

IN THE SUPREME COURT OF THE STATE OF IDAHO

**IN THE MATTER OF THE JOINT PETITION)
OF ROBERT RYDER, DBA RADIO PAGING)
SERVICE, JOSEPH MCNEAL, DBA)
PAGEDATA AND INTERPAGE OF IDAHO,)
FOR A DECLARATORY ORDER AND)
RECOVERY OF OVERCHARGES FROM U S)
WEST COMMUNICATIONS, INC.)**

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

**Petitioners/Appellants –)
Cross Respondents,)**

v.)

IDAHO PUBLIC UTILITIES COMMISSION,)

**Respondent on Appeal –)
Cross Respondent,)**

and)

QWEST CORPORATION,)

**Respondent/Respondent on Appeal –)
Cross Appellant.)**

**SUPREME COURT)
DOCKET NO. 29175)**

**COMBINED BRIEF OF)
RESPONDENT ON APPEAL)
AND CROSS RESPONDENT)**

**IDAHO PUBLIC UTILITIES)
COMMISSION)**

APPEAL FROM THE IDAHO PUBLIC UTILITIES COMMISSION

Commissioner Paul Kjellander, Presiding

JIM JONES
Jim Jones & Associates
1275 Shoreline Drive
Boise, ID 83702-6870

**Attorney for Petitioners/Appellants –)
Cross Respondents)
Robert Ryder dba Radio Paging Service,)
Joseph B. McNeal dba PageData and)
InterPage of Idaho, and Tel-Car, Inc.)**

LAWRENCE G. WASDEN
Attorney General

DONALD L. HOWELL, II
DONOVAN E. WALKER
Deputy Attorneys General
472 W. Washington St.
Boise, ID 83702-5983

**Attorneys for Respondent on Appeal –)
Cross Respondent)
Idaho Public Utilities Commission)**

WILLIAM J. BATT
Batt & Fisher
101 S. Capitol Blvd., 5th Floor
Boise, ID 83702

**Attorney for Respondent/Respondent
on Appeal – Cross Appellant
Qwest Corporation**

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II. STATEMENT OF THE CASE

Respondent on Appeal and Cross Respondent, the Idaho Public Utilities Commission, believes the Statement of the Case set forth in the Appellants' Brief is incomplete. Consequently, the Commission offers its own statement of the case.

A. Nature of the Case

This is an appeal and cross appeal from final Orders of the Idaho Public Utilities Commission (the "Commission") in an administrative proceeding that had three parts or phases. The first part was referred to as the "Liability Phase," the second part was the "Credit Phase," and the third part was the "Remand Phase." R. Vol. V, pp. 974-76. In the Liability Phase the Commission found that Respondent Qwest Corporation had inappropriately charged the Appellants (collectively referred to as the "Pagers") for certain telecommunications services and facilities in violation of the federal Telecommunications Act of 1996 and implementing regulations issued by the Federal Communications Commission (FCC). Consequently, the Commission concluded that the Pagers were entitled to refunds in the form of either cash reimbursements or billing credits. In the Credit Phase, the Commission determined the refund amounts that Qwest owed to each of the three Pagers. In the Remand Phase, the Supreme Court temporarily remanded the case to the Commission so the parties could examine a January 2004 opinion issued by the D.C. Court of Appeals. On remand and relying on the controlling Circuit opinion, the Commission modified its prior Orders and increased the refunds due the Pagers.

The Pagers generally appeal from the Credit Phase Order Nos. 29064 and 29140 (R. Vol. V, pp. 789-820, 854-913); and Qwest cross appeals from the Remand Order Nos. 29555 and 29603 (*Id.*, pp. 973-95, 1008-28). The Pagers claim the Commission ordered refunds should be larger and in cash; Qwest maintains the refunds should be smaller and in billing credits.

B. Course of Proceedings

1. The Liability Phase. In September 1999, PageData and Radio Paging Service filed with the Commission a Joint Petition for a Declaratory Order against Qwest Corporation's predecessor, U S WEST Communications. R. Vol. I, p. 1. The Commission processed the Petition as a Complaint. *Id.*, p. 128 n.2. Count I of the Complaint alleged that since 1996 Qwest had charged the Pagers for telecommunication services and facilities in violation of the federal Telecommunications Act of 1996 and FCC regulations. The Pagers claimed that FCC regulations and orders prohibit Qwest from charging them for Qwest facilities and services used to transport Qwest customers' telephone calls to the Pagers. *Id.*, pp. 1-6. Count II alleged Qwest discriminated against the Pagers by providing more favorable service rates to other paging carriers. In January 2000, Tel-Car, Inc. petitioned to intervene as a complainant. R. Vol. V, p. 969. The Commission granted intervention. *Id.*, p. 971.

In July 2000, the Commission issued its first of three Liability Phase Orders dismissing the Pagers complaint. R. Vol. I, p. 63. The Pagers filed a timely Petition for Reconsideration premised upon a (then) recently issued FCC Order, *TSR Wireless v. U S WEST Communications*.¹ *Id.*, p. 77. Qwest supported the Pagers' Petition so that the Commission could address the FCC's *TSR Order*. *Id.*, pp. 112-14. In August 2002, the Commission issued Order No. 28473 granting reconsideration and scheduling a hearing. *Id.*, p. 116.

After the hearing, the Commission issued its second Liability Phase Order in December 2000 reinstating the Pagers' Count I. *Id.*, pp. 128-41. Based upon Qwest's offer to comply with the *TSR Order* (*Id.*, p. 113) and the holding of the *TSR Order*, the Commission

¹ *Memorandum Opinion and Order*, 15 FCC Rcd 11166 (2000), *reconsideration denied*, 16 FCC Rcd 11642 (2000), *affm'd sub nom. Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001) (hereinafter the "*TSR Order*"). The *TSR Order* is found in the Record at Vol. I, pp. 79-108 and in the Pagers initial Brief at Tab 3.

found that the Pagers “are entitled to a billing credit or reimbursement for the [Qwest] charges they have incurred for the facilities used to deliver [Qwest]-originated traffic” to them. Order No. 28601 (emphasis added), R. Vol. I, p. 137. The Pagers did not seek reconsideration on their Count II. *Id.*, n.2, R., p. 128. Order No. 28601 directed the Parties to exchange detailed billing information in hopes of settling the refund due each Payer. *Id.*, p. 140.

In January 2001, the Pagers filed a Petition to Amend the ordering paragraphs of Order No. 28601. *Id.*, pp. 142-45. Among the proposed changes, the Pagers sought to amend the Order by deleting the phrase “a billing credit or” from the paragraphs that found the Pagers are “entitled to a billing credit or a reimbursement. . . .” *Id.*, p. 144. In other words, the Pagers wanted only cash reimbursements. For the first time, the Petitioners also requested 12% interest on the refunded amounts and attorneys fees. *Id.*, p.142. Qwest opposed the Pagers’ Petition to Amend and asserted the Commission’s “Rehearing Order [No. 28601] is correct in providing for reimbursement or billing credits.” *Id.*, p. 176 (emphasis added).

In February 2001, the Commission issued its third Liability Phase Order granting and denying the Pagers’ proposed changes. *Id.*, p. 182. The Commission denied the Pagers’ request to delete the “billing credit” phrase from the Order. *Id.*, p. 183. It also denied the request for attorney fees and the 12% interest but ordered interest at the telephone customer deposit rate (the federal T-Bill rate). The Commission again directed the parties to exchange information in the hopes of settling the refunds. *Id.*, p. 191. No party filed an appeal from this final Order.

2. The Credit Phase. When the parties were unable to reach settlement on the refund amounts, the Commission set this matter for hearing and appointed a Hearing Examiner. R. Vol. I, pp. 193-96. The evidentiary hearing was held on July 24-25, 2001. *Id.*, p. 195. Both the Pagers and Qwest presented witnesses and exhibits. The hearing transcript is more than 500

pages and more than 300 pages of exhibits were submitted. The Pagers and Qwest each submitted post-hearing briefs (R. Vol. II, p. 224; p. 294) and reply briefs (*Id.*, p. 321; p. 342), respectively.

On November 30, 2001, the Hearing Examiner issued his Proposed Order. R. Vol. III, pp. 399-422. The Examiner recommended that the Pagers were entitled to refunds but less than the amounts they claimed. The Examiner found that the Pagers were not entitled to refunds for non-paging services. *Id.*, pp. 401, ¶ 2, 404, 408-09. The Examiner also determined that refunds were not due for the delivery of third-party “transit traffic” originated by carriers other than Qwest, or for the Pagers use of Qwest “wide area calling” services. *Id.*, pp. 412-13. Finally, the Examiner found that Qwest presented the better evidence regarding the billing and payment information used to calculate the refunds. *Id.*, pp. 403-08, 419-20 (¶ 3-5).

In December 2001, the Pagers submitted timely Exceptions to the Examiner’s Proposed Order. R. Vol. III, p. 423. Also in December, the Pagers submitted Supplement Exceptions. *Id.*, p. 473. In June 2002, the Pagers filed untimely Supplemental Exceptions. R. Vol. III, p. 513–Vol. IV, p. 788.

In July 2002, the Commission issued its lengthy Credit Phase Order No. 29064 affirming and expanding on the Examiner’s Proposed Findings of Fact. R. Vol. V, pp. 789-820. In August 2002, the Pagers filed a timely Petition for Reconsideration raising more than 35 points of contention. *Id.*, p. 831. On August 14, 2002, Qwest filed its updated calculations regarding the Pagers’ refunds based on the Commission’s Order No. 29064. *Id.*, p. 851. In August 2002, Qwest filed an Answer to the Pagers’ Petition for Reconsideration urging the Commission to deny reconsideration. R. Vol. V, p. 854. In September 2002, the Commission

issued Order No. 29109 granting reconsideration so that it could review the numerous issues raised by the Pagers. *Id.*, p. 860.

