BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

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.

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

Petitioners/Appellants/Cross Respondents,

v.
IDAHO PUBLIC UTILITIES COMMISSION,

Respondent/Cross Respondent,

and

QWEST CORPORATION,

Respondent/Respondent on Appeal/Cross Appellant.

Supreme Court Docket No. 29175

Idaho Public Utilities Commission Docket No. T-99-24

BRIEF OF RESPONDENT/CROSS APPELLANT QWEST CORPORATION

Appeal from the Idaho Public Utilities Commission

JIM JONES
JIM JONES & ASSOCIATES
1275 Shoreline Lane
Boise, Idaho 83702-6870

Attorneys for Petitioners/Appellants/Cross Respondents (Robert Ryder d/b/a Radio Paging Service, Joseph B. McNeal d/b/a PageData and Interpage of Idaho, and TelCar, Inc.)

WILLIAM J. BATT, ISB No. 2938
BATT & FISHER, LLP
U.S. Bank Plaza, Suite 500
101 S. Capitol Boulevard
Post Office Box 1308
Boise, ID 83701

ADAM SHERR
QWEST COMMUNICATIONS, INC.
1600 7th Avenue - Room 3206
Seattle, WA 98191
(206) 398-2507

Attorneys for Respondent/Respondent on Appeal/Cross Appellant (Qwest Corporation)

DON HOWELL
IDAHO PUBLIC UTILITIES COMMISSION
472 West Washington
Boise, ID 83702

Attorneys for Respondent/Cross Respondent (Idaho Public Utilities Commission)

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

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. --- ROBERT RYDER dba RADIO PAGING SERVICE, JOSEPH B. MC NEAL DBA PAGEDATE AND INTERPAGE OF IDAHO, AND TEL-CAR, INC., Petitioners/Appellants/Cross Respondents, v. IDAHO PUBLIC UTILITIES COMMISSION, Respondent/Cross Respondent, and QWEST CORPORATION, Respondent/Respondent on Appeal/Cross Appellant.	**Supreme Court Docket No. 29175** **Idaho Public Utilities Commission Docket No. T-99-24**

BRIEF OF RESPONDENT/CROSS APPELLANT QWEST CORPORATION

Appeal from the Idaho Public Utilities Commission

JIM JONES
JIM JONES & ASSOCIATES
1275 Shoreline Lane
Boise, Idaho 83702-6870

Attorneys for Petitioners/Appellants/Cross Respondents (Robert Ryder d/b/a Radio Paging Service, Joseph B. McNeal d/b/a PageData and Interpage of Idaho, and TelCar, Inc.)

WILLIAM J. BATT, ISB No. 2938
BATT & FISHER, LLP
U.S. Bank Plaza, Suite 500
101 S. Capitol Boulevard
Post Office Box 1308
Boise, ID 83701

ADAM SHERR
QWEST COMMUNICATIONS, INC.
1600 7th Avenue - Room 3206
Seattle, WA 98191
(206) 398-2507

Attorneys for Respondent/Respondent on Appeal/Cross Appellant (Qwest Corporation)

DON HOWELL
IDAHO PUBLIC UTILITIES COMMISSION
472 West Washington
Boise, ID 83702

Attorneys for Respondent/Cross Respondent (Idaho Public Utilities Commission)

TABLE OF CONTENTS

Cases

Statutes

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Petitioners/Appellants/Cross Respondents are three Idaho paging companies ("Pagers") that interconnected with Qwest Corporation ("Qwest") in southern Idaho. The disputes in both the appeal and cross appeal are essentially billing disputes that arise out of legal confusion caused by the Federal Communications Commission's ("FCC") partial federal preemption of Qwest's Idaho service catalog under which the Pagers purchased services.

Qwest's cross appeal arose long after the Pagers had filed their appeal to this Court. While the Pagers' appeal was pending in early 2004, the parties stipulated to remand the case to the Commission for further consideration of the effect of the reversal of an FCC decision by the District of Columbia Circuit Court of Appeals. On remand, the Commission issued Order Nos. 29555 and 29603. Qwest contends the Commission erred in issuing those recent orders.

II. COURSE OF PROCEEDINGS

The Brief of Appellants does not paint a complete picture of this extremely complicated litigation. Qwest therefore provides additional information.

A. Petition, Dismissal and Reconsideration in "Liability Phase"

Count I of the Petition alleged that Qwest had assessed certain charges under its Idaho tariff that were prohibited by federal law. Count II alleged discrimination. *R, Vol. 1, pp. 4-5.* After taking extensive briefing on the question whether it had jurisdiction to entertain the petition, the Commission took jurisdiction but dismissed both counts of the Petition in Order No. 28427, issued July 5, 2000. *R, Vol. 1, pp. 63-74.* The Commission found that the Pagers were essentially demanding free facilities from Qwest, and that federal law could not compel the Commission to enforce a federal law, particularly one that the Commission believed would result

in an unconstitutional taking of Qwest's property without just compensation. *R, Vol. 1, pp. 71-74.*

Almost simultaneously, however, the FCC issued its decision in *TSR Wireless v. U S WEST,* in which the FCC held that since November 1, 1996, its rules had required Qwest and other local exchange companies (LECs) to provide free interconnection facilities to paging carriers, at least to the extent those facilities carried traffic that originated on the LECs' network.[1] The Pagers petitioned for reconsideration (*R, Vol. 1, p.77)* and Qwest supported reconsideration. *R, Vol. 1, p.111.*

The Commission issued what it described as its "Liability Order" on December 20, 2000.[2] *R, Vol. 1, p.128.* 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. *R, Vol.1, p. 137.* The Commission stated:

> 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.[3]

The Commission established ground rules in this Liability Order, providing the dates and time periods during which each Pager was entitled to "a billing credit or refund." *Id.* Furthermore, this Order required the parties to exchange detailed materials to attempt to informally resolve this amount of billing credit or reimbursement each pager was due. *Id.*

The Liability Order was a final appealable order on reconsideration, but no appeal was taken by any party. The Pagers, instead, filed a Petition for Amendment of the Liability Order,

---

[1] *Memorandum Opinion and Order,* 15 FCCR 11166 (2000), *aff'd sub nom. Qwest Corporation v. FCC,* 252 F.3d 462 (D.C. Cir. 2001).
[2] Order No. 28601, issued December 20, 2000.
[3] Order No. 28601 at p. 11, *R, Vol.1, p. 138.*

R. Vol. 1, p. 142. The Commission partially granted the Petition in Order No. 28626 issued February 5, 2001. *R, Vol. 1, p. 182.* Again, none of the parties filed any appeal from this final appealable order.

