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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

JOSEPH B. MCNEAL, d/b/a PAGEDATA,)	
)	
Complainant,)	CASE NO. QWE-T-03-25
)	
vs.)	PETITION FOR
)	RECONSIDERATION
QWEST CORPORATION,)	
)	
Respondent.)	
_____)	

PageData respectfully requests that the Idaho Public Utilities Commission (“Commission”) reconsider its decision in this matter in Order No. 29687 under Procedural Rule 331 and the Commission’s discretion. IDAPA 31.01.01.331.01. PageData contends the Order is unreasonable, unlawful, erroneous, and not in conformity with law, which will be discussed below.

The Commission’s ruling makes the dispute resolution clause (Section 13.14) of the interconnection agreement unconscionable. The Commission’s ruling unreasonably limits PageData’s choices for dispute resolution and significantly advantages Qwest.

In reaching its decision, the Commission erred by relying upon several cases that are not applicable. *International Assoc. of Firefighters, Local 672 v. City of Boise*, 136

Idaho 162, 168, 30 P.3d 940, 946 (2001) and *Driver v. SI Corportion*, 139 Idaho 423, 426, 80 P.3d 1024, 1027 (2003) quoting *Hecla Mining Co. v. Bunker Hill Co.*, 101 Idaho 557, 562, 617 P.2d 861, 866 (1980). No rational relationship can be made between these cases cited and PageData's complaint against Qwest. For example, the International Association of Firefighters' arbitration decision is not required by federal and state statute to be publicly available for review with the same terms and conditions being made available to every other fire department in the state of Idaho, as is the case with interconnection agreements under the 1996 Telecommunications Act.

Section 252 gives the state commissions the exclusive right to make first instance determinations with regard to interconnection disputes, which supercedes the AAA arbitration option unless both parties agree otherwise. Unlike the cases cited by the Commission in support of their decision, Section 252(i) requires that the resolution of a reciprocal compensation dispute be filed and approved at the Commission as a clarification or amendment to the interconnection agreement and available for adoption by other carriers.

Currently there is no mechanism in Idaho statutes to incorporate a private AAA arbitration decision into filed interconnection agreements to make the decision available to other carriers in a similar situation, such as Radio Paging and WaveSent LLC to name just two, under Section 252(i). The AAA arbitration decision would not be legally binding for adoption under Section 252(i) and therefore would be a violation of the 1996 Telecommunications Act. There is also no mechanism for the Commission to approve the AAA arbitration decision. The only two options in the dispute resolution Section 13.14 of

the interconnection agreement that will satisfy Section 252, is a formal complaint either filed at this Commission or the FCC.

The Federal Arbitration Act (FAA) and the interconnection agreement direct the Commission to apply federal law and state contract law when addressing disputes in arbitration clauses. 9 U.S.C. § 2. But here, not only is there an arbitration portion as an option, the 1996 Telecommunications Act gives state commissions the exclusive right to make determinations in the first instance.

The US Supreme Court has recognized that the defense of unconscionability is available to a party challenging an arbitration agreement.

[G]enerally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the Commission]. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)

In other words, state contract law applies to arbitration clauses. This principle is incorporated into the federal substantive law of arbitration.

An Agreement to arbitrate is . . . enforceable, *as a matter of federal law*, 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.' . . . Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to cover issues concerning the validity, revocability, and enforceability of contracts generally. (emphasis in original, citations omitted) *Perry v. Thomas* (1987) 482 U.S. 483, 492-93

Under Idaho Statute 28-2-302¹ PageData does hereby request a hearing. PageData claims the arbitration clause is unconscionable and requests an opportunity to present

¹ Idaho Statute 28-2-302. UNCONSCIONABLE CONTRACT OR CLAUSE. (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

evidence as to the commercial setting, purpose, and effect to aid the Commission in making a determination.

Since Qwest drafted the unconscionable arbitration clause, Qwest should not receive the Commission's assistance in rewriting the interconnection agreement.

