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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF)	- CASE NO. QWE-T-03-6
PAGEDATA FOR APPROVAL OF AN)	
AMENDMENT TO A PAGING)	
INTERCONNECTION AGREEMENT WITH)	
QWEST COPORATION PURUSANT TO 47)	
<u>U.S.C. § 252(e).</u>)	
IN THE MATTER OF THE APPLICATION OF)	CASE NO. QWE-T-03-7
WAVESENT, LLC FOR APPROVAL OF AN)	
AMENDMENT TO A PAGING)	
INTERCONNECTION AGREEMENT WITH)	
QWEST CORPORATION PURSUANT TO 47)	
<u>U.S.C. § 252(e).</u>)	

PETITION FOR RECONSIDERATION

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LIST OF EXHIBITS

- A – Qwest Letter of Understanding (“McKenna Letter”) Dated June 4, 2003
- B - FCC Letter Dated October 25, 2004
- C – PageData’s Original Informal Complaint to FCC Under Section 1321
- D – Single Point of Presence Email Correspondence
- E – Arch and PageNet Yellow Pages Advertising
- F – Unfiled Agreement Examples - Arch and PageNet Settlement Agreements
- G – Unfiled Agreement Example – Qwest Letter to Eschelon Dated July 3, 2001
- H – Unfiled Agreement Listing – Colorado Appendix M Unfiled Agreements Matrix
- I – Excerpt from ELI Settlement Agreement with Washington UTC
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PageData and WaveSent LLC (hereinafter the "Pagers") respectfully request that the Idaho Public Utilities Commission ("Commission") reconsider its decision in this matter in Order No. 29604 under Procedural Rule 331 and the Commission's discretion. IDAPA 31.01.01.331.01 Pagers contend the Order is unreasonable, unlawful, erroneous, and not in conformity with law, which will be discussed below.

Synopsis

In its most simple form, this case is about Qwest Corporation ("Qwest") voluntarily negotiating a settlement of an informal complaint at the Federal Communications Commission ("FCC"). Qwest consummated the settlement by issuing a letter ("McKenna Letter") on June 4, 2003 (attached as Exhibit A). Qwest followed through on all the terms and conditions set out in the negotiated agreement, except now Qwest wishes to renege on the delivery of Internet traffic set out in paragraph 3 of the McKenna letter. Commission staff spent over eight months mediating the implementation of paragraphs 2 and 3 of the McKenna letter. Qwest failed to file the McKenna letter of understanding/amendment and Pagers filed it officially to be in compliance with Section 252 and to preserve their rights to terminate Internet traffic on a going forward basis under the negotiated agreement.

The Pagers complied with Order No. 29604 and contacted FCC and followed up with a letter to the FCC Market Dispute Resolution Division Chief on October 20, 2004. The FCC staff responded with a conference call (which included Qwest attorneys) on October 22, 2004. A letter from the FCC dated October 25, 2004, attached at Exhibit B, resulted from the conference call. The FCC responded promptly so the Commission could make a decision within the 90-day period.

The Commission made an error by improperly remanding the case to the FCC, as related by FCC staff. By letter dated October 25, 2004, the FCC staff referred the case back to the Commission for first instance determination per Section 252. It is unreasonable for the Pagers to have to wait for the Commission and the FCC to decide sovereignty issues.

For the Commission's reference we have attached as Exhibit C the informal complaint referenced in the FCC's letter dated October 25, 2004. The complaint was filed because Qwest would not allow Pagers to adopt the AirTouch/Arch Paging Interconnection agreement with a single point of presence. Pages 2 and 3 of the informal complaint letter summarized Qwest's discriminatory policies against paging companies and specifically PageData such as: 1) not considering paging companies as full-fledged telecommunications carriers that terminated traffic; 2) unlawfully restricting the type of traffic a CMRS paging carrier can terminate; 3) not interconnecting with a single point of presence; 4) not paying paging carriers reciprocal compensation; 5) settling billing disputes with select, favored carriers; and 6) not giving all companies access to upper management to settle disputes. The issuance of the McKenna letter of understanding/amendment ended the informal complaint at the FCC.

The Commission made an error in granting Qwest's Motion to Dismiss. The 90-day timeframe is the ruling factor and extending it is not in conformity with law and goes against Congress' intent. Section 252(e) clearly and unambiguously requires a vote by the state commission within 90 days or it is automatically approved. There is no law or precedent for the Commission to extend the 90-day time period without the approval automatically taking effect.

