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IN THE SUPREME COURT OF THE STATE OF IDAHO

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IDAHO PUBLIC
UTILITIES COMMISSION

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IN THE MATTER OF THE JOINT)
PETITION OF ROBERT RYDER, d/b/a)
RADIO PAGING SERVICE, JOSEPH B.)
MCNEAL, d/b/a PAGEDATA AND)
INTERPAGE OF IDAHO, AND)
TEL-CAR, INC., FOR DECLARATORY)
ORDER AND RECOVERY OF)
OVERCHARGES FROM U.S. WEST)
COMMUNICATIONS INC.,)

_____)
ROBERT RYDER, d/b/a RADIO)
PAGING SERVICE, et al.,)

Petitioners/Appellants,)

vs.)

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

BRIEF OF APPELLANTS

APPEAL FROM THE IDAHO PUBLIC UTILITIES COMMISSION

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I. STATEMENT OF THE CASE

A. Nature of the Case

This proceeding was initiated by Petitioners/Appellants ("Pagers"), all of whom were operating paging services in southern Idaho on and after November 1, 1996, to obtain reimbursement from Respondent on Appeal, Qwest Corporation, for telephone service and facilities that were billed to the Pagers in violation of the federal Telecommunications Act of 1996 ("Act"), 47 U.S.C. §§ 251, et seq.

B. Course of Proceedings

This proceeding was commenced at the Idaho Public Utilities Commission ("IPUC") by Robert Ryder and Joseph B. McNeal on September 24, 1999. The petition/complaint sought recovery of alleged overcharges made by U.S. West Communications, Inc. ("Qwest") from the effective date of the Act. *R, Vol. I, p. 1.* Tel-Car, Inc., was allowed to intervene on February 9, 2000. *R, Vol. V, p. 790.*

The IPUC dismissed the Pagers' complaint in Order No. 28427, which was issued on July 5, 2000. *R, Vol. I, p. 63.* Count One was dismissed on the ground that the IPUC had no authority to enforce federal dictates under the Act. *Id. at 74.* Count Two, which alleged that the Pagers were being discriminated against vis-à-vis other Idaho pagers, in violation of 47 U.S.C. § 252(i), was dismissed on a number of grounds, including a finding that the Pagers had not identified any filed interconnection agreements that offered better terms and conditions than the Pagers were receiving. *Id.*

The Pagers filed a timely Petition for Reconsideration, citing new authority from the Federal Communications Commission ("FCC"). *Id. at 77.* On December 20, 2000, the IPUC issued Order No. 28601, which granted the Petition for Reconsideration and reinstated

Count One. *Id. at 128.* The IPUC concluded that the Pagers were entitled to reimbursement for overcharges and ordered that the parties “attempt to agree upon the amount of the billing credit or reimbursement each Petitioner is entitled to.” *Id. at 139-40.* When the parties were not able to reach agreement on the amount of reimbursement, the matter was set for an evidentiary hearing to be held before a hearing examiner on July 24-25, 2001. *Id. at 195.*

The hearing was held as scheduled and the parties submitted substantial post-hearing briefing. On November 30, 2001, the Hearing Examiner’s Proposed Order was served. *R, Vol. III, p. 399.* The Pagers filed extensive exceptions to the Proposed Order in a timely manner. *Id. at 423.* On January 15, 2002, Qwest submitted a recalculation of billing credits showing a credit due to Radio Paging in the amount of \$41,182, a credit due to Tel-Car in the amount of \$31,292, and a credit due to PageData in the sum of \$44,739. *Id. at 482, 487-9.* On June 24, 2002, the Pagers filed a Request to Supplement Petitioners’ Exceptions to Hearing Examiner’s Proposed Order, seeking to supplement the record with unfiled interconnection agreements in support of Count Two of their complaint. *Id. at 513.*

On July 17, 2002, the IPUC issued its Order No. 29064, wherein it dealt with the Pagers’ exceptions to the Proposed Order, denied the request to supplement, and ordered certain revisions to the reimbursements owing to the Pagers. *R, Vol. V, p. 789.* In essence, the IPUC ordered that Qwest reimburse the Pagers for 76% of the charges they had been billed for Type One paging services. Based on Order No. 29064, Qwest again recalculated the credits due to the Pagers, determining Radio Paging to be entitled to \$42,105, Tel-Car to be entitled to \$31,997, and PageData to be entitled to \$45,742. *Id. at 822.* The Pagers filed a Petition for Reconsideration in a timely manner on August 7, 2002. *Id. at 831.* The Petition for Reconsideration included all issues upon which the Pagers seek review. On September

3, 2002, the IPUC issued Order No. 29109, granting the Petition for Reconsideration. *Id. at 860.* The IPUC issued Order No. 29140 on November 1, 2002, in response to the Petition for Reconsideration. *Id. at 863.* Based upon Order No. 29140, Qwest again recalculated the credits owing the Pagers, calculating \$42,105 to be owing to Radio Paging, \$33,512 to be owing to Tel-Car, and \$55,486 to be owing to PageData. *Id. at 916.*

The Pagers filed a timely Notice of Appeal to this Court on December 5, 2002. *Id. at 928.* The case was in the Court's mediation program for an extended period of time while the parties attempted to reach resolution. Mediation, however, was ultimately unsuccessful. On February 13, 2004, the parties filed a Stipulated Motion with the Court to suspend the appeal and temporarily remand the matter back to the IPUC for further consideration in light of a new decision by the U.S. Court of Appeals for the District of Columbia Circuit. After further proceedings, the IPUC issued its Order No. 29555 on August 2, 2004. *R, Vol. V, p. 973.* In Order No. 29555, the IPUC determined that the Pagers were entitled to reimbursement of the remaining 24% of Qwest's paging billings for "transit traffic" and additional refunds for "wide area calling". The IPUC determined that Radio Paging was due a refund credit of \$57,416, that Tel-Car was due a refund credit of \$52,783, and that PageData was due a refund credit of \$101,794, all as of July 1, 2004. *Id. at 993.* On August 12, 2004, Qwest again recalculated the credits, showing Radio Paging to be entitled to \$57,467, Tel-Car to entitled to \$52,848, and PageData to be entitled to \$101,950. *Order No. 29175, p. 2, Item 5.* Qwest filed a motion to stay Order No. 29555 on August 20, 2004. *Id., Item 8.* Qwest filed a Petition for Reconsideration on August 23, 2004. *Id., Item 9.* On October 5, 2004, the IPUC issued its Order No. 29603 wherein it ruled upon the Qwest

motions and ordered Qwest, once again, to recalculate the credits owing to the Pagers. A copy of Order No. 29603 is attached as Appendix I.

C. Statement of Facts

At the outset, it would be helpful to consider some of the acronyms and definitional terms that appear in the record. The Pagers are commercial mobile radio service ("CRMS") providers within the meaning of the Act. *R, Vol. I, p. 1*. At times relevant to this case, they have operated Type One paging services. A Type One paging service is a one-way operation. It receives telephone traffic from other telecommunication carriers but does not send traffic back. Qwest Corporation, the successor in interest of U.S. West Communications, Inc., is a local exchange carrier ("LEC"). This case is concerned with the Pagers' operations within the Boise local access and transport area ("LATA"), which encompasses southern Idaho. *R, Vol. V, p. 790*. The Boise LATA is located within a major trading area ("MTA"). *Id.* Frequent mention is made of "facilities", which generally refers to telephone lines, switches, and other physical equipment necessary to transport telephone traffic.

The Pagers have operated Type One paging systems in the Boise LATA since November 1, 1996, the effective date of regulations issued by the FCC to implement the Act. As of November 1, 1996, Joseph McNeal was operating a paging service under the trade name "PageData". On June 8, 1998, he purchased the assets of another paging service, InterPage of Idaho, Inc. ("InterPage"), which had also been in operation in the Boise LATA since November 1, 1996. Mr. McNeal acquired all of the accounts and entitlements of InterPage. *Tr, Vol. III, p. 150, ll. 9-19*.

