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October 25, 2007

Marlene H. Dortch
Secretary
Federal Communications Commission
236 Massachusetts Avenue, NE
Suite 110
Washington, D.C. 20002

ATTN: Hillary DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau

RE: Motion of the Kintzels, et al., to Modify the Issues, or, in the Alternative, Statement of Objections to the Order to Show Cause; EB Docket No. 07-197; File No. EB-06-IH-5037

Dear Madame Secretary:

Enclosed for filing on behalf of parties Kurtis J. Kintzel, Keanan Kintzel, and all other Entities by which they do business before the Federal Communications Commission, is the Motion of the Kintzels, et al., to Modify the Issues, in the above-referenced matter.

Sincerely,

Catherine Park, Esq.

Catherine Park, Esq.

FILED/ACCEPTED
OCT 26 2007
Federal Communications Commission
Office of the Secretary

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	EB Docket No. 07-197
	)	
Kurtis J. Kintzel, Keanan Kintzel, and all Entities by which they do business before the Federal Communications Commission	)	File No. EB-06-IH-5037
	)	
Resellers of Telecommunications Services	)	
	)	

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MOTION OF THE KINTZELS, ET AL., TO MODIFY THE ISSUES, OR, IN THE ALTERNATIVE, STATEMENT OF OBJECTIONS TO THE ORDER TO SHOW CAUSE

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MOTION OF THE KINTZELS, ET AL., TO MODIFY THE ISSUES, OR, IN THE ALTERNATIVE, STATEMENT OF OBJECTIONS TO THE ORDER TO SHOW CAUSE

I. Summary.

Kurtis J. Kintzel, Keanan Kintzel, and all Entities by which they do business ("the Kintzels, et al.") before the Federal Communications Commission ("FCC" or "Commission"), by and through their undersigned counsel, respectfully move, under 47 C.F.R. § 1.229, that the FCC modify the issues in the Order to Show Cause, FCC 07-165, as follows:

(1) Provide a more definite statement as to the number and instances of alleged violations, so that the accused parties can determine whether the proposed imposition of $50 million in forfeitures exceeds statutory and constitutional due process limits;

(2) Reduce the amount of the proposed forfeitures, because grossly disproportional to the harms alleged, in violation of the Excessive Fines Clause of the U.S. Constitution;

(3) Reduce the amount of the proposed forfeitures, because cumulative punishments for alleged violations of the 2004 Consent Decree, as well as the underlying offenses comprising the alleged violations, is barred by the Double Jeopardy Clause of the U.S. Constitution;

(4) Consider the alleged violations of the 2004 Consent Decree in a separate hearing, to prevent potential confusion of the issues that could jeopardize the right of the Kintzels, et al., to a fair hearing;

(5) Delete the discontinuance of service allegations, since the Kintzels, et al., are resellers of telecommunications services who were at the mercy of the wrongful actions of the underlying carrier; and

(6) Delete the proposed imposition of individual liability against Kurtis J. and Keanan Kintzel, because there is no reasonable basis in existing law for piercing the corporate veil under the facts of the case and well-established legal precedent.

The Motion is filed late, as permitted for good cause under 47 C.F.R. 1.229(b)(3). In the alternative, the Motion should be considered fully on the merits even without a showing of good cause, under the legal standard set forth in 47 C.F.R. § 1.229(c)—"initial examination of the motion demonstrates that it raises a question of probable decisional significance and substantial public interest importance as to warrant consideration despite untimely filing." 47 C.F.R. § 1.229(c). The apparent likelihood that the Commission exceeded its statutory and constitutional authority in proposing fines of $50 million for alleged harms involving mainly reporting offenses that worked no irreparable or costly damage to society and never endangered anyone's life or property, satisfy that legal standard. Thus the Motion should be considered fully on the merits.

II. The FCC must provide a more definite statement as to the number and instances of alleged violations that would justify the imposition of over $50 million in penalties.

The FCC is directed by 47 U.S.C. § 503(a)(2)(B) (Section 503 of the Communications Act of 1934) that forfeiture penalties against common carriers "shall not exceed $100,000 for

each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act ...."