A decision by the Commission that Qwest voluntarily negotiated and wrote the letter of understanding/amendment is non-reviewable by state court, federal court, and the FCC. (Section 252(e)(4) and (6))

The Commission is obligated to follow and enforce its own orders and in this instance Order No. 29154 is directly relevant. The Commission detailed what agreements need to be filed (Order No. 29154, p. 7) in conformance with the FCC's ruling in *Qwest Petition for Declaratory Ruling*, 2002 WL 31204893. The FCC has further expounded on this in their Notice of Apparent Liability ("NAL")¹, specifically in paragraphs 7, 10, 28, 31 and 34. The Commission has a standing order in place for Qwest to continue to review and file all unfiled agreements in conformance with the Act and the FCC's Declaratory Ruling (Order No. 29154, p. 8). The Commission is not in conformity with law by not enforcing their own Order 29154.

Pagers are entitled by statute (Section 252(e)(4)) to have the Commission approve or reject the agreement within 90-days or non-action, which accomplishes the same thing as an approval vote by deeming it approved. The Commission is not in conformity with law by making an extension of the 90-day period.

The Commission erred by placing the burden of proof on the Pagers when the burden of proof should be placed squarely on Qwest.

Procedural History

On August 11, 2004, PageData and WaveSent, LLC each filed a Revised Application for Approval of Amendment to their respective paging interconnection agreement with Qwest. On September 28, 2004, Qwest filed an Objection and Motion to

¹ 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

Dismiss Revised Applications. On October 6, 2004, the Commission filed Order No. 29604. The 90th day from the filing of the Revised Application is November 9, 2004.

Informal Complaint with the FCC

On October 21, 2002, PageData filed an informal complaint with the FCC under Section 1321 of the FCC's Local Competition Order. (See Exhibit C) The complaint was filed because Qwest unlawfully withheld adoption of interconnection agreements with a single point of presence and reciprocal compensation in violation of Section 252(i); Qwest was trying to restrict the type of traffic a CMRS carrier could terminate; and Qwest was out of compliance with the FCC Memorandum Opinion and Order No. 02-276² in Idaho.

Qwest complained to the FCC that it would cost too much money to have interconnection agreements filled out specifically for the Pagers and adoption letters were more cost efficient. Qwest had failed to file the Arch single point of presence amendment when it was signed. (See Exhibit D – Single Point of Presence Email Correspondence) This failure to file caused an array of problems because some states immediately approved the amendment while other states took as long as 90 days. Therefore, some states did not automatically consider the single point of presence amendment as being part of the adoption by Pagers, even though that was the original intent. The FCC mediated filing the single point of presence amendment separately to assure that the single point of presence amendment was included in the adoption of the interconnection agreement in each of Qwest's 14 states.

² FCC Memorandum Opinion and Order No. 02-276, "In the Matter of Qwest Communications International Inc. Petition for Declaratory ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)", October 4, 2002

On June 4, 2003, Qwest issued the McKenna letter of understanding advising Pagers that Qwest would work with Pagers for the installation of single point of presence facilities. Qwest also gave a contact person for assistance in completing the Access Service Requests (“ASRs”), determining the facilities configuration, and deposit requirements. Qwest further stated if Pagers used the facilities for Internet traffic, such traffic would not be subject to reciprocal compensation payments.

Commission Staff Mediation

Since the time Qwest sent the McKenna letter of understanding to Pagers and the FCC, the Commission staff had been mediating specifically from the letter of understanding to have PageData and WaveSent’s facilities installed. All parties had been following the letter of understanding until WaveSent and PageData submitted their first flat rate invoices for reciprocal compensation for facilities under the single point of presence. Qwest then started to renege on the agreement.

Burden of Proof

The Commission erred in placing the burden of proof on the Pagers. The issue is whether Qwest or the Pagers should bear the burden of proof regarding the voluntary nature of the letter of understanding that amends the interconnection agreements. The burden of proof should be placed squarely on Qwest—the party responsible for writing the letter of understanding to the FCC, PageData and WaveSent.

According to Pace v. Hymas, 111 Idaho 581, 585, 726 P.2d 693 (1986):

It is the general rule that where evidence necessary to establish a fact lies peculiarly within the knowledge and competence of one of the parties, principles of fairness require that party to bear the burden of going forward with evidence on the issue.

In that case, the party having knowledge of facts had the burden of proving it. Here, Qwest voluntarily submitted a letter of understanding that amended the interconnection agreements and clarified Section 2.4 specifically stating that if PageData and WaveSent terminated Internet traffic, PageData and WaveSent were not to charge Qwest reciprocal compensation for that traffic. Qwest controlled the ASR process and whether or not PageData and WaveSent received facilities for a single point of presence. The Commission staff helped mediate the installation of the single point of presence and the completions of the ASRs. Certainly, the burden of proof is on Qwest to show why they wrote the letter to PageData, WaveSent and the FCC.

