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2004 AUG 20 PM 4:55  
IDAHO PUBLIC  
UTILITIES COMMISSION

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**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

IN THE MATTER OF THE JOINT PETITION  
OF ROBERT RYDER, DBA RADIOPAGING  
SERVICE, JOSEPH MC NEAL, DBA  
PAGEDATE AND INTERPAGE OF IDAHO  
FOR A DECLARATORY ORDER AND  
RECOVERY OF OVERCHARGES FROM U.S.  
WEST COMMUNICATIONS, INC.

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ROBERT RYDER dba RADIO PAGING  
SERVICE, JOSEPH B. MC NEAL DBA  
PAGEDATE AND INTERPAGE OF IDAHO,  
AND TEL-CAR, INC.,

Petitioners-Appellants,

v.  
IDAHO PUBLIC UTILITIES COMMISSION,

Respondent on Appeal,

and

QWEST CORPORATION,

Respondent-Respondent on Appeal.

SUPREME COURT  
DOCKET NO. 29175

IPUC DOCKET NO. T-99-24

**QWEST CORPORATION'S  
MOTION TO STAY ORDER NO. 29555**

Qwest Corporation (“Qwest”) moves the Commission to stay Order No. 29555 (the “Remand Order”) pending a decision on Qwest’s Motion for Reconsideration. Qwest further moves the Commission to enter or continue a stay of the Remand Order during the pendency of Qwest’s appeal of the Remand Order to the Idaho Supreme Court, should such an appeal be filed.

1. Status of Remand Order and Procedural Issues

The Remand Order by its terms already purports to be a final order on reconsideration, and states that an appeal may be taken. If this case were in an ordinary procedural posture, a motion to reconsider a final appealable decision might not be inappropriate. After reviewing the law and procedural rules, however, Qwest believes that not only would it be appropriate for the Commission to further consider the Remand Order, it is not legally certain that an appeal can be taken from the Remand Order without first filing a motion for reconsideration.<sup>1</sup> Qwest will file its Motion for Reconsideration of the Remand Order with the Commission on August 23, 2004. Qwest will urge the Commission to hear its Motion for Reconsideration, however, based on the unusual circumstances presented.

2. The Commission Decided Issues of First Impression in the Remand Order

This protracted litigation has already been on appeal to the Idaho Supreme Court for a substantial period of time, but the parties and Commission stipulated to ask the Supreme Court to remand the case to the Commission for consideration of whether any of the Commission’s previous decisions on the issues of wide area calling or transit traffic should be changed in light

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<sup>1</sup> The requirement that a party file a motion for reconsideration regarding issues to be raised on appeal is jurisdictional. *Eagle Water Co. v. Idaho Pub. Utils. Comm'n*, 130 Idaho 314, 940 P.2d 1133 (1997).

of the reversal of the Federal Communications Commission's decision in *Mountain Communication v. Qwest*<sup>2</sup> by the District of Columbia Circuit Court of Appeals.<sup>3</sup>

In *Mountain*, the DC Circuit Court reversed the FCC on the first of the issues: wide area calling. The Court in effect held that the FCC had abused its discretion by failing to provide a reasoned rationale for its decision that Mountain had to pay Qwest for facilities used to transport traffic to a point of connection outside the landline local calling area, and by failing to reconcile its decision with other paging rulings and its own interconnection rules.<sup>4</sup> Essentially, the Court vacated the FCC's decision and remanded the case to the FCC, implicitly for the purpose of conducting further proceedings to reconsider its decision in light of these inconsistencies. What will happen on that remand is unknown. Nothing productive has yet taken place at the FCC.

On the transit traffic issue, the Court established no law whatsoever. In a bizarre turn of circumstances, Mountain withdrew the issue from the appeal based on a discussion among the judges and counsel at oral argument. Accordingly, the Court did not rule on that issue, and on remand to the FCC, the issue is no longer part of the case.

The FCC's and federal courts' lethargic articulation of the policy and law of paging interconnection under the 1996 Act is one of the worst failures under the Act. The result for the industry and this Commission has been uncertainty and litigation. Indeed, this Commission and the FCC itself are the only two bodies in the country to have made any attempt to comprehensively articulate this law. In its Remand Order, the Commission substantially

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<sup>2</sup> *Mountain Communications, Inc. v. Qwest*, 17 FCC Rcd 2091 (February 2, 2002); Order on Review, 17 FCC Rcd 15135 (July 25, 2002).

<sup>3</sup> *Mountain Communications v. FCC*, 355 F.3d 644 (D.C. Cir. 2004).

<sup>4</sup> *Mountain Communications v. FCC*, 355 F.3d at 649.

changed its previous holdings on the wide area calling and transit traffic issues. In so doing, the Commission had to guess what the law may be.

3. Grounds for Stay

In its Motion for Reconsideration, Qwest will argue that the Commission's decisions on these issues wrongly predict how the FCC and federal courts will ultimately articulate the law. Because the Remand Order presents the first articulation of paging interconnection law following the *Mountain Communications* reversal, the decision may have broad implications. This is particularly true with respect to the transit traffic issue, where the Commission seems to have ruled that Qwest must refund past transit traffic charges to paging companies, even though the FCC has said Qwest may assess such charges, and even where the Pagers did not request data from which they could bill the originating carrier.

Qwest interconnects with approximately 200 paging companies in its 14-state territory. Qwest will show on reconsideration that the revenue associated with transit traffic for paging companies is approximately \$300,000 per month. Qwest's exposure on past transit charges has not been calculated, but it surely is many millions of dollars.

Idaho Code § 61-626 and Rule 324, provide for stay of an Order to be entered by the Commission.<sup>5</sup> A stay can be important and necessary pending reconsideration or appeal, to protect parties' due process rights.<sup>6</sup>

As Qwest will explain in its Motion for Reconsideration, Qwest's due process rights are at stake. Qwest will show that the requirement that ILECs provide paging companies with free

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<sup>5</sup> See IDAPA 31.01.01.324.

<sup>6</sup> *Utah Power Light Co. v. Idaho Public Utilities Commission* 107 Idaho 47, 50, 685 P.2d 276, 279 (1984) (stay to prevent confiscation and irreparable loss); *Joy v. Winstead* 70 Idaho 232, 238, 215 P.2d 291 293 (1950).

dedicated interconnection facilities, has been challenged as a taking in the past, but the FCC and courts have avoided the issue in various ways. However, if the Idaho Commission has accurately articulated the law of paging interconnection in its Remand Order, then the government's taking of Qwest's property without compensation is complete. Qwest will receive no compensation for the dedicated facility it must provide to paging carriers.

Finally, as will be detailed in Qwest's Motion, the Commission has ordered Qwest to refund or credit certain amounts to the paging carriers in this case, and the extent of that obligation is unclear. Qwest will not be able to agree with the Pagers as to whether they are entitled to credits or refunds, thus making appropriate a stay of the Remand Order until the parameters of that obligation can be clarified.

DATED this 20<sup>th</sup> day of August, 2004.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20<sup>h</sup> day of August, 2004, 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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William J. Batt

