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IDAHO PUBLIC
UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

JOSEPH B. MCNEAL, d/b/a PAGEDATA,)	Case No. QWE-T-03-25
)	
Complainant,)	
)	
vs.)	QWEST CORPORATION'S
)	LIMITED RESPONSE TO
QWEST COMMUNICATIONS, INC.,)	JOSEPH B. MCNEAL, d/b/a
)	PAGEDATA'S COMPLAINT
)	
Respondent.)	
)	

Introduction and Summary

On October 31, 2003, Joseph McNeal d/b/a PageData ("PageData") filed a document captioned as a "Complaint" with the Idaho Public Utilities Commission ("Commission"). That

ORIGINAL

document (hereinafter “PageData’s Filing”) names Qwest Communications, Inc. as Respondent¹. PageData seeks to invoke the Commission’s jurisdiction to interpret an interconnection agreement² – the “Arch Agreement” – recently adopted by PageData,³ and to order Qwest to do certain things in connection with the Arch Agreement.

Qwest hereby provides a limited response to PageData’s Filing. Qwest does not address PageData’s allegations and contentions, but raises only a single point that the Commission should consider before determining whether to open a complaint docket. For the reasons stated below, the Commission should decline to open a complaint docket, and should dismiss PageData’s Filing.

First, the Arch Agreement itself sets out detailed procedures for resolving disputes such as this one, but PageData has entirely ignored that contractual obligation.

Second, the resolution of this billing dispute depends on determining one narrow factual issue – the intent of the contracting parties. PageData raises no legal issues whatsoever, much less important questions of telecommunications law. Likewise, resolution of this private contract language dispute will not affect other Idaho telecommunications carriers, nor is there any potential ramification for telecommunications industry.

¹ Qwest Corporation (“Qwest”) notes that the Respondent named by the Complainant is inaccurate, as there is no entity named Qwest Communications, Inc. Qwest Corporation is the incumbent local exchange company in Idaho and is the party with whom PageData has an interconnection agreement. See *Order No. 29198*.

² Type 1 and Type 2 Paging Interconnection Agreement between U S WEST Communications, Inc., and Arch Paging, Inc./ Mobile Communications Corporation of America, filed with the IPUC on July 13, 2000 (hereinafter as “Arch Agreement”). See *In the Matter of the Joint Application of Qwest Corporation FKA U S WEST Communications, Inc. Arch Paging, Inc. and Mobile Communications Corporation of America for Approval of a Type 1 and Type 2 Interconnection Agreement Pursuant to 47 U.S.C. § 252(e)*, Case No. USW-T-00-20. The Commission approved the Arch Agreement on September 1, 2000. *Id.*, Order No. 28499.

³ The Commission approved PageData’s adoption of the Arch Agreement on February 25, 2003. See *In the Matter of the Joint Application of Qwest Corporation and Joseph B. McNeal dba PageData for Approval of a Paging Connection Agreement Pursuant to 47 U.S.C. § 252(i)*, Case No. QWE-T-03-6, Order No. 29198.

Finally, the Commission has no legal obligation to entertain this purely private contract dispute, and it would be a waste of the Commission's scarce resources for it to do so. The Commission should refer PageData back to the dispute resolution provisions of the Arch Agreement.

Qwest's Limited Response Is Not an Answer under the IPUC Rules of Procedure

Qwest understands the Commission has not opened a complaint case under Rule 54 of the IPUC Rules of Procedure or otherwise acted on PageData's Filing and that this matter is currently governed by the Commission's informal procedures,⁴ as follows:

1. After review, the Commission will determine whether to treat PageData's Filing as a complaint under the IPUC Rules of Procedure. In the meantime, the Commission has assigned a case number for administrative purposes only.
2. If the Commission decides to treat PageData's Filing as a complaint, the Commission will issue a summons and serve Qwest,⁵ after which Qwest would be required to file an answer.⁶
3. Under the Commission's Rules, Qwest is not obligated to answer or otherwise respond to PageData's Filing at this time. However, it is proper for Qwest to respond to PageData's Filing before the Commission decides whether to open a complaint docket.

⁴ IPUC Rules of Procedure, Rules 21-30.

⁵ IPUC Rules of Procedure, Rule 16.