Commission Order 29604 Does Not Follow Guidelines Established In
Commission Order 29154

The Commission erred by not applying the same filing requirements to the letter of understanding as it applied to other amendments (letters of understanding) filed by Qwest as in Order No. 29154³.

In Order No. 29154, under Commission Findings and Decision (p. 7) the Commission stated:

“Guiding the Commission’s review in this case is a recent decision regarding the filing requirements for interconnection issued by the FCC. The FCC found an agreement that created ongoing obligations regarding resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements or collocation is an interconnection agreement. *Qwest Petition for Declaratory Ruling*, 2002 WL 31204893, at 5 (F.C.C. 2002)”

Further the Commission stated:

³ In the Matter of the Applications of Qwest Corporation and McLeodUSA Telecommunications Services, Eschelon Telecom, Inc., and Covad Communications Company for approval of Amendments to their Interconnection Agreements, Issued November 19, 2002

“The Commission finds that it is necessary to order Qwest, in addition to its duties under the Act, to continue to review any and all unfiled agreements to determine whether they should be filed with the Commission under the provisions of the Act and the FCC’s recent order.” (Order No. 29154, p. 8)

The letter of understanding clearly has going forward terms and conditions relevant to interconnection, interconnection facilities, reciprocal compensation, and dispute resolution between PageData, WaveSent and Qwest. As such, the letter of understanding meets the Commission Order No. 29154 and Section 251(b) and (c) criteria and should be filed as an amendment to the interconnection agreements.

Commission’s Only Options Under 252(e)

Under Section 252(e) the Commission only has 3 choices for handling the submittal of a negotiated agreement: 1) approve it; 2) reject it if it discriminates against other telecommunication carriers or if it is not consistent with public interest, convenience, and necessity; or 3) make no ruling and it automatically becomes approved after 90 days. 47 U.S.C. Section 252(e)(2) Therefore 252(e)(6) would be implemented only if the Commission rejects the voluntary agreement because the agreement discriminated against other telecommunications carriers or is not consistent with public interest, convenience, and necessity and then the aggrieved party would bring action in federal court. In essence the Commission’s only remedy is an up or down vote based on the evidence presented. If the Commission rules that Qwest voluntarily wrote the letter of understanding, that would be the final determination and it would not be subject to judicial review.

Qwest's Motion to Dismiss

Qwest failed to ask for a hearing and their response was a motion to dismiss. A motion to dismiss is not a proper response in a 252(e) procedure. Section 252(e) requires an approval or denial or no action (which is the same as approval) after 90 days. These limited actions were the intent of Congress for quick approval and to promote competition and entrance into the marketplace. Again, Section 252(e) clearly and unambiguously requires a vote by the state commission within 90 days or it is automatically approved.

In their motion, Qwest asserted that the McKenna email does not state how or in what manner it changed the existing contracts and that it said nothing about the contract language whatsoever, much less offering or agreeing to any change of that language. (Qwest's Objection and Motion to Dismiss Revised Applications, p. 3)

Qwest is trying to obfuscate the issue by keeping the Commission from focusing in on its Order No. 29154 and the FCC's NAL, in which the FCC stated that "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.'"⁴ The letter of understanding/amendment in this case clearly falls in the guidelines established by Qwest's company policy and promise to all the 14 state commissions in their territories. The Commission should hold Qwest to publicly made promises.

Many of the other letters of understanding or amendments filed by Qwest in various states such as Colorado, Washington, Arizona, New Mexico, Minnesota, or Iowa

⁴ FCC NAL, ¶ 7

did not specifically reference specific interconnection agreements or said specifically which sections or paragraphs of the interconnection agreements were amended, but they were determined to be amendments because they had going forward terms and conditions that related to Section 251(b) or (c).

Having a simple letter considered an interconnection agreement is not unusual. For example, the letter dated July 3, 2001 from Qwest to Eschelon Telecom concerning Status of Switched Access Minute Reporting (attached at Exhibit G and referenced in Exhibit H, Colorado February 27, 2004 "Initial Public Comments of Staff of the Commission" Appendix M Unfiled Agreements Matrix, Item No. 20) has been determined by Minnesota, Arizona, and Colorado to be an interconnection agreement. It does not specifically address an interconnection agreement, or say what contract language it modified. There are over nine letters that the Colorado commission determined were interconnection agreements in their investigation of unfiled agreements (Exhibit H). These letters do not rise to the level of settling a complaint filed at the FCC. Qwest is trying to put restrictions on the Pagers letter of understanding that were not put on Qwest's other letters of understanding that were deemed interconnection agreements by various state commissions.

