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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, 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.

SUPREME COURT
DOCKET NO. 29175

IPUC DOCKET NO. T-99-24

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

**QWEST CORPORATION'S
PETITION FOR RECONSIDERATION,
ALTERATION OR AMENDMENT OF
ORDER NO. 29555**

Petitioners-Appellants,

v.
IDAHO PUBLIC UTILITIES COMMISSION,

Respondent on Appeal,

and

QWEST CORPORATION,

Respondent-Respondent on Appeal.

ORIGINAL

Introduction

Qwest Corporation (“Qwest”) hereby requests, pursuant to Idaho Code § 61-626 and RP 331, that the Commission reconsider Order No. 29555 (the “Remand Order”) issued in this case on August 2, 2004. As explained below, Qwest requests in the alternative, pursuant to Idaho Code § 61-624 and RP 326, that the Commission alter or amend the Remand Order.

In this long litigation, the Commission has before been in the unenviable position of attempting to predict what legal principles the FCC and federal courts will articulate concerning interconnection between incumbent local exchange carriers (“ILECs”) and paging carriers. The Commission has spent considerable resources on this case and others brought by the three petitioners in this case (the “Pagers”), and has issued several excellent, well-reasoned decisions. Regrettably, the development of federal law concerning paging interconnection has been inconsistent and unpredictable.

Until January 2004, it appeared that – eight years into the Telecommunications Act of 1996 – the most controversial paging interconnection issues were finally close to resolution. With the reversal of the FCC’s *Mountain Communications* decision¹ by the District of Columbia Court of Appeals,² the legal turmoil of three to four years ago is revived. Meanwhile, the FCC continues to sweep unsolvable issues such as the ones present here, into its Intercarrier Compensation Docket, now pending for three years itself. The remanded *Mountain* case now sits inactive at the FCC, with the parties so far unable to reach settlement or negotiate an interconnection agreement. Thus, for the foreseeable future, as long as this Commission continues to act as the proxy for the FCC and attempts to divine what the FCC may do, if it does anything, the

¹ *Mountain Communications, Inc. v. Qwest*, 17 FCC Rcd 2091 (February 2, 2002); Order on Review, 17 FCC Rcd 15135 (July 25, 2002).

² *Mountain Communications v. FCC*, 355 F.3d 644 (D.C. Cir. 2004).

Commission will be on uncertain ground.

In its Remand Order, the Commission played the role the FCC should be playing in the *Mountain* case. The Commission stepped forward and made unprecedented rulings regarding wide area calling and transit traffic issues. Qwest disagrees with the Commission's decisions on those issues and thus files this Petition; nevertheless, Qwest respects the Commission no less for its excellent work in this case, and its willingness to try to make sense out of these frustrating issues and rules, that, in many ways, defy logic.

Qwest first reviews the Commission's original decisions in which it decided to take jurisdiction over paging interconnection matters. These decisions show that the basis of jurisdiction is tenuous. Next, we review the *Mountain* decision, and offer to show on rehearing that the interconnection at issue is factually and legally distinguishable from the Pagers here. We then discuss the billing credits issues raised in the Remand Order, and finally, we point out constitutional issues raised by the Order.

Basis of the Commission's Jurisdiction

When the Pagers filed this case in 1999, the Commission was unsure of its jurisdiction and ordered the parties to brief the issue of jurisdiction. The Commission then issued Order No. 28427, which after finding jurisdiction dismissed both Counts of the Pagers' Petition on the merits.³ The Commission found jurisdiction under Idaho Code section 62-626, governing

³ Order No. 28427, issued July 5, 2000. Count I alleged that Qwest had improperly charged Pagers for interconnection facilities, listing specific tariffed USOCs. Count II alleged that Qwest had discriminated against the Pagers by giving other paging companies more favorable interconnection terms.

subscriber complaints.⁴ Because Qwest's charges conformed to the Title 62 price lists, the Commission found that the Petitioners' claims failed as a matter of law.