The Telecommunications Act of 1996 made very substantial changes in the telecommunications industry. The Fourth Circuit Court of Appeals recently stated the intention of the 1996 amendments, as follows:

Through the 1996 Act, Congress sought to supplant the system of state-sanctioned monopoly in favor of a system of free competition. In addition to pre-empting the state laws that protected existing LECs from competition, *see* 47 U.S.C.A. § 253, Congress, recognizing both that the provision of local service required significant infrastructure and that the prohibitive cost of duplicating an incumbent LEC's infrastructure would be an insuperable barrier to entry, imposed on incumbents a number of affirmative duties intended to facilitate market entry by potential competitors.

MCIMetro Access Trans. Serv. v. BellSouth Tele., 352 F.3d 872, 874 (4th Cir. 2003). Under the Act, and its implementing regulations, LECs were prohibited from charging for certain facilities and services that they had been allowed to charge for prior to November 1, 1996. Both before and after that date, Qwest billed the Pagers under a tariff that it had filed with the IPUC. *Petitioners' Exhibit 106*. Qwest made no change in its billing practices or in the amount it billed the Pagers. Rather than taking into account the changes required by the Act, Qwest continued to bill as if the Act had not been enacted and implemented.

Prior to implementation of the Act, Qwest was billing Mr. Ryder the sum of \$1,811.67 per month. *Petitioners' Exhibit 103*. Qwest continued billing at the same rate until after October of 1999. Mr. Ryder had entered into an interconnection agreement with Qwest on February 19, 1999, and the same was approved by the IPUC effective on May 13, 1999. Mr. Ryder's recovery in this proceeding was for the period of November 1, 1996, to May 13, 1999. *R, Vol. I, p. 190*. Under the interconnection agreement, Mr. Ryder's monthly charge went from \$1,811.67 per month, to \$1,116.54 for three months, to \$768.98 for seven months, and to \$434.64 per month through November, 2000. *Petitioners' Exhibit No. 103*. In

negotiations leading up to the interconnection agreement, Mr. Ryder had taken the position that under the provisions of the Act he should not have to pay anything for traffic delivered to his point of connection, but Qwest took the position that he either had to continue paying the \$1,811.67 per month or agree to pay 24% of that amount for transit traffic under the terms of the agreement. *Tr, Vol. III, p. 109, l. 9 – p. 110, l. 21.* He chose the least cost alternative.

Mr. McNeal entered into an interconnection agreement with Qwest on June 8, 1999, and the same was approved by the IPUC effective September 10, 1999. Mr. McNeal's recovery in this proceeding was for November 1, 1996, to September 10, 1999. *R, Vol. I, p. 190.* Mr. McNeal had been paying approximately \$4,000 per month to Qwest prior to entry into the interconnection agreement. Mr. McNeal told Qwest that he should not be paying anything under the Act, but he was given a choice of either continuing to pay the \$4,000 per month or of agreeing to Qwest's terms in the interconnection agreement for a charge of about \$2,100 per month. *Tr, Vol. III, p. 211, l. 4 – p. 213, l. 4.* He, too, signed the interconnection agreement as the least cost alternative.

Tel-Car did not enter into an interconnection agreement with Qwest at any time. The parties treated Tel-Car's recovery period as extending from November 1, 1996 through July, 2000. *Exhibit No. 202.* During the course of these proceedings, Tel-Car went bankrupt and its claim is being pursued by the bankruptcy trustee.

II. QUESTIONS PRESENTED ON REVIEW

1. Whether the IPUC erred in approving Qwest's peremptory exclusion of private lines from the reimbursement requirement?
2. Whether the IPUC erred in allowing Qwest to charge for private lines as a wide area calling service?

3. Whether the IPUC erred in refusing to require Qwest to bear the cost of transporting paging traffic to Mr. McNeal's Boise paging terminal?
4. Whether the IPUC erred in placing the burden of proof on Mr. McNeal and Tel-Car?
5. Whether the IPUC erred in excluding mobile charges and some transportation charges from Tel-Car's recovery?
6. Whether the IPUC erred in calculating Mr. Ryder's recovery?
7. Whether the IPUC erred when it initially adopted a 24% transit traffic factor?
8. Whether the Pagers should have received a cash refund for all sums they paid Qwest?
9. Whether the IPUC erred in failing to use the 12% interest rate in I.C. § 28-22-104?
10. Whether the Pagers are entitled to attorney fees on appeal?

III. ARGUMENT

A. Summary of Argument

The Telecommunications Act of 1996 brought about substantial changes to the telecommunications industry. The Act required LECs, such as Qwest, to interconnect with other carriers, such as Pagers, on just and reasonable terms. CMRS customers became carriers, entitled to reciprocal compensation arrangements. Reciprocal compensation arrangements require interconnecting telecommunications carriers to base their respective charges upon the traffic that they received from and send to other telecommunication carriers. In the case of Type One pagers whose traffic goes just one way (they receive traffic but don't send it), the interconnecting LEC is responsible for providing facilities

necessary to deliver traffic to the Pager's paging terminal and must bear the cost for transporting the traffic to that point. Until recently, it was an open question as to who paid for the delivery of traffic that did not originate on the interconnecting LEC's system. A recent decision has placed the responsibility on the LEC, unless it can provide billing information to the pager.

Although the Act changed the telecommunications business, Qwest did not change its billing practices. It continued to bill the Pagers for traffic and facilities, just as it had before the Act became effective. By the time the Pagers had instituted this proceeding, Qwest had extracted tens of thousands of dollars from them that it was not entitled to have under the Act. In the case of PageData and InterPage, Qwest billed and received over \$240,000 that should have remained with those businesses. The IPUC has recognized Qwest's overreaching and has ordered reimbursement of approximately \$200,000, including interest. The IPUC has proceeded in fits and starts but has generally, albeit reluctantly, gone in the right direction.

Based on FCC orders and federal court decisions, the Pagers should receive full reimbursement of all sums they paid to Qwest during the relevant timeframe because the evidence, when considered in light of the relevant precedent, is not in conflict and the Pagers' entitlement to reimbursement is largely a matter of law. The Pagers should also get interest, not at the rate ordered by the IPUC, but at the rate of 12%, as provided by statute.

B. Standard of Review

This is, without doubt, a unique case. It involves an intermingling of state and federal telecommunications law. The IPUC was initially unwilling to recognize that the Act was the controlling law on the question of whether or not Qwest could properly charge the Pagers for

the services and facilities at issue. The IPUC initially found “that endorsing the Petitioners’ position – providing *free* and dedicated facilities and services to anyone – is not in the public interest and may be potentially unconstitutional.” *R, Vol. I, p. 70*. The IPUC argued that I.C. § 62-615(1), which authorizes the IPUC to implement the Act, “does not override existing Idaho statutory law and does not make the IPUC the ‘handmaiden’ of the FCC.” *Id. at 70-1*. However, when it was pointed out in the Pagers’ Petition for Reconsideration that the United States Constitution contains a Supremacy Clause requiring state law to give way to federal authority, the IPUC took another look at the matter. *Id. at 130*. The IPUC determined that it could require Qwest to observe FCC dictates, even though the IPUC disagreed with them, because Qwest had “acquiesced to FCC authority” prohibiting certain of the charges to which the Pagers objected and that the IPUC had authority under I.C. § 62-616 to require reimbursement. *Id. at 136-7*. However, the IPUC was still defiant, asserting that its change of heart “should not be viewed as this Commission’s acquiescence to federal authority.” *Id. at 137, footnote 16*. The IPUC has yet to recognize that I.C. §§ 62-602(5) and 62-615(1) and (3) authorize and implicitly require it to enforce the provisions of the Act. I.C. § 62-615(1) states, “The commission shall have full power and authority to implement the federal telecommunications act of 1996. . .” The Idaho Legislature appears to have understood that Congress expected the various states to implement and enforce the Act and, therefore, provided implementing authority.

It is important from the standpoint of the standard of review to recognize that the main substantive issues involved in this case – the propriety of the charges imposed on the Pagers by Qwest – are primarily a function of the Act, while the more procedural aspects of recovery are primarily a function of state law. Where the substantive law of Idaho is being

applied by the IPUC, such as in a rate-making proceeding, which combines judicial and legislative functions, a good deal of deference is afforded to the IPUC's determinations. However, where the IPUC is functioning as an interpreter of federal or state law, or determining facts unrelated to rate-making, or considering contractual provisions, less deference is afforded the IPUC and greater appellate scrutiny is appropriate.