In November 2002, the Commission issued its Credit Phase Reconsideration Order No. 29140 affirming, amending and clarifying its prior Credit Order No. 29064. R. Vol. V, pp. 863-914. The Commission determined that refunds were not due the Pagers for: (1) their non-paging services and facilities; (2) “transit traffic” from non-Qwest carriers; and (3) “wide area calling” arrangements. *Id.*, pp. 886, 895-98. The Commission also increased the amount of billing credit refunds owed each Payer. Because the Pagers had stopped paying their paging bills and the refunds were smaller than the amounts requested, the Commission acknowledged that the refunds may not exceed the amounts the Pagers owe Qwest. “If this the case, it would be unreasonable to require cash reimbursements.” *Id.*, p. 909 (emphasis added).

In December 2002, the Pagers timely filed their Notice of Appeal. *Id.*, p. 928. After the Notice of Appeal was filed, the Parties agreed to participate in the Court’s appellate settlement process. In January 2003, the Court stayed the appeal pending settlement negotiations. Following unsuccessful negotiations, the Court reinstated the appeal in November 2003 with the Pagers initial brief due in February 2004.

3. The Remand Phase. On February 13, 2004, the Pagers, Qwest and the Commission filed a Stipulated Motion with this Court to suspend the appeal and temporarily remand this matter back to the Commission. They maintained there was good cause to suspend the appeal primarily so that they could consider a recent decision issued in the D.C. Circuit, *Mountain Communications v. FCC*, 355 F.3d 644 (D.C. Cir. 2004). The parties asserted that remanding the matter would allow the Commission to reconsider two paging issues addressed in

the *Mountain* opinion and the subject of this appeal: (1) “transit traffic”; and (2) “wide area calling” arrangements. On March 8, 2004, the Court granted the temporary remand.

On remand, negotiations to settle the two remand issues were unsuccessful. Consequently, on May 11, 2004, the Commission issued Order No. 29491 directing the Pagers and Qwest to file supplemental briefs addressing the transit traffic and wide area calling issues in light of the *Mountain* decision. R. Vol. V, p. 997. On May 28, 2004, Qwest filed its supplemental brief on remand.² Appeal R., Exh. 1. The Pagers filed their remand brief on June 8, 2004. *Id.*, Exh. 2.

On August 2, 2004, the Commission issued its Remand Order No. 29555 granting in part and denying in part the Pagers’ request for additional compensation for transit traffic and wide area calling, based in part on the D.C. Circuit’s *Mountain* decision. R. Vol. V, p. 973 (Appendix 1). This Order noted that because the refunds have been substantially increased from those amounts initially calculated after the 2002 hearing, “it is possible that the refund credits might exceed the amounts the Pagers owe Qwest, if any. If the refunds afforded [the Pagers] exceed the amounts they owe Qwest, then Qwest shall provide them with cash reimbursements. . . .” *Id.*, App. 1, p. 993.

On August 12, 2004, Qwest filed its recalculations of the refunds. Appeal R., Exh. 5. On August 20, 2004, Qwest filed a Motion to Stay Order No. 29555 until the Commission could review Qwest’s subsequent request for reconsideration. *Id.*, Exh. 8. Qwest’s Motion also requested a stay on appeal. On August 23, 2004, Qwest filed its Petition for Reconsideration, Alteration or Amendment of the Commission’s Order. *Id.*, Exh. 9. On August 25, 2004, the

² By order of the Court dated September 15, 2004, the supplemental remand briefs and other Remand Phase pleadings were included in the Appeal Record as exhibits.

Pagers filed an Answer to Qwest's Motion to Stay urging the Commission to deny the stay. *Id.*, Exh. 10. On September 3, 2004, the Pagers filed an Answer to Qwest's Petition for Reconsideration requesting the Commission deny reconsideration. *Id.*, Exh. 12. On September 13, 2004, Qwest filed a Notice of Cross Appeal regarding Remand Order No. 29555.

On October 5, 2004, the Commission issued its Reconsideration Order on Remand No. 29603. R. Vol. V, p. 1008 (Appendix 2). In Order No. 29603, the Commission granted Qwest a limited stay so the Commission could take up Qwest's Petition to reconsider Order No. 29555. *Id.*, Tab App. 2, p. 1009. On the merits, Order No. 29603 granted in part and denied in part Qwest's reconsideration Petition. Consistent with Qwest's offer made at the D.C. Circuit's oral argument in *Mountain*, the Commission found that Qwest must either provide transit traffic data to the Pagers or not charge for transit charges. Because Qwest cannot provide the data, the Commission ordered Qwest to refund the transit charges. *Id.*, Tab App. 2, pp. 1022-24. Having completed its reconsideration, the Commission lifted its stay effective October 19, 2004. The Commission ordered Qwest to file new calculations showing whether the authorized refunds now exceeded the amounts the Pagers owe Qwest. "If the refunds exceed the amounts the Pagers owe Qwest, then Qwest shall issue cash reimbursements for the remaining balance of the refunds" owed to the Payer. *Id.*, Tab App. 2, p. 1027.

On October 15, 2004, Qwest Corporation filed its refund calculations in response to the Commission's directive in Order No. 29603. On November 9, 2004, Qwest filed an Amended Notice of Cross Appeal. On November 12, 2004, the Pagers filed a Motion to Strike Qwest's Calculations because such calculations were non-responsive to the Commission's Order No. 29603. Exh. 16. The Pagers asserted that Qwest's calculations "are in defiance of the

Commission's order" because Qwest has not issued cash refunds as directed by the Commission.
Id.

C. Statement of Facts

1. The Parties

a. Qwest. Qwest is the predominant local exchange carrier (LEC) in southern Idaho and provided "Title 62" services and facilities to the Pagers. Pursuant to *Idaho Code* § 62-604(2), the Commission does not set the rates for Title 62 services. However, the Commission is authorized "to investigate and resolve complaints made by subscribers to [these Title 62] telecommunication services. . . ." *Idaho Code* § 62-616.

Under the federal Telecommunications Act of 1996, Qwest is obligated to "interconnect" with other telecommunication carriers such as the Pagers. 47 U.S.C. § 251(a). To promote competition in all telecommunication markets, Congress envisioned that telecommunications carriers would enter into agreements that would include the rates, terms and conditions for interconnection. These agreements are commonly referred to as "interconnection agreements." R. Vol. V, pp. 870-71. During the relevant refund periods, all the Pagers networks had multiple connections (commonly referred to as points of interconnection (POIs)) with Qwest's network. *E.g.*, Tr. Vol. III, p. 131-32, ll. 1-23.

b. The Pagers. The Pagers are both Title 62 customers of Qwest and telecommunication carriers in their own right. As paging carriers, the three Pagers provide one-way paging services to their customers. Typically, a one-way paging customer only receives calls. R. Vol. V, p. 864. In addition, PageData and Tel-Car acknowledged they provide telecommunication services other than simply one-way paging. *Id.*, p. 809; Tr. Vol. III, p. 131, ll. 15-16; p. 148, ll. 18-20. Each Pager also leased Qwest facilities to connect its multiple

interconnection points together. Tr. Vol. III, p. 195, l. 3-10; Tr. Vol. VI, p. 498, ll. 16-21; Exh. 111, p. 10.

c. Radio Paging. Radio Paging operates in southern Idaho primarily in an area from Weiser to Burley. Tr. Vol. III, p. 195, ll. 3-10. Radio Paging had two points of interconnection (POIs) with Qwest: Boise and Twin Falls. *Id.*, p. 123, ll. 5-8. Radio Paging's Mr. Ryder, testified that he is entitled to 100% refund of his payments made to Qwest. *Id.*, p. 104, ll. 18-22. He acknowledged that he had stopped paying his paging bill to Qwest as well as his non-paging bill. *Id.*, p. 120, ll. 16-22; p. 121, ll. 10-15; p. 128, ll. 9-11.

d. Tel-Car. Tel-Car provides one-way paging, two-way answering service, and mobile cellular services in southern Idaho. *Id.*, p. 131, l. 15-16. Tel-Car has three POIs located in Meridian, Twin Falls and Pocatello. *Id.*, pp. 131-32, ll. 25-1. Tel-Car's owner, Arden Casper, testified that some of his leased circuits are utilized to provide both paging and non-paging services. *Id.*, p. 147, ll. 6-9. Tel-Car filed for bankruptcy in March 2000 and was converted to a Chapter 7 debtor in January 2002. *Id.*, p. 139, ll. 2-8; R. Vol. V, p. 848.

e. PageData. PageData's owner, Joseph McNeal, testified he provides one-way paging, long-distance services, signal traffic, e-mails, and data across southern Idaho. Tr. Vol. III, p. 148, ll. 18-20; p. 199, ll. 1-2. Qwest's witness Sheryln Fraser also stated PageData provides two-way mobile service, private line service and plain old telephone service (POTS). Tr. Vol. V, p. 352, ll. 19-20. In June 1998, Mr. McNeal purchased the assets of another paging company called InterPage. Tr. Vol. III, pp. 150, 208. He testified that PageData/InterPage had POIs with Qwest at Idaho Falls, Rexburg, Pocatello, Twin Falls and Boise. *Id.*, p. 163, ll. 17-18, p. 164, l. 3. However, his Exhibits 121 and 111 state that PageData has POIs at seven locations: Rexburg, Idaho Falls, Pocatello, Hailey, Twin Falls, Boise, and Meridian. Pagers Exh. 111, p.

10, Exh. 121, p. 10. He leased dedicated lines from Qwest that connected his multiple POIs. Tr. Vol. VI, p. 498, ll. 16-21, Exh. 111, p. 10, 24; *See also* Tr. Vol. V, p. 415, ll. 3-8. He explained that InterPage had leased lines “that went from Idaho Falls to Pocatello, from Pocatello to 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.” Tr. Vol. III, p. 195, ll. 3-10.

About September 1, 1998, PageData requested a single point of interconnection in southern Idaho to replace its multi-POIs configuration. Exh. 111, p. 10; *compare* Exh. 113, p. 10 with p. 7. PageData asked for a refund of all monies paid to Qwest. Mr. McNeal said that all the different types of telecommunications traffic he carries use the same facilities that are “available to us at no charge.” Tr. Vol. III, p. 199, ll. 8-9. He also stopped paying Qwest for paging services before he executed his interconnection agreement with Qwest. *Id.*, p. 196, ll. 17-22.

