- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Formal Complaint of XMISSION, L.C., Complainant, vs. ELECTRIC LIGHTWAVE, INC., Respondent	))))))	DOCKET NO. 00-2202-01 ORDER

ISSUED: December 11, 2000

SYNOPSIS

The Commission concludes that it has jurisdiction to consider this complaint and would direct the parties and the Administrative Law Judge to proceed to resolve the complaint (*See Substitute Order of the Commission, starting page 6).*

Appearances:

Jeffrey S. Williams Lisa R. Petersen	for	XMISSION, L.C.
Charles P. Sampson Mark J. Morrise	"	ELECTRIC LIGHTWAVE, INC.

By The Commission:

PROCEDURAL HISTORY

Pursuant to notice duly served, a pre-hearing conference in the above-captioned matter was convened May 31, 2000, before A. Robert Thurman, Administrative Law Judge, at the Commission Offices, Heber M. Wells Building, Salt Lake City, Utah. In aid of deciding threshold jurisdictional issues, the Administrative Law Judge requested legal memoranda from the parties, and all briefs were submitted July 19, 2000. The Administrative Law Judge, having been fully advised in the premises, now enters the following Report, containing proposed findings of fact, conclusions of law, and the Order based thereon.

FINDINGS OF FACT

- Xmission, L.C. (Complainant), is an Internet Service Provider (ISP) which has taken telecommunications service from Electric Lightwave, Inc. (Respondent), a certificated telecommunications corporation under Utah law.
- Beginning in April, 1997, Complainant began taking certain telephone services from Respondent under the negotiated terms of a "Master Service Agreement" (MSA) for a two-year term. Although not executed until September, 1997, the MSA was made retroactive to April. *Inter alia*, the MSA provided that disputes arising out of the document were to be arbitrated.
- Disputes arose under the MSA culminating in a settlement agreement (the Settlement), dated February 25, 1999. Under the terms of the Settlement, Complainant was to make certain installment payments which both parties agree have been made.
- Still dissatisfied with Respondent's service, Complainant sent a notice of termination at the beginning of March, 1999. Respondent thereupon sent a demand letter, ostensibly based on early termination provisions of the MSA,

for approximately $327,500. In its prayer for relief, Complainant asks the Commission to "(1) investigate ELI's billing practices and its failure to provide adequate service; (2) order ELI to provide an accurate statement of Xmission's account and to remove all unidentified charges and any balance forward from the year 1998; and (3) declare that Xmission has no further liability to ELI for any service whatsoever."

DISCUSSION

Complainant initially bottomed its claim for relief on § 54-4-1, U.C.A. 1953, as amended; § 54-8-2(b)(3), U.C.A. 1953, as amended, and § R746-240, Utah Administrative Code. The first-cited section relates to the Commission's general regulatory jurisdiction, the second to pricing flexibility for telecommunications corporations, and the third to resolution of consumer complaints against telecommunications utilities.

However, the Commission's jurisdiction in regard to utility-customer *monetary* disputes is circumscribed by § 54-7-20, U.C.A. 1953, as amended., which in pertinent part provides:

When complaint has been made to the commission concerning any rate, fare, toll, rental, or charge for any product or commodity furnished or service performed by any public utility, and the Commission has found, after investigation, that the public utility has charged an amount for such product, commodity, or service in excess of the schedules, rates, and tariffs on file with the Commission, or has charged an unjust, unreasonable, or discriminatory amount against the complainant, the Commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection.

As the Utah Supreme Court has construed this statute, the Commission's *sole* authority to issue a money judgment is to determine whether a utility has deviated from its published tariffs[(1)] and afford refunds if it has. The Commission does, of course, have authority to deal with other non-monetary issues.

Unfortunately for the Complainant's position, it is trying to ride two horses at the same time. On the one hand, to evade the arbitration clause of the MSA, it claims the dispute is really under the Settlement. But that document is clearly and absolutely not a tariff; nor was it ever filed with the Commission. It even specifically names the Utah Third District Court as the forum for resolution of disputes under it.[(2)] Accordingly, it cannot be the basis for relief under § 54-7-20.

