

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Formal Complaint of
Olympus Clinic Inc. against Qwest
Corporation

) DOCKET NO. 03-049-17
)
) ORDER DENYING MOTION TO
) CONVERT CASE TO FORMAL
) PROCEEDING AND RULE 56(f)
) MOTION FOR ADDITIONAL
) DISCOVERY AND ORDER GRANTING
) SUMMARY JUDGMENT

ISSUED: March 15, 2004

SYNOPSIS

The Commission grants Qwest Corporation's Motion for Summary Judgment and denies any further relief to Olympus Clinic and dismisses its complaint.

By The Commission:

On January 20, 2004, Qwest Corporation (Qwest) filed its Motion for Summary Judgment against the complaint of Olympus Clinic, Inc. (Olympus). Through its January 20th Motion, Qwest argues that Olympus has received reimbursement relief directly from Qwest which exceeds any further relief which could be granted by the Commission and that any further relief is time barred. In its January 20th Motion, Qwest also renewed various arguments raised in its April 4, 2003, Motion to Dismiss, arguing again that many of Olympus' denominated claims are outside the Commission's jurisdiction. In response to Qwest's January 20th Motion, Olympus filed a Motion to Convert Case to Formal Proceeding, a Rule 56(f) Motion to Allow Additional Discovery, and a Memorandum in Opposition to Qwest's Motion for Summary Judgment. Olympus' pleadings essentially argue that Qwest's Summary Judgment request is inadequately supported and that Olympus' claim is not time-barred. Olympus also argued that the Commission should convert this informal proceeding to a formal one and it should be able to conduct discovery. By Reply filed February 17, 2004, Qwest argues that Olympus' arguments are insufficient to avoid summary judgment.

In 1978, Olympus, a medical clinic, ordered a point-to-point telephone line from Qwest. The telephone

line was to provide a direct connection between the medical clinic and a local Salt Lake County fire station dispatch center. Olympus calls the line an “emergency line,” in telecommunications industry parlance, the line is known as a private line, point-to-point service. Such private lines allow the subscriber of the service to have a direct connection between the two points connected by the line; without having to rely upon the public switched telephone network to obtain a connection between the two points. The subscriber then attaches whatever equipment to the ends of the private line necessary for his intended use and uses the line for whatever communications needs, supported by the customer’s attached equipment, that he may have between the two points. Private lines are used to provide direct connectivity between two points of the same subscriber (e.g., a business desiring to have a connection between two of its various locations for data transmission) or between two unrelated entities who desire to use the direct connection for communication needs between them (e.g., a business and an alarm company who use the line to prove the connectivity for alarm service). In Olympus’ case, apparently, the line was to connect the medical clinic and the fire station. We deduce that the purpose was to enable the clinic to contact the fire station for emergency services (fire or ambulance) if needed; hence Olympus’ nomenclature as an “emergency line.”

In 1988, Salt Lake County relocated the fire station to which Olympus’ private line was supposedly connected. There is no information on whether Salt Lake County or Olympus informed Qwest that with the relocation of the fire station, that point of termination of Olympus’ private line was to be relocated to the fire station’s new location or to some other endpoint for whatever Olympus’ intended use. From Olympus’ complaint, Olympus believes that the private line may have never been installed. It is clear that with the relocation of the fire station, that termination end of the private line was not connected to any other location. For purposes of Qwest’s Motion for Summary Judgment, we construe, where possible, the factual basis of the parties’ dispute in favor of the party against whom summary judgment is sought, thus we will assume that the private line was not installed.

Qwest billed Olympus a tariffed, monthly fee for the private line beginning in 1978 through May, 2002, when Olympus informed Qwest it no longer desired the private line service. Olympus told Qwest it feared that it had been paying for a private line service which had not been used since the relocation of the fire station. Qwest granted a

refund of six months of private line service charges in May of 2002. Olympus sought a refund for a longer period, filing an informal complaint in September, 2002, and a purported class action complaint with the Commission in February, 2003. Qwest has given Olympus a refund of an additional eighteen months of private line service charges; given in December, 2002, but since the private line account was closed at the time, the refund was made to an account associated with another Olympus telephone number.

