

WILLIAM J. BATT, ISB No. 2938
JOHN R. HAMMOND, JR., ISB No. 5470
BATT & FISHER, LLP
U.S. Bank Plaza, Suite 500
101 S. Capitol Boulevard
Post Office Box 1308
Boise, ID 83701
Telephone: (208) 331-1000
Facsimile: (208) 331-2400

RECEIVED
FILED
2004 NOV -3 PM 4:49

IDAHO PUBLIC
UTILITIES COMMISSION

ADAM SHERR
QWEST COMMUNICATIONS, INC.
1600 7th Avenue - Room 3206
Seattle, WA 98191
(206) 398-2507

Attorneys for Qwest Communications, Inc.

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE JOINT
APPLICATION OF QWEST CORPORATION
AND WAVESENT LLC FOR APPROVAL OF
AN AMENDMENT TO AN EXISTING
INTERCONNECTION AGREEMENT
PURSUANT TO 47 U.S.C. § 252(e).

APPLICATION OF JOESPH B. MCNEAL
DBA PAGEDATA FOR APPROVAL OF THE
PAGING CONNECTION AGREEMENT FOR
THE STATE OF IDAHO PURSUANT TO 47
U.S.C. § 252(i).

IPUC DOCKET NO. QWE-T-03-7
IPUC DOCKET NO. QWE-T-03-6

**QWEST CORPORATION'S
RESPONSE AND CROSS-PETITION
TO PAGEDATA AND WAVESENT'S
PETITION FOR RECONSIDERATION**

On October 28, 2004, PageData and Wavesent, LLC (hereinafter the "Paggers") filed a joint Petition to Reconsider the Idaho Public Commission's Final Order No. 29604 that dismissed their Revised Applications (hereinafter "Applications") for approval of alleged amendments to their interconnection agreements with Qwest Corporation (hereinafter "Qwest").

Order No. 29064 dismissed the Applications without prejudice and referred them to the Federal Communications Commission (hereinafter "FCC") for resolution.¹

Recently the parties received correspondence from the FCC's Enforcement Bureau that declined to consider the issues raised by the Pagers' Applications, a copy of which is attached hereto as Exhibit 1. On the basis of the Enforcement Bureau's Letter, the Pagers now ask the Commission to reconsider its dismissal of the Applications.

Pursuant to *Idaho Code* § 61-626 and Commission Rule of Procedure 331.05, Qwest responds to Pagers' Petition for Reconsideration and requests that it be denied. IDAPA 31.01.01.331.05. In the alternative, should the Commission determine that it erred by referring this matter to the FCC, Qwest by Cross Petition requests that the Commission dismiss the Pagers' Applications on other grounds. *Idaho Code* § 62-626 & IDAPA 31.01.01.331.02.

I. BACKGROUND

A. Revised Applications for Amendments to Interconnection Agreements

On August 11, 2004, the Pagers filed their Applications for Approval of Amendments to their respective paging interconnection agreements with Qwest. The underlying agreements were approved by the Commission in Order No. 29198 issued February 25, 2003, and were amended in July of 2003 when the Commission issued Order No. 29293. The amendment added of Single Point of Presence ("SPOP") language.

The Pagers' Applications requested that the Commission approve an "amendment" to each of their interconnection agreements. The Pagers alleged the amendment was in the form of an email from Robert McKenna of Qwest dated June 4, 2003. The Pagers alleged in the Applications that the email/amendment was reached through voluntary negotiations that settled two informal complaints the Pagers had filed with the FCC. The Pagers further contended that this email provided forward-looking terms and clarified and amended section 2.4 of the parties' interconnection agreements. *Applications* at 1. The Pagers alleged that because the amendments were "reached through voluntary negotiations" and were in the public interest they could be approved without a hearing. *Id.* at 2-3.

¹ See IPUC Order No. 29604 at p. 4.

