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IDAHO PUBLIC
UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE JOINT PETITION
OF ROBERT RYDER, D/B/A RADIO PAGING
SERVICE and JOSEPH B. MCNEAL, d/b/a
PAGEDATA, FOR ARBITRATION OF A
INTERCONNECTION DISPUTE.

IPUC NO. QWE-T-04-32

**QWEST CORPORATION'S ANSWER
AND MOTION TO DISMISS
PETITION FOR ARBITRATION**

Qwest Corporation ("Qwest") hereby responds to the Petition for Arbitration filed by Joseph McNeal d/b/a PageData and Robert Ryder d/b/a Radio Paging Service (the "Pagers"). Qwest first answers the Pagers, and then moves the Commission to dismiss the joint Petition. On November 26, 2004, the Pagers filed a joint Petition for Arbitration of the terms of their expired/replaced Interconnection Agreements pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 (the "Act"). The Pagers filed the Petition for Arbitration even though there are mandatory arbitration provisions in their agreements and they had not properly conducted or even requested any negotiation of an amendment. In their Petition, the Pagers requested that the Commission arbitrate whether they should receive refunds for charges made

by Qwest under the terms of the interconnection agreements, apparently be applying the reasoning of Commission Order No. 29555 to old expired interconnection agreements through change in law provisions in those agreements.

The Negotiated Agreements

In their Petition, the Pagers asked the Commission to “arbitrate” “a dispute between Petitioners and Qwest . . . arising under interconnection agreements heretofore approved by the Commission.” Petition, p. 1. The interconnection agreements were the product of lengthy, contentious interconnection negotiations pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the “Act”). Negotiations between each Pager and Qwest covered the period 1997 to 1999.

Under Section 252 of the Act, the Pagers could at that time, during the Act’s arbitration window, have properly filed petitions for arbitration with the Commission for resolution of interconnection terms and conditions on which the parties did not agree. Each of the Pagers chose not to do so. Each Pager and Qwest filed fully negotiated, final agreements with the Commission seeking approval under Section 252. The Pagers represented in their joint applications with Qwest in Case Nos. USW-T-99-05 & USW-T-99-13 that the terms of the Interconnection Agreements had been reached by “voluntary negotiations without resort to mediation or arbitration,” *Joint Application* at p. 1, Case No. USW-T-99-13, and “the Agreement is consistent with the public interest as identified in the pro-competitive policies of the State of Idaho, the Commission, the United States Congress, and the Federal Communications

Commission.” *Id.* at 2. Based on these filings and representations, the Commission approved both agreements in 1999.¹

The Pagers now deny the validity of the 1999 agreements, and seek in this proceeding to undo their contracts and replace portions of agreed-to contract language with more favorable terms. Essentially, the Pagers seek retroactive amendment of these now-terminated contracts;² they seek terms more favorable those they agreed to in 1999, and on this basis ask the Commission to “refund” charges properly billed by Qwest under the 1999 agreements. Indeed, in keeping with their advocacy in other claims and complaints they have made against Qwest before this Commission and in the courts, they seek refunds of charges they never even paid.

The Pagers are six years too late in bringing their Petition for Arbitration. They could have properly invoked the Commission’s jurisdiction in 1999, but they chose otherwise, seeking instead the Commission’s approval of the very negotiated agreements they now ask the Commission to undo. The Commission should find the Pagers are bound by their contracts. Accordingly, the Commission should deny the relief the Pagers seek.

If the Commission is not inclined to reach the merits of this dispute, it is nonetheless clear that the Pagers allege, at best, a dispute under an interconnection agreement. Thus, alternatively, the Commission should dismiss the Petition for the reasons the Commission dismissed PageData’s “Formal Complaint” in Order No. 29687 – there, the Commission “declined PageData’s invitation to resolve its Interconnection Agreement dispute with Qwest,”

¹ Joint Petition, paragraph 2. The Interconnection Agreements relevant to this matter were approved by the Commission in Order No. 28032, Case No. USW-T-99-5 for Radio Paging and Order No. 28139, Case No. USW-T-99-13 for PageData.

² The Pagers have long since replaced both of the agreements that are the subjects of this proceeding with more modern paging interconnection agreements.

noting that it was undisputed that PageData had voluntarily agreed to the terms of the agreement.³

ANSWER

I.

