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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

ROBERT RYDER, d/b/a RADIO )  
PAGING SERVICE, et al., )  
Petitioners/Appellants/Cross Respondents, )

IPUC Docket No. T-99-24

vs. )

IDAHO PUBLIC UTILITIES COMMISSION, )  
Respondent on Appeal, )

and )

QWEST CORPORATION, )  
Respondent/Respondent on Appeal/Cross- )  
Appellant, )  
\_\_\_\_\_ )

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE IDAHO PUBLIC UTILITIES COMMISSION

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**Commission, Respondent on Appeal**

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## I. INTRODUCTION

This brief is submitted by the Petitioners and Appellants (“Pagers”) in reply to the response briefs of Qwest Corporation (“Qwest”) and the Idaho Public Utilities Commission (“IPUC”) and in response to the issues raised by Qwest in its cross-appeal. This brief will first address certain issues relevant to the reply and then respond to the issues raised in the cross-appeal. This brief does not contain additional argument on behalf of Tel-Car, Inc. because Qwest and Tel-Car have entered into a settlement, which awaits approval by the Bankruptcy Court. The IPUC has ordered the remaining parties to mediate but it is not likely that meaningful mediation will occur before the end of this year. The Pagers have filed a motion to augment the agency record to include that order (Order No. 29666) and a copy is included herein as Appendix I.

During the course of the briefing, the IPUC has grappled with the issue of how the reimbursement owing to the Pagers should be handled. That is, whether Qwest has the option to make reimbursement solely through a billing credit, whether reimbursement should be partially in cash and partially in billing credit, whether the credit option should be confined to the recovery period (11/1/96 – 5/13/99 for Mr. Ryder and 11/1/96 – 9/10/99 for Mr. McNeal), and, if the latter, whether either of the two Pagers owed anything to Qwest at the end of their respective recovery period.

In their initial brief, the Pagers pointed out that the IPUC should have required a full cash refund to the Pagers, instead of giving Qwest the option of either granting a refund or a billing credit, because Qwest had not sought affirmative relief in the proceeding. See, *Brief of Appellants*, p. 36. It appeared that the IPUC had addressed the matter in its Order No. 29555, requiring Qwest to make a cash refund of the net amounts owing the Pagers as of the

end of their respective recovery period, but subsequent orders have somewhat muddied the waters. In its Order No. 29666, the IPUC is essentially inviting an evidentiary discussion in order to resolve the matter. That is, to determine how much of the respective awards might be subject to a billing credit and how much should be made by way of a cash refund. Qwest has taken the position that it is entitled to apply the awards fully as a credit, regardless of the recovery period. The Pagers have taken the position that they are entitled to a full cash refund because their accounts with Qwest were current at the end of their respective recovery periods. The IPUC has taken somewhat of a middle ground. Thus, during the briefing period, the parties have been continuing to argue and litigate the issue of cash refund vs. billing credit and will likely to continue doing so unless and until this Court orders otherwise.

Although the Pagers have pointed out in their initial brief that Qwest failed to seek affirmative relief and was therefore not entitled to any, it may be appropriate to more fully focus upon that issue since it appears that it is critical to resolution of the appeal. Thus, the Pagers are characterizing this issue as an additional issue on cross-appeal in order to get to the nub of the issue of refund vs. credit.

## II. ADDITIONAL ISSUE ON CROSS-APPEAL

Whether Qwest is entitled to a billing credit since it failed to plead or prove an affirmative defense of set-off?

## III. THE PAGERS' REPLY

The main dispute between and among the parties relates to the question of whether the IPUC properly excluded charges assessed by Qwest and paid by PageData and InterPage of Idaho for lines utilized by those McNeal entities to funnel traffic from outlying areas to their paging terminal in Boise. Mr. McNeal testified that both PageData and InterPage of

Idaho used the leased lines and POTS lines to bring paging traffic from Idaho Falls, Twin Falls, Pocatello, Burley, and other outlying areas within the LATA, to the Boise paging terminal from which the calls were then transported to the paging customers. The IPUC and Qwest both contend that a pager is required to pay for POTS lines and leased lines even if they are used to transport traffic to the pager's point of interconnection at the paging terminal. The Pagers argue that it is Qwest's responsibility to get the traffic to the point of interconnection and to do so free of charge to the pager.

In its response brief, the IPUC stated the basis for its decision to exclude reimbursement to Mr. McNeal for the POTS lines and leased lines, as follows:

Based upon the *TSR Order*, Qwest witness Sheryl Fraser argued that it was reasonable for Qwest to exclude non-paging facilities from the calculation of the refunds.