B. Qwest's Motion to Dismiss

On September 28, 2004 Qwest filed its Objection and Motion to Dismiss the Pagers' Applications. Qwest stated that it did not join the Pagers' Applications, nor had it been invited by the Pagers to do so. Accordingly, the Pagers' Applications were contrary to the standard industry practice for submission of an amendment to an interconnection agreement to a state commission. Qwest argued that the Pagers' claim that the interconnection agreements had been amended by Mr. McKenna's email was wrong, and that the email sent by Mr. McKenna had not been intended as an amendment of the parties' interconnection agreements. Contrary to the assertion of the Pagers, it was clear that from a review of Mr. McKenna's e-mail that he was neither negotiating nor offering amendments to the adopted interconnection agreements. Qwest Motion at p. 3.

Qwest also stated in its Motion that it was never informed that the Pagers considered this email to be a contractual amendment until they unilaterally filed their Applications. In sum, Qwest argued that the parties have not voluntarily agreed to any amendments that are claimed by the Pagers. Qwest also argued that because there is no agreement between the parties to amend their interconnection agreements, the Commission should dismiss the Applications and refer the Pagers to the dispute resolution provisions contained in the interconnection agreements.

C. Commission Order No. 29604

In regard to the Pagers' contention that Mr. McKenna's email was a voluntarily negotiated amendment to the parties' interconnection agreements, the Commission stated:

It is not clear to us and the Applications do not articulate which portion(s) of the email contain the amending language. In addition, it is unclear about which Section 2.4 the proposed amendment pertains to – the Arch Agreement or the 2003 Amendment. Both the Arch Agreement and the Amendment contain a Section 2.4. . . . 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.

Order No. 29604 at p. 3-4. Thus, the Commission referred the Pagers' Applications to the FCC for resolution and granted Qwest's Motion to Dismiss without prejudice. *Id.*

D. FCC Enforcement Bureau Letter

On October 25, 2004, Anthony J. DeLaurentis of the FCC's Enforcement Bureau wrote correspondence to Joseph McNeal, owner of the Pagers, responding to his request for guidance regarding the IPUC's Order No. 29604. In his letter Mr. DeLaurentis states:

[c]onsistent with our practice in handling informal disputes, Commission staff facilitated discussions between you and Qwest in 2003 regarding an apparent dispute involving Qwest's alleged refusal to allow your company to opt into existing interconnection agreements. I understand that that dispute was resolved and your company ultimately opted into various interconnection agreements with Qwest. Subsequently, in response to an apparent attempt by your company to take service under one or more of these interconnection agreements, Qwest sent the June 4, 2003 email attached to you October 22nd letter. Commission Staff received the email but did not take any position with respect to Qwest's email and did not adopt or endorse this email as a formal or informal resolution of the dispute you were apparently having with Qwest concerning ordering service, a dispute which differs from the opt-in dispute you initially asked Commission staff to mediate.

Letter of Anthony J. DeLaurentis at 2 (*emphasis added*). Mr. DeLaurentis further stated the Enforcement Bureau was not asked to and did not make any determination as to whether the email was a valid § 252 amendment and concluded it would not be appropriate for the Commission staff to make that determination given that the Act gives state commissions the exclusive right to make such determinations in the first instance. *Id.* at 2.

**II.
PETITIONS FOR RECONSIDERATION**

In general, the grounds that the Pagers advance in support of their Petition for Reconsideration fail to demonstrate that the Commission's Final Order No. 29604 is unreasonable, unlawful, erroneous or not in conformity with the law. Furthermore, the Pagers fail to provide the nature and quantity of evidence or argument that they would offer if reconsideration were granted. *Idaho Code* § 61-626. Specifically, the Pagers have failed to demonstrate through their Petition for Reconsideration that the email they received from Mr. McKenna constituted an amendment to the parties' interconnection.

A. Standard for Reconsideration

Reconsideration provides an opportunity for an aggrieved person to bring to the Commission's attention any issue previously determined and provides the Commission with an opportunity to rectify any mistake or omission. *Idaho Code* § 61-626; *Washington Water Power*

v. Kootenai Environmental Alliance, 99 Idaho 875, 591 P.2d 122 (1979). In those instances where an aggrieved person asks the Commission to reconsider its decision based upon the record, it may simply do so. The Commission's Procedural Rule 331.01 requires that petitions for reconsideration must include "a statement of the nature and quantity of evidence or argument that the petitioner will offer if reconsideration is granted." IDAPA 31.01.01.331.01. Commission Rule 331.03 provides that petitions for reconsideration must state whether the petitioner requests reconsideration by evidentiary hearing, written briefs, comments, or interrogatories. IDAPA 31.01.01.331.03. The Pagers stated in their Petition that no hearing is needed to resolve this matter. Qwest agrees that no hearing is needed, and that as argued in detail below in both its response and Cross Petition, the Company believes that based on the record in this matter the Commission should dismiss the Pagers' Petition for Reconsideration.

