

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1270

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

Complainant,)

ORDER

vs.)

PRIME TIME VENTURES LLC, dba)
INFOSTRUCTURE,)

Defendant.)

DISPOSITION: COMPLAINT DISMISSED

On July 11, 2006, Umpqua Indian Development Corporation, Telecommunications Division, a federally chartered corporation, dba RIO Communications, Inc. (Rio), filed a complaint (Complaint) before the Commission against Prime Time Ventures LLC, dba InfoStructure (Prime).

In its Complaint, Rio alleges that, in February, 2006, it was providing DSL service to two Internet cafés operated by its customer, Mellelo Coffee Roasters, and managed by Cherie Frick (Frick). The premises subject to this Complaint is an Internet café at 229 West Main Street in Medford, Oregon (229 West).¹

Rio further alleges that, on February 14, 2006, a Prime representative arrived at 229 West and told the employee on duty that Prime was going to transfer the café's DSL service from Rio to Prime. The employee telephoned Frick who said that the change was not authorized and instructed Prime to cease installation.² The following day, Jeff Rhoden, a Prime principal, phoned Frick and informed her that 229 West was without DSL service but that Prime would be happy to proceed with the installation. Frick again declined Prime's offer to install.³

¹ Complaint, pars. 8-9.

² *Id.*, par. 10.

³ *Id.*, par. 11.

Rio next alleges that it was contacted by Frick and, after sending employees to 229 West, discovered that Prime had removed Rio's modem from service, connected Prime's own modem to Rio's wireless router and disconnected the wires connecting Rio's circuit to Qwest's central office, all without permission to do so.⁴ Upon contacting Qwest, Rio learned that on February 10, 2006, Prime had requested that Qwest convert the 229 West service to Prime. Prime is also alleged to have vandalized Rio's equipment, making it difficult for Rio to restore service to its customer.⁵ Rio also alleges that the subsequent letter of agency submitted by Prime to Qwest was dated two days after the installation and was signed by a 19-year old employee who lacked authority to consent to the installation, in a post hoc attempt to conceal its unauthorized actions.

On July 31, 2006, Prime filed an Answer and Affirmative Defenses (Answer), admitting some allegations, denying others and responding that it had insufficient information to answer yet other allegations.⁶ Prime then raised certain affirmative defenses based on its assertion that DSL service is an "informational service" as opposed to a "telecommunications service" and that, therefore, the subject matter of the case fell outside of the scope of 47 USC §258.

Furthermore, Prime asserts that, even if DSL service were included within the scope of 47 USC §258, the requirement that a carrier must collect charges for telephone exchange or toll service before liability may attach--and Prime affirmatively states that it collected no such charges from Rio's customer--supports Prime's view that the Complaint failed to state a valid claim for relief.⁷

A telephone prehearing conference was held in this docket on September 13, 2006. At the conference, the parties noted their disagreement as to whether this Commission has subject matter jurisdiction to resolve the dispute and a briefing schedule was adopted to address the question. The Parties filed opening briefs on October 13, 2006, and Reply Briefs on October 20, 2006. Pursuant to an agreement reached at the prehearing conference, the briefs specifically did not address the defense asserted by Prime that a carrier must collect charges for telephone exchange or toll service before liability may attach.

Positions of the Parties. Rio asserts that the Commission has a duty under ORS 756.040(1) to use its powers to protect the public from unjust and unreasonable exactions and practices, and that the Commission's general ORS 756.040(2) jurisdiction goes beyond the 47 USC §258(a) anti-slamming statutes.⁸ The allegation is that Prime acted unjustly and unreasonably by installing service without the customer's authority and cut wires on Rio's equipment making it impossible to reinstall service without further repairs.⁹ Prime subjected itself to Commission jurisdiction when it applied for and was

⁴ *Id.*, pars. 12-13.

⁵ *Id.*, par. 14.

⁶ Answer, pp. 1-3.

⁷ *Id.*, p. 4.

⁸ Rio's Opening Brief on Subject Matter Jurisdiction, p. 4.

⁹ *Id.*

granted a certificate to provide telecommunications services in Oregon as a CLEC and thereby accepted the responsibility to act responsibly in its interactions with the public.¹⁰ Furthermore, by contacting Qwest, Prime sought to hook up a connection with its collocated equipment, something that only a CLEC, and not an ISP, had the right to request.¹¹

Prime asserts that the subject matter is a “slamming” violation of 47 USC §258(a), which is administered by the Commission pursuant to 47 CFR §64.1110 and ORS 759.730, when Prime allegedly tampered with and disabled Rio’s DSL service. While Prime acknowledges the Commission’s jurisdiction over slamming, the terms of the federal statutes apply solely to telecommunications services, which DSL is not.¹² Merely being a CLEC does not give the Commission jurisdiction over every dispute, only those disputes regarding telecommunications services. The Complaint should therefore be dismissed.¹³

In reply, Rio asserts that the Commission has jurisdiction over all CLEC activities undertaken pursuant to its rights and powers as a certificated CLEC. Prime’s activities could have been performed only because it was a CLEC. CLEC activities unrelated to its certificate are beyond the scope of Commission jurisdiction, but that is not the case here. The type of equipment vandalized is not essential to determining Commission jurisdiction.¹⁴ Although the Commission has found that it doesn’t have jurisdiction over the provision of DSL service,¹⁵ this case is distinguishable because it relates to unjust and unreasonable practices that are not inconsistent with federal jurisdiction over DSL services, the use of its CLEC status in a manner inconsistent with the public interest.¹⁶

In its reply, Prime reiterates its view that the subject matter is DSL, which is an information service as opposed to a telecommunications service and that, therefore, “the inquiry into the Commission’s jurisdiction over this matter must end.”¹⁷ Prime cites federal rules and statutes along with an FCC decision and U.S. District Court case that clearly separate information services from telecommunications services and reflect Congressional intent to keep information services free from state regulation.¹⁸ Prime is a CLEC solely for the provision of telecommunications services; it is not required to have a certificate to provide data and internet services; the DSL services have been found by

¹⁰*Id.*, p. 5, citing *In re Prime Time Ventures, LLC*, Order No. 03-488, CP 1171 (Aug. 8, 2003). I take official notice of that Order and of Prime’s Certificate.