*IPUC Brief, p. 13.* As stated at pages 26-7 of that brief, the IPUC "found that it was not appropriate to provide refunds to the Pagers for those Qwest facilities that were on the Pagers' side of their points of interconnection (i.e., operating as part of the Pagers' networks)." The IPUC had the impression that the POTS lines and leased lines, which funneled the traffic to the point of interconnection at the Boise paging terminal, were on the Pager's (Mr. McNeal's) side of the system and the Pager's responsibility, solely because Qwest did not provide the single point of interconnection that it was obligated to provide under the Telecommunications Act of 1996 ("Act"). See, *Brief of Appellant's, pp. 18-22.* The IPUC is mistaken as to whose responsibility it is to provision facilities to a pager's terminal. As a matter of law, Qwest had an obligation to furnish a single point of interconnection within the LATA to each of the Pagers and to carry traffic to that point of interconnection, free of charge. Because Qwest failed to carry out its responsibility to

provide Mr. McNeal with a single point of interconnection, he found himself in a position where he had to use leased lines and POTS lines to collect the calls made to his customers from various points in the LATA and then funnel them to his paging terminal in Boise. However, just because Mr. McNeal did not have a formal Qwest-designated point of interconnection in Boise, does not mean that Qwest gets out of its obligation to transport the traffic to the defacto point of interconnection in Boise, free of charge. Indeed, even at the time of the hearing in this matter, Qwest's witness, Sheryl Fraser, emphatically stated that Qwest would not provide a single point of interconnection for any Type One (one-way) pager, despite what the law required.

The POTS lines and leased lines were not excluded based upon testimony that they were not part of Mr. McNeal's system for bringing traffic to his point of interconnection in Boise. Rather, they were excluded based upon Sheryl Fraser's interpretation of the TSR Order, which interpretation was adopted by the IPUC. Both were wrong, as a matter of law.

The only testimony regarding the configuration of Mr. McNeal's system was from Mr. McNeal. Sheryl Fraser did not know how the system was configured. She submitted no testimony on the issue. She did not contradict Mr. McNeal's testimony. Mr. McNeal testified that the lines represented by the accounts in his exhibits, Petitioners' Exhibits 109 and 122, were used solely for the purpose of transporting paging traffic to his paging terminal in Boise. He testified that these accounts did not include his business accounts. His testimony was uncontradicted and unrebutted. Neither Qwest nor the IPUC has contended otherwise. The accounts represented on Petitioners' Exhibits 109 and 122 are exactly the same accounts that Qwest documented in its itemization and comparison of accounts, which is attached as Appendix II to the opening Brief of Appellants. See, specifically the Table at

R., Vol. II, p. 375, a copy of which is attached hereto as Appendix II. Although the IPUC has belittled Mr. McNeal's evidence regarding the amounts paid on these accounts by PageData and InterPage of Idaho (See, *IPUC Brief*, p. 13), Qwest has documented that the two McNeal businesses actually paid about \$5,000 more during the relevant time frame than Mr. McNeal's exhibits showed. Mr. McNeal had calculated payments by PageData and InterPage at \$240,756.03 from January of 1996 through September of 1999. Qwest determined that the payments were actually \$245,628.51 from November of 1996 through August of 1999. In its calculations, Qwest did not include \$18,032.50 for frame relay, T-1 lines, and a number of other items to which Qwest has objected. The lions share of Qwest's calculations relate to accounts that Mr. McNeal testified were used solely to transport traffic to his Boise paging terminal. See, *Appendix II*. That is, \$207,847.93 was shown by Qwest to have been paid by Mr. McNeal's entities for accounts designated by Qwest as "DID Service". *Id.*

The contention by the IPUC and Qwest that Qwest does not have to reimburse for lines that were undisputedly used to transport paging traffic from outlying areas to Mr. McNeal's paging terminal is wrong, as a matter of law. Qwest was responsible for bringing the traffic to the paging terminal, regardless of the means for getting it there, under the applicable law, as interpreted by the Federal Communications Commission and the Federal Circuit Courts of Appeal, particularly in *Mountain Communications, Inc. v. FCC*, 355 F. 3<sup>d</sup> 644 (D.C. Cir. 2004). See, *Brief of Appellants*, pp. 18-20.