The Commission considered, but rejected, the applicability of the "claw-back" provision, Idaho Code section 62-605(5), because it found that Qwest's charges were not adverse to the public interest. The Commission rejected Pagers' argument that the charges were adverse to the public interest because they were "illegal," stating:

The Commission rejects this argument because it finds that every person should pay the fair costs for receiving service or having facilities dedicated to that individual's use. The Commission finds that endorsing the Petitioners' position – providing *free* dedicated facilities and services to anyone – is not in the public interest and may be potentially unconstitutional. It is not in the public interest to allow pager customers free use of the U S WEST network facilities and then expect other customers to shoulder the expenses of the dedicated pager facilities.⁵

Finally, the Commission rejected Pagers' suggestion that jurisdiction was proper under Idaho Code Section 62-615(1).⁶ The Commission stated:

This statute declares the Legislature's intent that the Commission act in accordance with "applicable" federal law. It does not incorporate federal law. It does not override existing Idaho statutory law and does not make the Commission the "handmaiden" of the FCC. It only allows the Commission to implement those portions of the Federal Telecommunications Act of 1996 that specifically delegate or recognize state Commission authority to act. It does not require the Commission to enforce FCC rules or actions independent of a specific statutory delegation to the Commission or recognition of existing Commission authority.⁷

⁴ "The commission shall have the authority to investigate and resolve complaints made by subscribers to telecommunication services which are subject to the provisions of this chapter . . . whether price and conditions of service are in conformance with filed tariffs or price lists, The commission may, by order, render its decision granting or denying in whole or in part the subscriber's complaint or providing such other relief as is reasonable based on the evidence presented to the commission at the hearing. . . ." *Idaho Code* § 62-616.

⁵ Order No. 28427 at p. 8.

⁶ "The commission shall have full power and authority to implement the federal telecommunications act of 1996, including, but not limited to, the power to establish unbundled network element charges in accordance with the act." *Idaho Code* § 62-615(1).

⁷ Order No. 28427 at p. 8-9 (underlining original).

The Commission further observed that it appeared to the Commission that it was the FCC's rules that were illegal:

The Commission finds that the items contained in the disputed Price List are those facilities and equipment necessary to allow the Petitioners to interconnect with the U S WEST network. The Commission finds that Congress intended, as is constitutionally required, that these facilities and equipment be provided on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." Congress did not say they should be provided *free of charge*. Certainly, Congress cannot and has not specifically authorized the Idaho Commission to impose interconnection responsibilities free of charge.⁸

Almost simultaneously with the Commission's Order, the FCC issued its decision in the *TSR Wireless* case.⁹ The Pagers petitioned for reconsideration. Qwest suggested that it would be beneficial to the parties if the Commission took jurisdiction for the purpose of determining what credits were due pagers under the FCC's *TSR Wireless* order, and the Commission agreed, granting reconsideration.¹⁰ The parties were ordered to make further filings and attempt settlement.¹¹ The discussions were not productive.

The Commission issued its "Liability Order" on December 20, 2000.¹² The Commission found jurisdiction to decide the "overcharges" issue and reinstated Count I of the Petition; the Commission found the subscriber complaint provisions of §62-616 applicable because Qwest had acquiesced in the FCC's ruling that Idaho tariffed charges were preempted.¹³ The Commission stated:

⁸ *Id.*

⁹ *TSR Wireless v. U S WEST, Memorandum Opinion and Order*, 15 FCC Rcd 11166 (2000), *aff'd sub nom. Qwest Corporation v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

¹⁰ Order No. 28473, issued August 9, 2000.

¹¹ *Id.*

¹² Order No. 28601, issued December 20, 2000.

¹³ *Id.* at pp. 10-11.

In the present case the Commission believes, despite its feelings about FCC decisions, that it is in the public's best interest to accept Qwest's offer and agreement to comply with FCC paging decisions which it recognizes governs this matter, pending appeals.¹⁴

The Commission established the ground rules in this Liability Order, providing the dates and time periods during which each Payer was entitled to "a billing credit or refund." The Commission also ruled that "Petitioners are not entitled to recovery of amounts charged for foreign exchange service or wide area calling services, i.e. WATS under the Commission's decision."¹⁵

The Payers filed a Petition for Amendment of the Liability Order, and the Commission granted the Petition in part in Order No. 28626.¹⁶ As relevant here, the Commission refused to amend the Liability Order's reference to "billing credit," stating:

The Petitioners request that the language "a billing credit or" be struck from the third, fourth, fifth and sixth ordering paragraphs on pages 12 and 13 of Order No. 28601. *See also*, Petition to Amend, Exh. 1. If this language were removed, the Petitioners would presumably be entitled "reimbursements" but not billing credits. * * * * The Commission finds that Petitioners have not provided any justification for striking the language "a billing credit or" as they have requested. For this reason, they have failed to comply with Commission Rules 326 and 331. IDAPA 31.01.01.326 and .331. Accordingly, this request is denied.¹⁷

With this ruling, the Liability Phase ended. Order Nos. 28601 (the Liability Order) and 28626 (on the Petition to Amend) were both final, appealable orders. No party appealed, thus making matters decided in the Liability Phase settled as a matter of law, and establishing the law of the case on those issues.

