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IDAHO PUBLIC  
UTILITIES COMMISSION

Attorney for the Respondent on Appeal,  
Idaho Public Utilities Commission

## IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT RYDER DBA RADIO PAGING )  
SERVICE, JOSEPH B. McNEAL DBA )  
PAGEDATA AND INTERPAGE OF IDAHO, )  
AND TEL-CAR, INC. )

Petitioners/Appellants, )

v. )

IDAHO PUBLIC UTILITIES COMMISSION, )

Respondent on Appeal, )

and )

QWEST CORPORATION, )

Respondent/Respondent on Appeal. )  
\_\_\_\_\_ )

SUPREME COURT  
DOCKET NO. 29175

STIPULATED MOTION TO  
CONTINUE THE  
SUSPENDED APPEAL

COMES NOW the Appellants, Qwest Corporation, and the Idaho Public Utilities Commission (collectively referred to as the "Parties") through their respective counsels of record and request that the Court continue the suspension in this appeal pursuant to I.A.R. 13.2 and 13.3. The parties maintain that there is good cause to continue the current suspension until July 15, 2004.

STIPULATED MOTION TO CONTINUE  
THE SUSPENDED APPEAL

## MEMORANDUM IN SUPPORT OF THE CONTINUED SUSPENSION

### *A. Background*

On February 13, 2004, the Appellants (Radio Paging Service, PageData, and Tel-Car, hereinafter referred to as “the Pagers”), Qwest Corporation and the Public Utilities Commission filed a Stipulated Motion with the Supreme Court to suspend this appeal and remand the matter back to the Commission. The Parties maintain that there was good cause to suspend the appeal primarily so they could consider a recent decision issued by the United States Court of Appeals for the District of Columbia Circuit. The Motion noted that this Circuit Court decision addressed two federal telecommunication issues that are present in this appeal. In particular, the Circuit Court vacated orders of the Federal Communications Commission (FCC) that the Public Utilities Commission relied upon when the PUC issued the underlying decisions in this appeal. The Parties’ Motion asserted that a temporary remand would allow: (1) the Parties another opportunity to settle the appeal; (2) the FCC to address at least one of the telecommunication issues on remand; and (3) the Commission to reconsider its Orders in light of the recent Circuit Court Opinion. Stipulated Motion at 4.

On March 8, 2004, the Supreme Court suspended this appeal and remanded the matter back to the Idaho Public Utilities Commission. The Court suspended the appeal until May 12, 2004, “at which time the due date for filing Appellants’ Brief shall be reset unless otherwise provided by an order of this court.”

### *B. Request to Continue the Suspension of the Appeal*

Following the Court’s remand of this appeal, negotiation to settle or narrow the issues on appeal have proven unfruitful. In addition, the FCC has yet to issue any order addressing the two federal issues when the Circuit Court remanded the matter back to the FCC. Given this turn

of events, the Commission found that it was appropriate to issue a scheduling Order requiring the Parties to address the two federal issues. Consequently, on May 11, 2004, the Commission issued Order No. 29491 directing the Pagers and Qwest to file supplemental briefs addressing the two federal issues. A copy of the Commission's Order No. 29491 is attached to this Motion.

Based upon the Commission's scheduling Order, the Parties request that the current suspension of appeal be continued until July 15, 2004. This will provide an opportunity for the Pagers and Qwest to submit additional briefs. The continued suspension would also allow the Commission to consider the briefs and issue an Order pursuant to *Idaho Code* § 61-626.

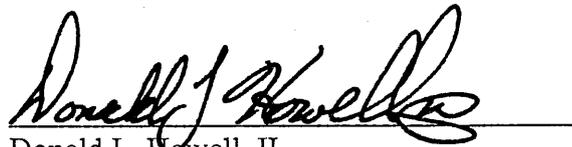
In considering the suspension of an appeal, the Parties must disclose the duration of the requested suspension, I.A.R. 13.2. The Parties believe that continuing the suspension until July 15, 2004 will provide ample time for them to brief the issues and for the Commission to render its decision.

#### PRAYER

In summary, the Parties respectfully request that the Court continue the suspension of this appeal. The Parties maintain that there is good cause for the Court to continue the suspension until July 15, 2004, pursuant to I.A.R. 13.2 and 13.3.