This Court discussed the standard of review for IPUC proceedings in Application of Hayden Pines Water Co., 111 Idaho 331, 723 P.2d 875 (1986). After noting that the standard of review for IPUC orders is addressed in I.C. § 61-629, the Court observed that it had applied a substantial evidence rule for such cases. *Id. at 334-5*. The substantial evidence standard was adopted in recognition that the IPUC "is a fact finding, quasi-legislative body authorized to investigate and determine issues presented by a utility's petition for increased rates." *Id. at 335*.

Where the particular expertise of the IPUC is not involved, the Court has been less inclined to defer to its determinations. For example, where, as here, requirements of federal law are being interpreted and applied by the IPUC, this Court has applied somewhat stricter scrutiny. In cases involving the IPUC's enforcement of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §§ 2601 et seq., the Court has followed this course. *See, Afton Energy, Inc. v. Idaho Power Co.*, 111 Idaho 925, 929, 729 P.2d 400 (1986); Idaho Power Co. v. Cogeneration, Inc., 129 Idaho 46, 49, 921 P.2d 746 (1996). Since this case primarily involves the interpretation and application of federal law, which is not within the expertise of the IPUC, it would be appropriate for the Court to apply a heightened standard of review. In this regard, it might be mentioned that this is the first case of this nature to be considered by the hearing examiner and by the IPUC.

A number of the critical issues in this case present mixed questions of law and fact. Mixed questions of fact and law are primarily questions of law, subject to *de novo* review. The Highlands, Inc. v. Hosac, 130 Idaho 67, 69, 936 P.2d 1309 (1997). The next section, dealing with Mr. McNeal's right of recovery, presents a mixed question that invites *de novo* review.

C. Mr. McNeal Is Entitled to Recovery of \$245,628.51.¹

Mr. McNeal sought recovery of overcharges in the amount of \$240,756.03, of which \$188,473.56 was paid by InterPage and \$52,282.47 was paid by PageData. *R, Vol. V, p. 991*, ¶ 3. Qwest did not contest that such sums had been paid and, indeed, following the hearing Qwest submitted a table comparing Mr. McNeal's record of payments with Qwest's record of payments ("Table"). *R, Vol. II, p. 375*. Copies of the Table, marked "Exhibit 5", and its detailed supporting data, marked "Exhibit 4", are attached hereto as Appendix II for the Court's convenient reference. Qwest's record of the payments made by InterPage and PageData shows that \$245,628.51 was paid during the relevant time frame. The IPUC, rather than using the \$245,628.51 figure as the basis for Mr. McNeal's recovery, utilized the \$87,389.76 figure shown in the first line of the Table. Mr. McNeal contends that the IPUC erred in failing to order reimbursement of the entire \$245,628.51, plus interest from the date each monthly payment was made to Qwest.

(1) The IPUC Erred In Approving Qwest's Peremptory Exclusion of Private Lines from the Reimbursement Requirement.

The IPUC decision is based primarily on a misunderstanding of the applicable law. The decision was not driven by the determination of a factual dispute over the manner in

¹ Recovery of 76% of this figure would be for paging traffic originating on Qwest's system and the other 24% recovery would be for transit traffic – traffic originating on the systems of other telecommunications carriers.

which Mr. McNeal's paging system was configured or a dispute over how the lines listed in the Table were used. Rather, the dispute centered on the interpretation of the FCC's order in TSR Wireless, LLC v. U.S. West Communications, Inc., 15 FCCR 11166, 2000 WL 796763 (2000) ("*TSR Order*"), a copy of which is attached as Appendix III. Qwest's witness, Sheryl Fraser, testified that the *TSR Order* allowed it to charge for private lines,² even those that bring paging traffic to the pager's point of connection. She stated a private line account "would not be relevant for this proceeding", even though she did not know the purpose the line served. *Tr, Vol. V, p. 408, l. 11 – p. 409, l. 25*. It was her position that "private lines which bring in the traffic to the point of connection are not relevant because [she] believed that the *TSR Order* allowed [Qwest] to charge for those." *Id., p. 432, ll. 13-23*. It was her contention that if a POTS line was used for interconnection or in a paging business, it would not be subject to reimbursement under the *TSR Order*. *Id., p. 460, l. 13 – p. 461, l. 4*. These contentions are patently incorrect.

Some knowledge of the InterPage/PageData system is necessary in order to understand the issue. According to Mr. McNeal, when the InterPage system was set up, "the person that put it together tried to get one point of interconnection in the LATA and he couldn't." This was because of "a standing policy that Qwest wasn't going to do it. . . ." *Tr, Vol. III, p. 194, ll. 10-17*. Therefore, InterPage used leased lines to funnel all of its paging traffic from Idaho Falls, Pocatello, Twin Falls, and other parts of its service area, to its paging terminal in Boise. According to Mr. McNeal:

InterPage has leased lines that came back, that brought the numbers back into Boise. So basically what they did was there was a lease line that went from

² Private lines are variously described in this proceeding as "leased lines" or as "POTS" lines, meaning plain old telephone service lines.

Idaho Falls to Pocatello, from Pocatello to Twin Falls, from Twin Falls into Boise, and so if you made a phone call in Pocatello – I'm sorry, Idaho Falls, then it would travel along that network back to Boise.

Id, at 195, ll. 3-10. Mr. McNeal testified, further, that the leased lines and POTS lines were dedicated facilities that connect the paging system together, bringing paging calls into the system and funneling them to the point of connection located in Boise. *Tr, Vol. VI, p. 498, ll. 15-25.*

Mr. McNeal testified that all of the lines identified in Petitioners' Exhibit Nos. 109 and 122, which lines are shown in the left-hand column of the Table, were facilities used to transport paging traffic to his Boise paging terminal. The following exchange is relevant in this regard:

Q. [Mr. Jones] Okay. Now, there are a couple of things I'd like to ask you about your system. Do the accounts reflected in Exhibit 122 include any POTS lines?

A. [Mr. McNeal] Yes, they do.

Q. And what – what are those POTS lines used for in your business, if anything?

A. They are used by the paging system. All the lines that we had in this billing account were paging.

Q. Okay. And how do you know that?

A. Because our phone – regular phone bills are paid in a separate manner and those we have continued to pay. The paging part is kept separate, and those we haven't been paying.

Q. Okay. And Exhibit 122 just deals with your paging bills?

A. Exhibit 122 just deals with the paging bills.

Q. Okay. And who was it that made the determination of which lines went to your private business and which lines went to your paging business? When you signed up, who told you they went to one part or the other?

A. Oh, Qwest. When we signed up . . . they told us what went where, and at that time, we weren't as experienced as we are now.

Q. Okay. So they assigned the accounts between your paging business and the nonpaging services?

A. Yes, they did, and we had like a rep, and she would come over and assist us in our stuff.

Tr, Vol. VI, p. 496, l. 25 – p. 498, l. 9. See, also, Tr, Vol. VI, p. 515, l. 19 – p. 516, l. 8 and p. 517, ll. 2-13. Mr. McNeal testified that his accounting system coded paging charges and regular business charges differently and that he was only seeking recovery for paging bills. *Id., at 525, ll. 3-10.* None of this testimony was rebutted or contradicted.

Petitioners' expert, Victor Jackson, testified that leased lines and POTS lines have been and are used to deliver traffic to a point of interconnection. Mr. Jackson stated:

Quite frankly, I don't think the specific technical mechanism is important with respect to the FCC's [TSR] Order simply because, ultimately, the local exchange carrier – in this case, Qwest – is required to deliver the traffic to the point of interconnection, and how it gets there is not really the important part.

Tr, Vol. VI, p. 564, l. 2 – p. 565, l. 14. When asked by the hearing examiner, "Until it gets to that point of connection, it's [Qwest's] responsibility?", Mr. Jackson responded, "Yeah, it's their network and their responsibility." *Id.* Mr. Jackson testified that Mr. McNeal's incoming traffic from Qwest terminated at PageData's Boise paging terminal and that "any facility preceding that is part of the preceding carrier's network." *Tr, Vol. IV, p. 284, ll. 2-5; p. 280, l. 17 – p. 286, l. 9.* In other words, the LEC, Qwest, has the responsibility for providing all facilities (lines, switches, etc.) to transport traffic to Mr. McNeal's Boise paging terminal.

