

DECISION MEMORANDUM

TO: COMMISSIONER KEMPTON
COMMISSIONER SMITH
COMMISSIONER REDFORD
COMMISSION SECRETARY
COMMISSION STAFF

FROM: DON HOWELL
DEPUTY ATTORNEY GENERAL

DATE: JUNE 22, 2010

SUBJECT: GRACE SCHOOL DISTRICT'S REQUEST TO AMEND COMMISSION
ORDER NO. 31099, CASE NO. QWE-T-10-04

On June 17, 2010, the Commission Staff received a request from Brian Stutzman on behalf of the Grace School District. In his e-mail to Nancy Hilton, Mr. Stutzman asked if final Order No. 31099 could be amended. More specifically, his e-mail states in part:

I would ask that part of [Order No. 31099] be corrected to include that I called Qwest's Joni Duran at least three times each month of December, January and February, for a total of nine times, and received zero response except for 2 form letters. It was only after I drove to Denver to try to meet with her that she left 2 after hour voice mails for me. To this date, she has never returned a call during business hours.

Your [Order] made it look like there had been regular and constant responses from Qwest. It has been nothing of the sort.

Can you amend [the Order] to reflect this?

BACKGROUND

A. The Complaint

On May 6, 2010, the Commission received a "formal complaint" from Brian Stutzman on behalf of the Grace Joint School District No. 148 against Qwest Corporation. In its complaint, the District raised two issues. First, the District claimed that its telephone equipment at a school was damaged by a power surge on the telephone line during the process of "porting" (i.e., changing) service from one telephone company to Qwest. The District maintained Qwest caused the surge and requested Qwest pay \$1,500 in damages to partially cover Mr. Stutzman's costs in replacing the damaged telephone equipment.

Second, Mr. Stutzman asserted that Qwest has not been responsive to his claims for damage reimbursement. In particular, he stated that after the School District submitted its claim to Qwest, “we were met with weeks of silence.” Order No. 31099 at 4 *quoting* Complaint at 1. Mr. Stutzman cited Telephone Customer Relations Rule 401.02 which provides that a complainant may have a face-to-face meeting to resolve complaints.

B. The Commission’s Final Order

In Order No. 31099 issued June 3, 2010, the Commission dismissed the complaint finding that it does not have the statutory authority to award damages under the Telecommunications Act. *Idaho Code* §§ 62-601, *et seq.* In response to the lack of adequate response from Qwest, the Commission found that Telephone Rule 401 pertains to the Commission’s “authority to investigate and resolve complaints made by subscribers to telecommunications services that concern quality and availability of local exchange service, or whether the price and conditions of service are in conformance with filed tariffs or price lists, deposit requirements for such services or disconnection of such services.” *Id. quoting* IDAPA 31.41.01.401.01. Thus, the Commission found that Mr. Stutzman’s reliance on Rule 401.02 is misplaced because the underlying complaint was for damages – an area beyond the Commission’s authority. Order No. 31099 at 4.

The Order (pages 1-2) sets out the sequence of events as portrayed in the complaint. Order No. 31099 is attached for your review. The Commission’s Order further stated:

Based upon our review of the correspondence provided by the District, we cannot find that Qwest has been wholly unresponsive. Qwest answered the District’s December 7 claim in nine days. Qwest answered Mr. Stutzman’s February 5, 2010, faxed letter on February 18, 2010. Ms. Duran has not always been available by telephone but did return at least one of Mr. Stutzman’s calls. We agree that Qwest did not respond to every letter or phone call, but what is clear is that Qwest denied the District’s liability claim.

In summary, the Commission does not have authority to award damages caused by the actions of a public utility. The award of damages rests with the courts of this State – not the Commission. While Qwest may have been more responsive to the calls and letters, we cannot find that the Company was entirely non-responsive.

Order No. 31099 at 5 (emphasis added).¹

¹ The complaint does state that Mr. Stutzman “called numerous times [to Qwest] requesting a conference call or return calls and was met with silence.” Complaint at 2.