⁶ IPUC Rules of Procedure, Rule 57.

Accordingly, Qwest submits this Limited Response , but does not hereby file an “answer” under Rule 57, and reserves the right to answer and defend against the allegations in PageData’s Filing, should the Commission determine that a complaint docket should be opened.

The Dispute

1. Money Owed to Qwest by PageData

As the Commission is well aware, PageData has pursued litigation against Qwest on a variety of theories since 1999. In *PageData v. Qwest*,⁷ the Commission determined the amount of billing credit due PageData under the FCC’s *TSR Wireless* decision and its progeny.⁸ Qwest applied the credit to PageData’s account per the Commission’s Orders. PageData has appealed the Commission’s decision to the Idaho Supreme Court, but PageData did not seek a stay of the Commission’s final order. Accordingly, the Commission established the amount of wholesale credit due PageData for the period of November 1996 through September 1999. PageData still has paid nothing for any interconnection or other wholesale services since at least October 1998, including services provided under PageData’s interconnection agreement. PageData currently owes Qwest approximately \$300,000 for wholesale/interconnection services after the Commission-determined credit is applied. PageData refuses to pay one cent of this balance.

⁷ See, *PageData et al v. US WEST Communications, Inc.*, USW-T-99-24, (appeal pending before the Idaho Supreme Court) Docket No.29175 (hereinafter “*PageData v. Qwest*”).

⁸ *TSR Wireless, LLC, et al. v. US West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 11166 (2000); *Metrocall, Inc. v. Southwestern Bell Tel. Co.*, Memorandum Opinion and Order on Supplemental Complaint for Damages, 16 FCC Rcd 18123 (2001); *Metrocall v. Concord*, Memorandum Opinion and Order, Case No. EB-01-MD-008, (February 8, 2002); *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 2091 (2002) (“*Mountain Order*”).

2. Charges and Payments Under the Arch Agreement

The Arch Agreement is a post-Metzger paging connection agreement under which Qwest provides local interconnection facilities to the paging company without charge, except to the extent the facilities carry transit traffic. The paging company must compensate Qwest for the facilities to the extent they carry transit traffic.

Under the Arch Agreement, Qwest compensates the paging company for the termination of the land-to-pager calls originated by Qwest customers. The paging company's charge for termination of land-to-pager calls is set at rates "symmetrical" to Qwest's reciprocal compensation (i.e., transport and termination) charges.

The crux of the parties' dispute is as follows. PageData claims that Qwest must write a check to PageData every month for the termination charges. Qwest, on the other hand, believes that it can offset PageData's charges against other amounts owed Qwest for wholesale services.

Resolution of this dispute depends on the language of the Arch Agreement and the intent of the parties under that Agreement.⁹ The contract itself is silent.

The Dispute Resolution Provisions

PageData's Filing acknowledges that Dispute Resolution provisions of the Arch Agreement govern. PageData states in its first paragraph:

This Complaint is a formal complaint, filed in accordance with [federal and state law] and section 13.14. of PageData's interconnection agreement with Qwest approved by the Idaho PUC on February 25, 2003.¹⁰

⁹ PageData's intent is irrelevant because it simply adopted an already existing agreement.

PageData correctly cites the Arch Agreement's dispute resolution section, which provides:

13.14. Dispute Resolution

If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents ("Dispute") cannot be settled through negotiation, it shall be resolved by arbitration under the then current rules of the American Arbitration Association ("AAA"). The arbitration shall be conducted by a single neutral arbitrator familiar with the telecommunications industry and engaged in the practice of law. Such arbitrator shall not be a current or former employee, agent, contractor, officer or director of either Party or its affiliates or subsidiaries or related in any way to a current or former employee, agent, contractor, officer, or director of either Party or its affiliates. The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply and the rules used shall be those for the telecommunications industry. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. The prevailing Party, as determined by the arbitrator, shall be entitled to an award of reasonable attorneys' fees and costs. The arbitration shall occur at a mutually agreed upon location. Nothing in this Section shall be construed to waive or limit either Party's right to seek relief from the Commission or the FCC as provided by state or federal law.¹¹

If Qwest (as PageData alleges) is misinterpreting the Arch Agreement when it offsets PageData's debts to Qwest against the reciprocal compensation charges of PageData, the contract provides a very clear path by which PageData can resolve that dispute. PageData is contractually bound to follow that approach to resolve its dispute.