At the same time, and with sublime indifference to logical consistency, to attempt to bring the matter within Commission jurisdiction, Complainant argues that the dispute does involve price lists on file with the Commission[(3)] on the premise that they underlie the MSA. But we cannot disregard the MSA so cavalierly. The Utah statute recognizes price lists and competitive contracts as separate, and equally valid, documents. More to the point, there is no requirement under Utah law that competitive contracts must adhere to filed price lists (otherwise what would be the point of the contract?). There is no suggestion that the Commission has any authority to regulate a contract's content beyond setting price caps, which the Commission has not done. So even if we were to hold that under § 54-7-20 filed price lists are the equivalent of tariffs approved by the Commission after hearing (we specifically do not so hold at this time), we still would have no jurisdiction to set aside the arbitration provisions of the MSA.

In sum, Complainant simply cannot avail itself of § 54-7-20. Whether under the Settlement or under the MSA, this is an ordinary contract dispute, and it belongs either in the courts or before an arbitration panel.[(4)]

Complainant's position is not aided by the Commission's authority under the Telecommunications Act. To the extent the Commission enjoys dispute-resolution authority under that Act, those provisions relate to adjusting disputes regarding interconnection between two telecommunications corporations, not between such a corporation and its customers.

As to Commission rule § R746-240, the rule, of course, pre-supposes a dispute within the Commission's jurisdiction -- the Commission can hardly bootstrap its own jurisdiction by rulemaking. Since we cannot find here a dispute within our jurisdiction, it follows that the rule is inapplicable.

CONCLUSIONS OF LAW

The Commission has party jurisdiction; subject-matter jurisdiction is lacking. The Complaint must be dismissed.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

- The complaint of XMISSION, L.C., against ELECTRIC LIGHTWAVE, INC., be, and the same hereby is dismissed.
- If XMISSION, L.C., wishes to proceed further, XMISSION, L.C., may file a written petition for review within 20 days of the date of this Order. Failure to do so will forfeit the right to appeal to the Utah Supreme Court.

DATED at Salt Lake City, Utah, this 11th day of December, 2000.

/s/ A. Robert Thurman
Administrative Law Judge

SUBSTITUTE ORDER OF THE COMMISSION

The Commission, having reviewed the documents submitted by Xmission, L.C. (Xmission), and Electric Lightwave, Inc. (ELI), and the proposed Report and Order of the Administrative Law Judge A. Robert Thurman, attached and hereby made a part of this record as Exhibit A, hereby enters this Order in lieu of the one proposed by the Administrative Law Judge (ALJ).

We reject the reasoning contained in the proposed Report and Order, as set forth in Exhibit A. The essence of Xmission's complaint is that it cannot determine whether the submitted charges for public telecommunications services rendered by ELI are consistent with the rates applicable to the services billed and whether the services billed correspond to the services received. The substance of the issues raised by Xmission's complaint implicate ELI's duties as a provider of public telecommunications services certificated by this Commission. Utah Code §54-3-1 requires that ELI's charges be just and reasonable and that it furnish service "as will promote the . . . convenience of its patrons . . . and as will be in all respects adequate, efficient, just and reasonable." Utah Code §54-3-7 requires that ELI's charges must correspond to the charges applicable to the service rendered. As we must construe Xmission's complaint in a favorable light at this stage of these proceedings, we conclude that the complaint questions ELI's compliance with these duties. If the bills are indecipherable by the customer, there is a question as to whether ELI has furnished adequate service. As presented by Xmission's complaint, whether ELI has sought payment consistent with the appropriate rates and terms for the telecommunications services rendered, falls squarely under §54-3-7. Both of these matters are subject to complaint before the Commission pursuant to Utah Code §54-7-9. If ELI has sought compensation that is not consistent with the terms and conditions of the services rendered, we disagree with the ALJ's conclusion that Utah Code §54-7-20 is not applicable.

