

October 20, 2006

VIA EMAIL AND US MAIL

Filing Center
Oregon Public Utility Commission
550 Capitol Street NE #215
PO Box 2148
Salem, OR 97308-2148

Re: RIO Communications Complaint

Dear Sir or Madam:

Enclosed for filing are the original and five copies of RIO Communications, Inc.'s Reply Brief on Subject Matter Jurisdiction. Please contact me with any questions.

Very truly yours,


Wendy Martin

Enclosures

cc: Service List

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**
3 **UM 1270**

4 Umpqua Indian Development Corporation
5 (UIDC), Telecommunications Division, a
6 federally chartered corporation, dba RIO
COMMUNICATIONS, INC.,

7 Complainant,

8 v.

9 PRIME TIME VENTURES LLC dba
10 INFOSTRUCTURE

11 Defendant.

REPLY BRIEF ON
SUBJECT MATTER JURISDICTION

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13 Pursuant to the Administrative Law Judge Allan J. Arlow’s Prehearing Conference
14 Report, RIO Communications, Inc. (“RIO”) submits its Reply Brief on Subject Matter
15 Jurisdiction in this docket.

16 **I. ARGUMENT**

17 InfoStructure chose to apply for certification as a competitive provider (“CLEC”) under
18 Oregon law, and there is therefore no question that the Commission has jurisdiction to regulate
19 InfoStructure. The only question is the extent of this jurisdiction. While the Commission does
20 not have jurisdiction over *all* aspects of a CLEC’s business, it does—in fact, it must—have
21 jurisdiction over those aspects of the CLEC’s business that are possible only as a result of the
22 entity’s status as a CLEC. A contrary conclusion would create the absurd result that a business
23 such as InfoStructure could use its Commission-conferred rights as a CLEC in an unreasonable
24 and unjust manner with impunity, so long as it refrained from doing so specifically with respect
25 to telecommunications services. The fact that InfoStructure’s activities primarily involved DSL
26 Service does not insulate it from the requirement to use the powers conferred upon it by the

1 Commission justly and responsibly. In addition, the Telecommunications Act does not preempt
2 the Commission’s assertion of jurisdiction under ORS 756.040. As a result, the Commission has
3 the jurisdiction to hear RIO’s complaint against InfoStructure.

4 **A. The Commission Has Jurisdiction Over CLEC Activities That Require Commission**
5 **Certification as a CLEC.**

6 RIO concedes that the Commission does not have jurisdiction over all aspects of a
7 CLEC’s business. However, the Commission does have jurisdiction over those unjust and
8 unreasonable practices related to a CLEC’s activities *as a CLEC*. See ORS 756.040(1). If the
9 Commission did not have such jurisdiction, it would be in the position of certifying entities to
10 participate in activities that it could not regulate. CLECs would be able to use the powers
11 granted to them without a corresponding duty to use those powers in a just and reasonable
12 manner.

13 In this case, InfoStructure’s activities were of the kind that it could have performed *only*
14 because it is certified as a CLEC. See 49 U.S.C. § 252. Specifically, InfoStructure requested an
15 unauthorized CLEC-to-CLEC conversion from Qwest. In so doing, it directed Qwest to transfer
16 to InfoStructure the UNE-loop previously leased by RIO, and to route the traffic carried on that
17 UNE-loop to InfoStructure’s equipment collocated in Qwest’s central office. InfoStructure
18 would have been unable to make this request had it not been certified as a CLEC by the
19 Commission. The Commission cannot be in the position of certifying a CLEC to conduct
20 activities without having the ability to sanction that CLEC for using the certification in a manner
21 that is contrary to the public interest. While CLEC activities that are unrelated to its certification
22 may be beyond the scope of the Commission’s jurisdiction, activities directly related to that
23 certification certainly are not.

24 In addition, the type of service at issue in this RIO’s Complaint—either
25 telecommunications or information service—is irrelevant to the fact that InfoStructure’s actions
26 were unjust and unreasonable. Regardless of the type of service InfoStructure attempted to

1 provide, its actions were beyond the bounds of acceptability and were contrary to the public
2 interest. The type of equipment InfoStructure vandalized is not the central issue with respect to
3 the Commission’s jurisdiction. More important is the fact that InfoStructure’s actions were
4 unjust and unreasonable, thereby implicating the Commission’s duty to protect the public from
5 such actions.