Paragraphs 31, 32, and 33 of the Order describe in very general terms the allegations for which the Commission proposes over $50 million in fines, but offers no detail on the number of instances that would justify such astounding penalties. Those paragraphs merely state that the violations occurred "repeatedly." Order, ¶¶ 31-33. Because the Order lacks any detail on the number of instances alleged, and which instances might be considered continuing violations, the accused parties request more detail to assess whether the Commission's proposed penalties are authorized under Section 503 or exceed statutory limits.

The Kintzels, et al., respectfully move that paragraphs 31, 32, and 33 of the Order be revised to state the following details: (1) the number of instances of each alleged violation, (2) the date of occurrence of each instance, (3) the amount of the forfeiture proposed for each instance, and (4) the authority upon which the amount of each forfeiture is based (citations to regulations and enabling statute are requested).

As stated above, under Section 503, forfeiture penalties against common carriers "shall not exceed $100,000 for each violation or each day of a continuing violation," and assessments for continuing violations "shall not exceed a total of $1,000,000 for any single act or failure to act ...." Yet, under paragraph 32 of the Order, the Commission seeks penalties of $130,000 for single violations—a number that exceeds the statutory ceiling. Order, ¶ 32; 47 U.S.C. § 503(a)(2)(B). The Kintzels, et al., reiterate their request that the Commission identify the authority upon which the imposition of fines is based, for each alleged violation. The Kintzels, et al.. also request that the Commission demonstrate that there is any combination of single violations or continuing violations in which fines that exceed $50 million fall within statutory

limits.

The U.S. Supreme Court has observed that the Due Process Clause of the U.S. Constitution prohibits sanctions that are "irrational." *Hudson v. U.S.*, 522 U.S. 93, 103 (1997) (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955)). Under that standard, the Commission's imposition of fines that exceed the statutory ceiling violate due process. And because $50 million in fines is imposed for alleged harms consisting of mere reporting offenses that worked no irreparable or costly damage to society, and never posed a threat to life or property, the amount of the fines violates the "fundamental fairness" component of due process. *See Santosky v. Kramer*, 455 U.S. 755, 775 (due process requires "fundamental fairness"); *Ingraham v. Wright*, 430 U.S. 651, 675 (the due process guarantee represents "a profound attitude of fairness"). The Kintzels, et al., reiterate their request that the Commission identify the authority upon which their imposition of fines is based, for each alleged violation.

III. The amount of the proposed penalties violates the Excessive Fines Clause of the U.S. Constitution and must be reduced.

The Eighth Amendment of the U.S. Constitution guarantees that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The U.S. Supreme Court has held that the Excessive Fines Clause is applicable whenever the fine imposed is punitive in nature, and that there is no threshold question whether the fine imposed is civil or criminal. *Austin v. U.S.*, 509 U.S. 602, 609-10 (1993). Under *Austin*, a fine is regarded as punitive if the court determines that "it can only be explained as serving in part to punish." *Id.* at 610.

In the instant proceeding, forfeitures exceeding $50 million are imposed for alleged

underlying violations in the following amounts: $224,700 in unpaid voluntary contributions; $2,709 in unpaid TRS contributions; unspecified amounts of unpaid USF contributions; and reimbursement of subscribers' fees to the preferred carriers for 10 slamming complaints. Only those amounts can be said to serve a remedial, non-punitive purpose.

Austin notes that, in addition to the remedial purpose, other non-punitive purposes for civil forfeitures include payment of damages to society, the cost of enforcing the law, and deterrence. *Austin*, at 621, 622 n.14. In the instant proceeding, there was no significant damage to society, e.g., no potential for loss of life or irreparable environmental damage. *See Korangy v. U.S. FDA*, 498 F.3d 272 (4th Cir. 2007) (upholding civil fine of $1.5 million against excessive fines challenge by doctor who conducted mammograms after lapse of mammography certification); *see Newell v. U.S. EPA*, 231 F.3d 204, 205 (5th Cir. 2000) (upholding civil fine of $1.3 million against excessive fines challenge for violation of toxic dumping statute). Nor has the cost of enforcing the law been overwhelming; the Commission has conducted only standard investigations and hearings. *See* Order, ¶ 1-3. As for deterrence: while the potential deterrent effect of $50 million in penalties cannot be ignored, it is blunted by the fact that $50 million in fines is clearly designed to completely and irreversibly disable the accused, the more so because the Commission seeks to revoke the operating authority of the accused in the same proceeding. *See* Order, ¶ 30. Furthermore, as the Supreme Court acknowledged in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), "punishment-retribution and deterrence" go hand in hand, and one cannot be accomplished without the other. *Id.* at 168. The penalties are unquestionably punitive.

