exchanges. Qwest’s Motion to Reopen is an inappropriate attempt to present a late proposal to the Commission that is outside the scope of the pleadings and the issues fairly litigated and presented by the parties.

QWEST HAS NOT PROVIDED A LEGITIMATE REASON TO REOPEN

Nowhere in its Motion to Reopen does Qwest claim that it did not have a full and fair opportunity to completely develop and present its case to the Commission. In fact, Qwest was the only entity in the case given an opportunity to file rebuttal testimony, which gave Qwest an opportunity to address each of the issues identified by Staff and intervenors in their direct testimony. Unable to argue any unfairness or deficiency in the hearing process, Qwest merely states that it filed its motion because “Qwest is aware that the other parties remain hesitant to support Qwest’s request for price deregulation in the seven exchanges primarily out of a concern that competition will not adequately constrain Qwest’s pricing.” Qwest’s Motion p. 2.

First, the Staff and intervenor’s opposition to Qwest’s Application was not revealed for the first time at the hearing. The other parties to this case have opposed Qwest’s Application from the very beginning. Qwest’s failure to address at the hearing the issues identified by Staff and intervenors cannot now be justification to give Qwest an opportunity to reopen the record.

Second, it is incorrect to say that Staff’s primary concern is that competition will not adequately constrain Qwest’s pricing. As Staff’s testimony and post-hearing briefs make clear,

Staff's primary concern is that Qwest absolutely failed to present evidence to satisfy the statutory standards for price deregulation. Staff's primary concern is that the Commission, and the entities subject to the Commission's regulatory oversight, comply with the statutory standards established by the legislature for price deregulation. The evidence that Qwest presented, were the Commission to find it sufficient to meet the requirements of *Idaho Code* § 62-622(3)(b), would render the terms of that statute meaningless. It is of course true that Staff believes the lack of evidence demonstrating the existence of meaningful competition, as the statute requires, makes Qwest's ability to raise rates practically unfettered.

Those issues aside, the significant problem with Qwest's Motion is that it offers no justification for reopening the case, other than Qwest's own unhappiness with the results of the hearing. Although the Commission's Rules of Procedure do not address the standard for granting a motion to reopen a case once it has been fully submitted, guidance is provided by the State Courts' Rules of Civil Procedure. Rule 59(a) authorizes a court to grant a new trial "on all or part of the issues in an action for any of the following reasons:

1. Irregularity in the proceedings of the court, jury or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

* * *

3. Accident or surprise, which ordinary prudence could not have guarded against;
4. Newly discovered evidence, material for the party making the application, which the party could not, with reasonable diligence, have discovered and produced at the trial;

* * *

7. Error in law, occurring at the trial.

IRCP 59(a).¹

Legitimate reasons for reopening a record include irregularities resulting in unfairness, unavoidable accidents or surprises, newly discovered evidence that could not have

¹ Paragraphs 2, 5 and 6 of Rule 59(a) address jury issues, damages, and the final verdict or decision and thus are not relevant to this discussion.

been discovered prior to the hearing, and errors in law occurring at the hearing. Qwest's stated reason for its request to reopen – its awareness that other parties do not support its application – is not a valid reason to reopen the record.

**QWEST'S PROPOSED NEW EVIDENCE
DOES NOT ADDRESS RELEVANT ISSUES**

Staff believes Qwest's Motion to Reopen was prompted only by its awareness that its evidence does not meet the statutory standards for price deregulation established in Section 62-622(3)(b). Qwest simply did not present evidence showing that cellular telephone service provides meaningful competition to Qwest's basic landline service. Qwest's proposed new evidence, however, makes no attempt to address the shortcomings in its case. Instead, Qwest proposes that the Commission ignore the deficient evidence and approve Qwest's Application on a conditional basis. Qwest does not explain how the Commission could approve Qwest's Application, on a conditional basis or otherwise, in the absence of evidence on the standards set forth in *Idaho Code* § 62-622(3)(b). Were Qwest proposing to submit new evidence it previously missed for good reason, relating to the existence of competition in the seven relevant exchanges, its Motion could be given serious consideration. Qwest's new evidence instead is a newly conceived idea to create a "conditional Pilot Project."