¹¹ *Id.*, p. 6.

¹² Respondent’s Opening Brief on Subject Matter Jurisdiction, pp. 1-2.

¹³ *Id.*, pp. 3-4. Prime also asks for an award of attorneys’ fees. However, the Commission has not been granted the authority to award attorneys’ fees.

¹⁴ Rio Reply Brief, pp. 2-3.

¹⁵ *Id.*, p. 3, citing *Margaret Furlong Designs v. Qwest Corp.*, Docket UCB 31, Order No. 06-012 (January 10, 2006).

¹⁶ *Id.*, p. 4.

¹⁷ Prime Reply Brief, p. 2.

¹⁸ *Id.*, pp. 2-3, and citations therein.

the FCC to not be subject to regulation as common carriers merely because those services are provided via telecommunications.¹⁹

Discussion. When dealing with questions of jurisdiction to impose penalties for alleged behavior by one CLEC against another, the Commission must look for specific statutory and regulatory direction. We find that it is contrary to the clear reading of the statute to rely upon the broad general enabling language set forth in ORS 756.040(1) to use “powers to protect [telecommunications utility] customers and the public generally from unjust and unreasonable exactions and practices...” as a basis for Commission action.

Prime was granted a CLEC certificate by Order No. 03-488, entered August 8, 2003. Prime subsequently entered into an interconnection agreement with Qwest Corporation including amendments related to obtaining Qwest DSL service with UNE-P on a discounted basis.²⁰ Thus, even though, as Prime notes above, the terms and conditions of DSL service provided to customers may not be subject to Commission jurisdiction, the availability of the service from Qwest and the terms and conditions of the associated unbundled network elements necessary for Prime to provide DSL service were the subject of a proceeding before the Commission and required Commission approval prior to implementation. Prime’s participation in these processes is indicative of its recognition that certain relationships underlying the provision of DSL service to the public are within the Commission’s jurisdiction.

Assuming the truth of Rio’s allegations of Prime’s execrable behavior, as we must for the purposes of ruling on the issue, we must find that Prime is not a party over whom the Commission has authority to act. When the allegations are viewed first through the prism of the applicable Oregon statute, it is not the status of DSL as an information service that determines our lack of jurisdiction regarding the subject matter of this Complaint; it is Prime’s status as a competitive telecommunications services provider, rather than a telecommunications utility, that deprives us of jurisdiction.

ORS 759.020(5) enables the Commission to classify a certificate holder as either a telecommunications utility or as a competitive telecommunications provider, and both parties have been classified as the latter. ORS 759.455 sets forth a list of prohibited acts and the authority of the Commission to act on allegations regarding violations, their penalties and the process for judicial review. Prime is alleged to have vandalized Rio’s equipment and to have interfered with the services Qwest provided to Rio and which Rio provided to its customers. The relevant statutory language provides, in pertinent part as follows:

- (1) Unless exempt from compliance under section 251(f) of the federal Telecommunications Act of 1996 (47 U.S.C. 251(f)), a *telecommunications utility* shall not: ... (c)

¹⁹ *Id.*, p. 4.

²⁰ Approved by the Commission in ARB 505, Order No. 04-125, entered March 1, 2004.

Unreasonably degrade or impair the speed, quality or efficiency of access or any other service, product or facility provided to another provider of telecommunications services. (Emphasis added.)

Thus, notwithstanding the fact noted above that the Commission has jurisdiction with respect to certain of Prime's operations, because Prime is a competitive telecommunications carrier, and not a telecommunications utility, it falls outside of the prohibitions of ORS 759.455.

When the allegations are next examined under the Commission's Rules, we also fail to find jurisdiction over the subject matter, not because the parties are competitive service providers, but because DSL is not a telecommunications service. OAR 860-032-0007 sets forth the conditions to which all certificate holders, telecommunications utilities and competitive telecommunications service providers alike, are subject. The most closely pertinent rule to the allegations in this case, Subsection (10), provides that "The certificate holder shall not take any action that impairs the ability of other certified telecommunications providers to meet service standards specified by the Commission." However, the Commission has no service standards for DSL services. Rio has not been impaired because it has no service standards to meet.


In light of our review of the statutes and rules applicable to the allegations in this case, we must find that we lack jurisdiction to proceed.²¹

²¹ Such allegations might be relevant in determining whether it served the public interest for the Respondent to be the holder of a Certificate to provide telecommunications services in Oregon.

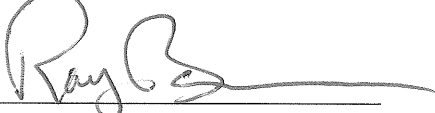
ORDER

The Complaint of Umpqua Indian Development Corporation, Telecommunications Division, a federally chartered corporation, dba Rio Communications, Inc. against Prime Time Ventures LLC, dba Infostructure is **DISMISSED** and the docket is **CLOSED**.

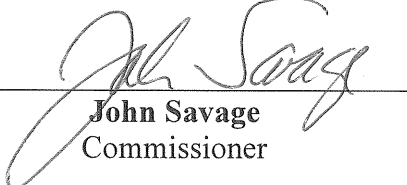
Made, entered, and effective NOV 29 2006.



Lee Beyer
Chairman



Ray Baum
Commissioner



John Savage
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.