Office of the Secretary
Service Date
December 9, 2004

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 CORPORATION PURSUANT 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** **ORDER NO. 29655**

In August 2004, PageData and WaveSent, LLC (hereinafter the "Pagers") each filed a Revised Application for approval of an amendment to their respective paging interconnection agreements with Qwest Corporation. The proposed amendment was in the form of an e-mail that the Pagers contend was a Settlement Agreement in "two informal complaints filed with the Federal Communications Commission" (FCC). In Order No. 29604 issued October 6, 2004, the Commission referred this matter to the FCC and, consequently, dismissed the matter without prejudice.

On November 8, 2004, the Pagers filed a timely Petition for Reconsideration asserting that the Commission erred by referring this matter to the FCC. On November 3, 2004, Qwest filed a timely Answer to the Petition for Reconsideration and a Cross Petition urging the Commission to deny reconsideration. On November 8, 2004, the Pagers submitted a Reply to Qwest's Answer and Cross Petition. As set out in greater detail below, the Commission denies the Pagers' Petition for Reconsideration.

BACKGROUND

The procedural history of this case is set out in detail in Order No. 29604 but the pertinent points are summarized here. In their Revised Applications, the Pagers assert that an e-mail purportedly from Qwest's FCC counsel, Bob McKenna, dated June 4, 2003, amends Section 2.4 of their respective interconnection agreements with Qwest. The Pagers alleged the amending e-mail "was reached through voluntary negotiations of two informal complaints filed

with the [FCC]. The settlement [e-mail] has forward-looking terms and clarifies and amends Section 2.4 of the Agreement." Order No. 29604 at 2 *quoting* the Pagers' Applications at 1.

Qwest subsequently filed a Motion to Dismiss the Pagers' Revised Applications. Qwest maintained the McKenna e-mail does not represent either negotiations or an amendment to the underlying interconnection agreements. Qwest asserted it did not agree to any amendment of the interconnection agreements and argued that even a cursorary review of the e-mail does not support the Pagers' contention. Qwest pointed out that the e-mail does not even state how or in what manner it changed the existing interconnection agreements.

In Order No. 29604, the Commission observed that the parties disagree whether the e-mail was the product of voluntary negotiations or whether the e-mail amends Section 2.4 of the underlying agreements. The Commission found that the only area of agreement between the parties is that the e-mail arose in the context of an FCC informal proceeding. Order No. 29604 at 4 ("Clearly, the McKenna email responds to issues in an informal FCC proceeding.").

> However, this Commission was not a party to the FCC proceeding. Given the disagreement between the parties, the lack of specificity to the proposed amendment and the fact that the proposed amendment arises in the context of an FCC informal proceeding, we believe the better course of action is to refer this matter to the FCC. The FCC is the agency with primary jurisdiction over both the Pagers and Qwest. The FCC Staff also conducted the informal proceeding and its Staff is presumably familiar with the context in which the e-mail arose.

Id. After deciding to refer the matter to the FCC, the Commission found that it was reasonable to dismiss the Revised Applications without prejudice.

THE PETITION FOR RECONSIDERATION

In their Petition for Reconsideration, the Pagers assert the Commission erred in referring this matter to the FCC for three primary reasons. First, the Pagers allege that because the McKenna e-mail amends existing interconnection agreements, the Commission must either approve or reject the e-mail amendment within 90 days pursuant to 47 U.S.C. § 252(e).[1] The Pagers describe the present dispute as Qwest reneging "on the delivery of Internet traffic set out

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[1] In pertinent part, Section 252(e) of the federal Telecommunications Act provides that any "interconnection agreement [or amendment to an interconnection agreement] adopted by negotiation. . .shall be submitted for approval to the State commission. A State commission. . .shall approve or reject the agreement. . . . If the State commission does not act to approve or reject the [negotiated] agreement [or amendment] within 90 days. . .the agreement [or amendment] shall be deemed approved." 47 U.S.C. § 252(e)(1) and (4).

in paragraphs 3 of the McKenna letter." Petition for Reconsideration at 2-3. In pertinent part, the third paragraph of the McKenna e-mail states that

> there does not seem to be any dispute that compensation will be necessary for services provided under current interconnection agreements. Such compensation can be required in the case of transiting traffic and WATS or FX equivalent facilities, on the one hand, and reciprocal compensation on the other hand. Should PageData or WaveSent use interconnection facilities or services for internet traffic, such traffic would not be subject to reciprocal compensation payments.

Exhibit A (emphasis added). Because the e-mail functions as a voluntary amendment, the Commission must approve or reject within 90 days.

Second, the Commission's referral of this matter to the FCC conflicts with the Commission's Order No. 29154 in Case No. QWE-T-02-17. This prior case addressed the issue of unfiled interconnection agreements. In Order No. 29154 the Commission ordered Qwest "to review any and all agreements to determine whether they should be filed with the Commission under the provisions" of the federal Telecommunications Act of 1996 and a recent FCC order.

The referenced FCC order was in response to a Petition for Declaratory Ruling filed by Qwest. In its Order, the FCC found that agreements that create ongoing obligations[2] commensurate with interconnection are indeed interconnection agreements. Order No. 29154 at 7 *citing FCC Memorandum Opinion and Order, Qwest Corporation's Petition for Declaratory Ruling*, 17 FCC Rcd 19337 ¶ 8 (Oct. 4, 2002). However, the FCC also determined that agreements which simply provide for "backward looking consideration" need not be filed as interconnection agreements. *Id. citing* 17 FCC Rcd 19337 at ¶ 12. In essence, the Pagers maintain that paragraph 3 of the McKenna e-mail constitutes a prospective interconnection obligation and it must be filed.