B. Credit Phase

Unfortunately, the parties were unable to informally settle what amount of billing credit or reimbursement each Pager was due. Thus, the Commission appointed a hearing examiner to hear and recommend a decision regarding the aforementioned issue.[4] After the evidentiary hearing on this issue, Hearing Officer John Antonuk issued his Proposed Order on November 30, 2001. *R, Vol. III, p.399.* Qwest presented detailed calculations showing the amount of credits it believed were owing to the Pagers under the FCC's *TSR Wireless* decision. See generally *R, Vol. II, pp. 294-318.* Essentially, the Hearing Officer found Qwest's evidence more credible that of the Pagers. In his Proposed Order, the Hearing Officer ordered Qwest to make modifications to its calculations. *R, Vol. III, pp. 419-422.* The credit calculations included interest. *Id.* Qwest performed the modified calculations and applied credits to each of the Pagers' accounts, accordingly. *Id. at pp.482-496.*

The Pagers filed timely exceptions to the Proposed Order. *R, Vol. III, p. 423.* However, nearly six months later, they sought to supplement their exceptions with various matters and new evidence. *Id. at 513.* On July 17, 2002, the Commission issued Order No. 29064, a comprehensive order adopting in part the Hearing Officer's proposed decision, and ruling on Pagers' exceptions. *R, Vol. V, p. 789.* The Commission ordered Qwest to make further changes to the credit calculations, and Qwest applied the revised credits to the Pagers' accounts. *Id. at 821.*

[4] Idaho Public Utilities Commission Order No. 28683.

The Pagers filed for reconsideration on August 7, 2002, *R, Vol. V, p. 831,* and the Commission partially granted their petition by Order No. 29140 issued November 1, 2002. *Id. at 863.* The Commission again ordered Qwest to provide additional billing credits and interest to the Pagers, and Qwest applied the revised credits to the Pagers' accounts, *Id. at 916,* thus ending the Credit Phase.

C. Remand to Consider *Mountain Communications* Decision and Cross Appeal

After *TSR Wireless* , the FCC issued several decisions concerning LEC- paging interconnection, one of which was *Mountain Communications v. Qwest.*[5] The Idaho Commission relied on the FCC's *Mountain Communications* decision in its rulings in the Credit Phase. In January 2004, the Court of Appeals for the District of Columbia reversed the FCC's decision in *Mountain,*[6] and the parties to this appeal stipulated the case could be remanded back the Commission to consider whether it should modify any of its rulings. *R. Vol. V, p. 997.*

In Order No. 29555, the Commission ruled the Pagers were entitled to additional "refund credits," and ordered Qwest to calculate those. *R. Vol. V, p. 973.* Qwest performed the calculations, moved for a stay of Order No. 29555, and petitioned for reconsideration, alteration, or amendment of Order No. 29555. *Appeal Record, Ex. 9.* The Commission issued Order No. 29603 on October 5, 2004, raising issues about whether the Pagers were entitled to credits or cash refunds. As of this writing, these matters remain under discussion and are not resolved.

Qwest filed its Notice of Cross Appeal on September 13, 2004.

III. STATEMENT OF FACTS

> "It would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly

[5] *Mountain Communications, Inc. v. Qwest,* 17 FCCR 2091 (February 2, 2002); Order on Review, 17 FCCR 15135 (July 25, 2002), .
[6] *Mountain Communications, Inc. v.F.C.C.,* 355 F.3d 644 (2004)

affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 397, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999).

A. The Telecommunications Act and Cooperative Federalism

The Telecommunications Act of 1996[7] opened local telephone markets up to competition. The United States Supreme Court explained:

> Until the 1990s, local phone service was thought to be a natural monopoly. States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC), which owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network.

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 *(1999).*

One federal court succinctly explained the acts mechanisms in forcing competition:

> Through sections 251 and 252, [the Act] attempts to alleviate economic barriers, recognizing that an incumbent LEC's network provides it with a competitive advantage because the cost of constructing a new, wholly redundant network is generally prohibitive. To that end, the TCA subjects incumbent LECs to "a host of duties intended to facilitate market entry" including "the LEC's obligation under *47 U.S.C. § 251*(c) . . . to share its network with competitors." *Iowa Utils. Bd., 525 U.S. at 371.* Section 251(c) provides three ways a competitor can gain access to an incumbent LEC's network: "It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network 'on an unbundled basis'; and it can interconnect its own facilities with the incumbent's network." *Id.* The TCA also requires an incumbent LEC to allow a competitor to collocate "equipment necessary for interconnection or access to unbundled network elements." *47 U.S.C. § 251*(c)(6).

Bell Atlantic-Penn v. Penn. Pub. Util. Comm., 107 F. Supp. 2d 653, 655 (E.D.Penn. 2000). The Act provides an unprecedented, most peculiar, "cooperative federalism," in which state public utilities commissions are required to take the laboring oar in implementing the negotiation and arbitration of interconnection agreements between incumbent LECs and the new competitors:

---

[7] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

> The Act requires that an incumbent LEC and any competitor negotiate an agreement in good faith. See *47 U.S.C. § 251*(c)(1). During these negotiations, any party may request the state commission that regulates telephone services to mediate. See id. § 252(a)(2). In the event that the negotiations fail, the TCA provides that either party may petition the state commission to arbitrate any open issues. See id. § 252(b). An agreement encompassing the access methods detailed in section 251(c), whether arrived at privately or through compulsory arbitration, must be approved by the state commission. See id. § 252(e)(1). The TCA limits the grounds under which a commission may reject an agreement under federal law and regulations, see id. § 252(e)(2), while preserving a state's authority to impose additional conditions that do not conflict with federal law. See id. § 252(e)(3) (stating that, notwithstanding section 252(e)(2) but subject to *47 U.S.C. § 253,* "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement[.]"). If a state commission fails to act under section 252, the Federal Communications Commission (FCC) will preempt the state commission's jurisdiction and responsibilities over the access agreements. See *Id.* § 252(e)(5); *MCI Telecomm. Corp. v. Public Serv. Comm'n,* 216 F.3d 929, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *3 (10th Cir. June 20, 2000) (same).
>
> "In any case in which a State commission makes a determination under . . . [section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements" of sections 251 and 252. *47 U.S.C. § 252*(e)(6). Moreover, "no State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement" under section 252. Id. § 252(e)(4).

Id. at 656-57.

Thus state commissions are instructed to perform these duties under the Act, but their actions are reviewed by federal district courts; indeed state courts, according to the Act, shall have no jurisdiction to review those actions of the state commissions.

To Qwest's knowledge, the instant case is unique in the United States, in that a state commission has valiantly taken on the task of attempting to discern what the FCC intended in its various paging pronouncements. Nor has any other state court dealt with paging interconnection issues under the Act.

B. Paging Interconnection Under the Act

Generally the 1996 Act left alone existing state regulations, such as the tariffs in question in this case, so long as they did not restrict market entry; thus, existing state tariffs on file, from which competitive carriers purchased interconnection services and facilities, remained intact until the competitive carrier sought to negotiate an interconnection agreement under the act. Not so with paging interconnection. In the *TSR Wireless* decision issued June 2000, the FCC ruled that since November 1, 1996 pagers had been legally entitled to at least some of the benefits of the Act even without seeking negotiation of an interconnection agreement as the Act contemplated.[8]

Prior to *TSR Wireless* , the Act, as implemented by the FCC, had already created uncertainty and litigation concerning in the law governing LEC-paging company interconnection. The Act set up a system of "reciprocal compensation" for local interconnection between telecommunications carriers.[9] The system was designed to roughly cover the costs of interconnection by compensating interconnecting carriers that exchange two-way traffic. Under reciprocal compensation, each interconnecting carrier compensates the other carrier for cost of "terminating" calls that originate on its network. Thus, if a Qwest customer makes a local call to the customer of a competing local exchange company, Qwest will compensate the other carrier for its costs in terminating the call.