A. A Conditional Pilot Project is not a Remedy Authorized by Section 62-622(3).

In its proposed new evidence, Qwest offers a new, alternative regulatory scheme, and asks the Commission to approve price deregulation on a conditional basis. The statute under which Qwest filed its Application for price deregulation does not authorize conditional approval. Instead, Section 62-622(3) requires the Commission to cease regulating prices for basic local exchange service when the requisite evidentiary showing has been made. Qwest now is proposing an alternative regulatory scheme, calling it a pilot project, and including a price cap provision it terms a "universal service assurance cap." The Commission may well have jurisdiction under Title 61 to consider adjustments to the regulatory scheme for the utilities it regulates, and clearly can approve price-cap regulation in a case filed under Section 62-622(1)(a). Staff indicated to Qwest before it filed its Application in this case that Staff would willingly discuss with Qwest proposals to adjust traditional rate of return regulation under Title 61. Nothing in Section 62-622(3), however, suggests the Commission has jurisdiction to approve a conditional pilot project when an application is filed under that section. The

Commission is required to “cease regulating basic local exchange rates in a local exchange calling area” upon a showing by the applicant that the statutory standards are met.

B. Qwest Proposes to Legislate a New “Claw-Back” Section Without Legal Authority.

Included in Qwest’s proposal for a pilot project is a “claw-back” provision similar to the one found in *Idaho Code* § 62-605. Section 62-605(5) applies to any telecommunications service which was subject to Title 61 regulation as of July 1, 1988, and also “which at the election of the telephone corporation became subject to this chapter [Title 62].” Because price deregulation of local service granted pursuant to Section 62-622(3)(b) would not occur by the election of Qwest, the claw-back provision of Section 62-605(5) arguably would not apply to basic local service once deregulation were approved. Accordingly, Qwest purports to grant to the Commission a claw-back provision similar to that in statute “to provide to the Commission authority to ‘claw back’ the flexibility granted [to Qwest] if it determines the public interest has been harmed.” The terms of Qwest’s volunteered provision make it clear, however, that rate increases within a Qwest proposed price cap would not be grounds to exercise the claw-back provision.

Qwest does not explain in its proposed new evidence how its voluntary claw-back term would provide legal authority to the Commission. Without the force of law, questions about the enforceability of the claw-back provision remain unanswered. In addition, Qwest’s extra legal claw-back provision sprang from its own biased mindset. Besides that the legislature has not had an opportunity to consider and authorize an appropriate claw-back provision for a conditional, deregulation pilot project, the parties in this case, as well as other potentially interested parties, have not had an opportunity to consider whether the claw-back terms proposed by Qwest are sufficient or appropriate.

C. Qwest Does Not Really Propose New Evidence.

One possible valid reason to reopen a fully submitted matter is to present previously undiscovered, new evidence. Other than the extra legal claw-back provision, Qwest’s proposed evidence does not really present anything new, and is only intended to comfort the Commission should it determine to approve Qwest’s Application in the absence of real evidence. The only new term is a commitment by Qwest to put a cap on the amount of its rate increases through

2007. Qwest in its rebuttal testimony stated it would not raise prices, should the Commission approve its Application, through December 2004. Qwest now attempts to make its advocacy more attractive by committing to limiting its price increases through December 2007. Qwest proposes to cap its rate increases during that period to \$6.60 per month for residential customers and \$9.49 per month for small business customers. This provision is not newly discovered, it was not out of Qwest's awareness previously so that it was prevented from presenting it at the hearing, and it provides no basis for reopening the record. More importantly, although it may be appropriate for the Commission and Qwest to consider some sort of price-cap regulation, that can and should be accomplished in a case filed under paragraph (1)(a) of Section 62-622, or within the confines of the Commission's regulatory authority in Title 61.

CONCLUSION

Qwest seeks to reopen a fully submitted, fairly litigated proceeding on the eve of the Commission's final Order. Qwest does not state a valid reason to reopen, and seeks an opportunity to fundamentally change the case, without benefit of evidence or hearing, from a deregulation case to a price-cap case that should have been filed under Section 62-622(1)(a). Staff asks the Commission to deny Qwest's Motion to Reopen the Record in Case No. QWE-T-02-25.

Respectfully submitted this *22nd* day of August 2003.



Weldon B. Stutzman
Deputy Attorney General

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 22nd DAY OF AUGUST 2003, SERVED THE FOREGOING **STAFF'S RESPONSE TO QWEST CORPORATION'S MOTION TO REOPEN THE RECORD**, 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 7TH AVE, ROOM 3206
SEATTLE, WA 98191

CONLEY WARD
GIVENS PURSLEY LLP
277 N 6TH 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
WORLD.COM INC.
707 17TH 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 11TH 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