Motion to Dismiss is Not an Option

The Commission erred by granting Qwest's Motion to Dismiss. Section 252(e) does not allow the Commission to dismiss a negotiated agreement unless the Commission rules that the agreement discriminates against other carriers or is not consistent with the public interest, convenience, and necessity.

Setting Bad Precedence

The Washington Utilities and Transportation Commission (“UTC”) filed complaints against 14 CLECs concerning unfiled agreements with Qwest. Some of these same CLECS provide services in Idaho. As part of their settlement agreements with the Washington UTC, many of the CLECS stated they previously believed the only entity eligible to file agreements was the ILEC itself. (See Exhibits I and J, showing example settlement agreement excerpts.) The Washington UTC specifically ruled that both carriers involved in an interconnection agreement were responsible for filing with the state under Section 252. So, if Qwest had not filed the interconnection agreements, then it was up to the carrier to individually file the agreements themselves.

Even though Washington’s ruling has no legal authority in Idaho, legal options on how competitive carriers are to handle such situations are set. Both PageNet and Arch provided paging service in Washington and Idaho in the relevant time period. Had Arch or PageNet done what was recommended in Washington, they would have had to file their agreements in Idaho as well because their agreements also covered Idaho.

Even the Idaho PUC staff recognized in Order No. 29154 that not all interconnection agreements were presently on file at the Idaho PUC, even though the Commission ordered Qwest to review and to file any and all interconnection agreements. Many of the companies mentioned in the FCC’s NAL and many of the companies who admitted that they were involved in unfiled interconnection agreements in Washington also do business or have done business in Idaho during the relevant time periods of both

agencies investigations. However, Qwest and the CLECs have failed to file those agreements in the state of Idaho.

PageData and WaveSent have stepped forward to comply with Section 252(a) by filing the letter of understanding (McKenna letter) so that it would be officially on file at the Commission. For the telecommunications industry in general in the state of Idaho it is in the public good that the Commission wholeheartedly support and encourage such action.

Economic Harm of Delay

Under Section 252(e) the Commission is to approve the interconnection agreement or deny it within 90 days. While the Commission may disagree with the FCC remanding the case back to the Commission any decision to extend the proceedings past the 90-day time frame is in violation of the Act and causes economic harm and delay to both PageData and WaveSent. The Pagers submit to the Commission that the Pagers should not be involved in a fight of sovereignty issues between the Commission and the FCC. That should not delay an up or down vote at the Commission.

PageData Has Been Harmed By Qwest's Noncompliance of Commission

Order No. 29154

PageData was harmed because it was not able to adopt terms and conditions out of unfiled interconnection agreements such as the Arch and PageNet unfiled interconnection agreements where Qwest refunded in cash 76% of the amount of money that Arch and PageNet paid Qwest for certain facilities and forgave past disputed accounts. (See Exhibit F)

Qwest voluntarily filed the Arch and PageNet agreements in Iowa as interconnection agreements and the agreements clearly cover Idaho (see Exhibit F, ¶3 of the Arch agreement and ¶1a of the PageNet agreement). Arch Paging and PageNet provided paging in the state of Idaho during all relevant time periods. (See Exhibit E, showing Arch and PageNet yellow pages advertising for the Boise area) PageNet, Arch and Qwest have all failed to file this interconnection agreement in the state of Idaho.

In footnote 89 of its NAL, the FCC referenced Iowa's investigation of Qwest's unfiled agreements and the Arch and PageNet settlement agreements were two of the fourteen agreements filed by Qwest. Arizona, Colorado (see Exhibit H, Items No. 5 and 55), Minnesota, and Iowa declared the Arch and PageNet settlement agreements as interconnection agreements. These agreements cover the state of Idaho and therefore these interconnection agreements need to be filed in Idaho as well. Qwest continues to disregard the Commission Order No. 29154 "to continue to review any and all unfiled agreements to determine whether they should be filed with the Commission under the provisions of the Act and the FCC's recent order." (p. 8)

