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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF)
PAGEDATA FOR APPROVAL OF AN)
AMENDMENT TO A PAGING)
INTERCONNECTION AGREEMENT WITH)
QWEST COPORATION PURUSANT TO 47)
U.S.C. § 252(e).)

CASE NO. QWE-T-03-6

IN THE MATTER OF THE APPLICATION OF)
WAVESENT, LLC FOR APPROVAL OF AN)
AMENDMENT TO A PAGING)
INTERCONNECTION AGREEMENT WITH)
QWEST CORPORATION PURSUANT TO 47)
U.S.C. § 252(e).)

CASE NO. QWE-T-03-7

**REPLY TO QWEST'S
RESPONSE AND CROSS-
PETITION**

PageData and WaveSent, LLC ("Pagers") submit this Reply to Qwest Corporation's ("Qwest") Response and Cross-Petition to PageData and WaveSent's Petition for Reconsideration to the Idaho Public Utilities Commission ("Commission").

Qwest Lacks Standing Either to Make a Motion to Dismiss or to Seek

Extension of the 90-day Time Period Pursuant to 47 U.S.C. Section 252(e)

Pagers filed an application with the Commission as required by Section 252(e) of the federal Telecommunications Act seeking a ruling within 90 days. If the Commission fails to act within the 90 days, under 252(e) the application is automatically approved.

Under federal and Idaho Rule 12(b)(6) the Commission must deny Qwest's motion to dismiss unless Qwest can demonstrate beyond doubt that Pagers cannot prove no set of facts in support of its claim that Pagers are entitled to relief. In making this determination the Commission must also accept the factual allegations in the Pagers' application and must construe those facts in light most favorable to Pagers. The Idaho Commission is the only entity that can provide non-appealable relief to the Pagers. 47 U.S.C. 252(e) Through Pagers' application Pagers seek to continue to obtain access to telecommunications capabilities in par with Pagers' competitors and in par with the McKenna letter submitted to the FCC in settlement of an informal complaint.

The McKenna letter was issued by Qwest to settle specific items identified in an informal complaint filed at the FCC (see Exhibit C of Pager's Petition for Reconsideration). The McKenna letter identified and discontinued years of discrimination visited on Pagers by Qwest for reciprocal compensation, types of traffic that could be terminated, and single point of presence.

Oral agreements and Letters Considered Interconnection Agreements

The McKenna letter is required to be filed with the Commission. The McKenna letter was submitted by Qwest to the FCC in settlement of an informal complaint with Pagers. Qwest stated, "Mr. McKenna's email was only sent in order to explain how portions of the agreement operated."¹ That admission alone made by Qwest requires that the McKenna letter be filed. Portions of operation included that Qwest would, at Pagers option, deliver Internet traffic over facilities and should Pagers do so, Pagers could not charge Qwest reciprocal compensation for such traffic. The McKenna letter provided

¹ Qwest Corporation's Response and Cross-Petition to PageData and WaveSent's Petition for Reconsideration, page 8

forward looking terms and conditions that meet the guidelines established in Commission Order No. 29154, the FCC's Declaratory Order², and the FCC's NAL³ for filing with the Commission. In its NAL the FCC stated:

Notwithstanding the position taken in its petition, in May 2002, Qwest informed the state commissions in its region of a new policy of filing all new "contracts, agreements, and letters of understanding" between Qwest and competitive LECs that "create obligations to meet the requirements of Section 251(b) or (c) on a going-forward basis." (paragraph 7)

With less evidence than Pagers submitted to this Commission, other state commissions have found that oral agreements and letters were considered interconnection agreements, despite vehement denial by Qwest that it had entered into any unfiled agreements at all. Minnesota, Iowa, Arizona, Colorado and the FCC all concurred that Qwest had entered into interconnection agreements by letter and by oral commitments, none of which have been submitted to the Idaho Commission for approval in violation of Idaho Code 61-301 and 61-315. For example,

