

## DECISION MEMORANDUM

**TO: COMMISSIONER KJELLANDER  
COMMISSIONER SMITH  
COMMISSIONER HANSEN  
COMMISSION SECRETARY  
LEGAL  
WORKING FILE**

**FROM: WAYNE HART**

**DATE: OCTOBER 1, 2004**

**RE: PAGEDATA AND WAVESENT APPLICATION FOR APPROVAL OF  
AMENDMENTS TO THEIR PAGING AGREEMENTS WITH QWEST,  
CASE NOS. QWE-T-03-6 AND QWE-T-03-7.**

On August 11, 2004, Joseph McNeal of PageData and Wavesent unilaterally filed an Application for the approval of an amendment to their paging agreements with Qwest. In each case, the amendment is an e-mail from Qwest's FCC counsel, Bob McKenna to McNeal, dated June 4, 2003. Mr. McNeal claims that this e-mail clarifies and amends Section 2.4 of both agreements that were previously approved by this Commission in Order No. 29198 issued in February 2003. McNeal indicated the e-mail was the result of informal negotiations to settle two informal complaints filed with the Federal Communications Commission (FCC). He indicated that the e-mail contains forward-looking terms and clarifies the existing agreement and "in accordance with the Federal Communications Commission's Notice of Apparent Liability in the Matter of Qwest Corporation Apparent Liability for Forfeiture on March 12, 2004", and Section 252(e) of the Telecommunications Act of 1996, is required to be filed for approval by this Commission.

On September 28, Qwest filed a motion to dismiss this petition, claiming that the e-mail was not an agreement or an amendment to the existing agreement and the unilateral amendment does not follow the amending procedures in the interconnection agreements, Qwest Motion to Dismiss at 3.

## STAFF ANALYSIS

This filing is related to three other cases now pending at the Commission and a decision in this matter may impact those cases as well. In Case No. QWE-T-03-25, McNeal has filed a formal complaint against Qwest alleging that Qwest has failed to pay reciprocal compensation in accordance with the existing Paging agreement. In Case Nos. GNR-T-04-5 and GNR-T-04-6 the Pagers are requesting that the Commission arbitrate the negotiations to establish new agreements that clearly define reciprocal compensation and allowable traffic terms. The general issues in all of these cases, as well as the amendment in these cases (QWE-T-03 -6/7) is: 1) whether the Pagers may terminate enhanced and/or internet traffic over the circuits Qwest installs to carry paging traffic to the Pagers, and 2) whether the presence of such traffic eliminates or reduces in any way Qwest's obligation to pay reciprocal compensation to the Pagers under the terms of the existing agreements. Staff understands that Qwest and the Pagers have been involved in negotiations to resolve these issues. These negotiations are ongoing.

In their Applications to Amend, the Pagers assert that the current agreement does not prohibit them from terminating enhanced and Internet traffic on these facilities. In addition, the current agreement does not allow Qwest to refuse to pay reciprocal compensation for the paging traffic under the fixed rate terms specified in the agreements if the Pagers also use the facilities to carry enhanced or Internet traffic. The Pagers believe the e-mail/amendment clarifies and supports their position.

Staff understands Qwest's position is the current paging agreement does not allow the Pagers to terminate enhanced or Internet traffic on the facilities it provides under the paging agreement. The presence of enhanced or Internet traffic on these facilities relieves Qwest of any obligation to pay reciprocal compensation for the paging traffic on these facilities. Moreover, Qwest objects to the unilateral amendment of the interconnection agreements.

Staff understands that these issues were key issues in the two informal complaints filed by the Pagers at the FCC. The Pagers claim the McKenna e-mail was intended to resolve these issues, and that the FCC already has investigated and settled the disputed issues. Staff believes the FCC has the prior knowledge of the intent of the e-mail, and whether it clarifies or amends the existing agreements.

Paging has historically been primarily a federal issue. Pagers were primarily regulated by the FCC, which regulated the airwaves used to provide paging services. See *Idaho Code* § 62-603 (13 & 14). Pagers purchased the wireline products used to provide its paging services from regulated wireline companies like Qwest in accordance with the retail tariffs and price lists on file with this Commission and the FCC. However, under the federal Telecommunications Act of 1996, the FCC has ruled that paging companies are telecommunications carriers and they are eligible for wholesale terms in accordance with interconnection agreements. The IPUC has jurisdiction to review and approve such interconnection agreements, and also has jurisdiction to resolve inter-carrier disputes under *Idaho Code* § 62-616. The Commission has previous experience with paging issues in Case No. USW-T-99-4, which is now being reconsidered in Supreme Court Docket No. 29175.

The issue of whether this e-mail constitutes an amendment to an interconnection agreement is similar to the issues previously considered by the FCC in WC Docket No. 02-89, *Qwest Petition for Declaratory Ruling*, 2002 WL 31204893 at 5, (F.C.C. 2002), and in the Notice of Apparent Liability, FCC-04-57, File No. EB-03-IH-0261, NAL Acct. No. 200432080022, FRN No. 0001-6056-25. The FCC has examined scores of documents and agreements between Qwest and other carriers in reaching its conclusions in these two cases and is very familiar with the issues to be considered in determining whether this document is an interconnection agreement subject to the filing and approval requirements of Section 252(e).

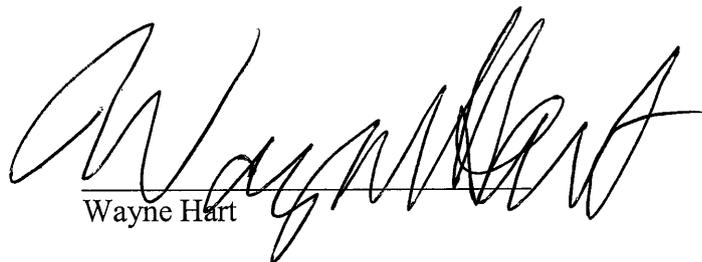
There is precedent for a state commission to defer an interconnection agreement issue to the FCC in cases where the state commission determined the FCC was the more appropriate agency to resolve the issue. Because the Pagers maintain that the e-mail represents an amendment to the Pagers' interconnection agreements and that the e-mail was the product of a FCC informal proceeding, the Staff believes that the FCC is the agency with the most knowledge of the purpose and force of the e-mail. Consequently, these cases should be referred to the FCC for resolution.

**STAFF RECOMMENDATION:**

Staff recommends that the Commission issue an Order referring these cases to the FCC.

**COMMISSION DECISION:**

Does the Commission wish to refer these cases to the FCC? Should these cases be dismissed without prejudice?



Wayne Hart

pagedata and wavesent 3 mail amendment DM