The Supreme Court held in *U.S. v. Bajakajian*, 524 U.S. 321, 324 (1998), that a punitive forfeiture is constitutionally excessive if "grossly disproportional to the gravity of a defendant's

offense." *Id.* In the instant proceeding, that legal standard is more than satisfied. One of the harms alleged is unauthorized switching of subscribers' preferred carriers; the remedial penalty for such acts consists merely of payment to the preferred carrier of "an amount equal to all charges paid by such subscriber after such violation ...." 47 U.S.C. § 258(b). Another harm alleged is discontinuance of service, a charge that should be leveled at the underlying carrier, not the Kintzels, et al., who were at the mercy of the wrongful actions of the carrier. *See infra*, p. 11-13. The rest of the alleged harms consist of non-payment and non-responsiveness to the FCC's inquiries. Order, ¶¶ 24(b), (c), (d), (f), (g), (h). As to these allegations, the Order evidences no awareness by the Commission of any of the following facts, which might mitigate liability or provide a complete defense:

Sale of Assets to UMCC, and Rerouting of Mail. Assets of Business Options, Inc. (BOI), and Buzz Telecom Corp. were sold in an Asset Purchase Agreement to UMCC Holdings, effective December 1, 2006 and later superseded by an Agreement dated December 11, 2006.[1] With the sale of assets, including the sale of the BOI and Buzz trade names, some mail usually routed to BOI and Buzz was transferred to UMCC beginning in December 2006; the Order states that non-responsiveness to FCC inquiries occurred in or after January 2007. Order, ¶ 8. The timing of the alleged non-responsiveness would coincide with the rerouting of mail.

No Access to Verifications. In the asset sale, UMCC received BOI's and Buzz's database computer and relationship to The Verification Company, and agreed to pay The Verification Company's open invoice. UMCC chose not to pay the open invoice or to make payment arrangements. This caused reluctance by The Verification Company during December 2006 and January 2007 to provide verification tapes to the Kintzels, et al. Prior to this timeframe, the

[1] *See* Exh. A, Affidavit of Kurtis J. Kintzel. All facts asserted by the Kintzels, et al., in this Motion are henceforth cited to Exh. A.

Kintzels, et al., built a record for several years of responding quickly to FCC inquiries. The Order states that non-responsiveness to FCC inquiries occurred in or after January 2007. Order, ¶ 8. The timing of the alleged non-responsiveness would coincide with the inability to retrieve some or all requested verifications from The Verification Company.

Change to Direct Billing. The Order evidences no awareness by the Commission that the Kintzels, et al., changed to direct billing in October 2006 (previously, customers of the Kintzels, et al.. had been billed through the LEC). Thus, in October 2006, customers who might have chosen the Kintzels, et al., as their carrier five, ten, or fourteen years earlier but had continued to be billed by the LEC suddenly began receiving bills from the Kintzels, et al. The customers might have forgotten that they had authorized the change in carrier and reported the Kintzels, et al., for slamming. The Order states that "during the last quarter of 2006," the Commission received a number of customer complaints about alleged slamming and cramming. Order, ¶ 6. The Order makes no mention of a high volume of slamming complaints prior to the fourth quarter of 2006. Order, ¶ 6. The timing of the complaints would coincide with the change to direct billing.

BOI and Buzz Had Ceased Marketing by the Fall of 2006. The Order evidences no awareness by the Commission that the Kintzels, et al., had ceased nearly all marketing by August 2006, and that no customers were billed by the Kintzels, et al., after November 2006. The Order states that "during the last quarter of 2006," the Commission received a number of customer complaints about alleged slamming and cramming. Order, ¶ 6. The timing of the inquiries does not coincide with the timing of solicitations by the Kintzels, et al.