The interconnection of one-way paging carriers and local exchange carriers (LECs) presented unique and controversial issues under the Act and reciprocal compensation principles. Unlike other new entrants and interconnectors, paging carriers do not provide telephone exchange service to their subscribers. Moreover, paging subscribers do not initiate calls; traffic is entirely one-way. Instead of paying for exchange service, paging subscribers pay the paging

---

[8] *TSR Wireless* at __.
[9] 47 U.S.C. § 251(b)(5).

company to broadcast paging signals to their paging devices. In a typical call, a Qwest customer originates the call by dialing a number assigned to the paging provider; that number is associated with a specific paging device. The paging terminal records the dialed number. After the Qwest caller hangs up, the paging terminal then broadcasts the dialed number to all paging devices served by the network. *R. Vol. I, pp. 66.* In late 1996, the FCC issued Rules interpreting the Act. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order,* 11 FCCR 15499, 16024-25 PP1056-59 (1996) ("Local Competition Order"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC,* 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v.* FCC, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 397, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999). The FCC ruled that LEC—paging interconnection should be treated at least in some respects like interconnection between LECs and other interconnectors.[10] As a result, both LECs and paging companies brought litigation, both before the FCC and state public utility commissions.

C. The *TSR Wireless* Decision

Around the beginning of 1998, several paging companies, including the **Debtor**, filed complaints at the FCC against LECs, including Qwest.[11] Like the Pagers here, the complaints were based on the LECs' charges for interconnection facilities, such as trunks ordered from a LEC by a paging carrier to connect the paging system to the LEC's network. The LECs maintained that without an interconnection agreement, the charges for such facilities were governed by state-approved tariffs.

In its June, 2000 *TSR Wireless* decision, the FCC determined the following:

---

[10] 47 C.F.R. §51.703(b), promulgated by the FCC under the Act in connection with the Local Competition Order, provides that paging carriers are entitled to receive reciprocal compensation even though the traffic is not reciprocal.
[11] See, eg. *TSR Wireless LLC v. US West Communications, Inc.*, 15 FCCR 11166 (2000).

- LECs could not charge paging carriers for interconnection facilities used to carry LEC-originated traffic;[12]
- LECs could charge for services/ facilities "not necessary for interconnection;"[13]
- LECs could configure their networks as toll networks so that the originating caller would pay a toll charge to reach a paging subscriber; in such case, the paging provider can choose to "buy down" the toll, and "nothing in the [FCC's] rules prohibits a LEC from charging the paging carrier for those services."[14]

At issue in Qwest's cross appeal is whether it must reimburse the Pagers for facilities used to carry another carrier's traffic. This traffic, referred to as "transit traffic," originates with a third carrier but is delivered through Qwest switches and facilities to the Pagers. In *TSR Wireless,* the FCC indicated that paging companies must pay for facilities to the extent they carry transit traffic.

> Section 51.703(b) of the rules affords carriers the right not to pay for delivery of local traffic originated by the other carrier. However, Complainants are required to pay for "transiting traffic," that is, 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. See *Local Competition Order, 11 FCCR at 16016-17.*[15]

Qwest appealed the FCC's *TSR Wireless* decision to the District of Columbia Circuit Court of Appeals. Meanwhile, Qwest immediately complied with the FCC's ruling pending the outcome of its appeal. *R. Vol. I, p. 113.* To implement the decision, Qwest ceased charging paging carriers for local interconnection facilities except to the extent such facilities are used to

---

[12] *TSR Wireless*, ¶ 29.
[13] *Id*, ¶30.
[14] *Id.*, ¶31.
[15] *Id.*, ¶20 and n. 70.

carry transit traffic. The Circuit Court denied Qwest's petition for review of *TSR Wireless* on June 15, 2001.[16]

D. The *Mountain Communications* Decision

Meanwhile, the FCC has issued at eight other paging interconnection decisions, generally affirming its position on transit traffic and providing welcome guidance to the industry – and to the Idaho Commission.[17] Unfortunately, the recent reversal of *Mountain Communications* has provided a considerable setback.

In *Mountain,* the FCC ruled that where a paging company had ordered dedicated facilities to cross local calling areas, so that landline callers would not incur a toll charge in dialing the paging numbers, this arrangement was in essence a "toll buy-down service" and that the paging company must pay for those facilities outside the local calling area.[18] The Circuit Court reversed the holding, vacated the ruling, and remanded the matter back to the FCC, stating that the ruling was inconsistent with other rulings the FCC had made.[19]

Moreover, the Circuit Court raised questions about whether Qwest and other LECs could charge paging companies for transit facilities. In a peculiar development, at oral argument the transit issue was withdrawn by Mountain Communications because:

> [a]t 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.[20]

The Idaho Commission believed that the turn of events at oral argument in the *Mountain* case somehow removed Qwest's ability to charge for transit traffic. However, the FCC's rulings

---

[16] *Qwest Corporation v. FCC*, 252 F.3d 462 (2001).
[17] These are discussed below in Qwest's Argument on Cross Appeal.
[18] 17 FCCR at 2096-97.
[19] 355 F. 3d 644 (2004).
[20] 355 F.3d at 649 (2004).

that LECs such as Qwest may charge for facilities used to carry transit traffic remain intact. As noted in the argument below, the Commission went further than ordering Qwest not to charge for such traffic in the future; it ordered Qwest to refund all past transit charges. *R., Vol. 5, pp. 987-994.*

E. Facts Concerning the Pagers

Qwest's evidentiary presentation concerned its charges to the Pagers for facilities that might arguably be eligible for credit under the FCC's "free facilities rationale, and the Pagers' payments on those accounts. Qwest's expert Sheryl Fraser developed considerable evidence for each of the three Pagers; these were submitted into the record as Exhibits 201, 202, and 203. *R, Vol. II, p. 200.* The Hearing Officer found them to be credible and reliable.

ISSUES ON CROSS APPEAL

1. Whether the Commission Erred in Ordering Qwest to Provide Reimbursements for Transit Traffic, Contrary to Rulings of the FCC?

2. Whether the Commission Erred in Recently Ordering Qwest to Make Refunds in Cash, Contrary to the Commission's Earlier Rulings?

ARGUMENT

I. STANDARD OF REVIEW

A. Questions of Fact

On questions of fact, "where the Commission's findings are supported by substantial, competent evidence, this court is obliged to affirm its decision." *Boise Water Corp. v. Idaho Pub. Util. Comm*, 97 Idaho 832, 838, 555 P. 2d 163, 169 (1976). Regarding questions of fact, this Court has stated that "we will sustain the Commission's determination unless it appears that the clear weight of the evidence is against its conclusion or that the evidence is strong and persuasive

that the Commission abused its discretion." *Utah-Idaho Sugar*, 100 Idaho at 376, 597 P. 2d at 1066. Idaho Code § 61-629; *Industrial Customers of Idaho Power v. Idaho PUC,* 134 Idaho 285, 288, 1 P.3d 786, 789 (2000); *Eagle Water Co. v. Idaho PUC,* 130 Idaho 314, 318, 940 P.2d 1133, 1137 (1997) . "It is a well settled rule that in an appeal from the commission matters may not be raised for the first time on appeal and that where the objections were not raised in the petition for [reconsideration], they will not be considered by this court." *Eagle Water, 130 Idaho* at 317, 940 P.2d at 1136 *quoting Key Transp. v. Trans Magic Airlines,* 96 Idaho 110, 112-13, 524 P.2d 1338, 1340-41 (1974).