In response to paragraph 1 of the Petition, Qwest admits only that Radio Paging “operates” Type 1 services. Qwest alleges, on information and belief, that PageData “operates” Type 2 services at this time.

II.

Qwest admits the allegations contained in paragraph 2 of the Petition.

III

In response to paragraph 3 of the Petition, Qwest denies the allegations contained therein, and alleges that every statement of Pagers contained in paragraph 3 of the Petition is utterly false. Qwest affirmatively alleges that the Pagers engaged in voluntary interconnection negotiations with Qwest, and that each of them agreed voluntarily to the terms and conditions of their negotiated agreements as approved by the Commission.

IV.

In response to paragraph 4 of the Petition, Qwest denies same. Qwest specifically denies that the Pagers’ interpretation of Commission Order No. 29555 is correct, or that the change of law provision in each agreement “incorporates” that Order.

V.

Qwest admits the allegations contained in paragraph 5 of the Petition.

³ *Joseph B. McNeal, d/b/a PageData v. Qwest Corporation*, IPUC Case No. QWE-T-03-25.

VI.

In response to paragraph 6 of the Petition, Qwest denies same, except that Qwest admits that the Pagers have requested refunds – even of amounts they have not paid Qwest.

AFFIRMATIVE DEFENSES

First Affirmative Defense

This Commission lacks jurisdiction over the matters set forth in the Petition. Moreover, the Commission has no authority under Idaho law to modify a contract where the public interest is not at stake, as requested by the Pagers. The Commission has no jurisdiction over this dispute under Idaho Code Section 61- 642, as stated by the Commission in Order No. 28687.

Second Affirmative Defense

The Petition fails to state a claim upon which relief can be granted.

Third Affirmative Defense

To the extent the Pagers seek to amend their agreements in the proceeding, they have not followed proper contractual procedures for amendment, nor have they even sought amendment. They never initiated negotiations to implement any change in law. In so alleging, Qwest acknowledges the Pagers have always taken the position that they were not required to pay for any telecommunications services.

Fourth Affirmative Defense

Under the agreements, any amendment negotiated on account of a change in law would have prospective effect only, as of the effective date of the amendment. There is no such thing as a unilateral retroactive amendment of a contract.

Fifth Affirmative Defense

The Pagers have failed to mitigate their damages. For years they refused – for reasons not known to Qwest – to enter into or adopt interconnection agreements that would have provided more favorable terms and conditions of interconnection.

Sixth Affirmative Defense

PageData has not paid Qwest for the services and facilities for which it now seeks refunds.

Seventh Affirmative Defense

The relief sought by Pagers – involuntarily forcing Qwest to retroactively “amend” its agreements with the Pagers – would, if granted by the Commission, violate provisions of the United States and Idaho Constitutions. Such relief, if granted, would constitute an improper law respecting a contract, and a taking of Qwest’s property with due process of law.

RELIEF REQUESTED - ANSWER

Based upon the foregoing answer and defenses, Qwest requests the following relief:

- A. An order denying the Pagers’ prayer for relief.
- B. An order dismissing the Petition with prejudice.
- C. Such other and further relief as may be within the Commission's jurisdiction and to which the Commission deems appropriate.

MOTION TO DISMISS

Voluntarily Negotiated Interconnection Agreements

Qwest firmly believes that no law requires it to deliver transit traffic to the Pagers at no cost, but will not reargue that point here. This Commission has, however, held that parties voluntarily negotiating the terms, prices and conditions of an interconnection agreement “may

negotiate terms prices and conditions that do not comply with either the FCC rules or with the provision of Section 251(b) or (c).” Order No. 28427 at 11, *see also* Order No. 28905. The Commission noted that this comports with the FCC’s statement that “a state commission shall have authority to approve an interconnection agreement adopted by negotiation even if the terms of the agreement do not comply with the requirements of (Part 51).” 47 C.F.R. § 51.3.

Accordingly, the Pagers voluntarily entered into these interconnection agreements which required them to compensate Qwest for the transit traffic delivered to them. Because they agreed to terms which they now wish were different is immaterial. Based on the foregoing, the Petition must be dismissed.