Application Not Remanded Properly to FCC

The Pagers complied with Order No. 29604 and contacted the FCC to request clarification of how the Pagers or the Commission would remand the case to the FCC. The Pagers followed up with a letter to the FCC Market Dispute Resolution Division Chief on October 20, 2004. The FCC staff responded with a conference call (which included Qwest attorneys) on October 22, 2004. FCC staff attorneys said the Commission made an error by improperly remanding the case to the FCC and the case was a state matter because the state has first jurisdiction under Section 252. As a follow-up to the

conference call, on October 25, 2004, the FCC staff referred the case back to the Commission for first instance determination per Section 252. (See Exhibit B)

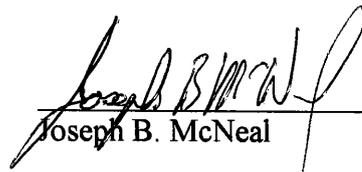
Additional Information to be Provided with Reconsideration

Because of the unusual nature of this case and the 90-day time restraint that is involved in the decision, Pagers have submitted additional evidence supporting the Pagers' position with this Petition. The Pagers could provide more detailed correspondence between the Pagers, Qwest and the FCC to supplement the additional information provided.

Conclusion

For all the foregoing reasons, Pagers request that the Commission grant reconsideration by rescinding, modifying or changing the order granting Qwest's Motion to Dismiss; considering all the attached exhibits; putting the Application for the submittal of the letter of understanding/amendment back on the 90-day track, which ends November 9, 2004; making a ruling either approving the Application or denying it per Section 252(e)(2), Commission Order No. 29154, the FCC Declaratory Ruling (2002 WL 31204893), and the FCC NAL; and requiring Qwest to file the Arch and PageNet interconnection agreement according to Commission Order No. 29154.

Respectfully submitted this 27th day of October, 2004.



Joseph B. McNeal

CERTIFICATE OF SERVICE

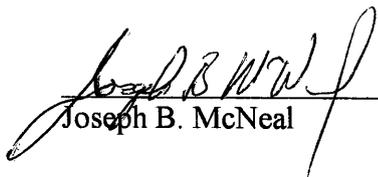
I HEREBY CERTIFY that on this 27th day of October, 2004, I caused a true and correct copy of the foregoing PETITION FOR RECONSIDERATION to be served, in the manner indicated, on the following:

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, ID 83720-0074

Hand Delivery
 U.S. Mail
 Facsimile
 Email

William J. Batt
Batt & Fisher
U.S. Bank Plaza, Suite 500
101 S. Capitol Boulevard
Boise, ID 83701

Hand Delivery
 U.S. Mail
 Facsimile
 Email



Joseph B. McNeal

Exhibit A

Qwest Letter of Understanding (“McKenna Letter”) Dated June 4, 2003

-----Original Message-----

From: Bob McKenna [[mailto:"Bob McKenna"](mailto:Bob McKenna)]

Sent: Wednesday, June 04, 2003 3:02 PM

To: Joseph McNeal

Cc: Christopher Olsen; William Bill Batt; Bryan E Sanderson; Andrea E Sanchez; kpettey; dljenni

Subject: WaveSent and PageData

Text item: Message Text

Dear Mr. McNeal:

We have reviewed your May 28 responses to the FCC's questions concerning interconnection requests by PageData and WaveSent. Upon such review, we have determined that Qwest will not insist on resolution of Qwest's claims for payment of past amounts as a precondition to either PageData's or WaveSent's ordering further interconnection facilities and services from Qwest. Qwest will be willing to process properly submitted ASRs for interconnection on a timely basis upon submission.

In the past, PageData and WaveSent have had difficulty completing and submitting proper ASRs for service. Andrea Sanchez (303.965.1805) will be available to meet with you to assist you in preparing these documents. As Qwest has noted in its filings with the Federal Communications Commission, the ASRs that PageData sent to the Commission are not complete and do not provide sufficient information on which Qwest could begin to fill the order. In addition, while Qwest is willing to provide PageData and WaveSent with the interconnection facilities and services that they need to provide the services for which such interconnection can lawfully be utilized, the number of trunks shown on the two ASRs filed with the FCC is clearly excessive for the paging services that form the basis of the ASRs. These matters can be worked out with Ms. Sanchez, who can insure that the ASRs that you submit are complete and accurate.

Finally, irrespective of disputes over past amounts due, 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. Qwest would, of course, run its standard credit check on WaveSent to determine whether a deposit is necessary. These and similar compensation matters likewise can be worked out in advance with Ms. Sanchez. It makes sense to determine at this time what facilities and services must be paid for, and by whom.

Please do not hesitate to give me a call with questions. I can be reached at 303.672.2861.

Exhibit B

FCC Letter Dated October 25, 2004



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.