2. Liability Phase and the *TSR Order*.

In its *TSR Order*, the FCC found that Qwest may not impose charges on paging carriers for services and facilities used to deliver calls from Qwest customers to pagers, i.e., Qwest-originated traffic. *TSR Order*, 15 FCC Rcd 11166 at ¶ 1. In establishing regulations for the interconnection of carriers, the FCC promulgated Section 51.703(b) that states LECs (such as Qwest) “may not assess charges on any other telecommunications carrier for telecommunications traffic that originate on the LEC’s network.” 47 C.F.R. § 51.703(b); *Mountain*, 355 F.3d at 646.

Although LECs are prohibited from charging for facilities used to deliver LEC-originated traffic to pagers, the FCC’s *TSR Order* states that Section 51.703(b) “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.” *TSR Order*, 15 FCC Rcd 11166 at ¶ 1. The

FCC explained that LECs and pagers may enter into “wide area calling or reversed billing arrangements whereby [the pager] can “buy-down such toll calls to make it appear to [LEC] end users that they have made a local call rather than a toll call.” *Id.*, ¶ 31 (emphasis added).

In addition to charging pagers for wide area calling arrangements, the *TSR Order* also allows Qwest to charge a pager for “transit traffic.” *Id.*, n.70. The FCC explained that “transit traffic” is calling 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.” *Id.* For example, transit traffic are calls that originated with another carrier (e.g., a cellular carrier or a competitive LEC) but are transported over Qwest’s network to reach the paging carrier.

Finally, the FCC recognized that pagers would be responsible for paying charges for facilities ordered from a LEC to connect points “on the paging carrier’s side of the point of interconnection” (POI). *TSR Order* at n.70; *Qwest v. FCC*, 252 F.3d 462, 468 (D.C. Cir. 2001). The Pagers leased an assortment of facilities to connect their multiple POIs together. Tr. Vol. III, p. 195, ll. 3-10; Vol. VI, p. 498, ll. 15-21.

In summary, the Liability Phase ended with several guiding refund principals:

- Qwest was prohibited from charging the Pagers for services and facilities used to transport Qwest-originated traffic to the three Pagers’ multiple POIs.
- Qwest may charge the Pagers for Qwest “wide area calling” arrangements and “transit traffic.”
- Qwest may charge the Pagers for Qwest facilities that the Pagers use on the Pagers’ side of the points of interconnection.

TSR Order, ¶¶ 1, 30-31, n.70; R. Vol. I, pp. 133 n.12, p. 137 n.15.

3. The Credit Phase and the Hearing.

In their Complaint, the Pagers seek refunds from Qwest up until the time they entered into interconnection agreements with Qwest. R. Vol. I, p. 4. The Commission determined in its Credit Order No. 29140 that the refund period for each carrier should begin November 1, 1996, – the effective date of the FCC’s *Local Competition Order*³ which promulgated Section 51.703(b). R. Vol. V, p. 866. PageData’s interconnection agreement with Qwest was approved by the Commission on September 10, 1999. Radio Paging’s interconnection agreement with Qwest was approved by the Commission on May 13, 1999. Tel-Car did not have an interconnection agreement with Qwest. Consequently, the refund period for each pager was determined to be: PageData – November 1, 1996 to September 10, 1999; Radio Paging – November 1, 1996 to May 13, 1999; and Tel-Car – November 1, 1996 to September 1999 (but calculated to July 2000). *Id.*, pp. 866-67. The Pagers do not challenge the respective refund periods.

At the hearing, both the Pagers and Qwest presented witnesses and exhibits in support of their calculation of the refund amounts. The Pagers argued they were entitled refunds for all amounts paid to Qwest and that there should not be any off-sets for wide area calling or transit traffic. R. Vol. III, p. 450. The Pagers sponsored various exhibits, some generated by Qwest. Exh. 101-122. PageData introduced a single page exhibit 109 to support its request for a refund of \$248,473.56. (Appendix 3.) The top part of the exhibit purportedly showed the InterPage portion (\$188,473.56) of the requested refund and the bottom entry shows the PageData portion denoted as “Approx Amount paid by PageData – \$60,000.” (Appendix 3). At hearing,

³ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499 (1996) *Aff’d in part and vacated in part sub nom., Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) *aff’d in part and remanded, AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S.Ct. 721 (1999) (hereinafter the “*Local Competition Order*”).

PageData's Mr. McNeal corrected the PageData portion of the record to \$52,282.47 or an adjusted refund request of \$240,756.03. Tr. Vol. III, p. 154, ll. 12-15.

At the hearing, Qwest questioned the adequacy of PageData's Exhibit 109. Under questioning by Qwest's counsel, Mr. McNeal could not explain what backup information is available to support PageData's Exhibit 109. Tr. Vol. III, p.220, ll. 17-25. The following day on rebuttal, Mr. McNeal sponsored Exhibit 122 that purportedly contains the backup information for Exhibit 109. Exhibit 122 is comprised of mostly "QuickBooks" pages showing annual "Profit and Loss" statements and annual expense transaction sheets for the years 1996 through 1998 for InterPage.

Mr. Ryder for Radio Paging sponsored Exhibits 101-103. He testified that he was due a monthly refund of \$1,811.67 for 33-month period which would result in a refund of \$59,785.11. Tr. Vol. III, p. 104, ll. 2-12.⁴ Tel-Car's witness Mr. Casper sponsored Exhibit 104 that supported a refund of about \$68,833. Exh. 104. He testified that his refund amount shown in Exhibit 104 should include another \$5,000 or \$6,000 for charges not reflected in Exhibit 104. Tr. Vol. III, pp. 133-34, ll. 14-19. This would total approximately \$74,000.

Qwest offered a detailed exhibit for each pager showing payments, billing, taxes, and charges for paging, non-paging, wide area calling arrangement and transit charges: Radio Paging – Exhibit 201; Tel-Car – Exhibit 202; PageData/InterPage – Exhibit 203. 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. She insisted the Pagers clearly have a need for telephone services beyond interconnection for the purpose of paging. Tr. Vol. V, p. 461, ll.

⁴ This initially requested refund included two monthly payments outside the refund period.

21-25. She also testified that the refunds should not include charges for transit traffic, wide area calling arrangements, and facilities on the Pagers' side of the POI. Tr. Vol. IV, p. 318, ll. 15-21.

The Hearing Examiner made extensive findings in his Proposed Order issued after the evidentiary hearing held on July 24-25, 2001. R. Vol. III, pp. 399-422. After completing its *de novo* review of the evidentiary record, the Examiner's Proposed Order and the post-hearing briefs of the parties, the Commission adopted the Examiner's recommendations. R. Vol. V, pp. 789-820. The Credit Phase Orders contain the following findings.

a. Non-Paging Services. The Hearing Examiner recommended and the Commission found that the Pagers are entitled to receive credits for one-way paging traffic, and those facilities and services necessary to transmit paging traffic. R. Vol. III, p. 401 ¶ 2; Vol. V, p. 811. However, they both found it was reasonable and appropriate to exclude from the refund calculations those Qwest charges for non-paging services and facilities. *Id.*; R. Vol. III, p. 409. The Examiner and the Commission also found that Qwest correctly eliminated from its refund calculations non-paging services. *Id.*, pp. 409-10; Vol. V, pp. 809-11, 896-98.

The Examiner observed that the Pagers failed to separate their paging payments from their non-paging charges. R. Vol. III, pp. 409-10. The Examiner recommended and the Commission found that the Pagers failed to even address which Title 62 facilities and services were used for paging and non-paging purposes. The Examiner noted that

the [Pagers] provide their customers with more than paging services; those services include . . . cellular services, and long-distance, for example. They have provided no evidence about how the configuration of network on their side of the point(s) of connection with Qwest, or how facilities that carry paging traffic from Qwest are, if at all, isolated from traffic relating to the other services that they provide. [Pagers] offered virtually no evidence about how they use their networks for the other services that they offer to customers over them, despite substantial evidence from Qwest demonstrating an isolating tariff purchases for those other purposes. Moreover, [the Pagers] have admitted that facilities secured from Qwest under tariff: (a) may be used

for any relevant line of business, suggesting that such use would not be material to claims for credits or (b) have been used for purposes other than mere interconnection [.]

Id., p. 409 (Discussion section).

b. Wide Area Calling and Transit Traffic. In the Commission's Credit Phase Order No. 29140, the Commission relied upon the *TSR Order* and other FCC decisions to conclude that Qwest was permitted to charge the Pagers for transit traffic originated by third-party carriers. The Commission found that 24% of the Pagers' traffic was properly classified as transit traffic. R. Vol. V, p. 865. On the issue of wide area calling, the Commission found that PageData and Tel-Car had configured their paging networks in a manner that constituted wide area calling arrangements.⁵ Consequently, the Commission determined that the two Pagers were not entitled to a refund for these wide area calling charges. *Id.*, pp. 898-903.

c. Best Billing and Payment Evidence. Based upon Qwest's Exhibits 201, 202 and 203 together with supporting testimony, the Examiner determined that Qwest provided the better evidence on calculating the refund. The Examiner's Proposed Order contains detailed findings that Qwest's evidence was clearly superior to the Pagers. R. Vol. III, pp. 405-08. He found that

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

Id., p. 402. The Examiner explained that Qwest's

exhibits also contained worksheets showing the recalculation of each Pager's billing by billing element [i.e., USOCs⁶] (corresponding to the same element

⁵ Radio Paging had no wide area calling arrangements.

⁶ The Uniform Service Order process utilizes "codes" comprised of letters and numbers to generically refer to all telecommunications services and equipment. USOCs are used to provision, bill and maintain each telecommunications service and type of facilities. R. Vol. V, p. 897 n.29.

month by month for which Qwest had billed as shown earlier in the exhibit), listing the amounts actually billed, the amounts that should have been billed, and the difference, which represents a credit to be given. . . . These calculations also breakout billing elements between reoccurring and non-reoccurring charges. The sum of the billing-element-by-billing-element differences (or credits) were themselves summed for inclusion as the “rerate credit” amount on the first page of the three [Exhibits 201-203].