At times, the IPUC has indicated it did not know the purpose served by the POTS lines and leased lines. For example, the IPUC contends that Mr. McNeal did not separate his paging payments from non-paging charges. *IPUC Brief*, p. 14. To the contrary, Mr. McNeal

testified that all of the accounts represented in Petitioners' Exhibits 109 and 122 were for lines used to transport his paging traffic to his Boise paging terminal. The IPUC essentially recognized this to be the case at page 15 of its brief, where it found that PageData had configured its paging network in a manner that constituted wide area calling, and at pages 26-27 of its brief, where it acknowledged that Mr. McNeal's system consisted of a number of what the IPUC called "points of interconnection". What the IPUC did not acknowledge is that the multiple "points of interconnection" were on Qwest's side of the system and Qwest's responsibility under the law, rather than Mr. McNeal's. All of those alleged "points of interconnection" carried Qwest-originated traffic to the actual point of interconnection, Mr. McNeal's Boise paging terminal. There is not one item of evidence in the record that indicates a paging terminal was located at any of the multiple "points of interconnection" in Idaho Falls, Twin Falls, Pocatello, or anywhere else.

As the IPUC points out, it initially denied reimbursement for the lines that carried traffic from the outlying areas to the Boise terminal, characterizing this as a "wide area calling arrangement". *IPUC Brief, p. 15, item (b)*. The IPUC obviously knew that these lines were being used for "paging" services, i.e., to carry Qwest-originated traffic to Mr. McNeal's Boise paging terminal. The IPUC cannot contend that it does not know the lines represented by the accounts shown in Appendix II were not used for paging, i.e., to carry the Qwest-originated traffic to the Boise paging terminal.

The long and the short of it is that Mr. McNeal is entitled to reimbursement for the entire \$245,628.51, which Qwest has documented that PageData and InterPage of Idaho paid for DID Service, leased lines, and POTS lines during the relevant time frame. Appendix II. The uncontradicted testimony is that these lines were used to transport paging traffic to Mr.

McNeal's Boise paging terminal. The lines were on Qwest's side of Mr. McNeal's point of interconnection at Boise and, therefore, Qwest's responsibility. The IPUC first claimed that these outlying lines were wide area calling arrangements and Mr. McNeal's responsibility. However, the *Mountain Communications* decision made short work of that contention. Now, the IPUC and Qwest claim that the lines are on the pager's side of the point of interconnection, rather than on Qwest's side, but that interpretation is wrong as a matter of law and results from a misreading of the *Mountain Communications* decision. In an almost identical fact situation, the D.C. Circuit held that Qwest was not entitled to charge the paging company for calls that originated outside of the local calling area where its point of interconnection was located. See, *Brief of Appellants*, pp. 17-20.

On another matter, the IPUC contends that the interest rate in its Rule 106 should be applied to the awards it made to the Pagers, rather than the 12% interest rate in I.C. § 28-22-104 (1). However, Rule 106 does not apply to telecommunication carriers. Qwest and the Pagers are such carriers, who are not subject to State regulation but, rather, are subject to federal law. Rule 106 applies to telephone customers, whose service by Qwest is subject to State regulation. Further, the rule deals with utility deposits and there are no deposits in this case. On the other hand, I.C. § 28-22-104 (1) applies, "When there is no express contract in writing fixing a different rate of interest..." that is the situation here. Qwest extracted illegal payments from the Pagers on a monthly basis, beginning on November 1, 1996, and has never made restitution. Qwest has had its ill-gotten gains for eight years. The Pagers have neither had the money nor interest on the money. By failing to require Qwest to make a cash refund of its ill-gotten money, the IPUC has essentially rewarded Qwest for its misconduct and kept the Pagers from recovering back the purloined monies. There is no specific rate of

interest that applies, so the 12% provided for in I.C. § 28-22-104 (1) is the appropriate interest rate to be applied to the reimbursement owing to the Pagers.

#### IV. THE PAGERS' RESPONSE TO QWEST'S CROSS-APPEAL

When this proceeding was initiated, the Pagers alleged that Qwest had charged them for facilities and services that were required to be provided without charge under federal law. The Pagers sought "recovery of amounts paid" commencing in September of 1996. *R., Vol. I, 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 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*, 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 IPUC to Qwest to issue billing credits, in lieu of making cash refunds of the improper charges, amounted to a set-off. According to this 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 Pagers. While the hearing examiner required fastidious proof from the Pagers 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 litigated at the hearing. As a matter of fact, it is currently being litigated in on-going proceedings before the IPUC, as indicated in Order No. 29666.