None of Qwest's witnesses contested or rebutted Mr. McNeal's testimony regarding the manner in which his system was configured, including the fact that the POTS lines and leased lines were used to funnel traffic to the Boise paging terminal. Indeed, Qwest's witness had no idea what the POTS lines and leased lines were used for. *Tr, Vol. V, p. 409, ll, 10-25; p. 460, ll. 13-22.* Nobody contested his testimony that it was a Qwest representative who advised him as to how to break down his billings and payments between those used for paging and his regular business lines. Qwest excluded \$158,238.95³ in charges for facilities and services required to funnel traffic to the Boise paging terminal simply because Qwest contended that the FCC did not preclude such charges under the *TSR Order*. The IPUC bought off on this contention. *See, R, Vol. V, p. 899.* Both of them are dead wrong.

The *TSR Order* specifically prohibited LECs from charging paging carriers for delivery of traffic that originates on the LEC's system. According to the FCC:

We find that, pursuant to the Commission's rules and orders, LECs may not charge paging carriers for delivery of LEC-originated traffic. Consequently, Defendants may not impose upon Complainants charges for facilities used to deliver LEC-originated traffic to Complainants.

Id. at 1. The FCC stated, further:

In the *Local Competition Order*, the Commission promulgated section 51.703(b), which provides that: 'A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.' In adopting this rule, the Commission stated that '[a]s of the effective date of [the *Local Competition Order*], a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.' The Order further provided that carriers operating under arrangements that do not comport with the Commission's mutual compensation principles 'shall be entitled to convert such arrangements so that

³ This figure is derived from subtracting the \$87,389.76 in the first line of Appendix I from the \$245,628.51 which Qwest acknowledges that InterPage and PageData paid.

each carrier is only paying for the transport of traffic it originates, as of . . . [November 1, 1996]'

Id. at 3.

The FCC noted the argument made by Qwest and the other defendants that a distinction needed to be made between the traffic and the facilities (lines) used to transport it.

According to the FCC:

Defendants argue that section 51.703(b) governs only the charges for 'traffic' between carriers and does not prevent LECs from charging for the 'facilities' used to transport that traffic. We find that argument unpersuasive given the clear mandate of the *Local Competition Order*. The Metzger Letter correctly stated that the Commission's rules prohibit LECs from charging for facilities used to deliver LEC-originated traffic, in addition to prohibiting charges for the traffic itself.

Id. at 16.

The Fourth Circuit Court of Appeals provided strong support for the *TSR Order* in the MCIMetro decision, *supra*. There, the Court was considering whether BellSouth could charge MCI for the cost of transporting local calls originating on BellSouth's network to MCI's chosen point of interconnection when that point of interconnection was outside of the local calling area where the call originated. *Id. at 876*. The Court held:

In sum, we are left with an unambiguous rule, the legality of which is unchallenged, that prohibits the charge that BellSouth seeks to impose. Rule 703(b) is unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions.

Id. at 881. Therefore, it is rather obvious that Qwest had no right to require InterPage/PageData to pay for transportation to the Boise paging terminal of traffic that originated on its system.

The IPUC found that 76% of the Pagers' traffic originated on the Qwest system and, therefore, required Qwest to reimburse the Pagers for 76% of the interconnection-related charges that they had paid. There was no valid ground under the *TSR Order* and MCIMetro decision to exclude any of the \$245,628.51 in charges identified in the Table from eligibility for reimbursement because there was no credible evidence in the record to indicate that any of these charges were incurred for non-paging purposes. Indeed, the only evidence in the record is that they were incurred for delivering paging traffic to Mr. McNeal's paging terminal in Boise.

(2) **The IPUC Erred In Allowing Qwest to Charge for Private Lines as a Wide Area Calling Service.**

Qwest contended that the leased lines and POTS lines should be excluded from reimbursement because the *TSR Order* allowed a LEC to charge for wide area calling or similar services. Qwest's witness, Sheryl Fraser, characterized lines that extended outside of a local calling area as "FX Facilities" or "private line transport service" and contended that the *TSR Order* allowed LECs to charge for them as wide area calling services. *Tr, Vol. V, p. 385, ll. 8-19; p. 386, ll. 3-8; p. 409, ll. 13-25; and p. 412, ll. 8-22.* She testified that the *TSR Order* allowed Qwest to charge for a POTS line even if it was used for paging. *Tr, Vol. V, p. 460, l. 23 – p. 461, l. 4.* An illustration may be helpful. A Qwest customer in Idaho Falls wishes to send a page to a PageData customer located anywhere in southern Idaho. The Qwest customer could make a local call to the POTS line listed for PageData in Idaho Falls (522-7386). *See, Table.* That call would be transported to PageData's Boise paging terminal via the leased lines or POTS lines listed in the Table. Once the call reached the Boise paging terminal, it would be sent out as a page signal over Mr. McNeal's paging system. Since the

call goes outside of the local Idaho Falls calling area for business and residential customers, Qwest would characterize this as a wide area calling service. When asked what part of the *TSR Order* allowed Qwest to charge for the type of line that performed this function, Ms. Fraser pointed to the following language on page 1 of the Order:

We further conclude that section 51.703(b) of the Commission's rules does not prohibit LECs from charging, in certain instances, for 'wide area calling' or similar services where a terminating carrier agrees to compensate the LEC for toll charges that would otherwise have been paid by the originating carrier's customer.

Tr, Vol. V, p. 412, ll. 8-22. It was her contention that this language gave Qwest the ability to charge for lines such as the leased lines and POTS lines.

The IPUC bought off on this argument, indicating that Qwest could charge for the lines under this wide area language. According to the IPUC, "In particular, the Commission found that PageData and Tel-Car had configured their systems in a manner that constituted wide-area calling arrangements." *R, Vol. V, p. 899.* Both Qwest and the IPUC overlooked the fact that none of the Pagers agreed "to compensate [Qwest] for toll charges that would otherwise have been paid by the originating carrier's customer." An agreement is essential to effectuate this arrangement. And, this argument was obliterated by a recent federal court decision.

The DC Circuit Court of Appeals definitively decided this issue against Qwest in Mountain Communications, Inc. v. FCC, 355 F.3d 644 (D.C. Cir. 2004). Mountain Communications, a Qwest customer in Colorado, served customers in three Colorado local calling areas, all of which were located within the same LATA. *Id. at 645.* Mountain Communication used a single point of interconnection with Qwest. That point of interconnection was located in Pueblo. Customers in each of the three calling areas had pager

numbers associated with their individual local calling area. A Qwest customer could call a pager number in his or her area but calls from all three areas were routed to Mountain Communication's point of interconnection in Pueblo. Qwest sought to recover fees from Mountain Communications for those calls that originated outside of the Pueblo local calling area and were routed to the point of interconnection in Pueblo. Qwest contended that these were toll calls for which it could charge under the language Sheryl Fraser quoted from the *TSR Order* (wide area calling services). *Id. at 645-6*. The FCC had, indeed, determined that Mountain Communications had obtained a wide area calling service and held that Qwest was entitled to charge for such service.

The DC Circuit found the FCC's holding to be contrary to the *TSR Order* and to 47 C.F.R. § 51.703(b). The Court held that Qwest could not levy toll charges against Mountain Communications, citing the MCIMetro holding that Rule 51.703(b) unequivocally prohibits LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions. *Id. at 648*.

At times relevant in this case, Mr. McNeal served Idaho Falls, Pocatello, Twin Falls, and certain outlining areas, as well as Boise. Those areas had local paging numbers that customers could call without toll charges, just as the customers of Mountain Communications could do in their three local calling areas. Mr. McNeal used his paging system, including the POTS lines and leased lines, to transport those calls to his paging terminal in Boise. From Boise the paging messages went out to the local calling areas, just as they did from Mountain Communication's Pueblo point of interconnection. Just as in Mountain Communications, Mr. McNeal was entitled to have the traffic transported free of charge to his point of

interconnection in Boise. Thus, he is entitled to have his reimbursement also calculated upon the \$158,238.95 overlooked by the IPUC.