Id., p. 407. The Commission agreed with the Examiner that Qwest presented the better billing and payment evidence. R. Vol. V, p. 818.

In weighing the evidence, the Examiner determined that the Pagers “did not provide credible, contrary evidence of their bills and payments.” R. Vol. III, p. 408. The Examiner acknowledged that the most extensive attempt to do so was made by PageData.

However, the evidence made clear that PageData offered its information not for the purpose of generating a complete and accurate list of the information in question, but, in affect, to bring Qwest to the table to respond to it. . . . PageData was unable to provide direct proof of payment, but submitted a number of documents that its accountants prepared and with which the witness was not very familiar.

Id., p. 408.

The Examiner concluded that Qwest’s calculations reasonably account for those paging services and facilities subject to the *TSR Wireless Order*. *Id.*, pp. 402 ¶¶ 6-7, 403-08. He noted that those facilities and services Qwest excluded are not necessary for paging interconnection, were purchased for reasons beyond just interconnection, and serve purposes other than paging interconnection. *Id.*, pp. 409-10.

In affirming the Examiner’s proposed findings, the Commission observed that the Pagers’ failure in attempting to separate paging and non-paging services is consistent with their arguments at the hearing that they were entitled to reimbursement of all their Qwest charges. R. Vol. V, p. 811. “However, while we recognize that the Pagers are entitled to credit for paging services, they are not entitled to credits for their use of non-paging services and facilities to

provide services such as long-distance, cellular, data, private line, and the like. We conclude that Qwest presented sufficient evidence to demonstrate that it properly excluded non-paging services from the credit calculations.” *Id.*

On reconsideration the Commission provided more detailed findings in its Order No. 29140. It found that Qwest properly excluded non-paging services from the refunds.

In calculating credits owed each Pager, Qwest utilized its billing account information broken down by Uniform Service Order Codes (USOCs).¹⁷ Qwest used the USOCs to bill (and then calculate the credits) for services and facilities provided to the Pagers. As Qwest witness, Frasier testified, the Company utilized its USOC codes to determine what services are appropriately classified as “paging” services. Tr. at 328. Those services that were identified by their USOC codes as non-paging (e.g., mobile service, frame relay, long-distance, private line or POTS) were excluded. Consequently, credit for these services were not included. The Hearing Examiner determined that the Pagers made no effort to show that the USOCs [used in] Qwest Exhibits 201, 202 and 203 were incorrectly assigned to non-paging services. Order No. 29064 at 20.

R. Vol. V, p. 897.

d. Tel-Car’s Mobile Service. The Commission rejected Tel-Car’s request to be compensated for its mobile cellular service for two reasons. First, the Commission found it reasonable to not compensate the Pagers for their non-paging services. Second, even if Tel-Car used some of its mobile circuits for its paging services, “it was incumbent upon Tel-Car to provide evidence regarding the usage ratio between one-way paging and non-paging traffic over the joint use circuits. Tel-Car did not provide any such evidence.” R. Vol. V, p.897-98.

At the conclusion of the Credit Phase, the Commission ordered refunds to the Pagers in the following amounts: Radio Paging – \$42,105; PageData – \$55,486; and Tel-Car – \$33,512. *Id.*, p. 916.

⁷ See *supra* n.6.

4. Remand Phase and the *Mountain* Opinion.

The temporary remand was premised on the D.C. Circuit's opinion in *Mountain Communications v. FCC*, 355 F.3d 644 (D.C. Cir. 2004). Mountain Communications is a Colorado paging company. Unlike the Idaho Pagers multiple points of interconnection, Mountain has a single point of interconnection with Qwest. Mountain used direct inward dialing (DID)⁸ lines to funnel traffic to its single point of interconnection. *Mountain Communications*, 17 FCC Rcd 2091 at ¶ 3. On appeal from the FCC, Mountain requested that Qwest be ordered to cease assessing wide area calling and transit traffic charges and issue refunds for these charges back to August 1996. *Id.* at ¶¶ 4-5.

In its appeal, Mountain argued that Qwest's assessment of wide area calling charges were in violation of the FCC's *TSR Order* and the FCC's regulation 51.703(b). This regulation states Qwest "may not assess charges on any other telecommunications carrier for . . . traffic that originates on [Qwest's] network." 47 C.F.R. § 51.703(b). Mountain also argued that the FCC's practice of allowing carriers to charge for transit traffic is arbitrary and capricious "because it does not follow the standard [industry] practice of charging the cost of calls to the network of the party initiating the call." *Mountain*, 355 F.3d at 649.

The Court as need and held that the FCC's wide area calling decision is at odds with the FCC's own regulation and with the *TSR Order*. The Court observed that while the facts of the *TSR Order* and *Mountain* are identical, the results of the two cases "are opposite." *Id.* at 646. Thus, the Court easily concluded that the FCC's wide area calling decision is "logically inconsistent with [the FCC's] *TSR* decision." *Id.*, p. 647. The Court also found that the FCC's

⁸ DID is typically a Qwest switching feature that the two Pagers in this case used to route calls to non-local DID trunks connected to Qwest central offices in other local calling areas. R. Vol. V, p. 794 n.6.

decision “seemingly comes into direct conflict with its own regulation” – Section 51.703(b). *Id.*, p. 648. Consequently, the Court vacated the decision and remanded the case to the FCC. *Id.*, p. 649.

The Court next turned to transit traffic. The Court observed that the FCC permits Qwest to charge Mountain for transit traffic but “indicated that Mountain could seek reimbursement from the originating carrier for whatever charges it paid to Qwest.” *Id.*; *Mountain Communications v. Qwest, Memorandum Opinion and Order*, 17 FCC Rcd 15135 n.13 (FCC 2002). Mountain maintained that its ability to seek reimbursement from the originating carrier “was illusory” because Qwest does not pass on such information to Mountain. The Circuit Court continued that:

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* 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.

Mountain, 355 F.3d at 649 (italicized original, underline added). *See also* R. Vol. V, p. 1001, App. 1, p. 980. In other words, Mountain declined to pursue this issue once Qwest promised to provide the transit data.

a. Wide Area Calling. Relying upon the *Mountain* decision, the Commission concluded that Qwest cannot charge the two Pagers for the use of DID trunks to deliver Qwest-originated traffic to their points of interconnection. App. 2, p. 1019 *citing Mountain*, 355 F.3d at 647-49. Both PageData and Tel-Car used DID services and facilities in their wide area calling arrangements. In addition, PageData also ordered 500 toll-free “800 numbers” as a means to route calls via the DID lines to its paging facilities. App. 1, p. 1010. However, the Commission

determined that the *Mountain* decision is not applicable to PageData's "800" service. The Commission found that PageData's ordering of the "800" numbers is substantially different than its use of DID lines and effectively denies Qwest the ability to charge its own customers for toll calls made to PageData by using the 800 numbers. App. 2, p. 1021. The *Mountain* decision explicitly recognizes that Qwest is entitled to charge its customers for long-distance calls made to the Pagers. *Mountain*, 355 F.3d at 645, 647-48 (a LEC can charge its own customers for a toll call made to the pagers). The Commission also noted that even the Pagers' expert Victor Jackson acknowledged that the Pagers did not oppose paying Qwest for the "800" calls. App. 2, p. 1021 *citing* Tr. Vol. IV, p. 250, ll. 13-20. Qwest's witness Ms. Fraser also concurred that PageData's use of the 800-service was not subject to refund. Tr. Vol. V., pp. 353-54, ll. 24-4.

b. Transit Traffic. Turning to the transit issue, the Commission found that based upon Qwest's concession to provide Mountain Communications with the transit calling data, Qwest should provide the transit calling data to the Pagers in this case. R. App. 1, pp. 987-88; App. 2, pp. 1022-24.

In its Order No. 29603, the Commission recognized that the D.C. Circuit did not reach the merits of the transit traffic issue in *Mountain*. App. 2, p. 1023. The Commission observed what was more important was the reason the Court did not reach the merits of the transit traffic issue. Qwest's counsel at oral argument indicated "Qwest would provide Mountain with the information necessary so that Mountain could charge the originating carrier for reimbursement." *Mountain*, 355 F.3d at 649. In explaining its decision to increase the refunds for transit traffic, the Commission stated in Order No. 29603,

it was Qwest's offer to provide Mountain with the originating call data that was the basis for our decision [to refund the transit traffic charges] in Order No. 29555. We agree with the Pagers that it is discriminatory for Qwest to provide the calling information to Mountain but not to the Pagers in our case.

Order No. 29555 at 15 *citing* 47 U.S.C. § 251(c)(2)(D). Our departure from Order No. 29140 was premised on the *Mountain* opinion and Qwest's offer to provide the calling data to Mountain. Our Order No. 29555 recognizes that Qwest may charge the Pagers for transit traffic so long as it provides the originating call data – like it agreed to provide Mountain. Our finding in Order No. 29555 is also consistent with prior FCC decisions that recognize that the transit carrier (Qwest) may charge the Pager for transit traffic; and the Pager “may then seek reimbursement of the cost associated with transport and termination of that traffic from the carrier that originated the transiting traffic in question.” *Mountain Communications v. Qwest*, 17 FCC Rcd 2091 at n.30; *Mountain Communications v. Qwest*, 17 FCC Rcd 15136 at n.13; *TEXCOM v. Bell Atlantic, Order on Reconsideration*, 17 FCC Rcd 6275 at ¶ 4 (March 27, 2002).

