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IDAHO PUBLIC
UTILITIES COMMISSION

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Attorney for Petitioners/Appellants/Cross-Respondents

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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.,)

Supreme Court Docket No. 29175

USW-

IPUC Docket No. T-99-24

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

**MOTION TO STRIKE QWEST
CORPORATION'S CALCULATIONS
PURSUANT TO ORDER NO. 29603**

Petitioners/Appellants-)
Cross-Respondents,)

vs.)

IDAHO PUBLIC UTILITIES)
COMMISSION,)

Respondent on Appeal,)

and)

QWEST CORPORATION,)

Respondent/Respondent on)
Appeal – Cross-Appellants.)

The Petitioners hereby move the Commission for entry of an order striking Qwest Corporation's Calculations Pursuant to Order No. 29603 ("Qwest Calculations") and requiring Qwest to make an immediate cash refund of all amounts heretofore determined by the Commission to be owing to the Petitioners. This motion is made on the following grounds:

(a) Qwest Corporation's most recent calculations are not made pursuant to Order No. 29603. Rather, the calculations are in defiance of the Commission's order. Instead of performing straight-forward calculations, as ordered by the Commission, Qwest has used the document as a means to reargue its case and to attempt to assess bogus charges against the Petitioners in an effort to reduce their reimbursement to nothing.

(b) By giving Qwest Corporation the option of granting either a cash refund or a billing credit, the Commission has allowed Qwest an affirmative defense (set-off) that was neither pleaded nor proven.

When this proceeding was initiated, the Petitioners alleged that Qwest had charged them for facilities and services that were required to be provided without charge under federal law. The Petitioners sought "recovery of amounts paid" commencing in September of 1996. *See, Agency Record on Appeal ("R"), p. 5.* At no time did Qwest file an answer asserting any affirmative defenses. Set-off is an affirmative defense which must be pleaded and proven by the person asserting it. According to Commission 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. *ADAPA 31.01.01.057.02.a. and b.* Not only must an affirmative defense be asserted in the answer, it

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must be proven by the party asserting it. *See, Pace v. Hymas*, 111 Idaho 581, 586, 726 P.2d 693 (1986) (“where the defense to an action is of an affirmative nature, the defendant becomes the proponent, and has the burden to bear.”)

There is no question but that the option granted by the Commission to Qwest to issue billing credits, in lieu of making cash refunds of the improper charges, amounted to a set-off.

According to the Idaho Supreme Court:

Setoff is an equitable doctrine. It is based on the principle that where two parties are mutually indebted, justice requires that the debts be set off and that only the balance is recoverable. *See 20 Am. Jur. 2d Counterclaim, Recoupment, and Set Off § 7 (1965).*

Intern. Equip. Serv. v. Pocatello Indus. Park, 107 Idaho 1116, 1119, 695 P.2d 1255 (1985).

Set-off is an affirmative defense and must be either pleaded as such or pleaded as a counterclaim. *Fleming v. Hathaway*, 107 Idaho 157, 160-1, 686 P.2d 837 (Ct. App. 1984).

There can be no question but that Qwest failed to assert a set-off defense or counterclaim in any answer.

Nor was a set-off proven with regard to any of the Petitioners. While the hearing examiner required fastidious proof from Petitioners as to the amounts they had paid for the services and facilities that should have been provided to them by Qwest free of charge, there was no requirement that Qwest carry the burden of proving any claim that it might have to a set-off. Indeed, since the issue was not pleaded by Qwest, the issue was not subject to being tried at the hearing.

In its latest calculation, Qwest states in footnote 14 on page 10 that it “applied the billing credits for Radio Paging and PageData more than a month ago.” There was never any

directive from the Commission for it to do so. Rather, in Order No. 29555 the Commission ordered that the refunds be made in cash.