Respectfully submitted on behalf of all the Parties this 11<sup>th</sup> day of May 2004.

IDAHO PUBLIC UTILITIES COMMISSION



Donald L. Howell, II  
Deputy Attorney General

Vld/O:USWT9924\_Appeal\_Stipulated Motion to ContSuspension Appeal\_dh

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 11<sup>th</sup> DAY OF MAY 2004, SERVED THE FOREGOING **STIPULATED MOTION TO CONTINUE THE SUSPENDED APPEAL**, IN SUPREME COURT DOCKET NO. 29175, VIA U S MAIL BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO:

JIM JONES  
JIM JONES & ASSOCIATES  
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*Brenda Sorrell*

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SECRETARY



Following the Court's remand, negotiations to settle or narrow the issues on appeal have failed. In addition, the FCC has yet to issue any order addressing the federal issues. Given this state of events, the Commission finds that it is appropriate to issue this scheduling Order requiring the parties to address several questions set out below.

### THE COMMISSION'S PRIOR ORDER

In November 2002 the Commission issued its final Order on Reconsideration No. 29140 in the second part of this two-part case. The underlying proceeding was initiated when three paging companies (Radio Paging Service, PageData, and Tel-Car, hereinafter referred to as "the Pagers") filed a Petition for Declaratory Order seeking relief against Qwest Corporation's predecessor, U S WEST Communications. In Order No. 29140 the Commission found that the Pagers were entitled to refund credits from Qwest but not in the amounts they had claimed. The Order also decided many issues including two disputed issues pertinent to the present appeal: (1) wide area calling; and (2) transit traffic. These issues are described in greater detail below.

1. Wide Area Calling. "Wide area calling" generally refers to "an arrangement or service "that allows a paging carrier to subsidize the cost of calls from [Qwest's] customers to a paging carrier's customers, when the caller and the paging company are located in different local calling areas." Order No. 29140 at 5. Normally telephone calls from one local calling area to another local calling area are assessed "toll" or long-distance charges. Paging carriers can create and use a number of different wide area calling arrangements so that it would appear to callers that toll charges will not be assessed when calling a paging company located in a different local calling area. *Id.* at 37; *Mountain Communications v. Qwest Corporation*.<sup>1</sup> "These arrangements include: 800 service, DID configurations, reverse billing or reverse toll, FX (foreign exchange), and other possible configurations such as frame relay." Order No. 29140 at 37 *quoting* Order No. 29064 at 28 *citing* *Mountain Communications* at ¶ 3.

In this case, the Commission found that PageData and Tele-Car had configured their paging systems in a manner that constituted wide area calling arrangements. Order No. 29140 at 37. "For example, Tele-Car's wide area calling arrangement allowed it to "provide toll-free service from Hailey, Idaho to Twin Falls, Idaho without a toll charge to...our potential

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<sup>1</sup> *Memorandum Opinion and Order*, 17 FCC Rcd 2091 (February 4, 2002), *vacated and remanded sub nom. Mountain Communications v. FCC*, 355 F.3d 644 (D.C. Cir. 2004).

customers or subscribers or the person that would be calling [the paging customer].” *Id.* (emphasis original). In PageData’s case, the Commission found that PageData “wanted to consolidate his four points of interconnection into a single LATA-wide point of interconnection so that [PageData’s] paging and other services could all be transported by T-1 facilities and frame relay services.” Order No. 29064 at 24 (emphasis omitted).

2. Transit Traffic. The Commission also recognized that FCC regulations and controlling decisions prohibit Qwest from charging the Pagers for the delivery of Qwest-originated traffic or for facility used to deliver Qwest-originated traffic. Order No. 29140 at 5, 23. However, the Commission noted that the FCC has ruled that pagers “are required to pay for ‘transit traffic,’ that is, traffic that originates from a carrier other than the interconnecting LEC [in this case Qwest] but nonetheless is carried over the LEC network to the paging carrier’s network.” *Id.* at 23, *quoting TSR Order*<sup>2</sup> at n. 70 (emphasis original).