App. 2, pp. 1023-34.

c. Other Issues. Although the remand was to be limited to the two issues of transit traffic and wide area calling, the Pagers again requested a full refund of all sums paid to Qwest. Appeal Exhibit 2 at 3. PageData asserted it was now entitled to \$260,555.31 (an increase from the Credit Phase of about \$15,000). R. Vol. V (App. 2), p. 989. In addition, Tel-Car renewed its request to recover its mobile charges. *Id.* The Commission rejected Tel-Car's mobile request for the same reasons it identified in the Credit Orders. R. Vol. V (App. 1), pp. 990-91. The Commission also found that it was inappropriate to increase the refunds afforded PageData. *Id.*, p. 992. In Order No. 29555 the Commission found that it is undisputed

that for the first 22 months of the 34-month refund period, PageData/InterPage had at least (if not five [or more]) POIs scattered throughout Qwest's southern Idaho service area. Pursuant to FCC regulation 51.703(b), facilities transporting Qwest local traffic to these POIs should have been without charge to the Pager. However, 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. *Qwest Corporation v. FCC*, 252 F.3d 462, 468 (D.C. Circ. (2001)).

Mr. McNeal testified that InterPage leased lines connecting its paging terminals (i.e., the POIs to Boise). Tr. at 164, 195. He stated that “there was a lease line that went from Idaho Falls to Pocatello, from Pocatello to Twin Falls, from Twin Falls into Boise, and so if you made a phone call into . . .

Idaho Falls, then it would travel along that network back to Boise.” Tr. at 195. PageData’s August 29, 1998 letter to Qwest explains that the Pager’s “network sends TMPP packets between the paging terminals.” Exh. 111, p. 10. In other words, for at least 22 months, the Qwest facilities that transported traffic among the POIs was appropriately charged to InterPage. Order No. 29140 at 44.

Taking account of the non-paging services, the inter-POI facilities, the 22 months of the 34-month period with multiple POIs, the majority of the paging payment (\$188,473.56) were attributed to InterPage, Qwest’s better calculating evidence and the less weight attributed to Mr. McNeal’s explanation of exhibits 109 and 122, we find there is substantial and competent evidence to reject PageData’s calculations and adopt Qwest’s calculations.

R. Vol. V (App. 1), pp. 992-93 (internal cites omitted).

The Table below shows the Commission ordered refunds through the Remand Phase and the refund amounts that the Pagers seek on appeal.

COMMISSION ORDERED REFUNDS

| | <u>Radio Paging</u> | <u>PageData</u> | <u>Tel-Car</u> |
|---|-------------------------|-----------------|-----------------------|
| Billed Amt thru 4-99* | \$54,028 | \$123,447 | \$56,885 |
| Payments | <u>-53,111</u> | <u>- 87,390</u> | <u>-45,349</u> |
| Balance owed Qwest | (917) | (36,057) | (11,536) |
| Credit Phase Refund | <u>34,572</u> | <u>81,119</u> | <u>39,162</u> |
| Net Refund | 33,655 | 45,062 | 27,626 |
| Comm Ordered Interest | <u>8,450</u> | <u>10,421</u> | <u>5,886</u> |
| Total Credit Phase Refund 11/2002 | \$42,105 | \$ 55,483 | \$33,512 |
| Remand Phase wide-area calling | NA | 5,600 | 3,909 |
| Remand Phase transit traffic | 15,311 | 35,704 | 15,362 |
| Addit. Mo. Interest | <u>51</u> | <u>156</u> | <u>65</u> |
| TOTAL REFUND | \$57,467 | \$ 96,943 | \$52,848 |
| | | | |
| Pager Requested Refunds on Appeal (without interest) | \$54,953.99 | \$245,628.51 | \$66,897 (approx.) |

Sources: R. Vol. V (Tab 2), pp. 1014-15, 1022, 1027; Pager Brief at 11, 26, 28.

*Tel-Car’s billed amt is thru 7-00 because it had no interconnection agreement.

III. THE COMMISSION'S ARGUMENT ON APPEAL

A. Standards of Review

The standards of judicial review of Orders of the Commission are well settled. Idaho Constitution Article V, Section 9 states that the Legislature may fix the scope of review on the appeal. By statute the Legislature has limited the scope of review:

No new or additional evidence may be introduced in the Supreme Court, but the appeal shall be heard on the record of the commission as certified by it. The review on appeal shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the constitution of the United States or of the state of Idaho.

Idaho Code § 61-629; *Idaho Power Co. v. Idaho PUC*, 140 Idaho 439, 441-42, 90 P.3d 889, 891-92 (2004); *Hulet v. Idaho PUC*, 138 Idaho 476, 65 P.3d 498 (2003).

With regard to questions of law, judicial review is limited to whether the Commission regularly pursued its authority. *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996); *Hulet*, 138 Idaho at 478, 65 P.3d at 500; *Industrial Customers of Idaho Power v. Idaho PUC*, 134 Idaho 285, 288, 1 P.3d 786, 789 (2000).

With regard to findings of fact, if the Commission's findings are supported by substantial and competent evidence, this Court must affirm those findings and the Commission's decision. *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789; *Application of Burlington Northern R. Co.*, 112 Idaho 693, 695, 735 P.2d 1004, 1006 (1987); *Grindstone Butte Mut. Canal Co. v. Idaho PUC*, 102 Idaho 175, 627 P.2d 804 (1981). Substantial, competent evidence has been defined to quantify, "more than a mere scintilla of evidence in support of the agency's determination, though something less than the weight of the evidence." *Industrial Customers*, 134 Idaho at 292-93, 1 P.3d at 793-94. Furthermore, the "Court will not displace the

Commission's findings of fact when faced with conflicting evidence, 'even though the Court would have made a different choice had the matter been before it *de novo*.'" *Hulet*, 138 Idaho at 478, 65 P.3d at 500 *quoting Rosebud*, 128 Idaho at 618, 917 P.2d at 775. In fact *de novo* review is precluded by the substantial evidence rule discussed above. *Industrial Customers*, 134 Idaho at 292-93, 1 P.3d at 793-94.

"The burden is on the party challenging the Commission's findings to show that they are unsupported by the evidence." *Hulet*, 138 Idaho at 478, 65 P.3d at 500 *citing Industrial Customers*, 134 Idaho at 292, 1 P.3d at 793. The Commission's findings are entitled to a presumption of correctness, and the burden is on the appealing party to show that those findings are not supported by substantial evidence. *Industrial Customers*, 134 Idaho at 292-93, 1 P.3d at 793-94 *citing Rosebud*, 128 Idaho at 631, 917 P.2d at 788. As the finder of fact, the Commission "need not weigh and balance the evidence presented to it, but is free to accept certain evidence and disregard other evidence. The Commission is at liberty to believe or disbelieve proffered contradicted evidence." *Hulet*, 138 Idaho at 479, 65 P.3d at 501 (citations omitted). The Commission's findings of fact are to be sustained unless it appears that the clear weight of the evidence is against its conclusions or that the evidence is strong and persuasive that the Commission abused its discretion. *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789.

The Commission's findings must contain the reasoning behind its conclusions to sufficiently allow the reviewing court to determine that the Commission did not act arbitrarily. *Rosebud*, 128 Idaho at 618, 917 P.2d at 775. "What is essential are sufficient findings to permit the reviewing court to determine that the IPUC has not acted arbitrarily." *Id.* 128 Idaho at 624, 617 P.2d at 781 (citations omitted).

Additionally, the Commission is not bound by the doctrine of *stare decisis* in the same manner as a court of law, but must adequately explain a departure from prior Commission rulings. *Rosebud*, 128 Idaho at 618, 617 P.2d at 755.

Because regulatory bodies perform legislative as well as judicial functions in their proceedings, they are not so rigorously bound by the doctrine of *stare decisis* that they must decide all future cases in the same way as they have decided similar cases in the past. If, however, the IPUC decides a case in a manner contrary to prior IPUC rulings the Court will consider whether the IPUC has adequately explained the departure from prior rulings so that a reviewing court can determine that the decisions are not arbitrary and capricious.

Id. (citation omitted).

The constitutionally limited appellate review of Commission Orders does not support *de novo* review as suggested by the Pagers. Pagers Brief at 11. *A.W. Brown Co. v. Idaho Power Co.*, 121 Idaho 812, 898 P.2d 841 (1992) (under Idaho Constitution the Supreme Court has only limited jurisdiction to review decisions of the PUC.). The authority cited by the Pagers stands for the proposition that appellate review of a trial court's determinations regarding questions of mixed fact and law will be reviewed *de novo*, as the court would review questions of law. In *The Highlands, Inc. v. Hosac*, 130 Idaho 67, 69, 936 P.2d 1309, 1311 (1997) the Court stated "The theories of waiver and estoppel present mixed questions of law and fact. Because mixed questions of fact and law are primarily questions of law, we review them *de novo*." (citations omitted). The standard of review for Commission Orders is constitutionally unique and is not the same as if the Court were reviewing a determination of the trial court. Therefore, the limited appellate review of Commission Orders does not support *de novo* review as suggested by the Pagers.

Where evidence presented to the Public Utilities Commission is competent and substantial in support of the findings made and there has been no clear abuse of discretion, the

Court is constrained to affirm those findings. *Grindstone Butte*, 102 Idaho at 178, 627 P.2d at 807. If the Supreme Court finds that the Commission has not regularly pursued its authority, then the Court shall set aside the Commission's Order in whole or in part. *Idaho Code* § 61-629. The Commission, upon its own motion or upon the motion of any party, may alter or amend the Order to meet the objections of the Court. *Id.*

B. There is substantial and competent evidence that supports the Commission's findings that the Pagers are not entitled to additional refunds

As outlined by the Hearing Examiner and affirmed by the Commission, there are several reasons why the Pagers are not entitled to refunds in the amount that they request. First, the Examiner and the Commission found it was reasonable and appropriate to exclude from the calculation of the refunds those charges paid by the Pagers for services and facilities for non-paging services. R. Vol. III, p. 401 ¶ 2, Vol. V, p. 811. In their initial complaint, the Pagers simply sought recovery for charges assessed for their paging operations. Consequently, the Commission found it was reasonable and appropriate to exclude from the calculation refunds those Qwest charges for non-paging services and facilities such as long-distance, cellular service data, private line and the like. *Id.*; Vol. III, p. 409; Vol. V, pp. 811, 896-98; *TSR Order*, 15 FCC 11166 ¶ 30.

