

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Complaint of)	
VAL PAK OF NORTHERN UTAH, L.C.,)	<u>DOCKET NO. 00-049-15</u>
Complainant,)	
vs.)	
QWEST CORPORATION, fka)	
U.S. WEST COMMUNICATIONS, INC.,)	<u>REPORT AND ORDER</u>
Respondent)	

ISSUED: November 2, 2000

SYNOPSIS

Complainant having failed to show any violation of Respondent's published tariffs or of the applicable statutes and Commission rules, we dismiss.

Appearances:

Jill M. Pohlman	For	QWEST CORPORATION, fka U.S. WEST COMMUNICATIONS, INC.,
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By The Commission:

PROCEDURAL HISTORY

Complainant above-named filed its complaint March 21, 2000, and Respondent filed its answer, together with a motion to dismiss, April 20, 2000. Customer complaints being designated informal proceedings under Commission rules, and there appearing to be no disputed factual issue necessary to the resolution of this matter, we deem it ripe for disposition without hearing or submission of further evidence. 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

- Complainant is a commercial customer of Respondent, a telephone corporation certificated by this Commission.
- Complainant alleges, and for purposes of deciding Respondent's motion to dismiss, we find that:
 - Owing to Respondent's alleged backlog in wiring orders, Complainant had a remodeling contractor install phone jacks and associated wiring in early June, 1999. On July 13, 1999, Respondent's technician came to activate the lines but found that they were improperly installed. The technician quoted Complainant a price of \$50 to \$75 to correct the problem.
 - Complainant authorized the work, which the technician performed. However, Respondent billed Complainant \$205 for the work. Complainant seeks Commission relief in the form of an order to limit Respondent's charges to the \$75 quoted.
- In its answer, Respondent asserts that the charges at issue are included in Respondent's unregulated business and hence the Commission lacks jurisdiction. It asserts further that it is not threatening to terminate Complainant's

service for non-payment but intends to seek its remedy through the courts, affording Complainant the right to assert any legal defense it may have.

DISCUSSION

For purposes of deciding Respondent's motion to dismiss, we must consider the allegations contained in the complaint and answer in the light most favorable to Complainants. Our findings above do so.

We begin our analysis with the premise that the Commission is a creature of the Utah Legislature and can exercise *only* the authority specifically delegated by the Commission's enabling statutes or fairly inferable from the explicit grant.⁽¹⁾ In regard to *monetary* disputes between a public utility and its customers, the Commission's *only* authority to order the payment of money, or to abate charges, derives from § 54-7-20, UCA 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 regarding monetary disputes is to determine whether a utility has deviated from its published tariffs⁽²⁾ and afford refunds if it has. Of course, the Commission has jurisdiction regarding other non-monetary disputes.

However, in the instant case, the wiring installation/maintenance portion of Respondent's business has been removed from Commission jurisdiction by the force of a deregulation order of the Federal Communications Commission ("FCC").⁽³⁾ It follows that inasmuch as wiring-related services have been removed from Respondent's tariff, the Commission has no authority to grant Complainant the relief it seeks as there is no violation of Respondent's tariff, which is the only basis for the Commission's affording of monetary relief. Since Respondent is not threatening to suspend Complainant's service over the dispute, Complainant has already been afforded the only relief within the power of the Commission to grant.

The point is that no matter how compelling Complainant's evidence might be, we would still have no authority to afford it the relief it seeks. While it is possible such a claim as this would be justiciable by a court of law,⁽⁴⁾ it is not justiciable by us.

CONCLUSIONS OF LAW

The Commission has party jurisdiction; subject matter jurisdiction is lacking. Complainant has failed to allege facts which would entitle it to relief under Section 54-7-20, UCA 1953, as amended. That statute entitles a customer to reparations only upon a showing of charges beyond Respondent's published tariff, or a discriminatory application of the tariff. The facts alleged by Complainant do not indicate such overcharge or discrimination.

Respondent's motion to dismiss must be granted, and the complaint must be dismissed.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

- The motion of QWEST CORPORATION, fka U.S. WEST COMMUNICATIONS, INC., to dismiss the complaint of VAL PAK OF NORTHERN UTAH, L.C., be, and it is, granted, and this matter be, and it is, dismissed.
- If VAL PAK OF NORTHERN UTAH, L.C., wishes to proceed further, VAL PAK OF NORTHERN UTAH, L.C., may file a written petition for review within 20 days of the date of this Order. Failure so to do will forfeit the right to appeal to the Utah Supreme Court.

Dated at Salt Lake City, Utah, this 2nd day of November, 2000.

/s/ A. Robert Thurman
Administrative Law Judge

Attest:

/s/ Julie Orchard

Commission Secretary

SUBSTITUTE ORDER OF THE PUBLIC SERVICE COMMISSION

Based upon the record developed before the Administrative Law Judge, the Commission enters this Substitute Order. We reach our conclusion in this matter, in part, upon different considerations than relied upon by Judge Thurman.