¹⁴ *Id.* at p. 11.

¹⁵ *Id.* at n.15.

¹⁶ Order No. 28626, issued February 5, 2001.

¹⁷ *Id.* at 2.

The *Mountain Communications* Decision as Applied to This Case

The parties agreed to a procedure on remand whereby they would address, and the Commission would examine, the effect of the D.C. Circuit's decision in *Mountain Communications* on two issues: wide area calling, and transit traffic. In both cases, we start with the language in Order No. 28601, by which the Commission articulated that it found jurisdiction to reinstate Count I and determine the disputes between the Pagers and Qwest:

[T]he Commission finds that there is agreement among the parties that the Petitioners are entitled to a billing credit or reimbursement for the charges they have incurred for the facilities used to deliver local LEC-originated traffic to the Petitioners at least sometime after late 1996.¹⁸

Wide Area Calling

On the issue of wide area calling, the instant case differs significantly from *Mountain*. In *Mountain*, the issue of whether the network configuration constituted "wide area calling" was appealed to the DC Circuit. Here, however, the Commission decided that the Pagers were not entitled to recover for wide area calling facilities in final, appealable orders. Those orders were not appealed, thus legally foreclosing any change now.

Moreover, though, whatever the facts were in the *Mountain* record before the DC Circuit Court, the record presented in the Credit Phase of this case clearly established some critical facts that were missing in *Mountain*. The Circuit Court confusion over the "peculiar" *Mountain Communications* network configuration:

Here, for reasons not entirely clear to us, Qwest does not charge its customers for what it regards as a toll call if the originating number and the paging number are in the same local calling area. Accordingly, *Mountain* has no incentive to enter into a wide area calling arrangement with Qwest. *Mountain's* system of interconnection provides it no advantages other than those to which, presumably,

¹⁸ Order No. 28601 at p. 10. (Emphasis added.) In a footnote to the critical language, the Commission stated Pagers were not entitled to recovery of amounts charged for foreign exchange service or wide area calling services under the Commission's decision. *Id.* at n.15.

it is entitled for free. The Commission nevertheless chooses to term what Mountain has ordered from Qwest as wide area calling “service,” which presto becomes a reasonable facsimile of a wide area calling agreement. The FCC’s characterization of Mountain’s arrangement as a wide area calling “service,” – sort of a constructive agreement – is rendered even more dubious by the fact that there are no additional services provided by wide area calling. The only difference between wide area calling and traditional telephony is the entity billed for the tolls.¹⁹

The Court also expressed skepticism over whether the paging company would have voluntarily agreed to the arrangement.²⁰ Clearly the Court did not understand this issue, unlike the Hearing Officer and Commission in our case. The configuration was an old, probably pre-Act, legacy where the paging carrier had purchased the dedicated facilities out of state tariffs in order to obtain a more ubiquitous presence within the state. In our case, it was well established at trial that both TelCar and PageData chose to purchase wide area calling facilities from Qwest’s Idaho Price List. The Hearing Officer found:

Mr. Casper testified that Tel-Car has used facilities that allow it to avoid the payment of toll charges that would otherwise have applied to calls reaching their interconnection points. Tel-Car used the facilities to avoid toll charges to Hailey to Twin Falls, but he considered it significant that the facilities were within the LATA. (Transcript page 145)²¹

The petitioners suggest that they have not so agreed; therefore, this “agreement” provision does not apply. Under the evidence before us, however, we may read petitioner’s prior relationships with Qwest as intending such an agreement and such a reduction. Certainly there was motivation on the petitioners’ part; they gained the benefit of a toll reduction that made their services cheaper for callers to gain access to in reaching paging customers.²²

The record here refutes any claim that there has been no requisite agreement. The history of petitioners’ dealings with Qwest cannot be interpreted fairly to allow them retroactively to deprive Qwest of revenues in lieu of intrastate toll charges.