Second, the Commission 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). R. Vol. V (App. 1), p. 992; *Qwest v. FCC*, 252 F.3d at 468; *TSR Order* at n.70. The Pagers argue that they are entitled to refunds for the dedicated facilities that connect their paging terminals together. Pager Brief at 13. The Pagers argument misconstrues the *TSR Order*. The *TSR Order* and *Mountain* indicate that Qwest cannot charge the Pagers for Qwest facilities to the points of interconnection (POIs). However, Qwest

may appropriately charge the Pagers for facilities used to carry traffic between and among the respective Pagers' POIs. It is undisputed that all of the Pagers had multiple points of interconnection. Tr. Vol. III, p. 101, ll. 9-11; p. 195, ll. 4-7; Vol. IV, p. 498, ll. 16-21; Exh. 111, p. 10, Exh. 121, p. 10. Thus, the leased and dedicated facilities that connect the Pagers points of interconnection may be properly charged. As the Circuit held in *Qwest v. FCC*, Qwest may charge "for connecting parts of a paging carrier's own network." 252 F.3d at 468.

The Commission observed in its Credit Order that Qwest is not required to provide services for PageData to connect PageData's network together. The Commission continued that Qwest is not

obligated to provide facilities, dedicated or otherwise, to PageData that are used by PageData on its side of the network. . . . The relevant question is not whether facilities were used in PageData's paging business; the facilities must be used to deliver paging traffic from Qwest [to the Pagers]. PageData provided no evidence regarding which accounts carry what types of traffic.

R. Vol. V, p. 906 *quoting* Qwest's Post-Hearing Reply Brief at 22-24.

The Pagers reliance on *MCIMetro Access Transmission Services v. BellSouth Communications*, 352 F.3d 872 (4th Cir. 2003) is unavailing. Unlike the Pagers in the present appeal, MCI had only a single point of connection in North Carolina. *Id.*, 352 F.3d at 877. Thus, *MCIMetro* is factually distinguishable from the present case where the Pagers had multiple points of interconnection.

The same factual distinction is present in the *Mountain* decision. In that case, Mountain Communications "used a single point of interconnection (POI) with Qwest. . . ." *Mountain*, 355 F.3d at 644-45. It is undisputed that the Pagers here have multiple points of interconnection with Qwest. Tr. Vol. III, p. 123, ll. 5-8; pp. 131-32, ll. 25-1; Exh. 111 at p. 10; Exh. 121, p. 10. In other words, they do not have a single point of interconnection. This

distinction is critical because the leased facilities that connects the Idaho Pagers' facilities are not properly refunded under the *TSR Order n.70* and *Qwest*, 252 F.3d at 468. In *Qwest*, the Court noted that paging carriers themselves must pay "for connecting parts of [their] own network." 252 F.3d at 468. In the case of PageData, with its four to seven POIs, the facilities used to connect these points are appropriately characterized as facilities Qwest provides to the Pagers on the Pager's side of the network. Because PageData/InterPage have the largest number of POIs of the Idaho Pagers, it uses more facilities to connect its POIs and, thus probably incurred the most charges. Thus, there is substantial evidence to find that Qwest's Exhibit 203 based on service codes properly excluded those codes in the calculation of the refund owed to PageData. *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789.

The Commission's Remand Order increased the refunds available to the Pagers for those facilities used to carry Qwest-originated traffic to the Pagers' points of interconnection. R. Vol. V (App. 1), p. 986. However, the Pagers were not compensated for those dedicated facilities that connected their paging terminals together. In its Order No. 29555, the Commission noted 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 (App. 1), p. 992 *citing Qwest*, 252 F.3d at 468. The Commission has correctly applied the holding of FCC Orders and case law when it found the Pagers were not eligible to receive refunds for dedicated facilities that were on the Pagers' side of the network. There is substantial and competent evidence to support the findings that the Pagers all had multiple POIs and used leased lines to connect their terminals. Tr. Vol. III, p. 195, ll. 3-10; Vol. V, pp 414-15, ll. 24-7; Vol. VI. 498, ll. 16-21; Exh. 111, p. 10; *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789.

C. There is substantial and competent evidence to support the Commission's findings that Qwest provided the better evidence used to calculate the refunds

On appeal the Pagers assert they are entitled to a full refund of all monies paid to Qwest. Pagers Brief at 11, 26, 28. However, the Commission found that there is substantial and competent evidence supporting its findings that Qwest's Exhibits 201, 202 and 203 constituted the better evidence regarding the appropriate billed amounts and paid amounts necessary to calculate the refunds due each Pager. R. Vol. V, pp. 816-18; pp. 903-08.

The Examiner and the Commission both found that Qwest presented the better evidence regarding billing and payment information. R. Vol. III, pp. 402 ¶ 6, 403-08; Vol. V, pp. 807-12, 818. In particular, the Examiner found that Qwest Exhibits 201-203 came with back up support sources; were developed from systems that are routinely used to measure, bill and credit customers; and employed billing elements (USOCs)⁹ with distinct codes for each type of service or facility and excluded non-paging services. R. Vol. III, p. 402, 407; R. Vol. pp. 895-96, 907-08.

At the hearing, PageData alleged that it was entitled to a refund in the amount of \$240,756.03. Tr. Vol. III, p. 154, l. 15. This amount is the combination of InterPage's operations (from November 1, 1996 to June 1998 when InterPage was purchased by PageData). InterPage's amount was \$188,473.56 (Exh. 109; Tr. Vol. III, p. 154, l. 12) and PageData's subtotal was \$52,282.47 (Exh. 122, pp. 2-3).

On remand and again on appeal the Pagers point to an "Exhibit 5" which was submitted with their Exceptions. This document purportedly shows a side-by-side comparison on payments made as reported by PageData and as reported by Qwest. Based on this document, PageData asserts that it is entitled to a refund of \$245,628.51. Pager Brief at 11. However, the

⁹ See *supra* n.6.

Commission noted in its Order No. 29140, R. Vol. V, p. 905, "Exhibit 5" was not an admitted exhibit but appears to be a Qwest-generated document that was attached to a pleading.

In its Reconsideration Order No. 29140, the Commission rejected PageData's claim. R. Vol. V, pp. 906-07. The Commission noted that both the \$240,000 and the \$245,628.51 (Pagers Brief at 11) include payments for facilities that are not one-way paging services. R. Vol. V, p. 906. The Commission found that Qwest's calculations in Exhibit 203 utilizing USOC paging codes to calculate the appropriate credit "carries greater weight than the request of the Pagers to recover all of their charges billed by Qwest." *Id.*, p. 907 (emphasis added).

When Qwest questioned the credibility and lack of detail concerning PageData's Exhibit 109 (Tab 3), PageData's witness Mr. McNeal introduced Exhibit 122 at his rebuttal hearing. Exhibit 122 was extensively offered to shore up Exhibit 109 (Tab 3). In response from a question by his counsel whether Exhibit 122 just deals with his paging bills, Mr. McNeal replied "Exhibit 122 just deals with the paging bills." Tr. Vol. VI, p. 497, ll. 15-18, 498, 515, 516, 517.

However, an examination of Exhibit 122 clearly illustrates the shortcomings of PageData's evidence. Page 5 of Exhibit 122 is entitled "InterPage of Idaho, Inc. Profit and Loss, January through December 1998." This part of the exhibit comprises three pages. Rather than just indicating paging accounts, these pages show charges for: advertising, automobile expenses, office expenses, meals, property rents, and payroll. InterPage Profit and Loss, Jan.-Dec. 1998, p. 1-3. On the next three pages entitled "InterPage of Idaho, Inc., Transaction Detailed by Account, January - December 1998 (Cash Basis)," show payments made to AT&T, VoiceStream, United States Cellular, and WorldCom. Exh. 122, InterPage Transaction Detailed by Account Jan.-Dec. 1998 Cash Basis. These entries clearly demonstrate that all the entries in Exhibit 122 do not

“just deal with the paging bills.” Tr. Vol. VI, p. 497, ll. 15-18. As the Examiner noted in his Proposed Order, Mr. McNeal

said that he did not use cancelled checks to create the list, but testified when first asked about them that he could probably get them. (Tr. pp. 200-201) He testified that his reason for knowing that the payments were made is because his accountant, on whom he depends, gave him the information that is shown in Exhibit 109. He further testified that he would be guessing to say what back up information supported the entries on Exhibit 109. (Tr. at 220) He also testified that he did not get access to bank accounts because of lawsuits involving the former owners of InterPage. When asked again about the cancelled checks, he agreed to look for them, but he said that he doubted that he would be able to find the bank records of payment. (Tr. at 222) On the second day of hearing, Mr. McNeal introduced an exhibit [122] consisting of a number of data runs from accounting systems of the two businesses. However, he testified that he had no access to the InterPage cancelled checks that would demonstrate the payment to Qwest. (Tr. at 550)

R. Vol. III, pp. 404-05. Consequently, there is substantial evidence supporting the Commission’s findings that PageData’s evidence should be given little weight. *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789; *Hulet*, 138 Idaho at 478, 65 P.3d at 500.

It is clear from a review of the exhibits and the supporting testimony that the Commission’s findings are supported by substantial and competent evidence. Consequently, the Court must affirm those findings in the Commission’s decision. *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789. The Commission’s findings are entitled to a presumption of correctness and the burden is upon the Pagers to show these findings are unsupported by the evidence. *Id.*, 134 Idaho at 292, 1 P.3d at 793; *Nez Perce Roller Mills v. Idaho PUC*, 54 Idaho 696, 34 P.2d 972 (1934).