As noted by Judge Thurman, there is a dispute between the parties relative to whether or not Qwest Corporation, fka U.S. West Communications, Inc. ("Qwest"), installed the equipment implied in the charges billed to Val Pak and a question whether Qwest has properly billed, pursuant to its Services Catalog, for the services rendered. As does Judge Thurman, we construe the Complaint's allegations in favor of Val Pak. The difficulty presented in awarding any Commission-ordered relief to Val Pak is that the Qwest activity upon which the complaint is based is not necessarily utility activity over which we are to exercise regulatory supervision.

Qwest argues, and Judge Thurman accepts the argument, that inside wire activities performed by Qwest are not subject to state commission regulation due to the FCC's Second Report and Order, *In the Matter of Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket No. 79-105, January 30, 1986. The FCC's "detariffing" is effectively a preemption of any state authority of state utility commissioners to regulate the installation and maintenance of wiring. That is precisely why the United States Court of Appeals for the District of Columbia remanded the FCC's preempting orders in *National Association of Regulatory Utility Commissioners v. F.C.C.*, 880 F.2d 422 (D.C. Cir. 1989). The Appeals Court held that the FCC had failed to show that such an extensive preemption was justified. It ruled that the FCC could preempt state regulation of installation and maintenance of inside wiring "only to the extent that such regulation negates the federal policy of ensuring a competitive market in such services." *Id.*, 880 F.2d, at 431. Thus, we do not base our decision upon any alleged preemptive result of an FCC order.

The federal and state policies, encouraging reliance upon market operations for inside wire services do, however, weigh in our conclusion that we should not attempt to exercise jurisdiction to resolve this complaint. In 1987, the State of Utah, through our acceptance of Qwest's Advice Letter, adopted a reliance upon market operations in the provision of inside wire installation and maintenance. Through our acceptance of the Advice Letter, we removed inside wire activities from Section 54-7-20's purview. Since Qwest's Services Catalog is not "filed" with the Commission, pricing disputes relating to Services Catalog matters are literally outside of Section 54-7-20's remedy. This is so whether the dispute is denominated as involving the charges for installation of jacks or the rearrangement of wiring; either activity and associated charges are no longer within our Section 54-7-20 remedies.

The exercise of Commission jurisdiction in this dispute would treat one provider of inside wire services differently from other providers of these services. Val Pak would not be able to bring any billing dispute involving the first contractor, who apparently installed the wiring incorrectly, before this Commission. Had Val Pak used another contractor, other than Qwest, to remedy the improper wiring, and had the second contractor billed just as Qwest,

Val Pak could not bring that billing dispute before us. Yet, because Qwest is a utility, subject to our utility jurisdiction, the billing dispute is presented to us. In light of more than a decade of state treatment of inside wire service providers to be outside of our direct public utility regulation, we conclude that there is no strong public policy basis to subject one provider of inside wire services to an additional dispute resolution forum solely because the provider is a public utility. Unless we are to reverse our acceptance of the 1986 Advice Letter, prices charged for inside wire services are no longer "filed" with us. Our treatment of inside wiring services places billing disputes for inside wire services outside of our utility regulation; beyond the Section 54-7-20 remedy. Since this direct monetary remedy is not available, we would be forced to address Qwest billing conduct through some other remedy should we decide to reassert jurisdiction over inside wiring services. From what we know of the inside wire services market, we are not aware of reasons why one provider, Qwest, should be subject to indirect Commission remedial action and other providers remain outside of our authority.

As does Judge Thurman, we reach our conclusion without weighing the merits of the factual dispute between the parties. We make no conclusion on whether Qwest did or did not install equipment claimed in its bill. Resolution of that factual dispute requires no specialized skill or knowledge of the Commission. Val Pak may well have an appropriate defense to avoid Qwest's claims, but it is a defense that can be resolved by a court; just as well as if the dispute involved a non-utility provider of inside wire services. For the reasons given, we dismiss the Complaint. Review or reconsideration of this Order may be sought pursuant to the Utah Administrative Procedures Act, Utah Code Sections 63-46b-0.5 et seq., and Utah Code Section 54-7-15.

Dated at Salt Lake City, Utah, this 2nd day of November, 2000.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

1. *Basin Flying Service v. PSC*, 531 P.2d 1303 (Utah 1975).
2. *Denver & RGR* v. *PUC*, 73 Utah 139, 272P. 939 (1928); *American Salt Co. v. W.S. Hatch Co.*, 748 P.2d 1060 (Utah 1987)
3. *In the Matter of Detariffing the Installation and Maintenance of Inside Wiring*, Second Report and Order, CC Docket No. 79-105, January 30, 1986.
4. See *American Salt Co. v W.S. Hatch Co., id., at 1067* (Concurring opinion.)