Consistent with several FCC orders, the Commission found that Qwest was permitted to charge the Pagers for transit traffic originated by third-party carriers. Although both the Pagers and Qwest offered conflicting evidence, the Commission found that 24% of the Pagers’ traffic was properly classified as transit traffic. Order No. 29140 at 5. Consequently, Qwest offset the refund credits owed to the Pagers by the charges assessed for transit traffic.

#### **THE FCC DECISION AND THE CIRCUIT COURT OPINION**

Mountain Communications is a paging carrier serving customers in three Colorado local calling areas. Like the present case, Qwest is the provider of local service within each of the three Colorado calling areas. Although Mountain serves all three areas, it has a single point of interconnection (POI) with Qwest in one of the three areas as permitted by federal law. *Mountain Communications v. FCC*, 355 F.3d 644, 645 (D.C. Cir. 2004) *citing* 47 U.S.C. § 251(c)(2)(B) (LECs must provide interconnection facilities with other carriers “at any technically feasible point within the [incumbent LEC’s] network”). As previously mentioned, a call from one local calling area to another local calling area is considered a toll call. Thus, a Qwest call from the two local calling areas to Mountain’s POI in the third calling area would

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<sup>2</sup> *TSR Wireless v. US WEST, Memorandum Opinion and Order*, 15 FCC Rcd 11166 (2000), *aff’d sub nom. Qwest Corporation v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

normally be considered a toll call. A Qwest call originating from the local calling area where Mountain's POI is located, would not be a toll call.

In the *Mountain* case, Qwest sought to collect fees from Mountain when a Qwest customer in one of the two different calling areas placed a call to Mountain's POI. Although Qwest considered these interexchange calls to be toll calls, it did not charge its own customers for placing such calls. 355 F.3d at 645.

1. The FCC Decision. Before the FCC, Mountain argued that the FCC's regulation at 47 C.F.R. § 51.703(b) bars Qwest from assessing the Pager charges on Qwest-originated traffic. More specifically, this FCC regulation provides that a "LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." Mountain asserted that because its local paging area<sup>3</sup> encompasses all three Qwest local calling areas, Qwest is not permitted to charge Mountain for Qwest-originated traffic or for facilities Qwest uses to deliver its traffic to Mountain's single-POI. 17 FCC Rcd 2091 at ¶¶ 8-10, 12-13; *see also* *TSR Order* at ¶ 32. Thus, Mountain insisted that Qwest should be prohibited from charging for wide area calling and for transit traffic.

Qwest responded that it was entitled to charge Mountain for the toll charges it was unable to assess its own customers. *Id.* As the Circuit Court subsequently explained:

According to Qwest, Mountain could avoid the toll charges by establishing a POI in *each* of the three local calling areas—doubtless at an increased cost. Then, if a paging call were placed from a local number to another local number, no toll would be charged to anyone. If, on the other hand, a paging call were made from one local calling area to another, Qwest would transport the call to Mountain's POI—without crossing a local calling area boundary—at which time Mountain would assume responsibility for delivering the call across the local calling areas, presumably at Mountain's expense.

*Id.* at 645-46 (emphasis original).

The FCC rejected Mountain's claims. The FCC determined that by "configuring its interconnection arrangement in this manner, Mountain prevents Qwest from charging its customers for what would ordinarily be toll calls to access Mountain's network." *Mountain Communications v. Qwest Communications, Order on Review*, 17 FCC Rcd 15135 at ¶ 5 (2002).

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<sup>3</sup> As a Commercial Mobile Radio Service (CMRS) provider, Mountain's local paging area is defined by the FCC as a Major Trading Area (MTA). In the Idaho case the MTA encompasses the entire Boise LATA, i.e., all of southern Idaho.

Consequently, the FCC held that Mountain had obtained a wide area calling service and therefore Qwest was entitled to charge Mountain for that service. *Id.*

Turning to the transit traffic issue, the FCC determined that Qwest may lawfully charge Mountain for transit traffic. Relying upon the *TSR Order* and the then recent *Texcom Order*<sup>4</sup> the FCC determined that a LEC may lawfully charge a paging carrier for the facilities used to transport transiting traffic. *Mountain Order on Review*, 17 FCC Rcd 15135 at ¶ 2.