THE PROCEDURAL RULES

The Commission's Rules of Procedure contain two rules which address the clarification or amendment of final Orders. Rule 325 provides that any person may petition to clarify any Order. IDAPA 31.01.01.325. This rule further states that a "petition for clarification may be combined with a petition for reconsideration or stated in the alternative as a petition for clarification and/or reconsideration. The Commission may clarify any order on its own motion." *Id.*

Commission Rule 326 addresses the amendment of final Orders. Rule 326.01 provides that any person may petition "to rescind, alter or amend a final order pursuant to Section 61-625, Idaho Code." This rule further provides that a petition to amend must state that "there have been changed circumstances or new information that has become available since the order was issued, or that there are other good and sufficient reasons for rescinding, altering or amending the order. The Commission may dismiss as defective any such petition not complying with this rule and with Rule 53 [(prescribing the form and content of petitions)]." IDAPA 31.01.01.326.01.b.

Staff has provided a copy of Mr. Stutzman's e-mail to Qwest. The Company believes that Order No. 31099 "correctly resolved the issues related to this dispute." Qwest urged the Commission to uphold its Order.

COMMISSION DECISION

1. Does the Commission find that Mr. Stutzman's e-mail requesting amendment of Order No. 31099 should be treated as a Petition to Clarify or Amend Order No. 31099?
2. If so, does the Commission find that his e-mail satisfies the requirements of Rule 53.05?
3. Does the Commission wish to clarify or amend its final Order No. 31099?



Don Howell
Deputy Attorney General

bls/M:QWE-T-10-04_dh

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

GRACE JOINT SCHOOL DISTRICT NO. 148,)	
)	CASE NO. QWE-T-10-04
COMPLAINANT,)	
)	
v.)	
)	
QWEST CORPORATION,)	ORDER NO. 31099
)	
RESPONDENT.)	

On May 6, 2010, the Commission received a “formal” complaint from Grace Joint School District No. 148 (District) against Qwest Corporation. Brian Stutzman of Business Phone Specialists, Inc. (BPS) is acting on behalf of the District. The District claimed that telephone equipment at Thatcher Elementary School was damaged by a power surge on the telephone line during the process of “porting” (i.e., changing) service from another telephone company to Qwest. The District maintained Qwest caused the surge damage and requested Qwest pay \$1,500 to partially cover the cost of replacing the damaged telephone equipment. Qwest denied responsibility for the damage. After reviewing the complaint, the Commission issues this Order dismissing the complaint.

BACKGROUND

The District and Mr. Stutzman claimed that a “power surge” damaged telephone equipment at Thatcher Elementary during the process of porting telephone service from Paetec, its former telecommunications provider, to Qwest. BPS was retained by the District to investigate and repair or replace the damaged equipment. BPS determined the damaged equipment could not be repaired cost-effectively and subsequently replaced the equipment. Mr. Stutzman alleged that a BPS technician determined that a Qwest-generated power surge on the telephone line caused the damage to the telephone system. BPS billed the District \$1,675 for the new equipment and sought recovery of \$1,500, constituting the damage claim against Qwest.

On December 7, 2009, the District submitted a written claim to Qwest. On December 16, 2009, Joni L. Duran, Qwest Manager of Service Claims, sent a reply letter to the District denying the claim. Ms. Duran asserted that the basic phone lines used by the District at the School are not designed for, or capable of, carrying the amount of amperage that could ruin a

phone system. She went on to say that a Qwest technician, sent on November 5, 2009, was unable to locate any trouble in the Qwest facilities or any unusual amperage on the lines.

On December 23, 2009, the District sent a fax to the Qwest Service Claims department to request the claim be submitted to a supervisor. According to Qwest, the claim was again denied.

On February 5, 2010, Brian Stutzman faxed a letter to Qwest asking for reconsideration of the claim. On February 18, 2010, Ms. Duran sent another reply letter denying the claim. The Qwest letter cited the Company's Exchange and Network Service Catalog 2.4.1 limiting Qwest's damage liability to "gross negligence or willful misconduct." Ms. Duran asked Mr. Stutzman in the letter to provide any information he had that established gross negligence or willful misconduct by Qwest.