In *Industrial Customers,* this Court described the appropriate test for substantial competent evidence as follows:

> The "substantial evidence rule" is said to be a "middle position" which precludes a de novo hearing but nonetheless requires a serious review which goes beyond the mere ascertainment of procedural regularity. Such a review requires more than a mere "scintilla" of evidence in support of the agency's determination, though "something less than the weight of the evidence." "Put simply", we wrote, "the substantial evidence rule requires a court to determine 'whether [the commission's] findings of fact are reasonable.'"

Industrial Customers, 134 Idaho at 293, *1 P.3d at 794* quoting *Idaho State Insurance Fund v. Hunicutt* (citations omitted).

The Court will not displace the Commission's findings of fact when faced with conflicting evidence, "even though the Court would have made a different choice had the matter been before it de novo" *Rosebud Enterprises, v. Idaho PUC*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996); *Application of Hayden Pines Water Company,* 111 Idaho 331, 336, 723 P.2d 875, 880 (1986). The Commission's findings of fact in this case are entitled to a presumption of correctness and the burden the Appellants to show those findings are unsupported by the

evidence. *Industrial Customers,* 134 Idaho at 292, 1 P.3d at 793*; Nez Perce Roller Mills v. Idaho PUC*, 54 Idaho 696, 34 P.2d 972 (1934).

The "Commission as the finder of fact, need not weigh and balance the evidence presented to it but is free to accept certain evidence and disregard other evidence." *Industrial Customers,* 134 Idaho at 293, 1 P.3d at 794. "The commission is free to rely on its own expertise as justification for its decision." Id. Simply put, findings of the Commission must be reasonable "when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [Commission's] view." *Application of Hayden Pines Water Company*, 111 Idaho 331, 336, 723 P.2d 875, 880 (1986) quoting *Hunnicutt*, 110 Idaho at 261, 715 P.2d at 931 (1985). The Commission's findings of fact are to be sustained unless it appears that the clear weight of the evidence is against its conclusions or that the evidence is strong and persuasive that the Commission abused its discretion. *Industrial Customers,* 134 Idaho at 288, 1 P.3d at 789 (2000).

The Commission's findings need not take any particular form so long as they fairly disclose the basic facts upon which the Commission relies in reaching its decision and support the ultimate conclusions. What is essential are sufficient findings to permit the reviewing Court to simply determine that the Commission has not acted arbitrarily. *Rosebud*, 128 Idaho at 624. *917 P.2d at 781; Boise Water Corp. v. Idaho Public Utilities Comm'n.*, 97 Idaho 832, 840, 555 P.2d 163, 171 (1976).

B. Questions of Law

Qwest agrees with Appellants that the standard of law for reviewing Idaho Commission decisions is much different where the question is one of law. Here, the Idaho Commission has answered several questions of pure law regarding the legal effect of the District of Columbia Circuit Court's reversal of the FCC in the *Mountain* case. Qwest submits that in this unique circumstance, the Commission's legal determinations should be subject to no special deference.

Here, the Commission has interpreted and decided contentious and difficult matters of purely federal telecommunications law, and in Qwest's belief, erroneously so.

This is the conclusion that federal courts have reached in reviewing state commission decisions under the Act:

> Federal review of state commission decisions does not implicate the rationale of the Chevron doctrine, which accords deference to federal agencies in their areas of expertise. See *Chevron U.S.A., Inc. v. Nat'l Resources Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); see also *MCI Telcoms. Corp. v. N.Y. Tel. Co.*, 134 F. Supp. 2d 490, 500-01 (N.D.N.Y. 2002), citing *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989). As a result, the state commission's interpretation of federal law is reviewed *de novo. Id. at 501*; see also *Southwestern Bell Tel. Co., v. Texas PUC*, 208 F.3d 475, 482 (2000); *Michigan Bell Tel. Co., v. MCIMetro Transmission Services, Inc.*, 323 F.3d 348, 354 (2003).

Southern N. Eng. Tel. Co. v. Conn., 285 F. Supp. 2d 252, 258 (D.C.Conn. 2003).

II. QWEST ARGUMENTS AS RESPONDENT ON APPEAL

A. The Commission's Orders Regarding Credit Amounts Due the Pagers Are Consistent with the Law and Are Supported by Substantial and Competent Evidence

Qwest argues in its Cross Appeal that the Commission should not, in its recent decisions on remand, have ordered credits for the Pagers with respect to transit traffic. However, in all other respects the Commission's decisions on credits due the Pagers were well supported and in accordance with the FCC's ruling and applicable law, and the Commission's finding are supported by substantial and competent evidence.

B. The Commission's Decisions Regarding What Services and Facilities are Subject to Credits under *TSR Wireless* Are Correct The Commission's Orders Regarding Credit Amounts Due the Pagers Are Consistent with the Law and Are Supported by Substantial and Competent Evidence

The Pagers argue in their Appellants brief that the Commission should have awarded them cash refunds for all amounts paid to Qwest for all services. Appellants' Brief, pp. 7 -35. There is no legal authority to support the Pagers' demand. Under the FCC's rulings, paging

companies are entitled to free interconnection facilities for LEC-originated traffic; they are not entitled to all facilities and services for free. Indeed, the Pagers have claimed entitlement to free facilities that are not necessary for interconnection, including POTS lines, private line, frame relay, and all other facilities. They assert that they, as paging interconnectors, can obtain those free facilities and then route any type of traffic over the facilities as they may desire, whether two-way, voice, long-distance, or Internet traffic. See Appellants' Brief, pp. pp. 13-14, 17-18, 21-24. They even claim that facilities provided for two-way mobile services should have been provided for free. Appellants' Brief, pp. 26-27. Whatever type of facility or service, and whatever type of traffic the circuit carries, Petitioners admit no obligation to pay a cent to Qwest.

Clearly such a construction of the Act and the FCC's rules would give paging companies an improper and discriminatory advantage over other telecommunications carriers. The Commission rightly rejected the pagers assertions, determined which services and facilities must be provided for free, and calculated the billing credits accordingly.

In the *TSR* Wireless Order itself, the FCC stated that the facilities that must be provided to paging companies at no charge were those facilities that were ignoring the "necessary for interconnection." *TSR Wireless*, 15 FCC Rcd. at 11183-84 ¶ 30. After the *TSR Wireless* decision was issued by the FCC in mid-2000, the FCC issued several other decisions clarifying and expanding on the rules as to when a LEC such as Qwest must provide free facilities to paging companies. On October 2, 2001 the FCC issued its Memorandum Opinion and Order in *Metrocall, Inc. v. Southwestern Bell Telephone Company and Pacific Bell Telephone Company*, Memorandum Opinion and Order, 16 FCCR 18123 (2001).