The Commission Should Decline to Exercise Jurisdiction over this Private Contract Dispute, and Has No Legal Obligation To Entertain PageData's Filing as a Formal Complaint

Over a period of years following the Act's passage, the Federal Communications Commission created confusion and disorder in the law over paging interconnection, particularly by retroactively preempting state tariffs under which paging companies ordered interconnection

¹⁰ PageData Filing, p. 1.

services from local exchange companies.¹² The long-standing confusion over the extent of FCC preemption led to considerable difficulty in interconnection negotiations and ultimately litigation in interconnection arbitrations, in the courts, and at the FCC. The extent of the preemption was very uncertain until approximately one year ago.¹³

To Qwest's knowledge, the Idaho Commission has been alone among state commissions in being faced with the enormously difficult, expensive, and unrewarding task of attempting to determine retroactive credits due to paging companies under the FCC's murky preemption.¹⁴ This Commission's Orders in *PageData v. Qwest* present the most definitive and best reasoned statements available on paging interconnection law. Yet even now those rulings are challenged by PageData and the other appellants at the Idaho Supreme Court, and PageData seeks to

¹¹ Arch Agreement, ¶ 13.14. See Exhibit A. (Emphasis added.)

¹²Letter from A. Richard Metzger, Jr., Chief, Common Carrier Bureau to Keith Davis, Southwestern Bell Telephone, DA 97-2726 (Dec. 30, 1997) (Metzger Letter); *TSR Wireless, LLC, et al. v. US West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 11166 (2000).

¹³ The principal issues concerning preemption were: (i) the extent to which FCC rules, as interpreted by the FCC, preempted state tariffs and state commission decisions; (ii) whether paging carriers may obtain LEC facilities from the LECs without paying and if so, within what geographic area; (iii) whether paging carriers are entitled to compensation or free facilities even if they purchased the facilities under state tariffs and have not entered into section 251/252 interconnection agreements; (iv) transit traffic. The issues were primarily resolved in a series of decisions from the FCC beginning in June 2000. See *TSR Wireless LLC v. US West Communications, Inc.*, Memorandum Opinion and Order, issued June 21, 2000 *aff'd sub. nom.*, *Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001); *Metrocall, Inc. v. Southwestern Bell Tel. Co.*, Memorandum Opinion and Order on Supplemental Complaint for Damages, 16 FCC Rcd 18123 (2001); *Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Corp. d/b/a Verizon Communications*, Memorandum Opinion and Order, FCC No. 01-347 (rel. Nov. 29, 2001); *Metrocall v. Concord Telephone Company*, Memorandum Opinion and Order, 17 FCC Rcd 2252 (Feb. 8, 2002); *Texcom, Inc., d/b/a Answer Indiana v. Bell Atlantic Corp., d/b/a Verizon Communications*, Order on Reconsideration, FCC 02-96 (rel. Mar. 27, 2002) ("*Texcom Reconsideration Order*"); *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 2091 (2002); *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, Order on Review, July 25, 2002.

¹⁴ Besides the Commission's decisions in *PageData v. Qwest*, we are aware of only one other reported decision attempting to sort through the myriad accounting and billing issues where a paging company claimed retroactive credit: *Metrocall, Inc. v. Southwestern Bell Tel. Co.*, Memorandum Opinion and Order on Supplemental Complaint for Damages, 16 FCC Rcd 18123 (2001), in which the FCC expresses great frustration at the difficulty of the computations and lack of evidence; the FCC determined no credit was due Metrocall. *Id* at ¶¶ 8-10, 15.

relitigate all those issues in a new lawsuit in federal court.¹⁵ Against that backdrop, the Commission should decline this new opportunity. In *PageData v. Qwest*, the case presented issues of industry importance, and complex questions peculiarly within the Commission's expertise. The billing dispute described in PageData's Filing, on the other hand, presents no such important issues or technical complexities.