When the Pagers 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 IPUC. With regard to Radio Paging and PageData, the relevant timeframe ended at the time their respective interconnection agreements were approved by the IPUC. 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 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. In its latest calculation entitled "Qwest Corporation's Calculations Pursuant to Order No. 29603", dated October 15, 2004 ("Qwest Calculations"), Qwest claims at page 9 that Mr. McNeal actually owes Qwest in excess of \$200,000 and that it only owes Radio Paging approximately \$20,000. This is because Qwest has reduced their respective awards by crediting them against charges it contends are owing under the interconnection agreements. If it is allowed to unilaterally

determine how much it believes the Pagers owe under the interconnection agreements and to unilaterally credit their awards to charges that extend beyond the recovery period, Qwest will not have had to prove its entitlement to a set-off and will be the sole judge of how much the charges should be for periods both before and after approval of the interconnection agreement. In its Order No. 29666, the IPUC stated that any set-off or billing credits had to end as of the date each Pager entered into his interconnection agreement. *Order No. 29666, p. 3.*

To see how skewed the result would be if Qwest were to have its way, 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 May 13, 1999). Early on in this proceeding, the IPUC ordered that 76% of each monthly payment be refunded or credited back to Radio Paging. Upon remand early this year, the IPUC 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 IPUC 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 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 May 13, 1999 under the Qwest-Radio Paging interconnection agreement. 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 unilaterally claims a bogus set-off for a period that is entirely after May 13, 1999. Radio Paging never had the opportunity to submit proof to the IPUC 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 Pagers 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 opportunity to present their evidence and defenses. There has never been such an opportunity for the Pagers. By allowing Qwest to claim a set-off, which it neither pleaded nor proved, the IPUC has allowed this matter to descend into a quagmire. Qwest has not had to pay one thin dime to any of the Pagers and apparently 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 IPUC has attempted to resolve the quagmire in its Order No. 29666. First, the IPUC has found Qwest's Calculation to be "non-responsive" to the requirements of Order No. 29603. *Id., p. 3.* Second, the IPUC has indicated that any set-off has to be confined to

the Pagers' respective recovery period. Both Mr. McNeal and Mr. Ryder have stated, under oath, that they are entitled to a full cash refund of their respective awards because they both had a credit balance with Qwest at the end of their respective recovery period. See, *Affidavit of Robert Ryder* and *Affidavit of Joseph B. McNeal*, both filed with the IPUC on August 17, 2004 and subsequently augmented into the Agency Record. It is likely that Qwest will try to present some sort of evidence to the IPUC at some point, contending that either or both had no credit balance at the time. However, such evidence appears to be lacking in the present record. Therefore, it would be appropriate to require Qwest to immediately refund the amounts found by the IPUC to be owing to these two Pagers in this proceeding and, if Qwest believes it is entitled to some recovery for periods outside of the relevant time frame, to require it to pursue the same in another proceeding. The amounts determined to be owing, as set forth in Order No. 29555 are \$57,467 to Radio Paging and \$101,950 owing to PageData. The PageData award was subsequently reduced to \$96,943 in Order No. 29603.

In its cross-appeal, Qwest complains that the IPUC "erred in abandoning its previous rulings regarding billing credits vs. cash reimbursements". *Qwest Brief*, p. 22. However, even though the IPUC has gone back and forth on the question of cash reimbursement vs. billing credits, its previous rulings have not held as Qwest contends. No ruling by the IPUC, prior to Order No. 29666, gave Qwest specific authority to apply billing credits after the respective period of recovery for the Pagers. Qwest may have read such authorization into the previous orders, but it is not there.

Qwest contends that the IPUC acted arbitrarily and capriciously when it ordered cash refunds in Order No. 29603. *Qwest Brief*, pp. 28-29. Again, the IPUC never specifically ruled that Qwest could apply the awards made against it to billing credits that extended after

the Pagers' respective period of recovery. And, even if the IPUC subsequently determined that it was incorrect, the IPUC has the authority, at any time, to rescind or change any of its orders. *I.C. § 61-624*. And, doesn't it make sense that if the Pagers paid the illegal charges in cash, they should receive it back in cash?

Qwest does state that there is no evidence in the record to show what the Pagers' account balances with Qwest were at any particular point in time. *Qwest Brief, p. 26*. Qwest contends:

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.'

*Id.* Qwest acknowledges that it presented no evidence to determine whether there might have been a credit or debit balance with regard to either Pagers' account with Qwest at the end of their respective recovery period. However, the Affidavits of Messrs. McNeal and Ryder, which have been augmented into the Agency Record, disclose that both had a credit balance with Qwest at the end of their respective recovery period. Thus, both are entitled to a full and immediate cash refund.

