DECISION MEMORANDUM

TO: **COMMISSIONER KJELLANDER**
COMMISSIONER SMITH
COMMISSIONER HANSEN
COMMISSION SECRETARY
COMMISSION STAFF

FROM: **DON HOWELL**

DATE: **APRIL 27, 2004**

RE: **PAGEDATA'S "FORMAL" COMPLAINT AGAINST QWEST CORPORATION, CASE NO. QWE-T-03-25**

On October 31, 2003, Joseph McNeal dba PageData filed a "formal" complaint[1] against Qwest. PageData alleged that Qwest is not in compliance with the reciprocal compensation provisions of their Interconnection Agreement. On November 26, 2003, Qwest submitted a "limited" response to PageData's complaint. Qwest urged the Commission to refrain from opening a complaint docket and suggested that PageData's complaint should be dismissed. Qwest did not address the merits of PageData's complaint. On December 12, 2003, PageData filed a Reply to Qwest's limited response.

On January 29, 2004, PageData filed a Request for Summary Judgment. Since then, attempts to resolve the complaint have been unfruitful. No party has asked for oral argument.

BACKGROUND

In Order No. 28499 issued September 1, 2000, the Commission approved an Interconnection Agreement between Qwest and Arch Paging. In January 2003, the Qwest-Arch Interconnection Agreement was amended and subsequently approved by the Commission in Order No. 29178. Among other things, the amendment to the "Arch" Agreement added terms and conditions for interconnection at a single point-of-presence (SPOP). In February 2003, the Commission approved PageData's adoption of the Arch Agreement (as amended). Order No. 29198 at 3.

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[1] The Staff assigned a case number so that pleadings could be grouped for tracking purposes.

PAGEDATA'S COMPLAINT

In its complaint, PageData alleged first that Qwest has misbilled PageData under the adopted Arch Interconnection Agreement, and second that Qwest has refused to correct the billing. PageData requested that the Commission direct Qwest to correct the billing on Account BAN208R51-0454-454. In addition, PageData seeks an Order from this Commission to require Qwest to remit cash payments to PageData for reciprocal compensation or, at a minimum, to issue credits for the reciprocal compensation to specific accounts designated by PageData. Pursuant to the terms and conditions of their Interconnection Agreement, PageData has "invoiced" Qwest for reciprocal compensation for the period of January – May 15, 2003.

Under the adopted Arch Agreement, PageData asserted it is "in a unique position [because] Qwest owes PageData more money per month than PageData owes Qwest" as a result of the reciprocal compensation mechanism. Complaint at 2. PageData maintained Qwest has refused to issue cash payments for reciprocal compensation "because of prior disputed accounts." *Id.* at 3. PageData alleged that Qwest's failure to make reciprocal compensation payments or provide credits violates Section 12.3. of the parties' Interconnection Agreement. Section 12.3. allows either party to dispute any portion of the monthly billing and both parties agree to expedite investigation of any dispute. This section also provides that either party may withhold "up to four months worth of disputed charges not to exceed $100,000 in the aggregate." *Id.*

PageData argued that Qwest should not be allowed to violate the terms of the approved Interconnection Agreement by mixing current interconnection disputes with "past disputes that are before authoritative bodies that have jurisdiction to settle those disputes...." Complaint at 7.[2] PageData believes that the terms of its Interconnection Agreement should control regardless of past disputes with Qwest.

PageData filed its formal complaint pursuant to the federal Telecommunications Act of 1996, Section 13.14. (Dispute Resolution) of its Interconnection Agreement, and the Commission's procedural Rule 54.[3] Section 13.14. of the Interconnection Agreement addresses disputes. This section provides in pertinent part

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[2] As the Commission is aware PageData and Qwest are opposing parties in Idaho Supreme Court Appeal No. 29175 involving billing disputes arising before the parties entered into their first interconnection agreement.

[3] Rule 54 sets out the required contents of formal complaints. IDAPA 31.01.01.054.

> 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. ...The prevailing Party, as determined by the arbitrator, shall be entitled to an award of reasonable attorney's 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 [Idaho] Commission or the FCC as provided by state or federal law.