D. There is substantial and competent evidence that PageData is not entitled to a refund for using Qwest’s 800 service.

Without elaboration, the Pagers assert on appeal that the Commission erred in reducing PageData’s refund by \$5,007 for the “800” service it obtained from Qwest. Pagers

Brief at 35-36. The Pagers maintained there is “no wide area calling involved in this case of the type that Qwest can charge for, i.e., no buy-down agreement.” *Id.* at 35. Contrary to the assertion of the Pagers, 800-service is a sterling example of a buy-down service agreement. As the Commission explained in Order No. 29603, the use of 800 numbers makes it appear to a caller that there is no charge for dialing this number. With 800-service, a toll call made by any customer is paid for by PageData, rather than the calling party. R. Vol. V (App. 2), p. 1021.

After reviewing the Circuit Court Opinion and other FCC Orders, the Commission granted Qwest’s petition to exclude the 800 service charge from PageData’s refund. *Id.* (App. 2), p. 1020-22. In its Remand Reconsideration Order, the Commission recognized there was a distinction between the DID services and facilities used in the *Mountain* case and the “800” service used to route calls to PageData’s paging terminals. *Id.* (App. 2), p. 1021; Tr. Vol. VI, p. 499, ll. 18-19; p. 501, l. 9; R. Vol. V (App. 1), p. 985. PageData’s use of the 800 service “makes it appear to any Qwest or any other non-Qwest customers that they can call a paging customer without making a toll call.” R. Vol. V (App. 2), p. 1021. The Commission explained:

With 800-service, a toll call is paid for by the called party, rather than the calling party. We agree with the idea of toll-free 800-service “is to entice customers to call the number, with the theory being that if the call was a toll call and therefore cost the customer something, he or she might be less inclined to call.” In other words, PageData can “buy-down” the cost of toll calls by using Qwest’s 800-service. *TSR Order* at ¶ 31.

Id. (Internal Citation omitted). The *TSR Order* recognizes that “nothing prevents [Qwest] from charging its end-users for toll calls” to the Pagers’ facility. *TSR Order* at ¶ 31; R. Vol. V (App. 2), p. 1021.

Here the Commission relied upon its own expertise and knowledge about the characteristics of 800-service as justification for its decision. *Industrial Customers*, 134 Idaho at 293, 1 P.3d at 794. The Commission found that PageData’s use of the 800-service was

substantially different than its use of DID lines. PageData's acquisition of 800-service effectively denied Qwest the ability to charge its customers for toll calls made to PageData. R. Vol. V (App. 2), p. 1021. DID service can be assigned to a local telephone prefix (XXX-1234) but an "800" number is a distinct area code and dialing pattern (1-800). FCC regulations prohibit a charge for a 800 call. 47 C.F.R. § 64.1504. Thus, Qwest cannot charge its customers for such a call.

In addition, the Commission noted that even the Pager's expert Mr. Jackson conceded that the Pagers do not oppose paying Qwest for the 800 calls. R. Vol. V (App. 2), p. 1021 *citing* Tr. Vol. IV, p. 250, ll. 13-20. Qwest's witness Ms. Fraser also concurred that the use of the 800-service would constitute an additional charge. Tr. Vol. V, pp. 353-54, ll. 24-4. Consequently, the Commission found that Qwest may appropriately charge PageData for the 800-service where such service deprives Qwest of the opportunity to charge its own customers for making toll calls to the pager. There is substantial and competent evidence, including testimony from both parties' witnesses, to support the Commission's finding that PageData is not entitled to a refund for 800-service in the amount of \$5,007. *Grindstone Butte*, 102 Idaho at 178, 627 P.2d at 807.

E. The Commission did not place an unreasonable burden on Tel-Car

The Pagers next assert that the Commission place the "burden of proof" on Tel-Car to show that its mobile cellular facilities were used for paging. Pagers Brief at 24-28. The Pagers have mischaracterized the Commission's action. As explained above, the Commission found that the Pagers were not entitled to refunds for their non-paging services. R. Vol. V, p. 896-98. It was undisputed that Tel-Car provided mobile services. Tr. Vol. III, p. 131, ll. 15-16. Both in the Credit Phase and the Remand Phase of this case, Tel-Car sought to recover a refund of approximately \$17,574.72 for its mobile cellular charges. R. Vol. V (App. 1), p. 990 ¶ 2.

Although Mr. Casper readily admitted that he did provide mobile cellular services, he claims that part of his one-way paging services also utilized those cellular lines. Tr. Vol. III, p. 147, ll. 8-9. However, he offered no evidence regarding the ratio or proportion of paging traffic and cellular traffic that utilized these common circuits. Given Tel-Car's admission, the Commission found that it was incumbent upon Tel-Car to provide evidence regarding the usage ratio between its one-way paging and non-paging traffic over the joint use circuits. R. Vol. V, pp. 896-98; App. 2, pp. 990-91.

Contrary to the Pager assertion, it is Tel-Car that is in the best position to know how it is utilizing its facilities. Qwest does not possess this information because it simply leases the facilities to Tel-Car. The Pager is the entity that should know how its network is used. It is a common industry practice to allocate lines for joint use. *Industrial Customers*, 134 Idaho at 293, 1 P.3d at 794. For example, the 24% transit factor was an allocation of third-party transit traffic. Once Qwest identified the mobile facilities as non-paging service (Exh. 202), "it was incumbent upon Tel-Car to provide evidence regarding the usage ratio . . . over the joint use circuits." R. Vol. V, p. 897. "Tel-Car did not provide any such evidence." R. Vol. V, p. 897.

The Pagers reliance on *Pace v. Hymas*, is misplaced. 111 Idaho 581, 726 P.2d 693 (1986). Under the holding of *Pace*, it is the Pagers that possesses the information regarding the use of his joint facilities. *Pace*, 111 Idaho at 585, 726 P.2d at 697. It was reasonable for the Examiner and the Commission to find that Tel-Car should have offered evidence regarding to refute Qwest's evidence. Moreover, Mr. Casper inability to offer joint use evidence was consistent with the Pagers' positions that they were entitled to a refund for all monies paid to Qwest. The Commission did not error in concluding that Tel-Car had the burden of going forward. *Id.*

F. The PUC did not apply the wrong interest rate to the refunds

This is an issue of first impression in Idaho. The Pagers argue that the Commission applied the wrong interest rate to the Pagers' refunds. Pagers' Brief at 36-37. The Commission applied the interest rate contained in its Telephone Customer Rules based on the 12-month average interest rate for one-year treasury bills (i.e., the T-Bill rate). IDAPA 31.41.01.106.02. As the Pagers note in their brief, this interest rate "ranged around 5%-6%" during the refund period. Brief at 37. The Pagers assert the Commission should have used a 12% interest rate provided in *Idaho Code* § 28-22-104(1). *Id.*

As stated by the Commission in its Liability Phase Order No. 28626, *Idaho Code* § 62-616 provided the Commission with authority to resolve the Pagers' complaints in this case. R. Vol. I, p. 187. This statute 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). Here the Commission found that the Pagers were entitled to billing credits or reimbursements from Qwest. R. Vol. I, p. 139. 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 refunds in this case. As with other provisions of the Idaho Telecommunications Act (*Idaho Code* §§ 62-601 *et seq.*), the Commission looked to the Public Utilities Law (*Idaho Code* §§ 61-101 *et seq.*) to fashion reasonable relief. The Commission was guided by *Idaho Code* §§ 62-616 and 61-641 to find that "other relief as is reasonable" would include in this instance T-Bill "interest from the date of collection[.]"

In awarding the T-Bill interest rate for these refunds, the Commission was following a long established practice. The Commission's Liability Order No. 28626 stated:

As has been our practice, the Commission will use the interest rate on utility deposits set out in our Telephone Customer Relations Rule 106. IDAPA

31.41.01.106.01. For example in Order No. 28366 the Commission ordered that interest would accrue on a customer rebate Avista Corporation was allowed to defer distribution until a later date. To calculate this [rebate] amount the Commission selected the deposit interest rate from Rule 106. [*In re: Avista Corporation*, Case No. AVU-E-00-2, 2000 WL 1132795 (IPUC).] In a similar telephone case, the Commission awarded simple interest on overcharges based upon the rate of interest for utility deposits pursuant to Rule 106. *Idaho Public Utilities Commission v. General Telephone Company of the Northwest, Inc.*, Order No. 20974 at p. 9, Case No. U-1002-58, January 9, 1987.

R. Vol. I, p. 187. Given the Commission's long-standing practice of using the T-Bill interest rate for utility customer refunds, the Court should affirm the Commission's use of its telephone customer interest rate.

The authority to set an interest rate on an amount that a public utility overcharges a customer is inherently within the Commission's legislative authority. Traditionally, the Commission has authority to, and must ensure that rates charged by any public utility are just and reasonable to both the customer and to the company. *Idaho Code* § 61-301; *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 141 P. 1083 (1914). Although the Commission does not set Qwest's Title 62 rates in this case, the Commission is permitted to fashion reasonable and appropriate relief for complaints about Title 62 services. *Idaho Code* § 62-616. In providing this reasonable relief to the Pagers, the Commission has determined that its practice of using the T-Bill interest rate, as required on deposit refunds, was appropriate for this case.

Just as the Commission traditionally ensure that utility's rates are just and reasonable to both the customer and the company, the Commission must also ensure that the interest rate is just and reasonable to both parties. An interest rate that is too high may put upward pressure on customer rates, while too low of an interest rate would not compensate the customers for the use of their funds. Awarding the T-Bill rate of interest was a regular pursuit of the Commission's authority to fashion reasonable and appropriate relief upon the Pagers' Complaint. As such, this

Court must uphold the Commission's use of its telephone customer interest rate. *See, Rosebud*, 128 Idaho at 618, 917 P.2d at 777 (judicial review limited to whether Commission regularly pursued its authority).

The Pagers also argue they are not telecommunications customers but are telecommunications carriers, so the Commission's "customer" interest rate in Rule 106 (IDAPA 31.41.01.106.02) should not apply. Pagers Brief at 37. This is a distinction without a difference. Here the Pagers are "subscribers" to Title 62 services and customers of Qwest. *Idaho Code* § 62-616. The Court should affirm the Commission's use of its telephone customer interest rate as a proper exercise of its authority to fashion reasonable relief in this case.