The Commission's ruling made the arbitration clause procedurally unconscionable. A number of courts have recently struck down arbitration clauses on the grounds that the fees imposed by the AAA's Commercial Rules are prohibitive. Those seeking to enforce arbitration clauses frequently argue that no arbitration clause invoking the AAA's rules may ever be held to be prohibitively expensive because the AAA's rules supposedly incorporate various safeguards against excessive fees. Recently, however, several courts have held that the AAA's rules do not provide adequate protection against excessive arbitral fees. In *Phillips v. Associates Home Equity Services, Inc.*, for example, the court stated:

[D]efendants argue that the AAA's Commercial Rules contain certain safeguards to protect Philips against incurring exorbitant costs. These arguments are unavailing. . . . [D]efendants note that the arbitrator at his or her discretion can assess all expenses to one party at the conclusion of the case. But that is nothing more than an argument that there exists some possibility that Philips ultimately may not have to bear a prohibitively expensive portion of the arbitration costs.²

In this case, it is the Commission that has exclusive rights to settle interconnection disputes in the first instance. Again, those results are to be publicly available for adoption under Section 252(i) by all carriers in similar situations. An arbitrator's ruling is not, and therefore, not in the public interest for equal access to publicly available documents and to encourage telecommunications competition in the state of Idaho.

² *Phillips v. Associates Home Equity Services, Inc.*, 179 F. Supp 2d 840, 846, 847 (N.D. ILL 2001) (citation omitted).

The interdependent aspects of the arbitration clause should not be severed. In effect, the Commission unlawfully blue-penciled the dispute resolution Section 13.14 of the interconnection agreement and rewrote it. Severing allows the Commission to treat independent clauses independently, whereas blue-penciling implies actual editing of the interdependent sections to fix the interconnection agreement. As the drafter of the interconnection agreement, Qwest has the obligation and responsibility to make the contract language clear.

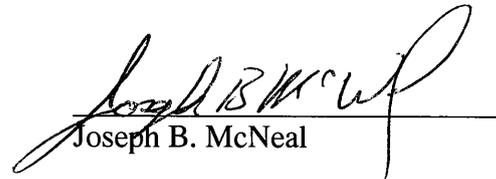
The difference between the options to go to the Commission, FCC, or AAA arbitration should be read in light of the 1996 Telecommunications Act to promote competition and the public interest to make interconnection agreements publicly available for adoption under Section 252(i). Compelling AAA arbitration, which cannot accomplish the aspects of Section 252(i), is unlawful editing of the interconnection agreement. The Commission's Order deprives PageData of its judicial economical and speedy ruling. There is no Idaho statute to make an AAA arbitration ruling available to other similarly situated carriers as required by Section 252. This is the exclusive domain of state commissions.

Conclusion and Prayer for Relief

Under Idaho Code 28-2-302 and IDAPA 31.01.01.331.01, PageData requests a hearing to present additional evidence. The evidence that will be presented includes Supreme Court cases that observed there is a fundamental requirement that arbitration allows parties to effectively vindicate their statutory rights. Further the court proclaimed repeatedly that judicial review is a guarantor of effective statutory rights. Arbitration in this case would not guarantee PageData's and other Idaho carriers' statutory rights

granted by the 1996 Telecommunications Act to publicly display for review and adoption terms and conditions awarded by any arbitrator. For all the foregoing reasons, PageData requests that the Commission grant reconsideration by rescinding, modifying or changing the Order No. 29687.

Respectfully submitted this 9th day of February, 2005.



Joseph B. McNeal

CERTIFICATE OF SERVICE

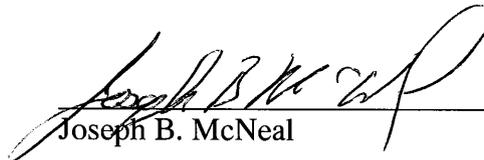
I HEREBY CERTIFY that on this 9th day of February, 2005, I caused a true and correct copy of the foregoing PETITION FOR RECONSIDERATION to be served, in the manner indicated, on the following:

Jean Jewell, Secretary
Idaho Public Utilities Commission
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Boise, ID 83720-0074

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Joseph B. McNeal