Olympus's class action complaint sought relief against Qwest "only with respect to the particular issue of recovering improperly or wrongfully billed amounts for certain point-to-point services and similar or related emergency-line services that were either never provided or were disconnected, and for which the class members were billed during the period indicated, paid amounts billed, and have not received a full refund of all amounts that were improperly or wrongfully billed." The complaint marches through eight causes of action. The first, a breach of contract or tariff; billing for services which may not have been provided. Second, a breach of implied covenant of good faith and fair dealing; again billing for service which may not have been provided and failing to inform customers that their private lines may have been disconnected. Third, violations of telecommunications statutes and regulation; that all charges are to be just and reasonable and provide refunds for inaccurately billed service. Fourth, breach of fiduciary duty; Qwest owes a fiduciary duty and failure to provide point-to-point service or inform the customer of a disconnection at one termination of such service violates that duty. Fifth, fraudulent misrepresentation; Qwest's representations that refunds are limited to two years are false. Sixth, fraudulent concealment; Qwest continued to bill for the service when it should have informed the customer that the line had not been installed or that it subsequently had a non-functioning termination end. Seventh, an accounting; for the amounts to be refunded under the prior causes. And, eighth, conversion; Qwest's actions have converted the customers property, money, given as payment for the point-to-point service charges.

While we recognize that Olympus' complaint follows an approach cognizable in courts with broad law and equity powers, we are not a court. Our powers are those conferred by statute enacted by the legislature. See, Basin

Flying Service vs. Public Service Commission, 531 P. 2d 1303 (Utah 1975). The gist of Olympus' complaint against Qwest, in each of its various causes of action, is rudimentarily driven to reclaim money collected by Qwest for the private line service which, for the purposes of the Motion for Summary Judgment, we have assumed was not provided. We do have authority concerning the conduct of utility business in Utah, but the essence of Olympus' complaint is the recovery of money damages. In this regard, there are two relevant statutory provisions. They are dispositive of Olympus' claims and require that we grant Qwest's Motion for Summary Judgment.

Complaints may be filed with the Commission, against public utilities operating the Utah. Utah Code 54-7-9. Olympus' complaint, as a request for agency action, easily falls within the language of Utah Code 54-7-9(1)(b). The nature of the issues that may be raised by a consumer complaint, however, is restricted by Utah Code 54-7-9(3). There, "no request for agency action shall be entertained by the commission concerning the reasonableness of any rates or charges of [a utility] unless the request is signed by" a governmental entity or by not less than twenty-five customers. Because Olympus is the sole customer requesting agency action, we are not able to use its complaint to inquire as to the "reasonableness" of Qwest's charges. In the context of Olympus' complaint, we are limited to consider its individual claim for a refund of money collected for the private line service.

We may require reparations pursuant to Utah Code 54-7-20. In part one of this statute, we are given the power to order refunds for amounts collected for service "in excess of the schedules, rates and tariffs on file with the Commission." We may also order refunds of an "unjust, unreasonable or discriminatory amount" charged by a utility. As we have noted, however, Olympus' complaint is not an avenue by which we may inquire into the "reasonableness" of Qwest's charges. Utah Code 54-7-20(2) contains its own limitation period that may be included in a refund. "All complaints concerning unjust, unreasonable or discriminatory charges shall be filed with the commission within one year, and those concerning charges in excess of the schedules, rates and tariffs on file with the commission shall be filed with the commission within two years, from the time such charge was made . . ." We conclude that this provision requires us to grant Qwest's Motion for Summary Judgment.

Olympus has not disputed Qwest's affidavit that Olympus has already received a refund representing two years worth of the monthly charges for the private line service billed by Qwest. Instead, Olympus argues that the discovery rule applies; the time limitation should begin to run only after Olympus knew or should have know that it had a possible claim. Therefore, a refund for more than two years may be ordered. Olympus' argument is at odds with the unambiguous language of Utah Code 54-7-20. We reject Olympus' position that we can extend the time period beyond that clearly stated in the statute: "all complaints . . . shall be filed with the commission within two years from the time such charge was made . . ." A refund of a monthly charge for private line service can only be had if complaint is made within two years of the monthly billing containing the private line charge. Once two years have passed since an amount was charged, a claim for a refund of the charge is time barred. Qwest has already provided Olympus a refund for of two years of private line service charges from May, 2002. We can require no greater refund.

Since we have concluded that we can not provide a refund greater than that already given to Olympus, further proceedings in this docket are unwarranted. Olympus' motions to permit discovery and to convert are moot. Based upon our discussion and conclusions made herein, we enter this

ORDER:

1. Qwest's Motion for Summary Judgment is granted.
2. All relief requested in Olympus' complaint and motions is denied.
3. Olympus' complaint is dismissed. Pursuant to Utah Code 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final

agency action. Any Petition for Review must comply with the requirements of Utah Code 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 15th day of March, 2004.

/s/ Ric Campbell, Chairman

/s/ Constance B. White, Commissioner

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard, Commission Secretary

GW#37379