In its Order No. 29555, the IPUC for some reason overlooked the fact that Mr. McNeal's situation is practically identical to that involved in Mountain Communications. The IPUC claimed that Mr. McNeal had failed to present adequate evidence that the Qwest charges levied against InterPage and PageData were for one-way paging traffic. *R, Vol. V, pp. 991-2*. However, Petitioners' Exhibits 109 and 122 fully documented that the \$240,756.03 paid to Qwest was for paging services. The hearing examiner (and IPUC) claimed that Mr. McNeal's evidence was scanty but that Qwest's evidence was well documented. Mr. McNeal does not challenge Qwest's evidence. What he does challenge is the failure of Qwest to include the POTS lines, leased lines, and other lines that were integral to his system and necessary to deliver paging traffic to the Boise paging terminal. Exhibits 109 and 122 were certainly detailed enough for Qwest to prepare the Table, which documents those charges in detail and compares them with Qwest's own records. Qwest's records indicate that PageData and InterPage paid more during the relevant timeframe than Mr. McNeal had contended. The hearing examiner might be excused for his error because he never saw the documents in Appendix II, but the IPUC did have the relevant evidence. Qwest presented the pertinent evidence, Appendix II, showing that InterPage and PageData had paid a total of \$245,628.51 for the telephone lines necessary to operate their paging system, but the IPUC failed to recognize the importance of the Appendix II evidence or to give it any consideration in determining how much reimbursement Mr. McNeal was entitled to have.

The IPUC has claimed that Mr. McNeal should not get a full refund of the amounts billed to and paid by InterPage and PageData because they “provided one-way paging, long-distance services, signal traffic, e-mails, data, two-way mobile service, private line service, 800 service, and plain old telephone service (POTS).” *R, Vol. V, p. 992*. The charges for which Mr. McNeal seeks recovery, as documented in the exhibit prepared by Qwest and attached as the Table, include private line accounts (leased lines) and POTS lines but do not include e-mails and internet service, two-way mobile service, 800 service, signal traffic, or data, as the IPUC claims. It is not certain what the IPUC means by long-distance services but this may be a reference to the fact that the leased line and POTS lines extend beyond the local calling areas established for business and residential service. Mr. McNeal’s unrebutted testimony states that the charges for which he seeks reimbursement were for paging only. In Order No. 29064, the IPUC claimed that Mr. McNeal had engaged in internet traffic during the timeframe in question. *R, Vol. V, p. 809*. When confronted with uncontested testimony that this was not the case (*Tr, Vol. VI, p. 546, ll. 1-25*), the IPUC backed off and admitted that “PageData did not provide ‘Internet’ services during the refund period.” *R, Vol. V, p. 910, ¶ 3*. Further, Mr. McNeal testified that InterPage, which was billed for and paid the lion’s share of the overcharges, engaged in paging and was not in the internet business. *Tr, Vol. VI, p. 516, ll. 2-8*. This testimony was not rebutted.

In its Order No. 29555, the IPUC claims that “charges for facilities used by PageData/InterPage to connect parts of their network on the paging side of the POIs (such as connecting the multiple POIs together), are costs appropriately borne by the Pagers.” *R, Vol. V, p. 992*. In support of this proposition, the IPUC cites Qwest Corporation v. FCC, 252 F.3d 462, 468 (D.C. Cir. 2001). It is incredible that the IPUC could reach this conclusion

after having read the Mountain Communications decision. First of all, it should be noted that the leased lines and POTS lines and other facilities located in Idaho Falls, Pocatello, Twin Falls, and the outlying areas are on Qwest's side of the Boise paging terminal, not on the Pager's side. Those lines and facilities feed the point of interconnection in Boise, just like Mountain Communication's three locations fed the Pueblo point of interconnection. In its Qwest Corporation v. FCC decision, the DC Circuit did say that a LEC may charge "for connecting parts of a paging carrier's own network, such as those linking a paging terminal with its antennas . . .", but that has no application to this situation. *See, 252 F.3d at 468.* Once a call comes to the Boise paging terminal, the call is routed out through PageData's system and PageData is responsible for all facilities and costs incurred from that point on, including its antennas. However, under all of the foregoing applicable precedent, Qwest has the obligation to furnish all facilities and to pay all costs necessary to transport the traffic to the Boise paging terminal. This is required by the *TSR Order*, the MCIMetro decision, 47 C.F.R. § 51.703(b), and the Mountain Communications decision.

(3) **The IPUC Erred in Refusing to Require Qwest to Bear the Cost of Transporting Paging Traffic to Mr. McNeal's Boise Paging Terminal.**

One further ground exists for requiring Qwest to calculate Mr. McNeal's reimbursement utilizing the \$158,238.75 in payments excluded by the IPUC. Under 47 U.S.C. § 251(c)(2)(B), a telecommunications carrier, including a CMRS, has the right to designate, and a LEC has a duty to provide, interconnection "at any technically feasible point within the [requesting] carrier's network". Regardless of this federal mandate, which became effective upon November 1, 1996, Qwest has steadfastly refused to provide Type One (one-way) pagers a single point of interconnection and, indeed, at the hearing Qwest's witness

made it clear that it would not be provided to any of the Pagers. *Tr, Vol. V, p. 400, l. 19 – p. 401, l. 5.* In the case of PageData/InterPage, a single point of interconnection at the Boise paging terminal would have eliminated the entire \$245,628.51 that Qwest extracted from them commencing on November 1, 1996 (assuming that the transit traffic charges are also to be reimbursed).

Although Mr. McNeal does have a *de facto* single point of interconnection with Qwest at his Boise paging terminal, it is not the type of interconnection point contemplated by the statute and implementing FCC rules. Federal law contemplate that a LEC will provide all facilities necessary to deliver traffic to the point of interconnection, free of charge to the interconnecting Type One paging carrier, in this case Mr. McNeal. When Qwest refused the request of InterPage to provide a single point of interconnection for its system at Boise, InterPage had to provide the facilities, i.e. the leased lines, to bring its traffic to the Boise paging terminal. *Tr, Vol. III, p. 194, l. 12 – p. 195, l. 10.* Qwest should have paid for these facilities, but the CMRS had to do so when Qwest refused. Again, on September 8, 1998, Mr. McNeal requested a single point of interconnection in Boise but was told by Qwest that “it was against the law, they weren’t going to do it”. *Tr, Vol. III, p. 163, l. 8 – p. 164, l. 18; Petitioners’ Exhibit No. 111, pp. 25 and 30.* Even though Sheryl Fraser submitted a declaration on January 15, 2001, in a dispute between Qwest and Mountain Communications, claiming that Qwest was willing to provide paging carriers with a single point of interconnection within the LATA (Petitioner’s Exhibit No. 113), she testified at the hearing that Qwest could not and would not provide a single point of interconnection or single point of presence for Type One paging carriers, such as Mr. McNeal and the other Pagers.

If Qwest had carried out its responsibility to provision the facilities, i.e. the necessary lines to bring all of Mr. McNeal's traffic from Idaho Falls, Pocatello, Twin Falls, and the outlying areas to the Boise paging terminal, as required under the Act, there would have been no need for InterPage/PageData to install POTS lines, leased lines, and other facilities to do the job. The IPUC seems to have the impression that because Qwest did not carry out its federally-mandated responsibility, and since InterPage and PageData therefore had to provide the necessary facilities themselves, Qwest should somehow escape responsibility for delivery of the paging traffic to the Boise paging terminal, free of charge. In actuality, Qwest should also shoulder the responsibility of reimbursing Mr. McNeal for the cost of provisioning his own facilities. The IPUC simply doesn't understand where the Qwest responsibility for provisioning facilities and delivering traffic ceases. That responsibility terminates at Mr. McNeal's Boise paging terminal, the same place where incoming traffic terminates. Mr. McNeal has the responsibility of provisioning for and transporting traffic once it reaches his paging terminal in Boise, but Qwest has the responsibility prior to that. He is entitled to reimbursement of the additional overcharges in the amount of \$158,238.95, or at least all but the 24% initially considered by the IPUC as transit traffic.