Third, Order No. 29604 instructed the Pagers to contact the FCC's Markets Dispute Resolution Division for guidance on how to process the referral. In compliance with this directive, the Pagers, Qwest and FCC staff held a conference call on October 22, 2004. In a letter dated the following day, a Division attorney advised Qwest and the Pagers that the FCC staff did not make any determination whether the McKenna e-mail was a valid amendment. The letter concluded that the Idaho Commission should "make such determinations in the first

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[2] These obligations include resale, number portability, dialing parity, unbundled network elements, access to right-of-way reciprocal compensation, interconnection, or collocation. 47 U.S.C. § 252(b) and (c).

instance." FCC Letter at 2. Consequently, the Pagers assert that the FCC "referred the case back to the Commission."

QWEST'S ANSWER AND CROSS PETITION

In its Answer and Cross-Petition, Qwest insisted the Commission did not err in referring this matter to the FCC. Qwest Answer at 6. Qwest stated that the Commission's actions were reasonable given the ambiguity in the e-mail and the fact that the e-mail arose in an informal FCC proceeding. *Id.*

Qwest also alleged that the referral is not contrary to prior Order No. 29157. Qwest observed that the Commission found it was unclear whether the e-mail did indeed amend the parties' interconnection agreements. "Finding no clear amendment, it cannot be said that the Commission violated any requirement of Order No. 29154." *Id.* at 7.

Qwest asserted in its Cross Petition that there are at least two grounds to affirm the referral to the FCC. Qwest first maintained that the Pagers carry the burden of demonstrating that the McKenna e-mail constitutes a "voluntarily negotiated amendment" to the underlying interconnection agreements. Qwest cites to the case of *Inland v. Comstock*, 116 Idaho 701, 703, 779 P.2d 15, 17 (1989) for the proposition that the party alleging that a contract has been formed has the burden of proving that the parties mutually assented to the contract. Although Qwest has not denied that its counsel transmitted the e-mail to the Pagers, Qwest disputed that the e-mail amends any portion of the underlying interconnection agreements.

Second, Qwest noted that Section 13.23 of the underlying interconnection agreements requires the parties to mutually agree in writing to amend their interconnection agreements. Qwest Answer at 8. Qwest asserted that the Pagers have failed to demonstrate that Qwest has agreed to amend the interconnection agreement. Thus, Order No. 29604 should be affirmed.

DISCUSSION AND FINDING

Reconsideration provides an opportunity for a party to bring to the Commission's attention any issue previously determined and provides the Commission with an opportunity to rectify any mistake or omission. *Washington Water Power Company v. Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979). The Pagers generally maintain that the Commission erred in referring this matter to the FCC. After reviewing the Pagers' Petition for Reconsideration and the other pleadings in this case, we affirm our prior Order.

Both our prior Order No. 29604 and the Pagers acknowledge that the McKenna e-mail arose in the context of an FCC proceeding. In particular, the Commission found that it was reasonable to refer this case to the FCC because: (1) the Commission was not a party to the FCC informal complaint proceeding; (2) the FCC has primary jurisdiction over both the Pagers and Qwest; and (3) the FCC Staff conducted the informal proceeding; therefore, its Staff is more familiar with the context in which the e-mail arose. Order No. 29604 at 4. The conclusion of the FCC letter notwithstanding, these findings support the referral.

The Pagers' arguments regarding Section 252(e) and the inconsistency with our Order No. 29154 are not applicable. These two arguments presume that the e-mail is in fact an amendment to an interconnection agreement. Here the Commission made no such finding because we referred the matter to the FCC. As we observed above, the Pagers assert in their Petition that the third paragraph of the e-mail concerns the delivery of Internet traffic but the subject paragraph addresses reciprocal compensation for Internet traffic. *Compare* McKenna e-mail and Petition at 1.

Our decision to refer this matter to the FCC under the doctrine of primary jurisdiction is subject to review under the abuse of discretion standard. The test for determining whether the Commission abused its discretion is based upon a three-part inquiry whether the Commission: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of discretion and consistently with applicable legal standards; and (3) reached its decision by an exercise of reason. *Sun Valley Shopping Ctr. v. Idaho Power Company,* 119 Idaho 87, 89, 803 P.2d 993, 1000 (1991). In this particular case, the Commission concluded that the FCC was the more appropriate agency to determine whether the e-mail constituted an amendment to the parties' interconnection agreement. The FCC is the federal agency entrusted with implementing the federal Telecommunications Act of 1996. Moreover, it is the FCC's Order in response to Qwest's Petition for Declaratory Ruling that lays out the framework for determining when interconnection agreements must be filed. Finally, the e-mail arose in an FCC proceeding. Consequently, we find that our referral of this matter to the FCC is not an abuse of our discretion.

ORDER

IT IS HEREBY ORDERED that the Petition for Reconsideration filed by PageData and WaveSent, LLC, is denied. The Commission affirms its prior Order No. 29604 referring this matter to the FCC.

IT IS FURTHER ORDERED that given the Commission's decision to deny reconsideration, Qwest's Cross Petition for Reconsideration is also denied pursuant to *Idaho Code* § 61-626(1).

THIS IS A FINAL ORDER ON RECONSIDERATION.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 9th day of December 2004.

PAUL KJELLANDER, PRESIDENT

Out of the Office on this Date
MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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