McLeod III - Qwest entered an **oral agreement** with McLeod to provide discounts ranging from 6.5-10 percent depending on the volume of McLeod's purchases over the course of the year. The discount applied to McLeod's purchases of unbundled network elements (UNEs), payments for switched access, wholesale long distance and tariffed retail services. **Testimony of a Qwest witness continuing to deny the existence of the discount agreement was found not credible.** See ALJ's Report, Findings 316-345, pages 43-47. (Minnesota Order Assessing Penalties *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*- Docket No. P-421/C-02-197, Issued February 28, 2003, page 5, emphasis added)

89. On November 15, 2000 Qwest and Eschelon entered into a **letter agreement** ("Eschelon Agreement III").

² *Qwest's Petition for Declaratory Ruling*, 2002 WL 31204893

³ FCC Notice of Apparent Liability for Forfeiture *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, File No. EB-OS-IH-0263, Released March 12, 2004

90. Qwest terminated Eschelon Agreement III on March 1, 2002.

91. Qwest did not submit Eschelon Agreement III to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

151. On July 3, 2001 Qwest and Eschelon entered into a **letter agreement** modifying and amending Eschelon Agreement IV ("Eschelon Agreement V").

152. Qwest did not submit Eschelon Agreement V to the Commission for approval under 47 U.S.C. §252(e) until March 1, 2002, in response to the Department's complaint in this matter.

153. Qwest terminated Eschelon Agreement V on March 1, 2002.

(The Administrative Law Judge's Findings of Fact, Conclusions, Recommendation and Memorandum *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*— Docket No. P-421/C-02-197, dated September 20, 2002, footnotes omitted, emphasis added)

The Pagers continue to dispute with the Commission that the Arch and PageNet Confidential Billing Settlement agreements must be filed. The Arch and PageNet's Confidential Billing Settlements have been classified by the FCC, through the investigations of Minnesota, Arizona, Colorado, and Iowa, as interconnection agreements. See Exhibit E, Arch and PageNet agreements and Exhibit H, Colorado Appendix M Unfiled Agreements Matrix, Pagers Petition for Reconsideration. Qwest is in continued violation of Idaho Code 61-301 and 61-315 and Commission Order No. 29154 because these agreements enable Qwest to provide advantageous terms and conditions to Arch and PageNet over Pagers due to Qwest's failure to file these agreements in Idaho.

Conflict of Interest

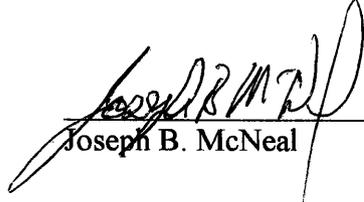
Mr. John Hammond of Batt & Fisher, LLP should recuse himself from all overt and covert participation in any of Pagers' cases currently filed with the Commission due to his involvement as a prior employee of the Commission in PageData's initial case at the Commission regarding section 252 discrimination issues and other cases filed by Pagers. Pagers can provide more detailed information if it becomes necessary.

Conclusion

Pagers pray for relief for the Commission to

- 1) Not extend the 90-day time limit;
- 2) Accept the applications as filed;
- 3) Deny Qwest's motion to dismiss in its cross-petition;
- 4) Order Qwest to comply with Order No. 29154 and file the Arch and PageNet agreements;
- 5) Order Mr. John Hammond not to participate overtly or covertly in any of Pager's proceedings with the Commission.

Respectfully submitted this 8th day of November, 2004.



Joseph B. McNeal

CERTIFICATE OF SERVICE

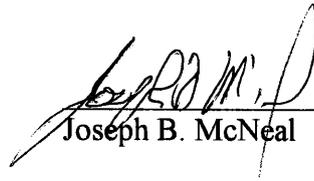
I HEREBY CERTIFY that on this 8th day of November, 2004, I caused a true and correct copy of the foregoing REPLY TO QWEST'S RESPONSE AND CROSS-PETITION to be served, in the manner indicated, on the following:

Jean Jewell, Secretary
Idaho Public Utilities Commission
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Joseph B. McNeal