(4) **The IPUC Erred in Placing the Burden of Proof on Mr. McNeal and Tel-Car.**

Before going on to Tel-Car's situation, it would be appropriate to address an issue that affects both Tel-Car and Mr. McNeal. The issue is whether Qwest or the Pagers should bear the burden of proof regarding the propriety of the charges Qwest levied against the Pagers. The hearing examiner placed the burden on the Pagers and the IPUC concurred. *See, R, Vol. V, pp. 990-1.* The Pagers had to prove that each and every item that Qwest billed for was for

Type One paging. If they could not, Qwest got to keep the money it had extracted from them. Quite frankly, the burden of proof should have been placed squarely on Qwest, the party responsible for the overcharges in the first place.

Generally, when a business bills for a good or service, the customer expects that the business will demonstrate that the billing is accurate, just, and in compliance with law. Here, Qwest has admittedly billed 76% more than it was entitled to receive under the *TSR Order* for paging services. Under the Mountain Communications decision, the other 24% was improperly billed. The hearing examiner and IPUC would require the Pagers to bear the burden of proving that the other charges were inappropriate. Where Qwest has overcharged for much of the services by a factor of 100%, it seems that Qwest should bear the burden of showing that the entire amounts billed to, and paid by, the Pagers was just and in compliance with law.

Indeed, 47 U.S.C. § 251(c)(2)(D) places a duty upon each incumbent LEC to provide interconnection “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . .” The *TSR Order* states that any LEC efforts to continue charging CMRS or other carriers for delivery of LEC-originated traffic “would be unjust and unreasonable and would violate the Commission’s rules, regardless or whether the charges were contained in a federal or a state tariff.” *TSR Order*, p. 18, ¶ 29. See, also, I.C. § 61-301 (charges of a public utilities shall be just and reasonable). The IPUC should have placed the burden of proof on Qwest to show that the entire billings levied against the Pagers for the relevant timeframe were just, reasonable, and in compliance with law. This is especially so where the FCC clearly called “for LECs immediately to cease charging CRMS providers for terminating LEC-originated traffic”, as of November 1, 1996. This appears to practically

create a presumption that LEC charges to a Type One pager where improper. The LEC should bear the burden of showing its charges to be proper. Placing the burden of proof on the Pagers is like requiring a burglary victim to shoulder the burden of proving what the burglar took. According to Pace v. Hymas, 111 Idaho 581, 585, 726 P.2d 693 (1986):

It is the general rule that where evidence necessary to establish a fact lies peculiarly within the knowledge and competence of one of the parties, principles of fairness require that party to bear the burden of going forward with evidence on the issue.

In that case, the party having knowledge of facts relating to a financial exigency had the burden of proving it. Here, Qwest retained all of the records pertaining to the charges billed to and paid by the Pagers, Qwest knew the type of facilities and services being charged for, and Qwest should therefore have borne the burden of proof. Certainly, it was Qwest's obligation to show that its charges were just, reasonable, and in accordance with law. Placing the burden of proof on the Pagers was error.

D. Tel-Car Is Entitled to Additional Recovery.

Tel-Car is entitled to additional recovery in the approximate sum of \$20,000. Of that amount, around \$2,000 - \$3,000 is for what Qwest characterized as "T1 Non Local" on page 8 of Qwest's Exhibit 202 and \$17,574.72 is for what Qwest claimed were "mobile charges" as documented on pages 24-27 of Qwest's Exhibit 202.

The T1 Non Local amount on page 8 (\$4,174.35) was for transportation of traffic from Hailey to Twin Falls. The traffic was over a facility that served Tel-Car's point of connection, according to its president, Arden Casper. *Tr, Vol. I, p. 134, ll. 1-19; p. 145, ll. 7-22*. It might be noted that this amount was listed as \$5,282 in the third line on Petitioners' Exhibit 104, which was prepared by Qwest on November 30, 2000. In Petitioners' Exhibit

105, which was also prepared by Qwest, the amount had been whittled down to \$4,264 (including tax) by March 1, 2001. The IPUC denied recovery of the entire amount until Order No. 29555, when it allowed for reimbursement of \$3,909, including interest, as a "wide area calling refund". Tel-Car should have been awarded the entire amount, either the \$5,282 calculated on November 30, 2000, or the \$4,264 calculated on March 1, 2001, plus interest from the date of each payment going back to November of 1996. This would have added an additional \$2,000 - \$3,000 to Tel-Car's recovery.

The \$17,574.72 was for what Qwest characterized as "mobile charges". Sheryl Fraser peremptorily determined that the mobile accounts were not part of the *TSR Order*. *Tr, Vol. V, p. 338, ll. 5-9; p. 342, ll. 20-22*. Qwest and the IPUC excluded these accounts without performing even a perfunctory examination to see what they were used for or whether they were part of Tel-Car's paging system. Obviously, they were. There is nothing in the *TSR Order* that says mobile service or mobile charges are not subject to the same rules that apply to all other telecommunication facilities and traffic. Indeed, the very name of a paging carrier, "Commercial Mobile Radio Service", would seem to indicate that such companies may well employ "mobile services" in their paging systems. Tel-Car certainly did. As a matter of fact, when Qwest initially calculated the amounts that Tel-Car was eligible to receive reimbursement for, it appears that some of the mobile charges may have been included in the calculation. The initial calculation was entered into evidence as Petitioners' Exhibit No. 104. That calculation was performed on November 30, 2000. Three months later, Qwest performed another calculation, which was admitted into evidence as Petitioners' Exhibit No. 105. That calculation excluded the "mobile services", although in a different amount than Qwest calculated the charges on pages 24-27 of its Exhibit 202. Mr. Casper

testified that the calculation performed by Qwest in Exhibit 104 correctly stated the amount of reimbursement he was to receive, except for mileage charges. *Tr, Vol., III, p. 133, l. 14 p. 134, l. 19.* In other words, the mobile services were part of the Tel-Car paging system, utilized to deliver paging traffic to its point of connection.

The IPUC declined to award any of the \$17,574.72 to Tel-Car, claiming it had not proven how much was actually used for one-way paging. *R, Vol. V, p. 991.* Again, the IPUC misplaced the burden of proof. Mr. Casper testified that all of the charges reflected on Exhibit 104 were for paging during the relevant timeframe. It was for Qwest to prove otherwise.

Tel-Car is entitled to reimbursement for mobile charges, including interest accrued on the same from November of 1996, as well as for additional transport charges of \$2,000 - \$3,000 for transportation of traffic from Hailey to Twin Falls. The exact amount depends on how much interest was calculated into the \$3,909 that the IPUC allowed and how much interest accrued on the actual amount of the reimbursement.

E. Mr. Ryder Is Entitled to Additional Recovery.

Mr. Ryder's entitlement to recovery is very easy to calculate. He paid a steady \$1,811.67 per month during the entire period in question (November 1, 1996 to September 10, 1999). *Petitioners' Exhibit No. 103.* That produces a recovery amount of \$54,953.99, to which must be added the interest that accrued on each payment after November of 1996. Since the total recovery provided for by the IPUC was \$57,416 (including interest), it is obvious that a substantial amount of additional interest is owing to Mr. Ryder.

F. Qwest May Not Charge for Transit Traffic.

During the course of this proceeding before the IPUC, there have been twists and turns on the issue of whether Qwest could properly charge the Pagers for transit traffic, i.e. traffic that originated from a carrier other than Qwest but which was transported over Qwest's system to the Pagers' networks. At the time of the hearing, the FCC had only dealt with this issue in an off-handed manner. Footnote 70 of the *TSR Order* states, in pertinent part:

Section 51.073(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 FCC Rcd at 16016-17.

The FCC's citation to the Local Competition Order does not support the proposition stated in the second sentence. Nor does the statement comport with the general "rules of the road" in the telecommunications business, i.e. where the originating carrier has the responsibility to provide the facilities to deliver the traffic and charges its own customers for making the calls. *See, TSR Order*, p. 21, ¶ 34; *Tr*, Vol. IV, p. 288, ll. 16-25.