We are not dissuaded by the arbitration provision contained in the parties' contract. Agreement terms between the parties cannot deprive the Commission of jurisdiction to regulate the conduct of ELI's utility operations. We recall that ELI itself has argued that arbitration provisions agreed to between parties should not be used to prevent the Commission from resolving their disputes ("Under the logic relied on . . . a public utility could entirely avoid regulation by the Commission by simply placing alternative dispute resolution provisions in the service agreements with its customers." ELI Supplemental Memorandum in Opposition to U.S. West Communication, Inc.'s (U.S. West) Motion to Dismiss or Stay, 11 March, 1997, PSC Docket No. 97-2202-01.). There is definitely a dispute between the parties as to whether the arbitration provision actually applies to the dispute before us. As previously argued by ELI in Docket No. 97-2202-01, it is not consistent with public policy to allow an arbitration provision, even if applicable, to prevent us from resolving the dispute presented to us.

The ALJ's reasoning that §54-7-20 does not apply to a dispute regarding charges for telecommunications services rendered under a contract is fundamentally at odds with the Commission's view. We construe the statute's use of the terms "schedules, rates, and tariffs on file with the Commission" as requiring a utility to charge for services consistent with whatever documentation or means a utility utilizes to inform a customer of the terms and conditions under which the utility service will be rendered. We discern no reasonable basis to hold that a contract for the provision of utility

service should not fall within §54-7-20. That the terms and conditions governing the provision of public telecommunications service to a customer are contained in a document called an X should not be a basis that permits the utility to charge in excess with those terms and conditions. The statute evidences the legislature's intent that billing disputes between utilities and their customers may be resolved in this forum and that we may order monetary recompense for utility's overcharges.

Our review of Title 54 of the Utah Code shows no situation where a telecommunications provider, offering public telecommunication services to customers in the State of Utah, need not file with the Commission, documentation containing the terms and conditions under which such public telecommunication services are rendered, whether the documentation is called a contract, price list, tariff, or some other name. It is not, as portrayed by the ALJ, that ELI's "competitive contracts must adhere to filed price lists," but that ELI's charges must adhere to the terms and conditions under which telecommunication services are offered. Xmission's complaint presents a dispute as to whether ELI has charged consistently with the applicable terms and conditions. We also conclude that whether ELI's Master Service Agreement with Xmission was, or was not, filed with the Commission does not prevent us from resolving the dispute. The result is nonsensical. To do so permits a utility's failure to comply with the statutory requirement that it file information on its charges to avoid its statutory duty to charge consistently with its pricing terms, and have billing disputes resolved in this forum.

There is no suggestion that ELI has not provided public telecommunication services to Xmission; no claim that the billing dispute involves non-utility services. While Xmission may not be able to decipher its bills, all of the references, contained in the parties' documents, pertain to telecommunication services. At this stage of the proceedings, we must conclude that Xmission's complaint deals with telecommunication services within our jurisdiction. As far as we are to consider at this point, the dispute involves Xmission's office phone service from ELI just as services involved with Xmission's enhanced services provided to Xmission's customers. While some have proposed that internet service providers (ISPs) provide interstate telecommunications service when connecting their customers to the world wide web, it is not a view shared by all. ELI has argued before this Commission that ISP traffic is to be considered local, intrastate traffic (See, PSC Docket No. 98-049-36, ELI Complaint against U.S. West for the Payment of Reciprocal Compensation for Exchanged ISP traffic.). Even the FCC recognizes that ISPs obtain their telecommunication services from exchange carriers using local, intrastate service offerings; ISPs operate in the local exchange (*See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, FCC February 25, 1999, *See also, Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1,5 - 8 (DC Cir. 2000)).

At this juncture, we have a customer complaint in which a utility, certificated by this Commission, is alleged to have provided public telecommunication services inconsistently with Utah statutory utility duties. We conclude that the subject matter of this complaint is within the subject matter jurisdiction of the Commission and that this complaint may proceed. We direct the Administrative Law Judge and the parties to schedule further proceedings to resolve the disputes raised in the complaint.

DATED at Salt Lake City, Utah, this 11th day of December, 2000.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

1. Denver & RGRR v. PUC, 73 Utah 139, 272P. 939 (1928); American Salt Co. v. W.S. Hatch Co., 748 P.2d 1060 (Utah 1987).

2. Settlement, § 5.9.

3. Unfortunately for Complainant's position, tariffs on file with the FCC don't count.

4. *See also* Atkin Wright & Miles v. Mountain States Tel., 709 P.2d 330 (Utah 1985); McCune & McCune v. Mountain Bell Tel., 758 P.2d 914 (Utah 1988).