Adopted Qwest-Arch Interconnection Agreement dated June 2000, § 13.14. (emphasis added).

In summary, PageData asked the Commission to order Qwest to: (1) correct the billing under the Interconnection Agreement; (2) comply with the terms of the Interconnection Agreement without regards to prior disputes between the parties; (3) pay PageData for reciprocal compensation in the form of a check or credits to specific accounts designated by PageData; and (4) provide other measures of relief. *Id.* at 8.

QWEST'S RESPONSE

In its "limited" response to PageData's filing, Qwest asserted that the Commission should decline to open a complaint proceeding and "should dismiss PageData's Filing." Qwest Response at 2. Qwest specifically stated that its limited response does not constitute an "Answer" under the Commission's procedural Rule 57, IDAPA 31.01.01.057. Qwest maintained that the parties' Interconnection Agreement sets out detailed procedures for resolving disputes "but PageData has entirely ignored that contractual obligation." *Id.* at 2. Because the substance of PageData's complaint is a contract dispute under their Interconnection Agreement, Qwest urged the Commission to decline jurisdiction and instead direct the parties to utilize the dispute resolution provisions of their Interconnection Agreement.

Commenting briefly on the stayed Supreme Court appeal (Docket No. 29175), Qwest noted that PageData has not sought a stay of the Commission's final Order No. 29140. Even after applying the Commission-determined refund credit in the case on appeal, Qwest claims that PageData currently owes Qwest approximately $300,000 for wholesale/interconnection services. Qwest Response at 4. Qwest stated PageData has not paid for "any interconnection or other wholesale services since at least October 1998, including services provided under PageData's

Interconnection Agreement." *Id.* (emphasis original). Thus, Qwest inferred that it is entitled to recover past-billed amounts accruing before the existing interconnection agreement.

Qwest further asserted that the procedures for addressing PageData's complaint is covered by the parties' Interconnection Agreement. Both Qwest and PageData rely on the dispute resolution Section 13.14. (set out above) of their Agreement. Given that the subject matter of PageData's complaint arises under their adopted and approved Interconnection Agreement, Qwest believes that PageData is contractually bound to follow the dispute resolution procedures called out in the Agreement. In other words, the parties' dispute should be submitted to a qualified arbitrator as provided for in Section 13.14.

Qwest next insisted there is no federal or state law clearly granting the Commission jurisdiction over disputes arising from an Interconnection Agreement. The Company maintained that generally the construction and enforcement of contract rights in Idaho is a matter that lies in the jurisdiction of the courts and not this Commission. *Bunker Hill Company v. Washington Water Power Company*, 101 Idaho 493, 616 P.2d 272 (1980). Thus, Qwest questions whether the Commission is the proper forum to address PageData's contract complaint.

Finally, Qwest asserted that Idaho law strongly favors the enforcement of contractual arbitration clauses. As mentioned above, Section 13.14. provides that unresolved disputes between the parties shall be resolved by arbitration.[4] Qwest noted arbitration is a favored remedy for disputes. *International Assoc. of Firefighters, Local No. 672 v. City of Boise*, 136 Idaho 162, 30 P.3d 940 (2001). For these reasons, Qwest urged the Commission to dismiss the complaint and not initiate a complaint proceeding.

PAGEDATA'S REPLY

In its Reply, PageData argued the Commission should reject Qwest's assertion that the Commission has no jurisdiction over this complaint. The Pager insisted the Commission has jurisdiction to resolve disputes concerning interconnection agreements. More specifically, PageData stated that *Idaho Code* §§ 62-614 and 62-615(1) provides the Commission with the requisite statutory authority to investigate and resolve this dispute. PageData relied on the Commission's Order No. 29219 in the *ITA/Iluminet v. Qwest* case (No. QWE-T-02-11) for

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[4] Section 13.14. of the Interconnection Agreement also notes that the dispute resolution section "shall not be construed to waive or limit either Parties' right to seek relief from the [Idaho] Commission or the FCC as provided by state or federal law."

support. In that case, the Commission noted that *Idaho Code* § 62-615(1) gives the Commission "full power and authority to implement the federal telecommunications act of 1996." PageData Reply at 326 quoting Order No. 29219 at n.1. In addition, the Pager maintained that *Idaho Code* § 62-614[5] provides broad authority to the Commission so that it may "resolve disputes between incumbent telephone companies, like Qwest, and other telephone service providers." *Id.*, quoting Order No. 29219 at 4. Consequently, PageData believes that the Commission has jurisdiction to entertain PageData's complaint.