2. The Circuit Decision. On appeal, Mountain argued that the FCC's wide area calling decision is at odds with the FCC's own regulation (Section 51.703(b)) and with the *TSR Wireless* decision. The Circuit Court agreed. The Court observed that "the facts of *TSR* are identical to" the facts presented in *Mountain*. *Mountain*, 355 F.3d at 646. Despite having identical facts, the results of the two cases "are opposite." *Id.* Thus the FCC's decision in the *Mountain* case is "logically inconsistent with [the FCC's] *TSR Decision*." *Id.* at 647. The Court also noted the FCC "seemingly comes into direct conflict with its own regulation", Section 51.703(b). The Court "rather easily conclude[d] that the Commission's decision on this issue is arbitrary and capricious" and vacated the FCC's Order. *Id.* at 649.

Mountain also objected to Qwest's assessment of charges for transit traffic. The Court observed that the FCC allowed "Qwest to charge for this service, but ... Mountain could seek reimbursement from the originating carrier for whatever charges [Mountain] paid to Qwest." Mountain objected "because it does not follow the standard practice of charging the cost of calls to the network of the party initiating the call." *Id.* Mountain further asserted that Qwest never provided the necessary caller information to determine which carrier initiated the transit calls. As the Court explained, by

indicating that Mountain could charge the originating carrier, [the FCC] suggested that Mountain was essentially correct in claiming that the originating carrier should bear all of the transport costs. At oral argument, Qwest's counsel obviated any need for us to decide this issue by indicating that Qwest would provide Mountain with the information necessary so that Mountain could charge the originating carrier for reimbursement. Under those circumstances, Mountain dropped that part of its Petition.

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<sup>4</sup> *Texcom v. Bell Atlantic, Memorandum Opinion and Order*, 16 FCC Rcd 21493 at ¶¶ 4-6 (Nov. 28, 2001), *reconsidered*, 17 FCC Record 6275 (March 27, 2002). In *Texcom*, the Commission found that the interconnecting LEC may charge the Pager for the costs of the portion of the facilities used to transport transiting traffic from the interconnecting LEC's network to the Pager's network. 17 FCC Rcd 6275 at ¶ 4. The FCC explained that the Pager may then seek reimbursement of transit traffic costs from the carrier that originated the transiting traffic. *Id.*; *Mountain*, 17 FCC Rcd 2091 at n. 30.

*Id.* With this background, we now turn to the facts in this appeal.

### THE RECORD ON APPEAL

Relying on the FCC's *Mountain Communications* and *TSR Orders*, this Commission "found that Qwest may properly charge the Pagers for facilities used for wide area calling arrangements." Order No. 29140 at 36. The Commission quoted approvingly from the *TSR Order* where the FCC found that

nothing prevents U S WEST from charging its end users for toll calls completed over a [toll route] T-1 [facility]. Similarly, Section 51.703(b) does not preclude [the Pager] and U S WEST from entering into wide area calling or reverse billing arrangement whereby [the Pager] can "buy-down" the cost of such toll calls to make it appear to end users that they have made a local call rather than a toll call [to reach the Pager].

Order No. 29140 at 37, *quoting TSR Order* at ¶ 31 (footnotes omitted).

The Commission determined that PageData and Tel-Car had configured their paging networks in a manner that constituted wide area calling arrangements. Order No. 29140 at 37, Order No. 29064 at 27; Tr. at 145, 163. Tel-Car's witness stated his paging company used Qwest facility to provide toll-free calling between the Qwest local exchanges of Hailey and Twin Falls—a distance of approximately 68 miles. Tr. at 143. He explained that the facility was acquired through negotiations with Qwest approximately 25 years earlier "with an Agreement signed between us." Tr. at 145.

In PageData's case, it originally had four points of interconnection (POIs) with Qwest but later sought to consolidate its four POIs into a single POI in Boise on or about August 1998. Order No. 29140 at 38; Pager Exhibits 111 (pp. 10, 25, 30), Exhibit 112; Tr. at 164. The Commission found that PageData had entered into a wide area calling arrangement when it requested frame relay facilities to transport its network traffic to the single POI. Order Nos. 29140 at 39; 29064 at 27.