UMCC, with the Assistance of Qwest, Slammed Former Buzz Customers. The Order evidences no awareness by the Commission that UMCC did not purchase the telecom certificates

or customers of the Kintzels, et al., when it acquired the assets of BOI and Buzz. Instead of reselling the disconnected customers onto its own service, UMCC slammed nearly 30,000 customers onto its service with the full knowledge and assistance of Qwest. *See* Exh. B, p. 1. Neither UMCC nor Qwest could have in their possession verifications allowing them to make changes to those customers' service. Apparently Qwest discontinued service again to those same customers, who had been migrated to the UMCC Reseller account, in April 2007, and in May 2007, without giving the customers legal and proper notice in violation of FCC regulations. *See* Exh. B, p. 2. The Order states that "the Commission continues to receive complaints alleging that Buzz executed a change to a subscriber's telephone exchange or telephone toll service without authorization ...." Order, ¶ 16. If the Commission is receiving complaints against Buzz more than a year after the last customer was sold by the Kintzels, et al., the complaints are more likely caused by those customers' recent service providers, UMCC via Qwest (with UMCC using the Buzz trade name). UMCC never obtained its own certificate of operation in Georgia, *see* Exh. B, p. 2, and was issued a Cease and Desist Order by the Georgia Public Service Commission. *See* Exh. B, p. 2. In response to the Cease and Desist Order, Qwest discontinued service to those customers of UMCC (positioning itself as Buzz), without giving notice to those customers. *See* Exh. B, p. 2.

Use of Outside Telemarketing Firm. Nor does the Order evidence awareness by the Commission that the Kintzels, et al., used a telemarketing firm called Telecommunications on Demand, Inc. ("TOD," a corporation with no relationship to the Kintzels, et al., except that of independent contractor) from March to August 2006. Under its contract with Buzz, TOD and TOD telemarketers were given and were to use marketing guidelines, procedures, and a script to follow that incorporated the marketing requirements of the 2004 Consent Decree. TOD

produced nearly all customers provisioned by Buzz from June 2006 through August 2006. The Order states that the Commission began receiving customer complaints in the fall of 2006. Order, ¶ 6. The timing of those complaints would coincide with the efforts of TOD. If the slamming complaints were caused by the actions of TOD, the liability of the Kintzels, et al., would be merely vicarious.

Uncertainty As To When Liability for TRS and USF Contributions Accrues. Since the TRS and USF contributions are "pay as you go" estimated payments, the due dates for the installment payments may not be the same as the date when liability for the payments accrues. If the installments are estimated payments based on the carrier's earnings, there is no way to determine the amount of the carrier's liability until tax returns are completed at the close of the fiscal year. There needs to be a legal determination that liability has actually accrued on the contributions; without such a determination, the imposition of $50 million in forfeitures seems premature and constitutionally excessive.

In view of the mitigating factors cited above, and the fact that the alleged harms worked no irreparable or costly damage to society and never endangered anyone's life or property, the Kintzels, et al., request that the proposed fines be reduced in accordance with the Excessive Fines Clause, because $50 million in penalties is grossly disproportional to the offenses alleged.

IV. Imposing cumulative punishments for alleged violations of the Consent Decree, as well as the underlying offenses comprising the alleged violations, is barred by the Double Jeopardy Clause of the U.S. Constitution.

The Order alleges that the Kintzels, et al., committed the following six violations: (1) non-payment of voluntary contributions, (2) non-payment of required universal service fund

contributions, (3) non-payment of TRS contributions, (4) discontinuance of service, (5) slamming, and (6) non-responsiveness to the FCC's inquiries. *See* Order, ¶ 24. Yet, the foregoing six offenses are listed as nine separate violations. *See id.*, ¶ 24, (a)-(i). The apparent rationale for doing so is that some of the alleged acts violate the FCC's rules *and* the 2004 Consent Decree. *See* Order, ¶ 24 (a)-(d). However, because only six underlying offenses are involved, this means that cumulative punishments are sought for several of the offenses.

Under the U.S. Supreme Court's double jeopardy jurisprudence, cumulative criminal punishments may be imposed for the same offense only if the legislature specifically authorizes it. *Missouri v. Hunter*, 459 U.S. 359, 366-67 (1983) ("where the offenses are the same ... cumulative sentences are not permitted, *unless elsewhere specifically authorized by Congress*," citing *Whalen v. U.S.*, 445 U.S. 684, 693 (1980)). Whether a punishment is criminal for double jeopardy purposes differs from the excessive fines analysis for determining whether a fine is punitive. *See Austin, supra*, at 608 n.4.