1. The Commission May Exercise Discretion Whether to Entertain a Private Contract Dispute.

The Commission should decline to exercise its jurisdiction, and should hold that PageData follow the contract's dispute resolution process. This result is supported by a long line of decisions from the Idaho Supreme Court and the Commission regarding when the Commission should assert jurisdiction over a private contract dispute.¹⁶

The Commission has stated that where there is concurrent jurisdiction over a private contract dispute with another court or commission, the Commission will exercise restraint and determine whether assertion of Commission jurisdiction is in the public interest:

The authority and jurisdiction of this Commission is restricted to that expressly and by necessary implication conferred upon it by the Legislature.... Mindful of our duty, we recognize that in some instances Commission power, authority and jurisdiction is coincident or concurrent with that of Idaho courts, specifically in the area of contracts. Determining when to exercise our jurisdiction is often predicated on an attitude of self-restraint and a determination of the most appropriate forum. *Idaho Code* §§ 61-307, -502, -503, -622, -623; Idaho Constitution Article I, §16; *Lemhi Telephone Company v. Mountain States Tel &*

¹⁵ *Joseph B. McNeal, d/b/a PageData, et al v. Qwest Corporation, et al*, filed October 31, 2003, (United States District Court, District of Idaho) Case No. CIV 03-473-S-MHW.

¹⁶ *Bunker Hill v. Washington Water Power*, 98 Idaho 249 (1977); *Lemhi Telephone Company v. Mountain States Tel & Tel*, 98 Idaho 692, 571 P.2d 753 (1977); *Agricultural Products v. Utah Power & Light*, 98 Idaho 23, 557 P.2d 617 (1976). *Forest Fuel Power v. Washington Water Power*, Case No. U-1008-246, Order No. 20486 (1986) (" We have repeatedly said that the Idaho Public Utilities Commission is not the proper forum for arbitration or mediation of disputed contracts."); *Idaho Power Company, vs. Cogeneration, Inc.*, Case No. IPC-E-94-24; Order No. 25918 (1995).

Tel, 98 Idaho 692, 571 P.2d 753 (1977); *Agricultural Products v. Utah Power & Light*, 98 Idaho 23, 557 P.2d 617 (1976).¹⁷

The Commission has further stated that this was true, even whether the parties had expressly agreed in the contract that contract disputes were to be decided by the Commission:

The Commission reminds the parties that jurisdiction may not be conferred on the Commission by contractual stipulation. The authority and jurisdiction of the Commission is restricted to that expressly and by necessary implication conferred upon it by enabling statutes. The nature and extent of Commission jurisdiction to resolve actual disputes will be determined by the Commission on an individual case-by-case basis, not withstanding P21.1 of the Agreement.¹⁸

In this case, the Commission's assertion of jurisdiction over PageData's billing dispute does not impact the public interest; it is a purely private matter affecting no one other than the parties to the interconnection agreement, especially since the parties have obligated themselves to use a different forum.

2. The Commission's Jurisdiction Over This Contract Dispute Is Uncertain.

There is no federal or state law clearly granting the Commission jurisdiction over disputes in an interconnection agreement between an incumbent local exchange company and a paging carrier, and the Commission does not appear to have a statutory obligation to entertain the PageData Filing as a formal complaint.¹⁹

¹⁷ *Idaho Power Company, vs. Cogeneration, Inc.*, Case No. IPC-E-94-24 (1995), Order No. 25918 at p. 5.

¹⁸ *Id.* at pp.3-4.

¹⁹ Although Idaho statutes may be read to empower the Commission to deal with interconnection disputes generally, the extent to which Idaho has asserted jurisdiction over wireless interconnection is completely unclear. The boundary of state commissions' jurisdiction over wireless interconnection is uncertain; the FCC and courts have found supreme law jurisdiction outside the 1996 Act. See, e.g., *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded*, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct 721 (1999 120 F.3d at 800 n.21, 820 n.39 (finding FCC authority to issue local competition rules of special concern to CMRS providers under sections 2(b) and 332(c) of the Act and granting motion to lift stay of section 51.703 as it applied to CMRS providers); *TSR Wireless, supra n.14, at ¶ 13, n. 42* ("An additional basis for authority for the action we take here exists under section 332 of the Act"); *Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132* (rel. Apr. 27, 2001) (seeking comment on the relationship between the CMRS interconnection authority assigned to FCC under sections 201 and 332, and that granted to the states under sections

3. The FCC Has Recognized That a State Commission Has No Responsibility to Decide an Interconnection Dispute If the Parties Have Provided A Dispute Resolution Mechanism.