In *Metrocall*, and in half a dozen other subsequent rulings,[21] the FCC itself has repeatedly rejected paging companies' claims that paging companies are entitled to free facilities to carry transit traffic, i.e. traffic originated by a third carrier and deliver to the paging company through Qwest's network. By the FCC's repeated rejection of paging companies' demands for free transit facilities, the FCC makes clear that the facilities are free to the pager only to the extent the facilities are necessary for interconnection and used to carry LEC-originated paging traffic. Thus, to obtain facilities in this case for free, the Pagers should have shown that the facilities were necessary for interconnection. They should likewise have shown the amount of Qwest-originated paging traffic actually carried on their facilities – this is also a necessary showing to establish the entitlement to free facilities.

The *Metrocall* Order fully supports the Commission's rulings and calculations in this case. For example, Metrocall sought only reimbursement of amounts paid for Type 1 and Type 2 interconnection charges and DID-related charges. Unlike Pagers in this case, Metrocall did not claim a right to all facilities at no charge (e.g. private line, frame relay, POTS, etc.). *Metrocall* ¶ 7 16 FCCR 18125-26. Nevertheless, the FCC stated that in the *TSR Wireless* did not stand for the proposition "that all charges imposed by the LECs on paging carriers were illegal. Rather, we held that LECs may charge for a number of services. *Id.* at 18125. (*emphasis added*).

According, Qwest believes the Commission was correct in excluding non-paging services, or services not necessary for paging interconnection, in its Orders in this case, and the Court should affirm the Commission's finding that such services were properly excluded.

C. The Commission's Decisions Regarding Factual Issues are Supported by Substantial and Competent Evidence

[21] Those decisions are discussed in connection with Qwest's cross appeal regarding free facilities for transit traffic.

Appellants claim their evidence was compelling and essentially unrebutted. A review of the record, however, shows the Appellants presented only scant evidence, preferring instead to attack Qwest's evidence. Qwest offered detailed proof, primarily documented in Exhibits 201 (Radio Paging), 202 (TelCar) and 203 (PageData). The Hearing Officer and the Commission found Qwest's evidence more persuasive. The Hearing Officer found:

> 2. * * * * The petitioners who alleged that none of their reimbursable payments to Qwest were for services other than interconnection failed to support those claims beyond bare mere assertions as to their nature. They failed as well to provide substantial evidence to show that all charges for which they sought reimbursement were for dedicated transport and channel facilities under Section 20.1.D.4.a(1), dedicated transport under Section 20.1D.4.b, channel performance under Section 20.1D.4.c, connectivity under Section 20.1.D.4.d, or dial outpulsing under Section 20.1.D.4.c of the U S WEST Exchange and Network Services Tariff; Section 20. Facilities for Radio Carriers. * * * *

Proposed Order, R. Vol. III, pp. 401-02. The Hearing Officer found that "Qwest provided the more credible evidence of the amounts billed to and paid by petitioners. *Id.* He further stated:

> 6. * * * Qwest's billing and payment evidence: (a) came with support for its sources, (which are the systems it routinely uses to measure, bill, and credit customers), (b) was carefully prepared, (c) was adjusted as Qwest developed more information to make appropriate calculations, (d) was made available in sufficient detail to allow petitioners to contest any billing element for any month in the recovery period, and (e) applied a series of explained and proper methods. * * * *

Proposed Order, Id., p. 402. The Hearing Officer further stated that "Petitioners' evidence of billing and payment, which was not well supported or capable of similar levels of verification, was not sufficient to demonstrate its reliability, when contrasted with Qwest's evidence." *Id.*

The Hearing Officer accepted Qwest's proof, and rejected the Pagers' meager evidence, regarding amounts billed and paid:

> Qwest made a reasonably complete and thorough effort to identify the amounts billed and paid for the credit periods at issue in these proceedings. Qwest has taken the relevant information from the systems it routinely uses to record and bill for services. It has presented that information in a manner that would allow

> petitioners and others to inquire fully into the details of its calculations and to identify the support for the information on which those calculations were based. This information has been available for a number of months to petitioners. The questions raised about the calculations during the hearings had the effect of corroborating the thoroughness and carefulness of Qwest's calculations. * * *
>
> Petitioners did not provide credible, contrary evidence of their bills and payments. The most extensive attempt to do so was by PageData. However, the evidence made clear that PageData offered its information not for the purpose of generating a complete and accurate list of the information in question, but, in effect, to bring Qwest to the table to respond to it. The evidence further shows that PageData's very reason for purchasing Interpage, whose credits for interconnection facilities formed the very reason that made that acquisition valuable to PageData. PageData was unable to provide direct proof of payment, but submitted a number of documents that its accountants prepared and with which the witness was not very familiar.
>
> As a general proposition, we believe that information shown to come from systems routinely used for many years by utilities to bill and credit customer accounts should be entitled to significant weight. Certainly, customers should be permitted an opportunity to show error or incompleteness in their billed and paid amounts. We conclude that petitioners here have failed to make such a showing; the best evidence of record addressing the credit calculation process and billing and payment components may be found in respondent's Exhibit 201 (for Radio Paging), Exhibit 202 (for Tel-Car), and Exhibit 203 (for InterPage/PageData).

Proposed Order, p. 10, R. Vol. III, p. 408.

The Hearing Officer also rejected the Petitioners claims that all of their services should be free because they were somehow connected to their paging businesses:

> * * *The petitioners provide their customers with more than paging services; those services include Internet access, cellular services, and long distance, for example. They have provided no evidence about the configuration of the network on their side of the point(s) of connection with Qwest, or about how facilities that carry paging traffic from Qwest are, if at all, isolated from traffic related to the other services that they provide. Petitioners offered virtually no evidence about how they use their networks for the other services that they offer to customers over them, * * *.

Proposed Order, pp. p. 12, R. Vol. III, p. 409.

> Petitioners presented scant evidence to support their claim that all their bills from Qwest were for interconnection for the purpose of receiving one-way paging traffic from Qwest. Bare assertions about their bills were not credible given the other kinds of

> businesses they operate across the same networks (some of which were for two-way traffic), nor was it credible to believe that they had no business operations needs for other telecommunications services from Qwest. Qwest' s exhibits, in contrast, took each billing element and assigned it to interconnection or other types of service based on logical categorizations. Moreover, months before hearings, Qwest provided the detailed billing elements for each month of the reimbursement period involved. Petitioners, who are not only in the telecommunications business themselves, but also retained the services of a telecommunications expert for these proceedings, made no effort to show that the specific billing elements detailed for them by Qwest and included in Exhibits 201, 202, and 203 was incorrectly assigned to non-interconnection use. Qwest, however, was able to show that a number of billing items included in one petitioner's claimed reimbursement appeared to fall into other categories, such as long distance or 800 numbers. We conclude that Qwest made a credible and essentially unrebutted effort to determine all the charges associated with its delivery of traffic to petitioners and associated only with that function.

Proposed Order, pp. 11-12, R. Vol. III, pp. 409-10.