On February 25, 2010, Mr. Stutzman faxed the vendor bill to Qwest along with a copy of Qwest's February 18 letter. Mr. Stutzman apparently wrote a note in the margin of the February 18 Qwest letter that stated "blowing up a phone system at cutover" and circled the words "gross negligence" in the letter. Qwest did not respond to this facsimile.

On March 23, 2010, Mr. Stutzman sent another letter to Qwest, again with a copy of the BPS invoice, saying he had not received the anticipated check and requested that Ms. Duran call him. On April 19, 2010, Mr. Stutzman went to Denver and hand-delivered yet another copy of the March 23, 2010, letter and invoice. On April 20, 2010, Ms. Duran left a voice message for Mr. Stutzman reiterating the claim was denied. On April 26, 2010, Mr. Stutzman left a message for Ms. Duran indicating he would come to Denver again, if necessary, to discuss the claim.

On April 28, 2010, the District filed an informal complaint with the Commission. Staff indicated to Mr. Stutzman that although it could assist him with submission of a damage claim as part of the informal complaint process, Staff could not determine the legitimacy of the claim or require the Company to pay damages for which it denied responsibility. Ultimately, Staff asserted it is not within the Commission's jurisdiction to award damages. Staff recommended the District pursue its damage claim through the Small Claims Court.

The District and Mr. Stutzman were not satisfied with the outcome of the informal complaint. They subsequently filed this "formal" complaint.

THE FORMAL COMPLAINT

In the formal complaint, Mr. Stutzman asserted two claims. First, he insisted the Commission has jurisdiction over this matter because the Company acted with “gross negligence” when it allegedly caused the power surge on the line. He observed that the Company’s Exchange and Network Services Catalog contains a general liability limitation. In pertinent part, Section 2.4.1A states:

NO LIABILITY SHALL ATTACH TO THE COMPANY FOR DAMAGES ARISING FROM ERRORS, MISTAKES, OMISSIONS, INTERRUPTIONS, OR DELAYS OF THE COMPANY . . . IN THE COURSE OF ESTABLISHING, FURNISHING, ARRANGING, MOVING, TERMINATING, OR CHANGING THE SERVICE OR FACILITIES . . . IN THE ABSENCE OF GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

(Capitals in original and underline added). He thus concluded that actions of gross negligence or willful misconduct were within the Commission’s jurisdiction.

Second, Mr. Stutzman insisted that Qwest has not been responsive to his claims, sending form letters but not returning his calls. He pointed out that the Commission’s Telephone Customer Relations Rule 401.02 provides that parties may have a face-to-face meeting to resolve complaints. Rule 401.02 (emphasis added) states:

Procedure on Review. The Commission will process these requests as informal complaints pursuant to the Commission’s Rules of Procedure, IDAPA 31.01.01.000 et seq. Telephone service shall not be terminated nor shall termination be threatened by notice or otherwise in connection with the subject matter of the complaint while the complaint is pending before the Commission so long as the customer continues to pay all amounts not in dispute, including current telephone bills. Upon request by any party, the parties and a representative of the Commission shall be required to meet and confer.

Consequently, the District asked the Commission to find that Qwest acted with gross negligence and did not adequately respond to the claim.

DISCUSSION AND FINDINGS

After reviewing the record compiled in this matter, the Commission finds there is sufficient (although conflicting) evidence in the record for us to decide this matter. In addition, Mr. Stutzman participated in our review of this matter at our decision meeting held May 24, 2010.

In essence, BPS and the School District seek recovery of its damages for the alleged gross negligence of Qwest. Qwest provides telecommunications services pursuant to Title 62.¹ *Idaho Code* § 62-616 provides that the Commission shall have the authority to investigate and resolve telecommunication complaints which concern the quality and availability of local exchange service; or whether the price and conditions of service are in conformance with filed price lists; or whether the carrier acted in compliance with the Commission's Telephone Customer Relations Rules. *See also Idaho Code* § 62-622(5); IDAPA 31.41.01. The Commission is an agency of limited jurisdiction and may only exercise that authority delegated to it by the Legislature. *Washington Water Power v. Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979).