When the Petitioners were seeking to establish the amount of the reimbursement to which they were entitled, they were required to confine their proof to the relevant timeframe, as determined by the Commission. With regard to Radio Paging and PageData, the relevant timeframe ended at the time their respective interconnection agreements were approved by the Commission. However, Qwest has not regarded the time that the interconnection agreements were approved as the end of its claims for set-off. Qwest has continued to assert that it is entitled to set off under the interconnection agreements. So, it has applied the amounts it claims to be owed pursuant to the interconnection agreements of Radio Paging and PageData against the amounts determined to be owing to them for overcharges. If allowed to do so, Qwest will not have had to prove its entitlement to a set-off and will be in a position to determine unilaterally how much the charges should be for periods both before and after approval of the interconnection agreement.

To see how skewed the result is, let us take the example of Radio Paging. As set forth in Petitioners' Exhibit No. 103, Radio Paging paid a steady \$1,811.67 per month during the entire period in question (November 1, 1996 to September 10, 1997). Early on this proceeding, the Commission ordered that 76% of each monthly payment be refunded or credited back to Radio Paging. Upon remand this year, the Commission ordered that the remaining 24% of the monthly payments be refunded or credited back to Radio Paging. This amounts to a 100% refund or credit. Although the Commission came out with a different number, a simple calculation would produce a recovery amount of \$54,953.99, exclusive of interest. This is money which was actually paid to Qwest during the relevant timeframe. If

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Qwest was not entitled to charge any of the \$1,811.67 per month during the period of time in question, it would seem that the very same services and facilities should have been provided to Radio Paging free of charge after September 10, 1999 under the Qwest-Radio Paging interconnection agreement. After all, the Commission can take official notice that the interconnection agreement in question has a change of law provision (Section 1.2), stating that a change in the law will amend the agreement where "it reasonably appears that the Parties would have negotiated and agreed to different term(s)". A copy of the provision is attached. Does anyone believe that Radio Paging would have agreed to pay a 24% transit traffic charge in its interconnection agreement if that provision had not been forced upon Radio Paging? The Commission's recent ruling on this issue should be applied to the transit traffic charges levied under the interconnection agreement, as the Commission has applied it to charges levied during the relevant timeframe for this proceeding. However, in calculating the amount of credit that Qwest claims Radio Paging is entitled to, i.e., about \$20,000, Qwest has obviously chosen to set off the transit traffic charges accumulated under the interconnection agreement against the amount found to be owing to Radio Paging. *See, Qwest Calculations, p. 9.* In other words, Qwest is unilaterally claiming a bogus set-off for a period that extends from and after September 10, 1999. Radio Paging has never had the opportunity to submit proof to the Commission to show that this is an inappropriate set-off. This is a set-off with a vengeance. The situation with regard to PageData's recovery is the same.

If the Petitioners owe something to Qwest for services provided either before or after they entered into their interconnection agreements, it is a matter that should be determined in a separate proceeding where the parties are on notice of what the issues are and have a fair

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opportunity to present their evidence and defenses. There has never been such an opportunity for Petitioners. By allowing Qwest to have a set-off, which it neither pleaded nor proved, the Commission has allowed this matter to descend into a quagmire. Qwest has not had to pay one thin dime to any of the Petitioners and has no intention of doing so. It claims that refunds are inappropriate, even though it failed to file for, or prove its right to, a set-off. It agrees that there is substantial confusion in the current case posture. According to Qwest:

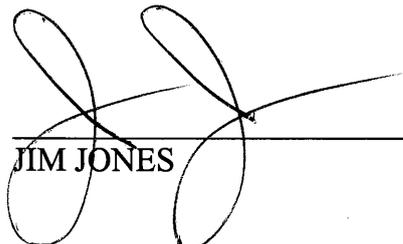
Moreover, how would such refunds be calculated; that is, at what point in time would debits and credits be compared? What services would be counted in determining whether there is a positive or negative balance? What about the billing credits previously ordered by the Commission and already applied – should they now be reversed?