The Commission, after its independent review of the record, agreed with the Hearing Officer:

> Based upon our review of the testimony and exhibits in this case, we find that the Pagers did not adequately rebut Qwest's evidence that the Pagers are not entitled to credits for non-paging services. In essence, the Pagers' failure in attempting to distinguish between paging and non-paging is consistent with their arguments at the hearing. Namely, that they were entitled to a reimbursement of <u>all</u> of their charges. However, while we recognize that the Pagers are entitled to credit for paging services, they are not entitled to credits for their use of non-paging services and facilities to provide services such as long-distance, cellular, data, private-line, and the like. We conclude that Qwest presented sufficient evidence to demonstrate that it properly excluded non-paging services from the credit calculations.

Order No. 29064, R. Vol. V, p. 811.

> Having reviewed the evidence submitted by the Pagers and Qwest, we agree with the recommended findings of the Hearing Examiner that Qwest presented the better evidence. Qwest's billing and credit information derived from its billing information and included payments made by the Pagers. * * * We find Qwest's evidence to be much more detailed, complete, and persuasive than the evidence offered by the Pagers.

Order No. 29064, R. Vol. V, p. 818. The Commission stated, "In summary, the Commission adopts the recommended findings of the Hearing Examiner.

Accordingly, the Court should reject Pagers' challenges to the Commissions rulings and findings. The rulings challenged by Pagers conformed with law as articulated by the FCC, and the Commission properly ruled that Qwest's evidence was more persuasive.

III. QWEST'S ARGUMENTS AS CROSS APPELLANT

A. The Commission Erred in Ruling Qwest Must Credit the Pagers for Transit Traffic

Until the IPUC's ruling in Order Nos. 29555 and 29603, neither the FCC, the District of Columbia Court of Appeals, nor any other state or federal court or regulatory had ruled that LECs must refund amounts paid by paging companies for transit facilities. Qwest submits that the Commission has erred as a matter of law. First, the Pagers themselves never asserted that Qwest must supply originating calling number data as a condition to charging them for the dedicated paging facility to the extent such facility carried third-party traffic. Indeed, there is no evidence that the Pagers ever requested such information from Qwest.

Second, the Hearing Officer himself rejected the contention that Qwest had the duty to provide Pagers with billing information:

> Petitioners' argument that Qwest's failure to provide them with information about the origin of transit traffic was not persuasive. The evidence did not support a conclusion that Qwest has the capability. Even were the record otherwise, it is not clear that Qwest, as opposed to the petitioners, bears sole or even primary responsibility for such identification. Qwest's responsibility is to accept traffic from the originator and to deliver it to the paging company involved. Qwest is entitled to compensation for its services, which include that intermediate transport function. Petitioners presented no evidence that they asked Qwest for billing information that would permit them to bill originating carriers, or that they stood ready to compensate Qwest for the provision of such information, let alone that Qwest refused to support efforts by the petitioners to make a full identification of the participants in calls to the petitioners' end users. We find that the principal burden to pursue the identification of the originators of calls lies with petitioners. While Qwest should have the burden to support those efforts if its support is requested and if it is compensated for doing so, there is no reason from this record to conclude that Qwest was ever asked or refused to provide such support.

Proposed Order at 15. *R, Vol. III, p.413.*

Third, even if the District of Columbia Circuit Court's reversal of *Mountain* gives rise to a change in law that would require Qwest to provide Pagers with calling origin information going forward in order to charge Pagers for transit traffic, that was not the law prior to January of this year. During the time periods in question, i.e. 1999 and earlier, the Pagers were charged for transit traffic in accordance with the law existing at the time. The FCC has repeatedly ruled that LECs may charge paging companies for interconnection facilities to the extent those facilities carry traffic. *TSR Wireless, LLC v. U S WEST*, Memorandum Opinion and Order, 17 FCCR 2252 (February 8, 2002) (Complainants are required to pay for "transiting traffic," that is, 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"); *Metrocall, Inc. v. Southwestern Bell Tel. Co.,* Memorandum Opinion and Order on Supplemental Complaint for Damages, 16 FCCR 18123 (2001) ("In [TSR Wireless] we unambiguously permitted LECs to charge paging carriers for transiting traffic. . . . [W]e reject Metrocall's claim that the transiting traffic issue is somehow uncertain . . ."); *Texcom, Inc., d/b/a Answer Indiana v. Bell Atlantic Corp., d/b/a Verizon Communications, Memorandum Opinion and Order,* 17 FCCR 6275 (March 27, 2002) (affirming that LECs can charge pagers for facilities used to carry transit traffic, affirming such principles are in accordance with allocating costs to cost-causers, rejecting arguments that where calls transit LEC's network, LEC becomes the "originating carrier" or that LEC obtains "double-recovery" of costs); *Mountain Communications, Inc. v. Qwest,* 17 FCCR 2091 (February 2, 2002) (rejecting Mountain's arguments that LEC cannot charge for facility carrying transit traffic – all arguments simply mirror arguments raised by Texcom and were already rejected by FCC); *Metrocall, Inc. v. Concord Tel. Co.,* Memorandum Opinion and Order, 17 FCCR 2252 (February 8, 2002) (Concord may charge for DID facilities to the extent they carry transit traffic); *Metrocall, Inc. v. Southwestern Bell Tel. Co.*, Order on Reconsideration, 17 FCCR 4781 (March

15, 2002) (rejecting reconsideration of transit issue; "[O]ur rules ... allow a LEC to charge a paging carrier for traffic that transits the LEC's network and terminates on the paging carrier's network as long as the traffic does not originate on the LEC's network."); *Texcom, Inc., d/b/a Answer Indiana v. Bell Atlantic Corp., d/b/a Verizon Communications,* Order on Reconsideration, released March 27, 2002) (rejecting several arguments that pagers should not have to pay for facilities carrying transit traffic – Commission has already thoroughly considered and rejected arguments; LEC does not receive compensation for facility through reciprocal compensation or any other mechanism"); *Mountain Communications v. Qwest,* Order on Review, 17 FCCR 15135 (July 25, 2002) (rejecting several arguments that pagers need not pay for facilities carrying transit traffic; arguments have all been made and repeatedly rejected by FCC).

Accordingly, the Commission's decision is contrary to its own previous decisions, and to the decisions of the FCC. To require Qwest now to give credit to the pagers for products lawfully charged for years ago is confiscatory and fundamentally unfair.

B. The Commission Erred in Abandoning Its Previous Rulings Regarding Billing Credits vs. Cash Reimbursements

Throughout this case, the Commission established that the Pagers were not entitled to cash refunds, but were instead entitled to billing credits. The basis for the Commission's ruling was that because the Pagers had stopped paying their bills to Qwest, the credits they were due because the FCC's ruling would be set off against the Pagers' balances. Order No. 29604, R. Vol. V, pp. 807-810. See also R. Vol. 1, pp. 140, 183, 193, Vol. III, p. 409-10. Thus, each time the Commission established the amounts of credits each Pager was due, Qwest applied these credits to the Pagers accounts to reduce the balances they owed Qwest. R. Vol. V, pp. 823, 850-51, 925-26.