Following the hearing in this matter, the FCC adopted the statement in footnote 70 as its official policy. *See, MetroCall, Inc. v. Southwest Bell Telephone Company, et al.*, FCC 01-279 ("*MetroCall Order*"), p. 3, ¶ 5. Based on the FCC's holding in the *MetroCall Order*, the IPUC allowed Qwest to retain 24% of the overcharges it had levied against the Pagers. This was the amount of the total traffic that the IPUC determined had originated from carriers other than Qwest. *R*, Vol. V, p. 807.

Thus, the IPUC ordered that Qwest reimburse the Pagers for all but 24% of the amounts that Qwest had previously extracted from them in paging-related charges. *Id. at 818.* However, while this case was pending on appeal, the DC Circuit issued the Mountain Communications decision. While not actually deciding the issue, the DC Circuit wondered aloud why the FCC did not follow the standard practice of charging the cost of calls to the network of the party initiating the call (the rules of the road). Mountain Communications, *supra*, at 649. The Court's discussion is as follows:

Mountain's petition challenged this FCC decision [to allow Qwest to charge for transit traffic] as well, claiming that the charge is arbitrary and capricious because it does not follow the standard practice of charging the cost of calls to the network of the party initiating the call. Mountain insisted that the prospect of reimbursement from the originating carrier was illusory, because Mountain never receives information from Qwest about which carrier initiates any individual call, and it is therefore impossible for Mountain to seek reimbursement from a third carrier.

It is undisputed that Qwest need not absorb these costs; the only question is whether Qwest can charge Mountain for one of the five portions of this cost or must instead look to the originating carrier for all of the costs. . . . [The FCC] did not explain why it rejected Mountain's contention that the originating carrier should be charged for all the costs. In any event, by indicating that Mountain could charge the originating carrier, it suggested that Mountain was essentially correct in claiming that the originating carrier should bear *all* the transport costs.

Id. It seems rather clear that the DC Circuit was inclined to visit the costs of transit traffic on the originating carrier, rather than the paging carrier.⁴ However, the Court did not take that step because Qwest voluntarily conceded to refrain from charging the paging carrier, Mountain Communications, for transit traffic unless and until it provided the paging carrier

⁴ The intermediate LEC, such as Qwest, would obviously be in a better position than the paging carrier to collect from the originating carrier.

with billing information so that the paging carrier could seek reimbursement from the originating carrier. *Id.*

Based on the Mountain Communications outcome, the IPUC determined in Order No. 29555 that the Pagers were entitled to receive refunds for their transit traffic. According to the IPUC:

On remand, we find it reasonable for Qwest to provide either refunds or the calling data. Because Qwest has no data to give, we are left with no choice but to order Qwest to refund the transit traffic charges to the Pagers.

R, Vol. V, p. 988. Qwest has filed a cross-appeal in which it is indicated that this determination will be contested.

While the Pagers have prevailed on the transit traffic issue as of the present time, it would be prudent to present argument as to why Qwest was not entitled to retain the 24% of the overcharges based on its claim of entitlement to compensation for transit traffic. Even if Qwest were entitled to charge the Pagers for transit traffic, it did not raise this claim in an Answer, nor did it submit competent proof of the transit factor (the percentage of paging traffic that originated on the systems of other carriers).

As mentioned, Qwest did not specifically raise the transit issue in an Answer. The ability to charge for transit traffic is an exception to the general rule laid out by the FCC in the *TSR Order* and is essentially the same as a set-off to the amount that is to be refunded or credited to the Pagers. Set-off is an affirmative defense which must be pleaded and proven by the person asserting it. According to IPUC Rule 57.02.a. and b., affirmative defenses must be separately stated in the answer and failure to do so generally prohibits the party wishing to rely on the affirmative defense from asserting it in the proceeding. *IDAPA 31.01.01.057.02.a. and b.*

Not only must an affirmative defense be asserted in the answer, it must be proven by the party asserting it. See, Pace v. Hymas, *supra*, at 586, (“where the defense to an action is of an affirmative nature, the defendant becomes the proponent, and has the burden to bear.”)

Here, the proof offered by Qwest regarding the amount of the transit factor was weak, at best. Sheryl Fraser testified that it is not possible to measure the transit traffic with regard to paging customers. *Tr, Vol. V, p. 404, ll. 5-8*. She testified that the 24 percent transit factor utilized by Qwest was based on a study of cellular traffic, not paging traffic. *Tr, Vol. IV, p. 314, ll. 9-13; Vol. V, p. 388, ll. 3-11*. She thought the study might have included Idaho traffic but didn’t know whether this was the case. *Tr, Vol. V, p. 404, l. 19 – p. 405, l. 25*. She stated that if the study did not include Idaho traffic, Qwest probably averaged several states to get an Idaho number, but she didn’t know what states might have been included. *Id., p. 406, l. 1 15 – p. 407, l. 3*. Ms. Fraser’s testimony was contradicted by another Qwest employee, Vickie Boone, who conceded that the transiting factors utilized by Qwest “are not based on traffic studies.” *Qwest Exhibit 115, p. 1*.

Victor Jackson testified that there was no reliable correlation between transit traffic in the cell phone context and transit traffic in the paging context. He was asked:

In your experience, would there be any consistent correlation or any correlation that someone could rely upon between transit traffic in the cell phone context and transit traffic in the paging context?

His response, in part, was, “I don’t believe there’s a great correlation between the two.” *Tr, Vol. VI, p. 559, l. 25 – p. 560, l. 25*. With regard to the 24 percent factor advanced by Qwest, he testified, “It’s totally unsupported by any factual evidence.” *Tr, Vol. IV, p. 243, ll. 18-24*.

All of the Pagers testified, based on their personal experience in the paging business in Idaho, that the 24 percent transit traffic factor was much too high. Mr. Casper, who had

conducted three studies on his paging system, testified that his transit traffic was between 5 percent and 8 percent. *Tr, Vol. VI, p. 553, l. 3 – p. 554, l. 19; p. 556, ll. 7-20.* The hearing examiner belittled Mr. Casper's sworn testimony, claiming that he did not properly define transit traffic (*R, Vol. III, p. 402, ¶ 5*), that he testified about his studies on rebuttal rather than direct (*Id., p. 13*), and that he didn't have written documentation of the studies (*Id.*). The IPUC adopted these assertions. None of those claims affect the validity of Mr. Casper's un rebutted testimony. Mr. Casper clearly understood the definition of transit traffic. The pertinent testimony is as follows:

Q. [Mr. Jones] And you were aware that what they're talking about is traffic that doesn't originate on the Qwest system. In other words, it doesn't originate on the Qwest system, but by some other source or cell phone user?

A. [Mr. Casper] That's correct.

Q. Okay. And would that, for your system, be an accurate figure, 24 percent?

A. Twenty-four percent would be a high figure for us. . . . I've run some surveys, and pretty close to somewhere around five, eight percent probably represents our small company, you know, experience with the transit traffic.

Tr, Vol. VI, p. 552, l. 22 – p. 553, l. 12. Mr. Casper assuredly understood what transit traffic was. Un rebutted oral testimony does not need written documentation to be considered.

Mr. McNeal testified that the 24 percent transit factor was in no way accurate. *Tr, Vol. III, p. 174, l. 10 – p. 175, l. 13.* Mr. Ryder testified that he was essentially forced to enter into an interconnection agreement with the 24 percent figure because it was put to him as being nonnegotiable and was the only way he could reduce his monthly bill from Qwest. He recalls the Qwest negotiator stating that the 24 percent figure "had no bearing upon the

conditions as they existed in Idaho.” *Id.*, p. 110, l. 12 – p. 111, l. 5. Mr. Ryder put his transit traffic at between 3 and 5 percent. *Id.*, p. 112, ll. 17-20.

The long and the short of it is that Qwest failed to carry its burden of proving the transit traffic factor that applied to paging traffic in the State of Idaho during the relevant time frame. By failing to carry its burden of proving this affirmative setoff defense, Qwest did not make the case to recover for such traffic.

Again, it should be mentioned that the IPUC has reconsidered the transit traffic issue and determined that the Pagers are entitled to reimbursement of the transit traffic charges. Since Qwest has crossed-appeal in order to challenge the IPUC’s reversal of position, the Pagers have included this Section E in order to establish that Qwest failed to make its case to retain the transit charges, should the Court disagree with the IPUC’s latest ruling.