Qwest also complains that the IPUC acted inappropriately in requiring Qwest to reimburse charges levied against the Pagers for transit traffic. However, the IPUC ruling in this regard is entirely consistent with the *Mountain Communications* decision and in keeping with trade practices, as evidenced by the "rules of the road", the standard practice of charging the cost of calls to the network of the party initiating the call. See, *Brief of Appellants, p. 30*. The IPUC has provided substantial justification for its directive to refund the transit traffic charges in pages 40-42 of its brief. As mentioned at page 42, "Qwest's

recent interconnection agreement with Radio Paging” contains a provision whereby Radio Paging does not have to pay for transit traffic unless and until Qwest provides the up-stream billing information, i.e., the billing information from the carrier on whose system the call originated.

And, as pointed out at pages 31-34 of the Brief of Appellants, Qwest was not entitled to charge for the transit traffic in this case, even if it had the general authority to do so. First, it did not raise the transit traffic issue as a set-off. Second, the evidence presented by Qwest was wholly inadequate to establish a 24% transit factor. Thus, for a variety of reasons, the Pagers are entitled to recover the transit traffic charges.

#### V. CONCLUSION

Based on the on-going proceedings before the IPUC, the Pagers hereby modify their request for relief and respectfully request that the Court remand the 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 PageData and InterPage of Idaho paid to Qwest for transport of all traffic to the Boise paging terminal from November 1, 1996, to September 10, 1999.

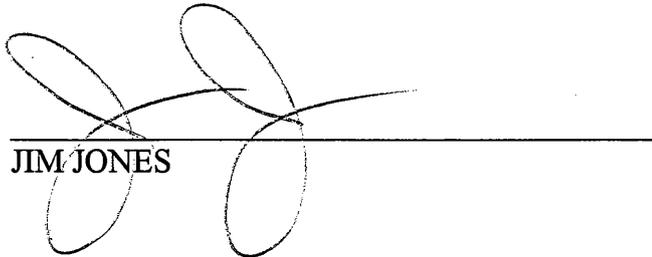
(b) That the IPUC require Qwest to make a full refund of the amounts that Mr. Ryder paid from November 1, 1996, to May 13, 1999.

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

(d) That the IPUC require Qwest to make an immediate cash refund of the amounts found by the IPUC to be owing Mr. McNeal and Mr. Ryder (\$96,943 and \$57,467, respectively), to be applied as credits to the above awards.

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

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of December, 2004.



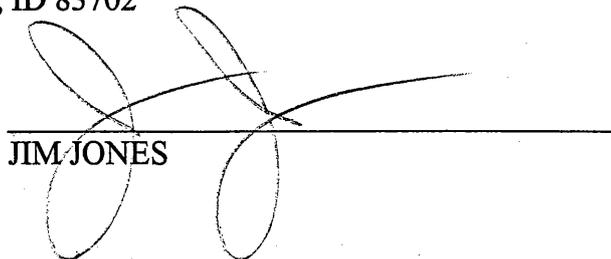
JIM JONES

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this 29<sup>th</sup> day of December, 2004, I caused to be served two true and correct copies of the foregoing REPLY BRIEF by depositing the same in the United States mail, postage prepaid, in envelopes address to the following:

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JIM JONES

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

ROBERT RYDER DBA RADIO PAGING	)	
SERVICE, JOSEPH B. McNEAL DBA	)	SUPREME COURT
PAGEDATA AND INTERPAGE OF IDAHO,	)	DOCKET NO. 29175
AND TEL-CAR, INC.	)	
	)	
Petitioners/Appellants/Cross-Respondents,	)	
	)	
v.	)	
	)	
IDAHO PUBLIC UTILITIES COMMISSION,	)	IPUC CASE NO. USW-T-99-24
	)	
Respondent on Appeal/Cross-Respondent,	)	
	)	
and	)	
	)	
QWEST CORPORATION,	)	
	)	
Respondent/Respondent on Appeal/Cross-	)	ORDER NO. 29666
Appellant.	)	
	)	