For double jeopardy purposes, the Supreme Court in *Hudson v. U.S.*, 522 U.S. 93, 99 (1997) directed that the court's first inquiry is whether the legislature has denominated the statute as civil or criminal, and then whether the statutory scheme is so punitive in purpose or effect that it transforms a civil penalty into a criminal penalty. *Id.* at 99. To determine whether the penalty effectively imposes criminal punishment, *Hudson* directs the court to consider the factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963), namely, whether the sanction (1) involves an affirmative disability or restraint, (2) has historically been regarded as punishment, (3) requires a finding of scienter, (4) promotes the traditional aims of punishment-retribution and deterrence, (5) applies to behavior that is already a crime, (6) can be rationally connected to an alternative purpose, and (7) is excessive in relation to the alternative purpose. *Hudson, supra*, at

99-101 (citing *Kennedy, supra*, at 168-69).

The proposed penalties of $50 million and revocation of operating authority would work an affirmative disability or restraint by imposing upon the Kintzels, et al., lifelong servitude to the debt; the historical treatment of $50 million in fines is difficult to evaluate because infrequent in history; scienter is required because the accused parties are alleged to have acted "willfully"; punishment-retribution and deterrence are involved, because the extraordinary amount of the fines is designed to permanently disable and to send a message; does not apply to behavior that is already a crime; can be rationally connected to the alternative purposes of remediation, paying damages to society, and the cost of enforcing the law (but perhaps only up to several hundred thousand dollars, not $50 million); and, is certainly excessive in relation to the alternative purposes, since *tens of millions* of dollars have been added to the amounts for remediation, damages to society, and the cost of enforcing the law. On balance, the penalties effectively impose criminal punishment, despite the nominally civil statutory scheme.

Once the punishment at issue is determined to be criminal in purpose or effect, the double jeopardy analysis determines whether cumulative punishments are imposed for the same offense. *Hunter, supra*, at 366-67. Under the traditional *Blockburger* test, two offenses are not the "same offense" for double jeopardy purposes if "each ... requires proof of a fact which the other does not." *Hunter, supra*, at 366 (citing *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932)).

The Commission seeks to impose penalties for the six underlying offenses, and to add cumulative punishment because these underlying offenses also allegedly violate the Consent Decree. *See* Order, ¶ 24(a)-(i). To find the accused parties guilty of all nine violations, the Commission need only prove the six underlying offenses. No additional facts need be proven to find violations of the Consent Decree. Thus the offenses are the same under *Blockburger*, and

cumulative punishment is permitted only if specifically authorized by the legislature. *Hunter, supra*, at 366-67.

Cumulative punishments are neither authorized nor contemplated under Section 503 of the Communications Act of 1934. *See* 47 U.S.C. § 503(a)(2)(B). By the express terms of the statute, the amount of forfeitures is specifically limited ("shall not exceed $100,000 for each violation or each day of a continuing violation," and "the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act").

Because the statute contains no specific authorization for cumulative punishments under Section 503, the Commission's intent to impose additional punishment on the rationale that the six underlying offenses also allegedly violate the Consent Decree is barred by the Double Jeopardy Clause of the U.S. Constitution.

V. A separate hearing must be held to examine alleged violations of the 2004 Consent Decree, to prevent confusion of the issues that could jeopardize the right to a fair hearing.

Under 47 C.F.R. § 1.95, alleged violations of a consent order must be considered in a separate hearing. The Commission has waived that rule in the instant proceeding to permit administrative efficiency. Order, ¶ 23. Administrative efficiency does not trump the right of the Kintzels, et al., to a fair hearing, however.

Considering the alleged violations of the Consent Decree in a separate hearing, of course, creates the potential for another double jeopardy violation. To wit, the Double Jeopardy Clause also protects the accused from being subjected to successive prosecutions for the same offense after an acquittal or conviction. *Ohio v. Johnson*, 467 U.S. 493, 498 (1984). However, the fact

that holding a separate hearing might foreclose a second hearing on double jeopardy grounds is an invalid reason for consolidating the hearings, because, as it has been shown, consolidation raises double jeopardy concerns due to cumulative punishments, and also, because the rights of the accused to be free from double jeopardy trumps the desire of any party to hold an unconstitutional second hearing.

The instant proceeding is infected by the very evils that the Double Jeopardy Clause was designed to prevent—"repeated attempts to convict an individual ... while increasing the risk of an erroneous prosecution or an impermissibly enhanced sentence." *Johnson, supra*, at 498-99.