¹⁹ Mountain Communications v. FCC, supra n.2, p. 3.

²⁰ *Id.*

²¹ Proposed Order, p. 17.

²² Proposed Order, p. 18.

Doing so would allow petitioners to keep the benefits that came from decisions that the record shows they themselves undertook to make their network more valuable to paging customers. The clearly appropriate conclusion in light of the FCC's decision is that pagers who have made retail tariff orders, and who have had the benefit of facilities that used not only to deliver traffic, but also to reduce toll charges, should pay for them as the record shows they agreed to do. Simple logic and fairness would compel this same result even had the FCC not so limited its ruling.²³

It is important to note that the D.C. Circuit's decision did not rule that ILECs must cease charging for legitimate wide area calling arrangements. To be sure, the Court raised a number of questions, but stopped short of holding that ILECs cannot charge for wide area calling arrangements. Unfortunately, the ruling could have been more clear in its exact holding, instead of finding it unnecessary to reach critical issues. Thus, disagreement between Qwest and Mountain Communications over the meaning of the D.C. Circuit's decision has prevented settlement or even agreement on a procedure to move forward. Meanwhile, the FCC has done nothing; Qwest is hopeful, however, that sooner or later the FCC will realize it must deal with the remanded *Mountain* case.

For these reasons, the Commission should avoid getting ahead of the federal regulators and the Court. Qwest believes it is reasonably likely that, by the time of oral argument in the Pagers' Supreme Court appeal, there will be a clarification of federal law that may shed some light on a way out of the present difficulties facing the parties, the Commission, and the Idaho courts.

Wide Area Calling: Calculation Error in Remand Order

Even if the Commission declines to reconsider the merits of its decision on the wide area calling issue, Qwest believes there is a calculation error. The Commission appears to have

²³ Proposed Order, p. 19.

accidentally included 800 Pageline in the services to be credited, contrary to the language of the Remand Order itself.

Not only did the Commission adopt the provisions from the Hearing Officer's proposed Order; the Commission went to considerable trouble to carefully articulate the factual basis for, and policy reasons behind, such a rule. The Commission found as a matter of fact that the Pagers they themselves decided to order, and pay for, the wide area calling/ toll reduction facilities.²⁴ In Order No. 29064, the Commission stated:

These arrangements include: 800 service, DID configurations, reverse billing or reverse toll, FX (foreign exchange), and other possible configurations such as frame relay.²⁵

Transit Traffic

The Commission's decision on the transit traffic issue is of great concern to Qwest. The Commission has gone far any other court or commission in imposing transit-related obligations on ILECs. If rehearing is granted, Qwest will present evidence regarding the difficulties in the measurement of such traffic. Qwest currently does not know if it will be able to develop a transit record product for purchase of Type 1 services. Qwest would like an opportunity to present its case to the Commission.

The Commission's decision will have huge ramifications in the industry. Today, all ILECs charge pagers for transit traffic, and with Type 1, a transit factor is invariably used. No ILECs, to Qwest knowledge, have any transit record product. But at any rate, Qwest believes that a ruling of this magnitude, based on Qwest's answers to a few limited questions asked by the Commission, simply does not provide enough procedural due process, and certainly does not put

²⁴ Order No. 29064 pp. 26-31; Order No. 29140 at pp. 36-40.

²⁵ Order No. 29064 at 28.

the Commission in the best position of receiving all critical information before taking such a bold step out in front of other regulators of the telecommunications industry.

Thus, Qwest requests that the Commission grant rehearing on this issue, and convene a scheduling conference to discuss what type of hearing would provide a sufficient factual record for the Commission's decision.

Qwest respectfully asks the Commission to revisit its transit decision. There is nothing in the Circuit Court's *Mountain* decision requiring such a result. In fact, the issue was simply dropped. There is no legal decision on these issues, either requiring an ILEC to cease charging for transit traffic, or to provide OCN records, much less even any hint of a decision that an ILECs must refund past charges for transit traffic.

For the foregoing reasons, the Commission should grant Qwest Corporation's Petition for Reconsideration on Order No. 29555, or in the alternative, Qwest Corporation's Alteration or Amendment of Order No. 29555.

DATED this 23rd day of August, 2004.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd 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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