There is nothing in the Telecommunications Act that authorizes the Commission to award damages for the negligence of a telecommunications company. *Idaho Code* §§ 62-601 *et seq.* Although the Commission has authority to recover "civil penalties" from telephone corporations that violate statutes, orders or rules, civil penalties are not the same as damages. *Idaho Code* § 62-620. In particular, civil penalties are brought in the name of the State of Idaho and such penalties recovered by the State are paid into the General Fund. *Id.*

Since the Commission's inception in 1913, it has not been authorized to award damages under the Public Utilities Act. More specifically, *Idaho Code* § 61-702 provides that "any corporation or person" injured by the conduct of a public utility may file an "action to recover such loss, damage or injury . . . in any court of competent jurisdiction. . . ." (Emphasis added.) Although the Commission is often described as a quasi-judicial agency, the Commission is not a judicial court. Thus, persons injured by public utilities have recourse through the courts.

We next turn to the "timeliness" claim. Mr. Stutzman relies on Telephone Rule 401.02 and asserts that Qwest has been unresponsive. In particular, he stated that after the District submitted its claim to Qwest "we were met with weeks of silence." Complaint at 1. He also said his telephone calls to Ms. Duran were not returned. *Id.* at 2. Mr. Stutzman's reliance on Rule 401.02 is misplaced. Rule 401.01 provides that the Commission "has authority to investigate and resolve complaints made by subscribers to telecommunication services that

¹ *Idaho Code* § 62-604(2) provides that any telephone corporation may elect to exclude all of its telecommunications services from regulation under Title 61 and such services shall be subject to the Commission's Title 62 authority. Qwest removed its basic local exchange service from Title 61 regulation in July 2005. Notice of Election, Case No. QWE-T-05-12/-13 (July 14, 2005).

concern quality and availability of local exchange service, or whether price and conditions of service are in conformance with filed tariffs or price lists, deposit requirements for such services or disconnection of such service.” IDAPA 31.41.01.401.01. Subsection 01 further provides that the Commission “may consider complaints regarding any telephone services over which the Commission has authority.” *Id.* (emphasis added). Subsection 02 pertains to informal complaints subject to the Commission’s jurisdiction. As stated above, the Commission has no authority over liability claims.

Based upon our review of the correspondence provided by the District, we cannot find that Qwest has been wholly unresponsive. Qwest answered the District’s December 7 claim in nine days. Qwest answered Mr. Stutzman’s February 5, 2010, faxed letter on February 18, 2010. Ms. Duran has not always been available by telephone but did return at least one of Mr. Stutzman’s calls. We agree that Qwest did not respond to every letter or phone call, but what is clear is that Qwest denied the District’s liability claim.

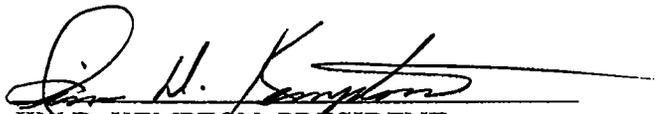
In summary, the Commission does not have authority to award damages caused by the actions of a public utility. The award of damages rests with the courts of this State – not the Commission. While Qwest may have been more responsive to the calls and letters, we cannot find that the Company was entirely non-responsive.

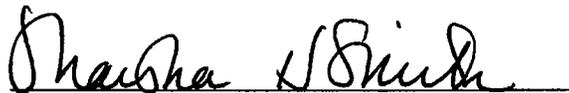
ORDER

IT IS HEREBY ORDERED that the formal complaint filed by Grace Joint School District No. 148 against Qwest be dismissed for reasons set out in greater detail above.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this case may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this case. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 3rd
day of June 2010.


JIM D. KEMPTON, PRESIDENT


MARSHA H. SMITH, COMMISSIONER


MACK A. REDFORD, COMMISSIONER

ATTEST:


Jean D. Jewell
Commission Secretary

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