Recently, however, while the case was on remand from this Court, the Commission indicated for the first time that "if credits exceed amounts owed" then refunds should have be paid in cash. Order No. 29603, R. Vol. V, p. 1027. The Commission seemed even to indicate that credits previously applied by Qwest in November 2002 – where billing credits were calculated and applied with full knowledge and approval of the Commission – should have been paid in cash. The Commission provided no guidance as to how and when the measurement of credits and "amounts owed" should be (or should have been) made. As explained below, the Commission's departure from its previous rulings is arbitrary and capricious, and highly prejudicial to Qwest.

C. The Commission's Previous Rulings Established the Pagers Were Entitled Only to Billing Credits

Up until Order No. 29603, the Commission's rulings had been clear that the Pagers were entitled to billing credits and not cash refunds. The Commission had accepted Qwest's arguments that because the Pagers had ceased paying their bills, it would be unfair to order refunds. See Order No. 29064, R. Vol. V, pp. 807-811.

1. Order No. 28626 – February 2001

In Order No. 28626, the Commission rejected the Pagers' request that ordering language providing for "a billing credit" be struck. The Commission stated:

> If this language were removed, the Petitioners would presumably be entitled "reimbursements" but not billing credits. In response, Qwest alleges that Petitioners did not seek cash reimbursements in their Petition for a Declaratory Ruling (hereinafter "Complaint"), but did request recovery of amounts charged in the past. Furthermore, Qwest argues that PageData is not entitled to cash reimbursements because it will still owe Qwest a substantial amount of money after any credits are given to it. . . . 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.

Order No. 28626, February 5, 2001. R. Vol. I, p.183.

2. Evidentiary Hearing and Proposed Order – July 2001:

The "recovery period" was slightly different for each of the three Pagers, depending on whether, and when, they entered into interconnection agreements and thus stopped purchasing services under Qwest's Idaho Services Catalog. For each of them, though, the recovery period well before the trial of the case in mid-2001. The Hearing Officer routinely admitted evidence that the Pagers had stopped paying their bills during and after the recovery period.

For example, Arden Caspar, TelCar's owner, testified:

> Well, as a matter of fact, I
> think the reason that we stopped paying the bills is
> that we had made several efforts to get this thing
> all resolved, and these were efforts that seemed
> very fair in accordance with our side of the
> picture, and we presented these over time and again
> and never got response from the Qwest people, so
> consequently, we then stopped paying the bills if
> for no other reason, to get attention.
> Q. Okay. And do you believe it's proper
> that you not pay your bills because Qwest
> overcharged you illegally?
> A. Yes. In other words, it's the same
> company. In my opinion, Qwest owes us money. Why
> should we pay Qwest then?
> Q. So you're looking at it as a setoff?
> A. Yes.
> Q. And you're not contending that you
> have a right not to pay the bill --
> A. Oh, no.
> Q. -- and to collect the amount
> 100 percent from Qwest?
> A. Right.
>
> Tr. p. 128, ll. 3 – 25.

Mr. Ryder testified as follows on cross-examination:

> Q. Have you stopped paying all your bills
> from Qwest?
> A. Yes. Uh-huh. I can't -- I don't have

the exact date that we -- we stopped paying, but we have stopped paying all of the -- all of the bills that we had received and had paid promptly. And so, yes, we have stopped.
Q. What's the justification for that?
A. Primarily, as a means of saying that, Hey, these charges are in dispute because Qwest owes us considerably more money than these bills represent.
Q. Well, which bills are you not paying?
A. We're not paying the specific bills involving the transport of number -- I mean, of these numbers. That's where I gather we'd call them the -- the transport charges. And we get two of these bills: One involving Oregon transport, and then also Boise or Idaho transport.
And then we had a -- we have a commercial business line, which we are -- have not been paying on, along with several other business lines that we have not been paying on.
Q. Are those ordinary telephone lines?
A. They're business lines, yes.
Q. And the transport charges that you're talking about, those are covered by your Interconnection Agreement, are they not?
A. Yes. However, we have difficulty in determining exactly what those charges are, in that they are varied from time to time.
Q. Well, would you agree that you do owe Qwest some amounts for facilities provided under the Interconnection Agreement?
MR. JONES: Objection, I don't know that we've talked about the appropriate time frame. Are we talking about under the Interconnection Agreement? What time?
MR. BATT: Well, this really is in response to Jim's question about why the mention of the Interconnection Agreement amount due is proper on the matrix.
HEARING OFFICER: Yeah, I think that's fair response to that issue that was raised during direct.
THE WITNESS: So repeat the question, please.
Q. BY MR. BATT: Yeah, sure. Would you agree that today, you owe Qwest charges under your Interconnection Agreement that you haven't paid?

A. I -- I would say, yes, we owe you charges as you had billed them. Now, the amount that you had billed seems to be in question, however.

* * * *

Q. Okay. Did I understand your testimony that you believe the Commission has ordered that you are entitled to a refund as opposed to a credit, or did I misunderstand that?
A. Well, I -- I would be satisfied with either, I suppose, credit or a refund.

Tr. p. 121, l. 3 – p.123, l. 19, p. 126 11. 13 – 18.

The evidence presented at the hearing did not address the Pagers' balances owed Qwest at any particular point in time; instead, the evidence, and the Hearing Officer's findings and conclusions, focused on services for which the Pagers were entitled to credits under *TSR Wireless.* Thus, in his Proposed Order, the Hearing Officer , the Hearing Officer's inquiry examined only those services that were affected by *TSR Wireless*; with respect to those services, the Hearing Officer's finding and conclusions determined (1) what amounts had been billed by Qwest, (2) what amounts had been paid by Pagers; and (3) the resulting net billing credit due each of the Pagers. R, Vol. III, p. 420-421. The Hearing Officer required Qwest to provide new calculations of billing credits, which Qwest filed on January 15, 2002. Qwest's Recalculation of Billing Credits, filed January 15, 2002. R, Vol. V, p.482.

Because there was no evidence presented regarding overall account balances during the recovery period or even at the time of the hearing, there is no evidence now from which the Commission or the court could determine whether credits ordered exceed "amounts owed."

3. Order No. 29064 – July 2002; Commission Again Rejected Pagers' Attempt to Obtain Cash Payments

The Commission issued its Order No. 29064 on July 17, 2002, adopting for the most part the recommendations of the Hearing Officer, including the ordering of billing credits rather than cash refunds. The Commission deemed this part of the case the "Credit Phase." The Pagers sought to raise their claim to a cash refund, rather than a billing credit. R. V., p. 798. The Commission rejected the Pagers' attempt to raise the issue on several grounds, and stated in part:

> [T]he Commission has already rejected the Pagers request to require Qwest to provide them with cash reimbursements rather than billing credits. In Order No. 28626, the Commission declined the Pagers' request to amend its final prior Order to require Qwest to provide the Pagers with cash reimbursements rather than billing credits. Order No. 28626 at 2. Having previously declined to require cash reimbursements in Order No. 28626, the Pagers could have sought judicial review of that issue from the Idaho Supreme Court. The Pagers did not appeal that decision and the Commission declines to revisit the issue now.

Order No. 29064, R. Vol. V, p. 798 (emphasis added).