PageData also asserted that the Commission "is responsible for enforcing the pricing schedules and reciprocal compensation terms on interconnection agreements that [the Commission] approved (*Idaho Code* § 62-614)." PageData Reply at 9. PageData also believes the Commission "is compelled by Idaho statute to investigate all commercially filed formal complaints and enforce all provisions of interconnection agreements that are filed within the state of Idaho.... *Id.*

PageData next argued "that Qwest has no authority under the interconnection agreement or the 1996 Tel Act to unilaterally withhold reciprocal compensation payments from PageData...or apply PageData's...reciprocal compensation to [accounts] actively disputed." *Id.* at 16.

PageData acknowledged that Section 13.14. of the Interconnection Agreement provides for three methods of dispute resolution. "Qwest has the ability to take PageData to arbitration; file a complaint at the [Idaho] Commission where the services are being provided; or file a complaint at the FCC in order that Qwest may request an order to demand payment or disconnect services." *Id.* at 16. Instead of pursuing one of these three methods of dispute resolution, Qwest took unilateral action by withholding reciprocal compensation. Consequently, PageData stated that Qwest's conduct leaves the decision on which dispute resolution alternative to utilize "to PageData alone." *Id.* at 1. PageData having filed this complaint, Qwest should now be prohibited from dictating a different course of dispute resolution. *Id.* at 19.

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[5] *Idaho Code* § 62-614(1) states

> If a telephone corporation providing basic local exchange service which has exercised the election provided in section 62-604(2)(a), Idaho Code, and any other telephone corporation subject to title 61, Idaho Code, or any mutual, nonprofit or cooperative telephone corporation, are unable to agree on any matter relating to telecommunication issues between such companies, then either telephone corporation may apply to the commission for determination of the matter.

Finally, PageData alleged Qwest is charging for facility PageData has "requested in writing...to be shut off. Qwest continues to invoice for these facilities, at inflated rates, along with interest and late charges." PageData Reply at 18. The Pager insists that a telecommunications carrier should not have to seek arbitration or file a complaint with this Commission or the FCC "in order for Qwest to disconnect facilities requested in writing by the carrier." *Id.*

THE REQUEST FOR SUMMARY JUDGMENT

On January 29, 2004, PageData filed a "Request for Summary Judgment." In its Request, PageData stated that Qwest is correcting the disputed invoices in this matter but is "still not agreeing to remit payment for reciprocal compensation due PageData." PageData Summary Judgment at 2. PageData also insisted that its entitlement to reciprocal compensation under its interconnection agreement is further bolstered by a recent Court of Appeals decision from the D.C. Circuit. In *Mountain Communications v. Federal Communications Commission,* 355 F.3d 644 (D.C. Cir. 2004), the Circuit Court found that the FCC had acted arbitrarily when it allowed Qwest to charge a paging company (Mountain Communications) for "wide area calling."[6] A review of the *Mountain* case will be helpful.

1. Wide Area Calling. Mountain Communications established a single point-of-presence (SPOP) in one of three local calling areas in Colorado and then requested Qwest to transport calls from Qwest customers in the three calling areas to Mountain's SPOP. *Id.* at 645.[7] Qwest provided the facilities but charged Mountain for calls to the SPOP made by Qwest customers. Qwest insisted that calls from the two local calling areas to the local calling area where the SPOP was located should be considered as toll calls. As the Court explained,

> Qwest claimed in response to Mountain's complaint before the FCC that it was entitled to charge Mountain for the tolls it was unable to charge its own customers. According to Qwest, Mountain could avoid the toll charges by establishing a [point-of-presence] in *each* of the three local calling areas—doubtless at an increased cost. Then, if a paging call were placed from a local number to another local number, no toll would be charged to anyone. If, on the other hand, a paging call were made from one local calling area to another, Qwest would transport the call to Mountain's [SPOP]—without crossing a local calling area boundary—at which time Mountain would

[6] Wide area calling is an issue in the Supreme Court appeal.