B. The Pagers' Petition

The Pagers' Petition for Reconsideration requests that the Commission grant reconsideration by rescinding, modifying or changing the order granting Qwest's Motion to Dismiss. In addition, the Pagers request that the Commission approve their Applications for approval of an amendment to their interconnection agreements based on the email they received from Mr. McKenna of Qwest. The Pagers offer several grounds for reconsideration. However, none of the Pagers' arguments warrant granting their Petition for Reconsideration and Applications.

C. Qwest Response and Argument

1. The Commission did not assign any burdens.

In Order No. 29604 the Commission did not specifically state that the Pagers had the burden to prove that the email constituted a voluntarily negotiated amendment. As such, the Pagers' argument that the Commission wrongly assigned the burden to them is moot. However, it should be noted that the Commission found that it was not clear from the Pagers' Applications "which portion(s) of the email contain the amending language" or "which § 2.4 the proposed amendment pertains to[.]" Combine this with the Commission's recognition that Qwest disputed Mr. McKenna's email constituted an amendment and it seems clear that the Commission was not convinced by the Pagers' representations that the email constituted a valid amendment. Qwest believes these Commission findings are consistent with state case law that would require the Pagers to

demonstrate that the email constituted a voluntarily negotiated amendment. *See Intermountain Forest Management, Inc. v. Louisiana Pac. Corp.*, 136 Idaho 233, 237, 31 P.3d 921, 925 (2001); *Inland v. Comstock*, 779 P.2d 15, 17, 116 Idaho 701, 703 (1989); *Haener v. Ada County Highway District*, 108 Idaho 170, 173, 697 P.2d 1184, 1187 (1985).

2. The Commission did not err by referring the Pagers' Applications to the FCC for resolution and granting Qwest's Motion to Dismiss.

In Order No. 29604 the Commission found that the alleged email amendment arose in the context of an FCC informal proceeding. Order No. 29604 at 4. The Pagers advocated that this was the case in their Revised Applications and their Petition for Reconsideration. *Rev. Applications* at 1; *Petition for Recon.* at p.1. The Commission also found that it was unclear "which portion(s) of the email contain the amending language[.]" for the existing interconnection agreements. Order No. 29604 at p. 3. Further, the Commission stated that it was unclear which Section 2.4 the proposed amendment pertains to – the Arch Agreement or the 2003 Amendment. *Id.* at 4. For these reasons and because the Idaho Commission was not a party to the informal proceeding before the FCC, it referred the Pagers' Applications to that agency finding it had primary jurisdiction.

Because of the Pagers' representations that there was an informal dispute before the FCC regarding the alleged email amendment, the Commission did not abuse its discretion in referring the matter to that forum or by granting Qwest's Motion to Dismiss on such basis. Even if the Commission finds it did error by referring this matter to the FCC and grants reconsideration, this error is "harmless" as the Commission could have and still can dismiss the Pagers' Applications on other grounds.² These grounds and arguments supporting them are discussed below in Qwest's Cross Petition.

3. The Commission did not fail to enforce its Final Order No.29154.

In Final Order No. 29154 (Case No. QWE-T-02-17) the Commission recognized that the FCC found that agreements that created ongoing obligations regarding, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection,

² The Idaho Supreme Court has stated that if an error did not affect a party's substantial rights or the error did not affect the result of the trial, the error is harmless and not grounds for reversal. *Martin v. Hackworth*, 127 Idaho 68, 70, 896 P.2d 976, 978 (1995).