Qwest calculated the billing credits ordered the Commission, which were filed with and approved by the Commission. In accordance with the Commission's Orders, the Commission applied those credits to the Pagers' accounts.[22] Qwest's Recalculation of Billing Credits, filed July 30, 2002; Qwest's Application of Billing Credits, filed August 14, 2004. R. Vol. V, pp. 822-23, 912-16..

4. Order No. 29140 – November 2002; Commission Rejects Cash Reimbursements Again, and Approves Qwest's Application of Billing Credits

The Pagers petitioned for reconsideration, and the Commission granted their motion in part in Order No. 29140. R. V. l. The Commission, however, steadfastly refused to depart from its previous rulings on the propriety of billing credits:

[22] By this time TelCar was in bankruptcy. The credit vs. cash reimbursement issue does not apply with respect to TelCar; the issue instead is one of setoff which must be determined by the bankruptcy court.

2. Credits vs. Reimbursements. The Pagers also take issue with the "form" of the refund due each Pager. In the Commission's Liability Order, we found the Pagers were entitled "to reimbursement or billing credits." Order No. 28601 at 11. In the Commission's Credit Order No. 29064, we directed Qwest to "issue the respective [billing] credits to the Pagers no later than 28 days from the service date of this Order." Order No. 29064 at 31. The Pagers do not claim that Qwest has failed to issue the billing credits but take issue with the actual form of the refunds. More specifically, the Pagers assert Qwest should have issued them reimbursements rather than simply issue credits to their accounts. The Pagers also claim they requested reimbursement in their initial Petition for Declaratory Order. "They never asked for a billing credit." Petition for Reconsid. at 2. In the alternative, the Pagers argue they should have the option of deciding how the credits should be applied to their Qwest accounts. *Id.*

Commission Findings. We decline the Pagers requests and find that it was appropriate to direct Qwest to issue billing credits in this case for four reasons. First, the Pagers' Petition for Declaratory Order simply stated that they "are entitled to recovery" of amounts paid or overcharged. Petition for Declaratory Order at 5. In other words, the Pagers' initial pleading simply sought recovery – they did not specify the form or manner of refund.

Second, this is the second time the Pagers have pursued this issue. In their Petition to Amend the Liability Order No. 28601, the Pagers asked the Commission to remove the language "a billing credit or" so that the form of the refund would be a reimbursement. The Commission denied this request finding that the Pagers provided no justification for this change. Order No. 28626 at 2. That Order was a final decision appealable to the Supreme Court. *Id.* at 10. The Pagers did not appeal. At that time, the Pagers remedy was to seek judicial review. The Commission will not permit the Pagers to now collaterally attack the prior Order in violation of *Idaho Code* § 61-625 (final and conclusive decisions shall not be attacked collaterally).

Third, as set out above, at least two pagers acknowledged they stopped paying their paging bills from Qwest. This fact coupled with the fact they sought much larger refunds than the Commission eventually ordered, leads us to infer that the credits may not exceed the arrearages. If this is the case, it would be unreasonable to require cash reimbursements. *See Metrocall Order I* at ¶¶ 4, 12 (Oct. 2, 2001). Finally, *Idaho Code* § 61-641 (concerning overcharges by a utility) empowers the Commission to order Qwest to "make due reparation to the complainant therefore, with interest from the date of collection provided, no discrimination will result from such reparation." (Emphasis added). The statute does not prescribe the form of the refund. In this instance, we find providing cash reimbursements would be discriminatory.

Order No. 29140, R. Vol. V, pp. 909-10.

D. On Remand from this Court, the Commission for the First Time Orders Cash Refunds

While this case was remanded to the Commission to consider the effect of the *Mountain Communications* ruling, the Commission departed significantly from its previous rulings and indicated that if the credits ordered by the Commission exceeded "amounts owed" then Qwest should provide cash reimbursements. Order No. 29603, R. Vol V., p. 1008. The Commission provides no clue as to what services would be included in determining "amounts owed" or at what point in time that comparison should be made.

The Commission went so far as to state that billing credits that the Commission had ordered be applied to the Pagers accounts in Order No. 29140, instead should have been paid in cash. *Id.*, at 1027.

E. The Commission's Departure from Its Previous Rulings on Credits vs. Refunds is Arbitrary and Capricious

The Commission offers no explanation for rejecting its previous rulings. The Commission's departure from the law it established earlier in the case – i.e., that the amounts due the Pagers under *TSR Wireless* would be applied to the Pagers' accounts as billing credits – is highly prejudicial to Qwest, primarily for reasons that are not reflected in the record. The Commission was not clear in its recent rulings at what point in time the comparison of credits with "amounts owed" (however defined) should be made; however, the evidence of "amounts owed" simply was not relevant to the issues and therefore was not calculated in the course of these proceedings; nor, is there sufficient evidence in the record from which such calculations could be made.

As indicated by the testimony quoted above, the Pagers stopped paying their bills to Qwest to gain leverage in this litigation; meanwhile, Qwest has already applied the Commission-ordered credits. For Qwest to now be ordered to pay those amounts in cash would be unfair and prejudicial to Qwest.

Because the Commission's rulings and orders in Order Nos. 29555 and 29693, requiring Qwest to make cash refunds rather than apply billing credits, instead of billing credits, are arbitrary and capricious, the Court should reverse the Commission and vacate those orders.

ATTORNEYS FEES

Respondent/Cross Appellant Qwest Corporation respectfully requests attorneys fees with regard to this appeal pursuant to I.C.§ 12-120(3).

CONCLUSION

Except as provided in Qwest's cross appeal, the Commission's determination of credits due the Pagers is legally correct, complies with federal law, and is based on substantial and competent evidence. The Commission's Orders should be affirmed.

The Commission's determinations that Qwest must refund amounts charged Pagers for transit traffic is contrary to federal law including relevant rulings of the Federal Communications Commission. The Commission's departure from its previous Orders in this case, ordering Qwest to make cash payments to the Pagers even though billing credits have already been given Pagers pursuant to Commission Orders, is arbitrary and capricious. Qwest prays that the Court reverse the Commission on these two issues, vacate Order Nos. 29555 and 29603 and remand this matter to the Commission.

DATED this 9th day of November, 2004.

Respectfully Submitted,

Adam Sherr
Qwest Communications, Inc.
1600 7th Avenue - Room 3206
Seattle, WA 98191

and

William J. Batt
James B. Alderman
Batt & Fisher, LLP
U S Bank Plaza, 5th Floor
101 South Capital Blvd.
Boise, Idaho 83702
(208) 331-1000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of November, 2004, I caused a true and correct copy of the above and foregoing document to be served, in the manner indicated, on the following:

JIM JONES
JIM JONES & ASSOCIATES
1275 Shoreline Lane
Boise, Idaho 83702-6870
Telephone: (208) 385-9200
Fax: (208) 385-9955

☐ Hand Delivery
☑ U.S. Mail
☐ Facsimile
☐ Federal Express

DON HOWELL
IDAHO PUBLIC UTILITIES COMMISSION
472 West Washington
Boise, ID 83702
Telephone: (208) 334-0312
Fax: (208) 334-3762

☐ Hand Delivery
☑ U.S. Mail
☐ Facsimile
☐ Federal Express

By: _____
William J. Batt