Even if there were a clear grant of jurisdiction to the Commission, the FCC has recognized that a state commission may not have responsibility to decide a dispute under an interconnection agreement if the parties have contractually agreed to a dispute resolution mechanism:

We note that, in other circumstances, parties may be bound by dispute resolution clauses in their interconnection agreement to seek relief in a particular fashion, and, therefore, the state commission would have no responsibility under section 252 to interpret and enforce an existing agreement. In this case, however, the relevant interconnection agreements do not expressly specify how the disputes shall be resolved.²⁰

4. Dismissal of the PageData Filing Is Supported By the Strong Public Policy Favoring Arbitration and Alternative Dispute Resolution.

Idaho law strongly favors the enforcement of contractual arbitration clauses. Idaho has enacted the Uniform Arbitration Act.²¹ In a recent case, the Idaho Supreme Court stated:

[W]e recognize that arbitration is a favored remedy. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986). *See Bingham County Comm'n v. Interstate Elec. Co.*, 105 Idaho 36, 665 P.2d 1046 (1983) (Arbitration allows parties to settle their disputes without expending time and unnecessary expense on needless litigation.). A court reviewing an arbitration clause will order arbitration unless "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT & T Technologies, Inc., supra*. Doubts are to be "resolved in favor of coverage." *Id.; Local Union No. 370 of Intern't'l Union of Operating Engineers v. Morrison-Knudsen Co., Inc.*, 786 F.2d 1356 (9th Cir.

251 and 252; noting FCC's authority for preemption of state entry and rate regulation under section 332(c)(3); seeking comment on extent to which section 332 preempts state regulation of intrastate LEC-CMRS interconnection and gives such authority to FCC). *Id.* ¶¶ 86-87.

²⁰ *In the Matter of Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, Memorandum Opinion and Order, FCC 00-216 (rel. June 14, 2000).

²¹ Idaho Code §§ 7-901 -- 7-922.

1986), citing *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582-83, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960). See *Iowa City Community School Dist. v. Iowa City Educ. Ass'n*, 343 N.W.2d 139, 141 (Iowa 1983); *Mayor v. Baltimore Fire Fighters, Local 734*, 93 Md. App. 604, 613 A.2d 1023, 1026 (Md.App. 1992); *Howard Co. Bd. of Educ. v. Howard Co. Educ. Ass'n*, 61 Md. App. 631, 487 A.2d 1220 (Md.App. 1985); *Mayor & City Council of Baltimore v. Baltimore City Fire Fighters*, 49 Md. App. 60, 430 A.2d 99 (Md. App. 1981), cert. denied, 291 Md. 771 (1981); *West Fargo Pub. School Dist. v. West Fargo Educ. Ass'n*, 259 N.W.2d 612, 620 (N.D. 1977); *Corvallis School Dist. v. Corvallis Educ. Ass'n*, 35 Ore. App. 531, 581 P.2d 972, 974 (Or. App. 1978). In further support of a strong policy in favor of arbitration, this Court has expressly stated that public bodies in Idaho are bound by their agreements to arbitrate disputes. *Bingham County Comm'n v. Interstate Elec. Co.*, 105 Idaho 36, 665 P.2d 1046 (1983); *Bear Lake Educ. Ass'n v. School Dist. 33*, 116 Idaho 443, 447, 776 P.2d 452, 456 (1989).²²

This strong Idaho policy requires that the PageData be required to adhere to the contractually provided dispute resolution clause. The Commission should there decline jurisdiction and dismiss PageData's Filing.

Conclusion

For the foregoing reasons, Qwest respectfully requests that the Commission deny the relief sought by PageData, as well as dismiss PageData's Complaint.

²² *International Assoc. of Firefighters, Local No 672 v. City of Boise*, 136 Idaho 162; 30 P.3d 940; 2001 Ida. LEXIS 36 (2001).

DATED this 26th day of November, 2003.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of November, 2003, I served the foregoing upon all parties of record in this proceeding as indicated below.

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