On October 5, 2004, the Commission issued its final Reconsideration Order No. 29603 following the Idaho Supreme Court's temporary remand of this matter to the Commission. In Order No. 29603, the Commission determined that the Petitioners (hereinafter referred to as "the Pagers") were entitled to additional refunds from Qwest Corporation. As the Commission observed in its Order, it appeared that based upon Qwest's earlier calculations, the refunds owed the Pagers may exceed any arrearages they may owe Qwest. Consequently, the Commission directed "Qwest to provide up-to-date calculations to confirm [whether] the refunds apportioned to each Pager . . . exceed the amounts the Pagers owe Qwest." Order No. 29603 at 19 (emphasis added). The Commission continued that if the "Pagers' refunds exceed the amounts they owe Qwest, then Qwest shall issue cash reimbursements for the balances to PageData, Radio Paging and Tel-Car's estate[.]" *Id.*

On October 15, 2004, Qwest Corporation submitted its "calculations" in response to Order No. 29603. Rather than provide detailed calculations, Qwest asserted that both PageData and Radio Paging owe Qwest in excess of \$200,000 and \$20,000, respectively. Qwest

Calculations at 9. Qwest also posed several questions and requested that the Commission “look at this issue [of calculating refunds] once more.” *Id.* at 10.

### PROCEDURAL BACKGROUND

After Qwest filed its calculations, the Pagers filed a Motion to Strike Qwest’s Calculations on November 12, 2004. The Pagers assert that Qwest’s calculations “are in defiance of the Commission’s order” because Qwest has not issued cash refunds as directed by the Commission. Motion to Strike at 2. The Pagers characterized Qwest’s calculations as a means to “re-argue its case and to attempt to assess bogus charges” against the Pagers. *Id.* The Pagers argue that if they owe something to Qwest for services provided either before or after their interconnection agreements with Qwest, the Pagers should be allowed an opportunity to refute any such claims. The Pagers conclude that the “only way to get out of the quagmire and to provide the clarity desired by all parties” is to strike Qwest’s calculations, order Qwest to pay cash reimbursements in the amounts designated by the Commission, and “to provide that any claims Qwest may have against the Pagers be determined in other proceedings.” *Id.* at 5-6.

On December 10, 2004, the bankruptcy estate of Tel-Car and Qwest filed a “Stipulation for Settlement and Dismissal” of Tel-Car’s claims. Under their Settlement, Qwest agreed to pay Tel-Car a total of \$65,000 in full and final settlement, and in return shall receive a credit of \$20,000 in settlement for all claims against Tel-Car including pre-petition and post-petition claims. Once the settlement is approved by the Bankruptcy Court, Qwest shall remit the net sum of \$45,000 to Tel-Car’s Trustee and the parties will stipulate to the dismissal of Tel-Car’s appeal. Stipulation at ¶ 4.

On December 15, 2004, the Pagers filed a Motion to Compel with the Commission. The Pagers ask the Commission to order Qwest to immediately pay the sum of \$57,467 to Radio Paging and \$96,943 to PageData. These sums are the refund amounts calculated by the Commission in Order No. 29603.

On December 16, 2004, the Pagers filed a Motion for Extension with the Idaho Supreme Court. The Pagers requested that the Court approve an extension of time to file their Reply/Cross Respondents Brief until December 30, 2004. In his affidavit accompanying the Motion, counsel for the Pagers noted that they have requested the Commission to address the refund issue once again. The Pagers suggested that a short extension may allow the remaining

parties to the appeal (PageData and Radio Paging) to settle their dispute. The Court granted the Pagers' Motion for Extension on the day it was filed.

### DISCUSSION

Contrary to our directions in Order No. 29603, Qwest's calculations submitted on October 15 did not explicitly "confirm" the Commission's calculation of refunds. Instead, Qwest asserted PageData owes Qwest in excess of \$200,000 and Radio Paging owes Qwest approximately \$20,000. Qwest argued its Exhibits 201 and 202 support its belief that the two Pagers owe Qwest amounts that exceed "the credits that would later be granted." Qwest Calculations at 9. Qwest did not provide detailed calculations regarding any arrearages that the Pagers owe Qwest. Thus, we find Qwest's "calculations" to be non-responsive to our directive in Order No. 29603. We are unable to fully address Qwest's argument that the Pagers' arrearages exceed the refunds owed to the Pagers.

As set out above, both Qwest and the two remaining Pagers request that the Commission once again take-up the issue of refunds. In an attempt to resolve this question, we shall layout some parameters for the parties and direct that they meet once again to exchange data and attempt to settle their differences.