Qwest Calculations, p. 10. And, in its Amended Notice of Cross-Appeal, Qwest asserts:

If the Commission ordered Cross-Appellant to make refunds to Cross-Respondents, rather than to provide billing credits, whether the Commission erred in making such decision and in failing to provide a clear order to determine how such refunds/billing credits or combinations thereof would be determined.

The only way to get out of the quagmire and to provide the clarity desired by all parties is to strike the Qwest Calculations as being inappropriate and nonresponsive to Order No. 29603, to order that the refunds calculated pursuant to Order No. 29555 be immediately paid in cash (\$57,467 to Radio Paging, \$52,848 to Tel-Car, and \$101,950 less the \$5,007 provided for in Order No. 29603, or \$96,943, to PageData), and to provide that any claims Qwest may have against the Petitioners be determined in other proceedings.

DATED this 10th day of November, 2004.



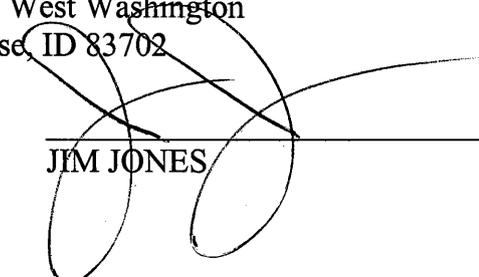
JIM JONES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of November, 2004, I caused to be served a true and correct copy of the foregoing MOTION TO STRIKE QWEST CORPORATION'S CALCULATIONS PURSUANT TO ORDER NO. 29603 by depositing the same in the United States mail, postage prepaid, in an envelope addressed to the following:

WILLIAM J. BATT
Marshall, Batt & Fisher
P.O. Box 1308
Boise, ID 83701

DON HOWELL
Idaho Public Utilities Commission
472 West Washington
Boise, ID 83702



JIM JONES

TYPE 1 PAGING AGREEMENT

This Type 1 Paging Agreement, is between Robert S. Ryder d.b.a. Radio Paging Service ("Paging Provider") an Individual Proprietorship, and U S WEST Communications, Inc. ("USWC"), a Colorado Corporation.

Paging Provider is licensed to provide paging services by the Federal Communications Commission ("FCC"). Both USWC and Paging Provider are engaged in providing telecommunications and other services and have agreed to connect their facilities and exchange traffic; therefore, each party covenants and agrees as follows:

1. RECITALS

- 1.1. The Parties enter into this Agreement without prejudice to any positions they have taken previously, or may take in the future in any legislative, regulatory, or other public forum addressing any matters, including matters related to the types of arrangements prescribed by this Agreement. It will be submitted to the Idaho Public Utilities Commission.
- 1.2. The Parties have agreed to certain provisions in this Agreement, based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the "Existing Rules"). To the extent that certain of the Existing Rules are changed and modified, and it reasonably appears that the Parties would have negotiated and agreed to different term(s), conditions(s), or covenant(s) than as contained herein had such change or modification been in existence before execution hereof, then this Agreement shall be amended to reflect such different term(s), condition(s), or covenant(s). Where the Parties fail to agree upon such an amendment, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement.

2. SCOPE OF AGREEMENT

- 2.1. Unless otherwise provided in this Agreement, the Parties will perform all of their obligations hereunder, to the extent provided in the Appendices attached hereto. The Agreement includes all accompanying appendices.
- 2.2. In the performance of their obligations under this Agreement, the Parties shall act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement, (including, without limitation, the obligation of the Parties to further negotiate the resolution of new or open issues under this Agreement) such action shall not be unreasonably delayed, withheld or conditioned.
- 2.3. Interchange of Type 1 Traffic
 - 2.3.1. USWC will originate and terminate paging traffic and deliver it to the Paging Provider's facility in the service area(s) set forth in Appendix C as herein provided.
 - 2.3.2. This Agreement is for Type 1 traffic interchange for licensed, narrow-band radio carriers only. All other interconnections are covered by