Turning to the issue of transit traffic, the Commission found it was appropriate for Qwest to charge the Pagers for traffic originated by other carriers. The Commission decision regarding transit traffic was based upon the various FCC Orders. Order Nos. 29064 at 4-5; 29140 at 5, 23-33. After reviewing conflicting evidence, the Commission found that 24% of the traffic Qwest delivered to the Pagers was properly classified as transit traffic. Order No. 29140

at 23. Consequently, Qwest was allowed to offset the amount of credits it owed the Pagers with the transit traffic charges.

## DISCUSSION

As the events described above indicate, the Commission's findings regarding wide area calling and transit traffic were primarily based upon FCC Orders. As noted above, the Court of Appeals for the District of Columbia Circuit vacated the FCC's *Mountain Communications* Order on the wide area calling issue and remanded the case back to the FCC. The Court did not decide the issue of transit traffic because Qwest agreed to provide the necessary information "so that Mountain could charge the originating carrier for reimbursement." *Mountain*, 355 F.3d at 649. It was undisputed that Qwest need not absorb transit traffic costs. *Id.* The unanswered question was whether Qwest should charge the originating carrier, or whether Qwest should provide the call detail to the Pagers who could in turn seek reimbursement from the originating carriers.

The Commission finds it is appropriate for the parties to provide additional briefing regarding the wide area calling and transit traffic issues. More specifically, the parties are directed to submit briefs or memoranda that address the following questions:

### Wide Area Calling

1. For each Pager, provide the total amount of wide area calling charges (e.g., 800, FX, DID, etc.) assessed by Qwest. Describe with specificity the exact wide area calling service (if any) that each Pager utilized.

2. Based upon the Record, did any of the Pagers voluntarily enter into a "buy-down agreement" (e.g., 800, FX, etc.) with Qwest so that Qwest would not assess toll charges on its customers' calls to a Pager located in another local calling area? See 355 F.3d at 648.

Qwest should prepare an exhibit that shows the amount of charges it assessed each Pager individually (if any) for wide area calling arrangements or services. The calculation of the amounts at issue for wide area calling shall also include an itemization of the applied interest. Interest should be calculated up to July 1, 2004.

### Transit Traffic

3. Describe in detail the call data provided to Qwest by the originating wireline or wireless carrier for all transit traffic to each Pager during the relevant time periods.

4. Given Qwest's offer to provide transit traffic data to Mountain, is Qwest in a position to provide transit traffic data to the Pagers in this case?

5. If such traffic transit data is no longer available, is it appropriate to credit the Pagers for transit traffic?

6. During the relevant time periods, what percentage of transit traffic was wireline; what percentage was wireless?

7. As noted in Order No. 29140 at pages 40-41, the Commission authorized Qwest to create three large-regional local calling areas (Magic Valley, Treasure Valley and eastern Idaho) in 1996. These regions were implemented in February, April, and May 1997, respectively. In Order No. 27633 the Commission approved a cost recovery methodology for Qwest when local calling (EAS) was authorized between a non-Qwest exchange and a Qwest local calling region. Would this cost recovery mechanism support a reduction in the amount of non-compensation transit traffic? If so, by what amount?

Qwest shall calculate the amount of transit traffic charged to each Pager during the relevant time periods. The calculation shall include an itemization of interest through July 1, 2004.

Qwest shall first respond to the questions set out above and supply the necessary credit calculations regarding each question. Qwest shall supply its response within 14 days of the date of this Order. Once Qwest has filed its response, then the Pagers will have an opportunity to respond to the questions and reply to Qwest's information/calculations no later than 28 days from the date of this Order.

#### **ORDER**

IT IS HEREBY ORDERED that the parties respond to the questions stated above. Qwest shall provide its responses and credit calculations no later than 14 days from the date of this Order.

IT IS FURTHER ORDERED that once Qwest has filed its responses and calculations in response to the questions contained in the body of this Order, then the Pagers will have an opportunity to respond to the questions and to reply to Qwest's responses. The Pagers' replies shall be filed with the Commission no later than 28 days from the date of this Order.

IT IS FURTHER ORDERED that the parties shall comply with the timelines set out in this Order.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 11<sup>th</sup>  
day of May 2004.

  
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PAUL KJELLANDER, PRESIDENT

  
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MARSHA H. SMITH, COMMISSIONER

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

ATTEST:

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

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