unbundled network elements or collocation were interconnection agreements under the Act. Order No. 29154 at p. 7 citing *Qwest Petition for Declaratory Ruling*, 17 FCC 19337, 19340-41 (F.C.C. 2002). The Commission further noted that the FCC had also found that dispute resolution and escalation provisions relating to obligations set forth in §§ 251(b) and (c) were appropriately deemed interconnection agreements. *Id* at p. 19341. Based on these authorities, the Commission ordered Qwest to continue to review any and all unfiled contractual agreements it had entered to determine whether they should be filed with the Commission as interconnection agreements under the Act. *Id.* at p. 8. The Commission did not error by not directing Qwest to file the email Mr. McKenna sent to the Pagers as an amendment for the simple reason that it was unclear to the Commission from the Pagers' unilateral Application what part of the email amended the interconnection agreements. Finding no clear amendment, it cannot be said that the Commission violated any requirement of Order No. 29154.

III. CROSS PETITION FOR RECONSIDERATION

Idaho Code § 61-626(1) and Commission Procedural Rule 331 allow a party to cross-petition for reconsideration in response to any issues raised in a petition for reconsideration within seven days: Section 61-626(1) provides:

Cross-petitions for reconsideration may be granted if any petition for reconsideration to which they respond is granted on the issues to which the cross-petition is directed, but cross-petitions for reconsideration will be denied when the petitions for reconsideration to which they are directed are denied.

Because a cross-petition for reconsideration will be granted only as to those issues that respond to an issue initially raised in a petition for reconsideration, the scope of a cross-petition for reconsideration is limited to those issues raised in a petition for reconsideration. *Eagle Water Company, Inc. v. Idaho Public Utilities Commission*, 130 Idaho 314, 940 P.2d 1133 (1997).

If the Commission finds that it erred by granting Qwest's Motion to Dismiss on the grounds that it referred this matter to the FCC, Qwest asserts there are at least two grounds upon which the Commission may still grant its Motion to Dismiss. First, the Pagers failed to carry their burden to demonstrate that the McKenna email constituted a voluntarily negotiated amendment. Second, through the underlying interconnection agreements, the parties agreed to

settle all disputes regarding the operation of their agreements through the dispute resolution procedures contained in Section 13.14.

As stated previously, the formation of a contract in Idaho requires that the parties have a common and distinct understanding. *Intermountain Forest Management, Inc. v. Louisiana Pac. Corp.*, 136 Idaho 233, 237, 31 P.3d 921, 925 (2001). The party alleging that a contract has been formed has the burden to prove that the parties mutually assented to an agreement. *Inland v. Comstock*, 779 P.2d 15, 17, 116 Idaho 701, 703 (1989); *Haener v. Ada County Highway District*, 108 Idaho 170, 173, 697 P.2d 1184, 1187 (1985).

Regarding amendments to the parties' interconnection agreements, Section 13.23 of the agreements require that the parties must mutually agree in writing to amend their interconnection agreements. The Pagers have failed to demonstrate that Qwest agreed to any amendment of the relevant agreements. Additionally, the Pagers have failed to identify with specificity how the email they received from Mr. McKenna amends their agreements. As such, the Pagers clearly have failed to carry their burden to demonstrate that a voluntarily negotiated amendment to their interconnection agreements with Qwest was formed by the email they received from Mr. McKenna. Thus, the Pagers' Applications should be dismissed on Qwest's Cross Petition.

Additionally, this matter should be dismissed because the Pagers' Applications at most demonstrate a dispute regarding the operation of the interconnection agreements between themselves and Qwest. Indeed Qwest asserts that Mr. McKenna's email was only sent in order to explain how portions of the agreements operated. As such they are bound by Section 13.14 of the parties' agreements to resolve such disputes. Accordingly, the Commission should also grant Qwest's Motion to Dismiss based on this basis.

CONCLUSION

Based on the foregoing, Qwest respectfully requests that the Commission deny the Pagers' Petition for Reconsideration. In the alternative, should the Commission feel that it must grant reconsideration, Qwest asserts that it may still dismiss this matter based on the grounds alleged in the Company's Cross Petition.

DATED this 3rd day of November, 2004.

Respectfully Submitted,

Adam Sherr
Qwest Communications, Inc.
1600 7th Avenue - Room 3206
Seattle, WA 98191

and

A handwritten signature in black ink, appearing to read "John R. Hammond, Jr.", written over a horizontal line.