The Commission's intent to seek an astounding $50 million in penalties, without more, is evidence of a double jeopardy problem, especially in view of the fact that the alleged offenses consist mainly of non-payment and non-responsiveness to the Commission's inquiries. Penalties in the amount of $50 million would not even be possible for such benign offenses, unless impermissibly enhanced through unconstitutional cumulative punishments.

The potential for "erroneous prosecution," another evil discussed in *Johnson, supra,* is heightened in the instant proceeding by the fact that the Commission has waived its own rules and consolidated the hearings. Order, ¶ 23. The result is that too many issues are being considered in one proceeding, which increases the risk of confusion of the issues that could jeopardize the right to a fair hearing.

The Kintzels, et al., respectfully request that a separate hearing, under 47 C.F.R. § 1.95, be held to examine alleged violations of the Consent Decree. By this request, the Kintzels, et al., by no means waive their right to assert the double jeopardy defense as a bar to any second proceeding. Rather, the Kintzels, et al., assert that double jeopardy problems are inherent in the proceedings due to the excessive fines, cumulative punishments, and multiple prosecutions

sought for the same offenses. In short, the Kintzels, et al., decline to waive their constitutional right to be free from double jeopardy for the sake of administrative efficiency.

VI. The discontinuance of service allegations should be deleted, because the Kintzels, et al., are resellers who were at the mercy of the wrongful actions of the underlying carrier.

A telecommunications resale agreement is not merely a two-party agreement. The underlying carrier whose facilities are being resold owes a duty not only to the reseller, but implicitly assumes duties to the reseller's customers, including the duty not to disconnect the customers in retaliation for alleged non-payment by the reseller.

Under well-established principles of contract law, the usual remedy at law for breach is money damages. Qwest, the underlying carrier who entered into a resale agreement with the Kintzels, et al., should have sued for non-payment and collected money damages. Qwest was *not* within its rights to terminate service to customers in 48 states in late November-early December of 2006, as a "remedy" for alleged breach by the Kintzels, et al. *See* Order, ¶ 11. Qwest's actions violated the rights of third parties to whom Qwest owed implicit duties as the underlying carrier.

The attached Exhibit B is a letter from Qwest describing its actions in shutting off service to customers of the Kintzels, et al., in late November-early December of 2006. *See* Exh. B. Qwest also acknowledges that "on November 30, 2006, a Qwest employee sent an e-mail to Buzz CEO Kurtis Kintzel, asking him if he would be interested in selling his base of customers." Exh. B, p. 1. The employee gave Kurtis Kintzel and Scott Wilson (CEO of UMCC) "each others' contact information. At that time, UMCC was another reseller of Qwest long distance

service." *Id.* Less than two weeks later, on December 11, 2006, the sale closed on an Asset Purchase Agreement, transferring assets of Buzz and BOI to UMCC, including the Buzz and BOI trade names.

Kurtis Kintzel hurriedly entered into the Asset Purchase Agreement, and in the process sacrificed more than $1 million in outstanding accounts receivable and unbilled charges in excess of $1 million, for the purpose of expediting the restoration of service to those customers. Thus, Qwest's wrongful actions not only caused discontinuance of service to those customers, but millions of dollars in damages to the Kintzels, et al., due to the forced sale of a multi-million dollar business.

Late payments to Qwest by the Kintzels, et al., in October and November of 2006 were caused by late payments by customers of the Kintzels, et al., on their phone bills. Customers are not always merely innocent victims of slammers and crammers, as the news media has portrayed them.[2] Sufficient numbers of them, who accounted for approximately $1 million in receivables by Buzz, were so late in paying their phone bills that they caused the Kintzels, et al., to be late in payments to Qwest. Customers' foundational role in the cycle of late payments that culminated in the shutdown of their own phone service by Qwest should be acknowledged.

The Kintzels, et al., respectfully move that the discontinuance of service allegations against them be deleted. The discontinuance of service described in the Order was caused by the wrongful actions of Qwest, which breached its implicit duty to customers of the Kintzels, et al., by disconnecting their service. The discontinuance of service was not caused by the Kintzels, et al., thus the allegations against them should be dismissed.