The Dispute Resolution Provisions

Each interconnection agreement at issue in this matter contains detailed procedures for resolving disputes such as the one raised by the Joint Petition. These provisions make dispute resolution mandatory and the Petitioners have completely ignored them. Section 17.16 of the PageData agreement specifically states:

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 conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Arbitration Association (“AAA”). 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. 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 in Denver Colorado. Nothing in this Section shall be construed to waive or limit either Party’s right to seek relief from the Commission or the Federal Communications Commission as provided by state or federal law. No Dispute, regardless of the form of action, arising out of this Agreement, maybe brought by either Party more than two (2) years after the cause of action accrues.⁴

⁴ PageData, USW-T-99-13 Agreement, Section 17.16. Radio Paging, USW-T-99-05, Section 8.15.

The dispute resolution section of the Radio Paging agreement is identical with except the last sentence provides for a three (3) year limitation period. By the terms of these Agreements the Pagers are contractually bound to resolve all disputes through this provision. Accordingly, the Commission should dismiss the Joint Petition.

The Commission Should Decline to Exercise Jurisdiction over this Private Contract Dispute, and has no Legal Obligation to Entertain the Pagers' Petition

The Commission has no legal obligation to entertain this purely private contract dispute, and it would be a waste of time and scarce resources for the Commission to do so. The state of the law regarding paging interconnection remains completely undecided, and the FCC has recently made clear that it intends to entirely scrap its existing intercarrier compensation system, including paging interconnection rules.⁵ Indeed, the FCC staff now opines, nearly a decade after the Metzger Letter, that providing paging carriers with free facilities and services creates uneconomic incentives and distorts economic markets. Clearly the FCC has given up trying to make sense out its now-archaic paging rules, and there is no further contribution to the public interest that this Commission can make by trying to figure out what the FCC might have meant, had it given thought.

The parties and Commission already have two appeals pending at the Idaho Supreme Court. Significant Commission resources have been spent trying to deal with these difficult and unrewarding issues over the last six years. Against that backdrop, the Commission should decline this new opportunity.

⁵ *In the Matter of Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, CC Docket 01-92, 20 FCC Rcd 4685, 4737 (rel. March 3, 2005).

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.⁶

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*, 98 Idaho 692, 571 P.2d 753 (1977); *Agricultural Products v. Utah Power Light* 98 Idaho 23, 557 P.2d 617 (1976).⁷

The Commission has further stated that this was true, even when 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, notwithstanding P21.1 of the Agreement.⁸

⁶ *Bunker Hill v. Washington Water Power*, 98 Idaho 249 (1977); *Lemhi Telephone Company v. Mountain States Tel*, 98 Idaho 692, 571 P.2d 753 (1977); *Agricultural Products v. Utah Power & Light*, 98 Idaho 23, 557 P.2d 617 (1976). See also *Forest Fuel Power v. Washington Water Power* Case No. U- IO08-246, 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- 94-24; Order No. 25918 (1995).

⁷ *Idaho Power Company v. Cogeneration, Inc.*, Case No. IPC-E-94-24 (1996), Order No. 25918 at p. 5.

⁸ *Id.* at pp.3-4.

In this case, the Commission's assertion of jurisdiction over the billing dispute raised by the Petition 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 Pagers' filing.⁹

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

⁹ 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 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 Inter-carrier 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 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.* ¶¶ 86-86.

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.¹⁰

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.¹¹

In a recent case, the Idaho Supreme Court stated:

[W]e recognize that arbitration is a favored remedy. *AT&T Technologies, Inc. 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 Internt'l Union of Operating Engineers v. Morrison-Knudsen Co., Inc.*, 786 F.2d 1356 (9th Cir. 1986), citing *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 582-4, L. Ed. 2d 1409, 80 S. Ct. 1347 (1960). See *Iowa City Community School Dist. v. Iowa City Educ. Ass'n*, 343 N. 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. 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.*, 116 Idaho 443 447, 776 P.2d 452, 456 (1989).¹²

¹⁰ *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).

¹¹ *Idaho Code* §§ 7-901 – 7-922.

¹² *International Assoc. of Firefighters, Local No. 672 v. City of Boise*, 136 Idaho 162; 30 P.3d 940; 2001 Ida. LEXIS 36 (2001).

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.

RELIEF REQUESTED – MOTION TO DISMISS

For the foregoing reasons, Qwest respectfully requests that the Commission deny the relief sought by the Pagers, as well as dismiss the Petition.

DATED this 23rd day of June 2005.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of June, 2005, I caused a true and correct copy of the above and foregoing document to be served, in the manner indicated, on the following:

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