[7] Section 251(c)(2)(B) requires LECs such as Qwest to provide interconnection facilities with other carriers "at any technically feasible point within the [ILEC's] network."

> assume responsibility for delivering the call across the local calling areas, presumably at Mountain's expense.

Id. at 645-46 (emphasis original). The FCC characterized Mountain's network configuration as a "wide area calling arrangement" and "therefore Qwest was entitled to charge Mountain for that service" *Id.* at 646.

However, the Circuit Court noted that the FCC's finding "comes into direct conflict with [the FCC's] own regulation." *Id.* at 648. The FCC's regulation (found that 47 C.F.R. § 51.703(b)) states that LECs "may not assess charges on any other telecommunications carrier for telecommunications traffic that originate on the LEC's network." Consequently, this regulation prohibits Qwest from charging Mountain for calls that Qwest customers made to Mountain's SPOP.

Returning to PageData's complaint, the Pager insisted that the *Mountain* decision supports its claim for reciprocal compensation. PageData now has its SPOP in Boise and Qwest provides T-1 facilities for traffic from Qwest's eastern Idaho local calling area to the SPOP. PageData Request at 9; Order No. 29064 at 23. Because Qwest presumably offsets its reciprocal compensation owed to PageData with charges for PageData's wide area calling, PageData believed its request for reciprocal compensation is even stronger. PageData may be entitled to more reciprocal compensation because Qwest cannot offset wide area calling against the amount it otherwise owes PageData for reciprocal compensation.

2. Transit Traffic. PageData also relied upon the *Mountain* case to support its argument that Qwest may not offset its reciprocal compensation with transit traffic charges.[8] PageData Request at 6-8. Here again, the Court in *Mountain* questioned why the FCC allowed Qwest to charge *Mountain* for the cost of transit traffic. *Mountain Communications,* 355 F.3d at 649. *Mountain* argued that Qwest should not have charged it for transit traffic. The FCC allowed Qwest to charge *Mountain* for transit traffic and indicated that *Mountain* could seek reimbursement from the originating carrier. *Id.* However, *Mountain* never received information from Qwest about which carrier initiated the transit call.

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[8] "Transit Traffic" is calling traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to the paging carrier's network. Order No. 29140 at 23. In other words, transit traffic in this instance would be non-Qwest originated traffic that Qwest transports to PageData.

The Court did not decide this issue. The Court noted that "at oral argument, Qwest's counsel obviated any need for us to decide this issue by indicating that Qwest would provide Mountain with the information necessary so that Mountain could charge the originating carrier for reimbursement. Under those circumstances, Mountain dropped that part of its Petition. *Id.*[9]

In summary, PageData asserted that it does not owe Qwest any money, rather, "Qwest owes PageData money." PageData Request at 12. PageData insisted that its accounts "should be zeroed out; it should receive a refund of all cash paid to Qwest for interconnection activity; and Qwest should remit reciprocal compensation through January 2003 directly to PageData." *Id.* at 13. Finally, PageData asserted that the reciprocal compensation that Qwest owes it from January 2003 forward should be applied to Accounts 208 R510454 454 and 208-375-8896-012B on a going-forward basis, with any remainder to be remitted to PageData by check. *Id.*

COMMISSION DECISION

1. Does the Commission wish to process this complaint as a formal proceeding? If so, what process (the Commission itself, hearing examiner, etc.) does the Commission wish to utilize?

2. Or, does the Commission wish to dismiss the formal complaint? For what reasons? Does the Commission wish to defer to an arbitrator or the FCC?

3. Does the Commission wish to pursue another course of action?

Don Howell

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[9] PageData's Request for Summary Judgment also raises several other issues not directly related to its formal complaint. These other topics included Qwest's failure to file interconnection agreements, federal rules preempted rate tariffs, and PageData's request for an SPOP in August 1998 was ignored by Qwest.