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[2] *See, e.g.*, Paul E. Kostyu, *State Fines Company, Collecting Another Matter*, CantonRep.com, Oct. 5, 2007, *at* http://www.cantonrep.com/index.php?style=newstyles3.css&Section=&ID=379671&Category=13.

VII. The proposed individual liability of Kurtis J. and Keanan Kintzel should be deleted from the Order, because there is no reasonable basis in law for piercing the corporate veil under the facts of the case and well-established legal precedent.

As the Supreme Court directed in *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003), piercing the corporate veil should be applied as a "rare exception ... in the case of fraud or certain other exceptional circumstances."

The FCC's previous veil-piercing cases involve efforts to prevent monopolization of radio frequencies, *Capital Tel. Co., Inc., v. FCC*, 498 F.2d 734 (D.C. Cir. 1974), and to ensure that subsidiaries of regional companies operating in the same industry are separately financed, *North American Telecommuncations Ass'n v. FCC*, 722 F.2d 1282 (7th Cir. 1985). And, in an extraordinary case that was uncontested by the defendants, the FCC revoked the operating authority of carrier companies operated by Daniel Fletcher, and assessed $5.6 million in forfeitures against their principals after a hearing in which the defendants failed to appear.[3]

The foregoing paragraph describes two very different types of veil-piercing conducted by the FCC: (1) veil-piercing in aid of the FCC's regulatory tasks in *Capital Tel. Co.* and *North American Telecom. Ass'n*, and (2) veil-piercing to prevent fraud or injustice by imposing individual liability on the principals, in the Fletcher case.

The D.C. Circuit acknowledged the difference in the types of veil-piercing, in *Capital Tel. Co., Inc., v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974):

> "[W]e need not consider whether Capital would be Bakal's alter ego under the strict standards of the common law alter ego doctrine which would apply in a contract or tort case. The contest in this case is over a license in a regulated industry and the applicable standard appears in the statute, not in court decisions involving civil suits." *Id.* at 738.

[3] *In the Matter of CCN, et al., Order to Show Cause and Notice of Opportunity for Hearing*, FCC 98-076, Apr. 21, 1998.

In the instant proceedings, the punitive nature of the proposed penalties indicates veil-piercing of the latter type—to prevent fraud or injustice. Yet, the Order does not allege fraud or injustice in any of the "ordering clauses," nor that the companies owned by the Kintzels are alleged to be alter egos of their principals.

The first step in the alter ego inquiry examines whether there was failure to maintain corporate minutes or records, lack of corporate formalities such as formal approval of stock issue by an independent board of directors, commingling of individual and entity assets, diversion of corporate assets to individual uses, and use of the same office location for business and individual purposes, all of which would suggest a mere sham entity. *Labadie Coal Co. v. Black*, 672 F.2d 92, 97-99 (D.C. Cir. 1982). The next step in the inquiry is whether injustice or unfairness would result by maintaining the corporate fiction. *Id.* at 99.

In the instant proceedings, the Order does not allege that the companies owned by the Kintzels, et al., are sham entities. Perhaps because such allegations would be unsustainable, given that the principals have been in the telecom business since 1992, the companies at one time employed 100 people, and offered the lowest rates in the industry servicing customers that the larger telcos would not service (selling long-distance at 2.9 cents per minute, the lowest rate in the industry, before selling off assets to UMCC; the first telecom firm to break 10 cents per minute in 1995; a history of driving competition by providing excellent rates; since 1992, rarely drew the attention of the FCC).

The Kintzels, et al., are legitimate businesses. Recognizing the entities would work no fraud or injustice. The Order makes no allegations of fraud or injustice. AT&T has been found guilty in FCC proceedings of slamming customers 123 times; Sprint, 114 times. Yet it would be unthinkable to propose individual liability on the executives of AT&T or Sprint. Singling out the

Kintzels, et al., for individual liability, in derogation of well-established legal precedent, raises the specter of selective prosecution.

Because the Order offers no legal theory upon which individual liability can be based, the Kintzels, et al., respectfully request that the proposed individual liability of Kurtis J. and Keanan Kintzel be deleted from the Order.

VIII. Late filing of the Motion should be accepted for good cause, and because questions of probable decisional significance and substantial public interest importance are raised.