First, Qwest asks in its calculations at what point in time should "debits and credits" be compared to determine whether the Pagers owed Qwest. Consistent with our previous Orders, the Commission believes that refunds and arrearages should generally pertain to the undisputed refund periods identified for PageData and Radio Paging. The refund period for PageData is November 1, 1996 to September 10, 1999, and November 1, 1996 to May 13, 1999 for Radio Paging. The end of the refund periods in 1999 corresponds to the dates that the Commission approved the respective interconnection agreements between the parties.

The Commission has consistently maintained throughout this proceeding that the refunds and any arrearages should end on the effective dates of the interconnection agreements set out above. In the Liability Phase of this case, the Pagers sought to extend the refund periods past the effective dates of their respective interconnection agreements. In Order No. 28626, the Commission found that such a request was inappropriate for several reasons. First, we found that the requested expansion exceeded the scope of the Pagers' Complaint. Order No. 28626 at 4. In addition, the Commission observed that each interconnection agreement contained a provision addressing dispute resolution. Order No. 28626 at 5. The Commission found that

neither PageData nor Radio Paging had attempted to exercise their options under these dispute resolution provisions. Consequently, the Commission concluded that it was “much too late for the Pagers to expand the scope of the refund period to include their interconnection agreements.” *Id.*

For its part, Qwest also objected to expansion of the refund periods to include the interconnection agreements. Qwest acknowledged that the interconnection agreements have their own dispute resolution mechanisms and it asserted that the Commission has no “jurisdiction over those matters [even] if it wanted to.” R. at 178. Qwest conceded that “[c]harges under the interconnection agreements are not at issue in this proceeding.” *Id.* Thus, it is clear that refunds and any arrearages arising after the effective dates of the interconnection agreements are beyond the scope this proceeding.

Qwest next asks what services should be included in determining whether the Pagers have a positive or negative balance. Qwest did not elaborate further. Without addressing the merits of which services may be included in the alleged arrearages, we believe that Qwest should identify all arrearages owed by the Pagers by type of service. Qwest should provide detailed calculations pertaining to what services are the subjects of any claimed arrearages. Qwest should also restate the data contained in the Table on page 9 of its calculations if such information is relevant to the refund issue.<sup>1</sup>

We order the parties to meet with our counsel in another settlement conference to address the issues of refunds and arrearages. Prior to the expedited settlement conference, Qwest should provide the Pagers and the Commission’s counsel with detailed evidence regarding paging and non-paging arrearages up to the effective dates on the interconnection agreements. For both paging and non-paging services, Qwest should identify with particularity the types of services in arrears. The amounts allegedly owed by PageData and by InterPage shall also be separately identified.

To facilitate settlement, the Commission directs that parties’ representatives attending the meeting have authority to settle these disputes or that such individuals participate in the settlement conference via teleconference.

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<sup>1</sup> Qwest’s question about “reversing” the billing credits should be addressed by the parties after they have examined Qwest’s data.

ORDER

IT IS HEREBY ORDERED that Qwest submit new calculations showing debits and credits (e.g., refunds and arrearages) as set out in greater detail above.

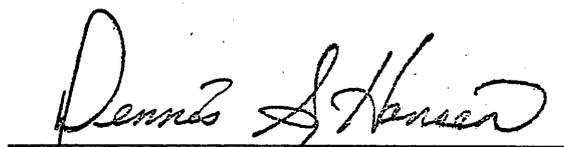
IT IS FURTHER ORDERED that the parties meet to exchange refund information and attempt to settle this matter. Each party shall be represented by persons with authority to authorize settlement of the dispute either in person or via teleconference. Counsel for Qwest and the Pagers shall contact Deputy Attorney General Howell to arrange a mutually agreed meeting time as soon as possible.

IT IS FURTHER ORDERED that the Commission Secretary shall serve this Order via electronic mail or facsimile to expedite the service of this Order.

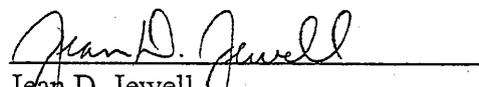
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 21<sup>st</sup> day of December 2004.