G. The Pagers Should Receive A Full Cash Refund for All Amounts Paid to Qwest During the Relevant Timeframe.

It has been the Pagers’ position since the start that they are entitled to recover back all sums that they paid to Qwest during the relevant timeframe, commencing on November 1, 1996. All of the amounts Qwest billed on the accounts in question were for their paging operations. Their regular business accounts are not included in the exhibits and have been paid separately. Qwest has not shown otherwise.

Qwest has, however, conceded that if the Pagers’ contentions regarding the proper interpretation of the *TSR Order* are correct, the Pagers should get a full refund. The concession came at the hearing during the testimony of Sheryl Fraser. The discussion was in the context of what Ms. Fraser referred to as “FX lines” or dedicated facilities that cross the local calling areas. The following exchange took place:

Q. [Mr. Jones] Now, I hate to be too simplistic, but if the TSR was saying that paging carriers shouldn't have to pay for dedicated facilities that deliver traffic to their point of connection, and if they shouldn't be required to pay for transiting traffic, wouldn't all these big, thick, voluminous Exhibits 201, 202, and 203 be pretty simple: You'd just figure out how much they paid and refund the whole thing with interest? Wouldn't that be the way you'd figure it?

A. [Ms. Fraser] Well, you'd still have to look at whether they had any other types of charges – 800 page line, wide area calling, self-healing – if they had any other additional services, because there are some other optional services besides just the facilities that are billed on those same accounts, so we'd still have to, you know, look at that.

Q. But you didn't include any 800 service or wide area calling or any of those other options in exhibit – in the summary sheets of Exhibit 201, 202, and 203?

A. Exhibit 203 does show that there were 800 page line charges, and they were shown, \$3,613.

Q. So we would deduct that from the total amount paid, but then once you deducted that, then you could take the amount paid and give 100 percent credit and that would kind of be the end of it, wouldn't it be?

A. Sounds right, yes, if we determined that all those facilities should have been provided at no charge.

Q. So it kind of depends on whether we interpret the TSR one way or interpret it the other way?

A. Yes.

Tr., Vol. V, p. 466, l. 8 – p. 467, l. 18. In its Order No. 29603, just released on October 5, 2004, the IPUC deleted the 800 page lines that it had credited to PageData, based upon Qwest's most recent recalculation of credits. There is no wide area calling involved in this case of the type that Qwest can charge for, i.e., no buy-down agreement. The Mountain Communications and MCIMetro decisions have interpreted the *TSR Order* in the manner that

Pagers have asserted to be correct. Therefore, based on the record, the applicable law, and Ms. Fraser's concession, full reimbursement should be made to the Pagers.

The reimbursement should have been, and any further reimbursement should be, made in the way of a full cash refund. Despite the fact that Qwest did not seek any affirmative relief in this case and despite the fact that Qwest had extracted the overcharges from the Pagers, in cash, the IPUC generously gave Qwest the option of either giving the Pagers a refund or a billing credit. It doesn't take a genius to figure out which option Qwest selected. The credits were initially granted by Qwest on the basis of the over-inflated billing rates that Qwest forced on Mr. McNeal and Mr. Ryder in the take-it-or-leave-it interconnection agreements. That, of course, has been the source of additional controversy. However, the kindness that the IPUC extended to Qwest in allowing it to reimburse by way of credit has resulted in not one thin dime having been returned to the Pagers since the start of this proceeding. The IPUC finally came around in Order No. 29555, requiring for the first time that Qwest actually give some money back to the Pagers. Order No. 29603 appears to do the same. This may have resolved the problem but any further reimbursement should be strictly by way of cash refund.

H. The IPUC Used The Wrong Interest Rate.

The IPUC correctly determined that the Pagers were entitled to recover interest on the overcharges Qwest levied against them commencing on November 1, 1996. After all, Qwest extracted tens of thousands of dollars from the Pagers in violation of the Act, under the threat of cutting off service if the improper bills were not paid. The Pagers are certainly entitled to interest on the money that Qwest improperly obtained from them. However, the IPUC utilized the wrong interest rate.

The IPUC stated the basis for the interest award, as follows:

In Order No. 28427, the Commission found that *Idaho Code* § 62-616 provided it with authority to resolve the Petitioners' complaints in this case. This section provides that 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[.]" *Idaho Code* § 62-616 (emphasis added). In this case the Commission found that Petitioners were entitled to billing credits or reimbursement from Qwest. Order No. 28601. The Commission relied upon *Idaho Code* § 62-616 ("other relief as is reasonable") and *Idaho Code* §§ 61-641 as a basis for it to order reparation in this case. As with other provisions of Title 62, the Commission looked to Title 61 to fashion reasonable relief in this case. *See e.g., Idaho Code* §§ 606; 62-608; 62-611; 62-614(2); 62-619. The Commission relies on these same authorities to now find that "other relief as is reasonable" would include "interest from the date of collection[.]" *Idaho Code* §§ 62-616 and 61-641.

R, Vol. I, p. 187.

The Pagers requested that the IPUC apply the legal rate of interest (12%) provided for in I.C. § 28-22-104(1), which applies, "When there is no express contract in writing fixing a different rate of interest . . ." However, the IPUC decided to use its Telephone Customer Relations Rule 106 (IDAPA 31.41.01.106.01), which uses a 12-month average interest rate for one-year Treasury Bills. *IDAPA 31.41.01.106.02*. There is obviously a large difference between the 12% interest rate in I.C. § 28-22-104 and the Telephone Customer Relations Rule, which ranged around 5% - 6%.

Rule 106 does not apply in this case. That rule applies to telephone customers. The Pagers are not customers within the meaning of the rule. Rather, they are telecommunication carriers. Further, the rule deals with utility deposits and there are no deposits in this case. Therefore, it would be more appropriate to use the statutory 12% interest rate. The IPUC erred in not doing so.

I. The Pagers Are Entitled to Attorney Fees on Appeal.

This case involves a contractual relationship between the Pagers and Qwest, whereby the Pagers have obtained telecommunication services from Qwest. The case also involves commercial transactions between the parties related to their respective telecommunications businesses. The Pagers respectfully request an attorney fee with regard to this appeal pursuant to I.C. § 12-120(3).

VI. CONCLUSION

It is respectfully requested that the Court remand this case to the IPUC with the following instructions:

(a) That, in accordance with the FCC and Circuit court decisions holding that a LEC must deliver traffic of a Type One pager to a single point of interconnection within the LATA (here the Boise LATA), the IPUC require that Qwest make a full refund of the amounts that Mr. McNeal and Tel-Car paid to Qwest for transport of all traffic to their respective paging terminals during the relevant timeframe.

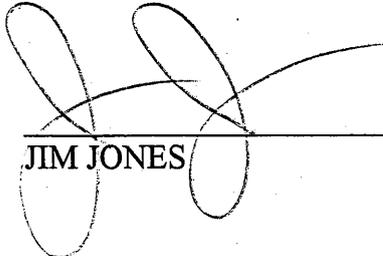
(b) That the IPUC require Qwest to make a full refund of the \$54,953.99 that Mr. Ryder paid from November 1, 1996, to September 10, 1999.

(c) That the IPUC calculate interest at the rate of 12% on the refunds owing from the date each payment was made and require Qwest to pay the same.

(d) That all refunds be made, in cash.

In addition, the Pagers request their attorney fees on appeal.

RESPECTFULLY SUBMITTED this 8th day of October, 2004.



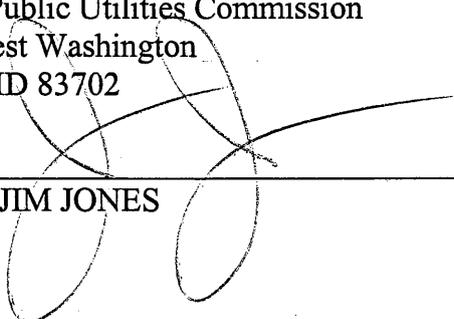
JIM JONES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of October, 2004, I caused to be served two true and correct copies of the foregoing BRIEF OF APPELLANT by depositing the same in the United States mail, postage prepaid, in envelopes addressed to the following:

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