Under 47 C.F.R. § 1.229(a), motions to enlarge, change, or delete issues must be filed within 15 days after the order designating the case for hearing is published in the *Federal Register*. The Kintzels, et al., file this Motion late as permitted for good cause, under 47 C.F.R. § 1.229(b)(3), and also request that the Motion be considered fully on the merits even without a showing of good cause under the legal standard set forth in 47 C.F.R. § 1.229(c)—"initial examination of the motion demonstrates that it raises a question of probable decisional significance and substantial public interest importance as to warrant consideration despite untimely filing."

Good cause exists in that the late filing was caused by unavoidable circumstances. The Kintzels, et al., obtained legal counsel only on October 12, 2007, the day of the deadline for filing Motions under § 1.229, despite diligent efforts to secure legal representation earlier. Upon release of the Order on September 10, 2007, the Kintzels, et al., were immediately in touch with their former attorneys who negotiated the 2004 Consent Decree; that firm elected not to take on the instant matter. Much strategizing ensued with one of those attorneys who had moved to

another firm, but the representation was not pursued because of the price quote. Over 30 attorneys were interviewed subsequently, and legal counsel finally obtained on October 12, 2007. Additionally, a Petition to Intervene as a Party had been filed on October 10, 2007. Opposition to the Petition was timely filed by counsel for the Kintzels, et al., on October 16, 2007, and the instant Motion is filed within ten days of that Opposition. Due to the sheer number of issues proposed for resolution in the proceeding, the complexity of the legal arguments that must be considered, and the search for legal representation which took longer than expected despite diligent efforts, the Motion could not be filed earlier.

Additionally, the instant Motion raises questions of probable decisional significance and substantial public importance that warrant consideration despite untimely filing. Consolidation of the hearings to examine alleged violations of the Consent Decree in concert with alleged post-Consent Decree violations could lead to confusion of the issues and jeopardize the right to a fair hearing; this issue must be considered. Cumulative punishments for alleged violations of the Consent Decree and the alleged underlying offenses may violate the Double Jeopardy Clause; the issue should be considered. The Commission is also requested to provide a more definite statement as to the number of alleged instances of violations that would warrant $50 million in penalties, to demonstrate how such amounts were calculated, and to identify the statutory authority upon which such amounts are based, because the proposed penalties seem to exceed statutory and constitutional due process limits. The Commission is also requested to consider the constitutional limits of the Excessive Fines Clause on the amount of the proposed penalties, because grossly disproportional to the nature of the alleged offenses, which work no lasting damage to society, and never endangered life or property. The discontinuance of service allegations can be dismissed immediately based on the wrongful actions of the underlying

carrier, thus should be considered. Finally, the Commission is requested to delete the proposed imposition of individual liability on the principals of the Kintzels, et al., because the Order alleges none of the elements that must be present to justify piercing the corporate veil under existing law.

IX. Conclusion.

The Kintzels, et al., respectfully request that the foregoing Motion of the Kintzels, et al., to Modify the Issues, or, in the Alternative, Statement of Objections to the Order to Show Cause, be considered on the merits by the Commission.

Respectfully Submitted,

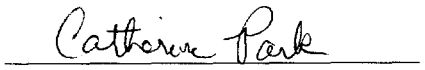

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Exhibit A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	EB Docket No. 07-197
	)	
Kurtis J. Kintzel, Keanan Kintzel, and all Entities by which they do business before the Federal Communications Commission	)	File No. EB-06-IH-5037
	)	
Resellers of Telecommunications Services	)	
	)	

AFFIDAVIT OF KURTIS J. KINTZEL

DISTRICT OF COLUMBIA

The undersigned Affiant, of lawful age and duly sworn on oath, hereby deposes and says:

My name is Kurtis J. Kintzel. I hereby declare, under penalty of perjury, that I have read the foregoing "Motion to Modify the Issues, or, in the Alternative, Statement of Objections to the Order to Show Cause," filed on behalf of the Kintzels, et al., and that the facts stated therein are true and correct to the best of my knowledge, information, and belief.

Executed on October 26, 2007.

Kurtis J. Kintzel, President
Buzz Telecom, Corproation

Subscribed and sworn to before me, this 26 day of Oct., 2007.

Notary Public

OFFICIAL SEAL
RONALD SANDBERG
NOTARY PUBLIC - INDIANA
PORTER COUNTY
My Comm. Expires June 8, 2013

Exhibit B