  
\_\_\_\_\_  
PAUL KJELLANDER, PRESIDENT

  
\_\_\_\_\_  
MARSHA H. SMITH, COMMISSIONER

  
\_\_\_\_\_  
DENNIS S. HANSEN, COMMISSIONER

ATTEST:

  
\_\_\_\_\_  
Jean D. Jewell  
Commission Secretary

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PAGE DATA

Payment Compare Qwest vs PageData Fig  
Idaho Only

Qwest: Payments for invoices 11-96 thru 8-99 Itemized				
PageData: Payments for Invoices 1-96 thru 9-99				
DID Service				
Account Number	Pmt per PageData by Account	Pmt per Qwest by Account	PageData Total Summary + SubAccount	Qwest Total Summary + SubAccount
208 R51-0454 454	\$ -	\$ 87,389.76	\$0.00	\$87,389.76
Total 208 111-1770	\$ 87,569.33	\$ 79,419.71		
208 234-3800 / 208 111-1770	\$ 5,729.22	\$ -		
208 788-8800 / 208 111-1770	\$ 1,674.00	\$ 1,596.43		
Total 208 736-5400 / 208 111-1770	\$ 8,946.79	\$ 1,242.53		
Total 208 324-1950 / 208 111-1770	\$ 3,415.86	\$ 607.76		
Total 208 677-8000 / 208 111-1770	\$ 6,159.00	\$ 1,239.84		
Total 208 226-3040 / 208 111-1770	\$ 3,536.50	\$ 1,057.95		
Total 208 587-0500 / 208 111-1770	\$ 7,322.43	\$ 2,639.42		
208 684-9000 / 208 111-1770	\$ 8,414.45	\$ -		
Total 208 359-6900/208 111-1770	\$ 6,520.19	\$ 2,266.69		
208 893-9100 / 208 111-1770	\$ 11,646.81	\$ 3,090.14		
Total 208 525-3000/208 111-1770	\$ 6,206.30	\$ 2,147.21		
Total Summary/Sub 208 111-1770			\$157,476.10	\$95,307.68
Total 208 642-8000	\$ 8,372.23	\$ 8,912.34		
Total 208 373-9000	\$ 15,128.37	\$ 16,238.15		
Total DID Payments / Adjustments	\$ 180,641.48	\$ 207,847.93		
Private Line Accounts (Leased Lines)				
Account Number	Pmt per PageData	Pmt per Qwest	PageData Total Summary + SubAccount	Qwest Total Summary + SubAccount
208 R55-2313 312	\$ -	\$ -		
Total 208 111-1769	\$ 6,303.00	\$ 12,162.94		
Total 208 232-7709/L 208 111-1769	\$ 1,712.04	\$ 2,963.44		
Total 208 232-7722/L 208 111-1769	\$ 1,787.60	\$ 1,079.43		
Total 208 888-5152/L 208 111-1769	\$ -	\$ 2,127.21		
Total 208 888-5156/L 208 111-1769	\$ 2,759.96	\$ 1,646.76		
Total Summary/Sub 208 111-1769			\$12,562.60	\$19,979.78
Total Private Line (Leased Lines) Pmt/Adj	\$ 12,562.60	\$ 19,979.78		
Business Lines (POTS)				
Account Number	Pmt per PageData	Pmt per Qwest	PageData Total Summary + SubAccount	Qwest Total Summary + SubAccount
Total 208 111-1771	\$ 12,264.14	\$ 10,314.23		
Total 208 733-9450/L 208 111-1771	\$ 3,037.52	\$ 614.04		
Total 208 233-1284/L 208 111-1771	\$ 6,453.73	\$ 596.64		
208 884-8365/L 208 111-1771	\$ 4,442.41	\$ -		
Total Summary/Sub 208 111-1771			\$16,197.80	\$11,524.91
Total 208 884-8822	\$ 2,984.43	\$ 2,049.73		
Total 208 522-7386	\$ 337.22	\$ 545.90		
Total POTS Payments / Adjustments	\$ 29,519.45	\$ 14,120.54		
Other Accounts not on Qwest Itemization of Payments				
Account Number	Pmt per PageData	Pmt per Qwest	PageData Total Summary + SubAccount	Qwest Total Summary + SubAccount
208 336-4203	\$ 9,344.57	\$ 1,991.40		
208 356-5271	\$ 1,224.53	\$ 1,688.86		
T-1 Lines				
208 327-8990-8022	\$ 1,635.37	no info		
208 375-6027-7998	\$ 606.67	no info		
208 375-6023-8008	\$ 675.16	no info		
T1 Line Installation Fee	\$ 976.86	no info		
Total T-1 Lines	\$ 3,894.06	no info		
Frame Relay				
208 D08-8826	\$ 990.20	no info		
#178793	\$ 2,579.14	no info		
Total Frame Relay	\$ 3,569.34	no info		
Total Other Payments/Adjustments	\$ 18,032.50	\$ 3,680.26		
Total Payments all Accounts	\$ 240,756.03	\$ 245,628.51		