6 **B. The Commission’s Jurisdiction Over RIO Communications’ Complaint Is Not**
7 **Preempted by Federal Law.**

8 Finally, federal law does not prohibit the Commission from investigating RIO’s
9 complaint against InfoStructure, issuing orders declaring InfoStructure’s behavior to be contrary
10 to the public interest, or ordering penalties against InfoStructure. In a previous order, the
11 Commission found that it did not have jurisdiction to hear a complaint centering on the provision
12 of DSL and Internet service, because 47 U.S.C. § 230(b) states that Congress intended to
13 “preserve the . . . competitive free market that presently exists for the Internet . . . unfettered by
14 Federal or State Regulation.” *Margaret Furlong Designs v. Qwest Corp.*, Docket UCB 31,
15 Order 06-012 (Jan. 10, 2006). However, as discussed below, this case is distinguishable. The
16 federal statute does not preempt the Commission’s assertion of jurisdiction over RIO’s complaint
17 pursuant to ORS 756.040.

18 The Supremacy Clause of the United States Constitution allows Congress to preempt any
19 state law that conflicts with the exercise of federal power. A state law may be preempted by
20 federal law in one of three ways: (1) express preemption (i.e., where state law is expressly
21 preempted by language of the federal statute or regulation); (2) field preemption (i.e., where
22 there is Congressional intent to occupy a particular field to the exclusion of state law); or
23 (3) conflict preemption (i.e., where state law is inconsistent with federal law or regulation). *See*
24 *generally Fidelity Fed. Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152–54 (1982).

25 In general, a state law is preempted if compliance with both federal and state law is not
26 possible. *See id.* In this case, the Commission’s regulation of InfoStructure’s behavior relates to

1 its unjust and unreasonable practices and is consistent with both federal and state law. The
2 federal statute cited by the Commission to find it did not have jurisdiction in Docket UCB 31
3 states that the competitive free market of the Internet should be free from state regulation.
4 However, a state law allowing the Commission jurisdiction over unjust and unreasonable
5 practices is not contrary to Congress' policy of allowing free development of the Internet.¹ By
6 asserting its jurisdiction in this case, the Commission will not be regulating the terms and
7 conditions of InfoStructure's provision of DSL Service, as 47 U.S.C. § 230(b) may preclude.
8 Rather, it will be regulating InfoStructure's actions toward the public and preventing
9 InfoStructure from using the CLEC certification granted by the Commission in a manner
10 inconsistent with the public interest. This is consistent with federal law and necessary to ensure
11 that InfoStructure does not abuse the powers granted to it by the Commission.

12 **II. CONCLUSION**

13 The Commission has jurisdiction over those activities of CLECs that are possible only by
14 virtue of the Commission's grant of CLEC status. InfoStructure cannot be insulated from the
15 Commission's regulation of its unjust and unreasonable activities that arise out of its certification
16 as a CLEC simply because the activities InfoStructure engaged in were primarily targeted to
17 DSL Service. Additionally, the Telecommunications Act does not preempt the Commission's

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24 ¹ For instance, while recognizing the Congressional goals set forth in 47 U.S.C. § 230(b), the New Hampshire
25 Public Utilities Commission nonetheless asserted jurisdiction over information service providers with regard to
26 their joint use of the state's PSTN in order to limit risks to public safety. *See Re. Congestion on the Public
Switched Telephone Network*, No. DT 99-020, Order No. 23,666, 86 N.H.P.U.C. 193 (Mar. 29, 2001). Similarly,
the Commission may take jurisdiction over those aspects of an information service that fall outside the scope of
the policy set forth in 47 U.S.C. § 230(b), such as a CLEC's abuse of its certificated authority.

1 assertion of jurisdiction pursuant to ORS 756.040. For the foregoing reasons, RIO respectfully
2 requests that the Commission find that it has jurisdiction over RIO's complaint in this docket.²

3 RESPECTFULLY SUBMITTED this 20th day of October 2006.

4 ATER WYNNE LLP

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26 ² In its Opening Brief, InfoStructure requests attorney's fees pursuant to ORS 759.900(1). By its terms, this statute is inapplicable to RIO because RIO is not a telecommunications utility. In addition, RIO has not committed any acts prohibited by ORS chapters 756, 757, or 758.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing **RIO COMMUNICATIONS, INC. REPLY**
3 **BRIEF ON SUBJECT MATTER JURISDICTION** on the following:
4

5 Attorneys for Plaintiff: Thaddeus G. Pauck
6 Brophy, Mills, Schmor, Gerking, Brophy & Paradis, LLP
7 P.O. Box 128
8 Medford, OR 97501

9 by mailing; hand delivery; facsimile a true and correct copy thereof to said parties on
10 the date stated below.

11 DATED this 20th day of October, 2006.

12 /S/
13 Wendy L. Martin
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