William J. Batt
John R. Hammond, Jr.
Batt & Fisher, LLP
U S Bank Plaza, 5th Floor
101 South Capital Blvd.
Boise, Idaho 83702
(208) 331-1000

CERTIFICATE OF SERVICE

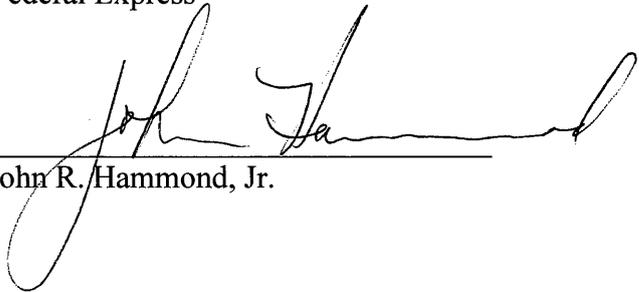
I HEREBY CERTIFY that on this 3rd day of November, 2004, I caused a true and correct copy of the above and foregoing document to be served, in the manner indicated, on the following:

Joseph B. McNeal
P.O. Box 15509
Boise, ID 83715
Telephone: (208) 375-9844

- Hand Delivery
- U.S. Mail
- Facsimile
- Federal Express

Don Howell
Idaho Public Utilities Commission
472 West Washington
Boise, ID 83702
Telephone: (208) 334-0312
Fax: (208) 334-3762

- Hand Delivery
- U.S. Mail
- Facsimile
- Federal Express

By: 

John R. Hammond, Jr.



Federal Communications Commission
Washington, D.C. 20554

Copies by Facsimile Transmission; Originals by U.S. Mail

October 25, 2004

Mr. Joseph McNeal
6610 Overland Road
Boise, ID 83709
(208) 373-7159 (facsimile)

Re: 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, 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, QWE-T-03-7

Idaho Public Utilities Commission Order No. 29604

Dear Mr. McNeal:

This letter responds to your October 20, 2004 letter to Alexander Starr, Chief of the Markets Dispute Resolution Division of the Federal Communications Commission's ("FCC") Enforcement Bureau regarding the above-referenced matter. In your letter, you ask for guidance with respect to IPUC Order No. 29604.

In response to your letter, I participated in a conference call with you and counsel for Qwest on October 22, 2004. During that call, I explained that the FCC's informal dispute resolution processes are not intended or designed to result in a Commission determination, decision, and/or order resolving the merits of an informal dispute. Informal disputes such as yours are typically closed without any formal decision by the Commission, whether or not they are ultimately settled by the parties.

EXHIBIT

tabbles

/

Consistent with our practice in handling informal disputes, Commission staff facilitated discussions between you and Qwest in 2003 regarding an apparent dispute involving Qwest's alleged refusal to allow your company to opt into existing interconnection agreements. I understand that that dispute was resolved and your company ultimately opted into various interconnection agreements with Qwest. Subsequently, in response to an apparent attempt by your company to take service under one or more of these interconnection agreements, Qwest sent the June 4, 2003 email attached to your October 22nd letter. Commission staff received the email but did not take any position with respect to Qwest's email and did not adopt or endorse this email as a formal or informal resolution of the dispute you were apparently having with Qwest concerning ordering service, a dispute which differs from the opt-in dispute you initially asked Commission staff to mediate.

It appears from your letter that your present dispute with Qwest concerns whether the Qwest email should be considered an amendment to one or more of your existing interconnection agreements under section 252 of the Communications Act of 1934, as amended ("Act"). As I indicated, Commission staff was not asked to and did not make any determination as to the substance, effect, legality, and/or enforceability of the referenced email under the governing law. Thus, Commission staff never considered whether the email was a valid section 252 amendment, nor would it have been appropriate for Commission staff to make that determination, given that section 252 gives state commissions the exclusive right to make such determinations in the first instance.

Do not hesitate to contact me if you have any additional questions.

Sincerely,



Anthony J. DeLaurentis
Attorney
Markets Dispute Resolution Division
Enforcement Bureau
Federal Communications Commission

cc: Robert McKenna, Qwest Counsel (303) 896-1107 (facsimile)
Timothy Boucher, Qwest Counsel (303) 896-1107 (facsimile)