IV. IT IS IMPROPER TO AWARD SECTION 12-120(3) ATTORNEY FEES AGAINST THE COMMISSION

Both the Pagers and Qwest request attorney fees on appeal pursuant to *Idaho Code* § 12-120(3). Pagers Brief at 38; Qwest Brief at 30. The Pagers simply state that this case involves a contractual relationship and commercial transactions between the Pagers and Qwest. Neither the Pagers nor Qwest expressly state that they seek attorney fees against the Commission.

The Commission asserts it is not proper for the Court to award attorney fees against the Commission under Section 12-120(3) for two reasons. First, the Commission's involvement in this matter was to act in its regulatory capacity as the finder of fact. The Commission was not involved in the underlying commercial transactions with either party. Second, an award of attorney fees on appeal is not applicable because the Commission's Orders do not constitute a "civil action" as required by *Idaho Code* § 12-120(3).

A. The Commission was not involved in any commercial transactions with the parties to substantiate an award of attorney fees under Idaho Code § 12-120(3)

Idaho Code § 12-120(3) provides that the prevailing party in a civil action in any commercial action shall be allowed a reasonable attorney's fee. As should be obvious, the Commission was not a party to the commercial transactions between the Pagers and Qwest. The Commission's role in this matter has been to act as the finder of fact pursuant to its regulatory authority granted by statute. *Idaho Code* § 62-616; R. Vol. V (App. 2), p. 1018. Moreover, this Court has previously held that a commercial transaction cannot exist under Section 12-120(3) unless the parties deal with each other directly. *Miller v. St. Alphonsus Regional Medical Center*, 139 Idaho 825, 829, 87 P.3d 934, 948 (2004).

More importantly, this Court has previously held that *Idaho Code* § 12-120(3) is not a basis for an award of attorney fees against the Commission. *Owner-Operator Independent Drivers Ass'n v. Idaho PUC*, 125 Idaho 401, 407-09, 871 P.2d 818, 824-26 (1994). In *Owner-Operator*, the Commission was collecting a regulatory fee on commercial trucks pursuant to statute. In that case, the Court held that the act of a legislative agency (i.e., the PUC) "collecting a fee for service . . . would not bring it within the meaning of 'commercial transaction' as used in I.C. § 12-120(3)." *Owner-Operator*, 125 Idaho at 408, 871 P.2d at 825. Just as in *Owner-Operator*, there is nothing in the Commission's role here as trier of fact that could properly be characterized as a commercial transaction.

B. Attorney Fees are not awardable against the Commission under Idaho Code § 12-120(3) because this appeal is not a "civil action."

Attorney fees are not available under *Idaho Code* § 12-120(3) because this appeal from Orders of the Commission is not a "civil action" as contemplated by the statute or Appellate Rule 11. Compare I.A.R. 11(a) with I.A.R. 11(d). Both Sections 12-120(3) and 12-121 start with the same exact language: "In any civil action. . . ." In *Lowery v. Board of County Comm'rs*, the Court found that attorney fees were not awardable in an appeal from the decision

of a County Zoning Commission because that type of case did not meet the definition of a “civil action” as required by *Idaho Code* § 12-121. 117 Idaho 1079, 1082, 793 P.2d 1251, 1254 (1990).

This Court extended the *Lowery* holding to appeals from Orders of the Commission in *Eagle Water v. Idaho PUC*, 130 Idaho 314, 318, 940 P.2d 1133, 1137 (1997) *citing Lowery*, 117 Idaho at 1082, 793 P.2d at 1254. “Attorney fees are not available under I.C. § 12-121 in an appeal from an order of the IPUC because this type of case is not commenced by a complaint filed in a court action as required by I.C. § 12-121.” *Eagle Water*, 130 Idaho at 318, 940 P.2d at 1137. As the Court noted in *Lowery*, “the words ‘*in any civil action*’ are controlling in this case. Idaho Rule of Civil Procedure 3(a) clearly declares that ‘*a civil action is commenced by filing a complaint with the court.*’” 117 Idaho at 1081, 793 P.2d at 1253 (emphasis original).

The same rationale applies to the award of attorney fees under *Idaho Code* § 12-120(3) in this case. This Court has specifically held that an award of attorney fees pursuant to *Idaho Code* § 12-121 in an appeal from an Order of the Commission is improper because it does not involve a “civil action” as required by that statute. *Idaho Code* § 12-120(3) contains the same language and same requirement of a “civil action.” Here the Pagers filed their Petition with the Commission. Consequently, attorney fees against the Commission are not available in this case because there is no “civil action” as required by *Idaho Code* § 12-120(3). *Eagle Water*, 130 Idaho at 318, 940 P.2d at 1137; *Lowery*, 117 Idaho at 1081, 793 P.2d at 1253.

V. THE COMMISSION’S ARGUMENT AS CROSS RESPONDENT

In its Cross Appeal, Qwest raises two issues. First, Qwest argues the Commission erred in its Remand Order Nos. 29555 and 29603 when it directed Qwest to refund transit traffic charges to the Pagers. Second, Qwest asserts the Commission erred when it ordered Qwest to

make cash reimbursement if the increase in refunds afforded to the Pagers in the Remand Phase exceeded the amounts they owed Qwest. In other words, Qwest objects to providing the Pagers with cash reimbursements if the refunds exceed the amounts owed to Qwest. Instead Qwest wants to simply provide billing credits. R. Vol. V (App. 1), p. 993.

A. The Commission did not err when it directed Qwest to refund the Transit Traffic Charges to the Pagers.

Qwest asserts the Commission erred when it directed that Qwest reimburse the Pagers for transit traffic charges during the refund period. Qwest Brief at 20. Transit traffic are calls that originated from a carrier other than Qwest but nonetheless are carried over Qwest's network for delivery to the Pagers' network. *Id.*, pp. 885, 977. Until the Remand Phase, the Commission had held that Qwest could charge the Pagers for transit traffic in conformance with prior FCC Orders. R. Vol. V, p. 792 *citing TSR Order* at n.70.

Qwest first argues that the Pagers never asked for transit traffic information. Qwest Brief at 20. However, the Pagers have consistently opposed Qwest transit traffic charges. R. Vol. II, p. 234. More specifically, the Pagers argued in the Credit Phase that they "should not and cannot be held responsible for any 'transit' traffic received from Qwest because Qwest does not send any information whatsoever to [them] concerning the initiator of such traffic." *Id.*, pp. 234-35 (emphasis added).

Qwest next argues the Commission's Hearing Examiner did not recognize that Qwest had a duty to provide transit traffic information. Qwest Brief at 20. In his Proposed Order, the Examiner determined that Qwest could properly charge for transit traffic. Of course, it is obvious that the Hearing Examiner did not have the benefit of the *Mountain* decision which was issued more than two years after the Examiner's Proposed Order. R. Vol. III, p. 399. Moreover,

Qwest stipulated to have the Commission reconsider its transit traffic decision in light of the *Mountain* case. Qwest's point here is unpersuasive and it is of no consequence.

Finally, Qwest argues that "the law prior to" the *Mountain* decision would not require Qwest to provide the Pagers with transit calling information. However, those same FCC decisions allowed LECs to charge for wide area calling and those decisions were vacated in *Mountain*. 355 F.3d at 647-49. More importantly, the Commission noted in its Order No. 29603 that three FCC decisions have recognized that pagers may seek reimbursement of the costs associated with transit traffic from the originating carrier. R. Vol. V (App. 2), pp. 1023-24 citing *Mountain Communications v. Qwest*, 17 FCC Rcd 2091 n. 30; *Mountain Communications v. Qwest*, 17 FCC Rcd 15136 at n.13; *TEXCOM v. Bell Atlantic, Order on Reconsideration*, 17 FCC Rcd 6275 at ¶ 4 (March 27, 2002).

The Pagers argued it is discriminatory for Qwest to provide the calling information to Mountain Communications but not transit similar information to the Pagers in this case. 47 U.S.C. § 251(c)(2)(D) (incumbent LECs must allow a carrier to interconnect its network on terms and conditions that are just, reasonable, and non-discriminatory). In its Remand Order No. 29555, the Commission agreed with the Pagers that it is inequitable for Qwest to offer the transit calling data to Mountain Communications but not to other similarly situated carriers. R. Vol. V (App. 2), p. 988. The Commission found 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." *Id.*

On reconsideration, the Commission affirmed its transit traffic decision. In Order No. 29603, the Commission disclosed that its changed decision regarding transit traffic

was premised on the *Mountain* opinion and Qwest's offer [at Mountain's oral argument] to provide the calling data to Mountain. Our Order No. 29555

recognizes that Qwest may charge the Pagers for transit traffic so long as it provides the originating call data – like it agreed to provide Mountain. Our finding in Order No. 29555 is also consistent with prior FCC decisions that recognize that the transit carrier (Qwest) may charge the Pager for transit traffic; and the Pager “may then seek reimbursement of the cost associated with transport and termination of that traffic from carriers that originated the transit traffic in question.” *Mountain Communications v. Qwest*, 17 FCC Rcd 2,091 n.30; *Mountain Communications v. Qwest*, 17 FCC Rcd 15,136 at n.13; *TEXCOM v. Bell Atlantic, Order on Reconsideration*, 17 FCC Rcd 6,275 at ¶ 4 (March 27, 2002). Because Qwest offered Mountain the originating data, we believe that the same offer should be made to the Pagers [here]. When Qwest advised the Commission that the transit traffic calling data “does not exist,” then the Commission was left with only one choice.

R. Vol. V (App. 2), pp. 1023-24.

The Commission’s Orders outlined above provide ample basis for the Commission’s findings that Qwest should refund the transit charges to the Pagers. The Commission’s decision here is consistent with Qwest’s own offer to provide Mountain Communications the transit traffic data going back to November 1, 1996. The Commission did not preclude Qwest from charging for transit traffic – so long as it provides the Pager with the originating call data. The Commission also noted that Qwest’s recent interconnection agreement with Radio Paging contains such a similar provision. *Id.* (App. 2), p. 1024.

The Commission’s decision is a regular pursuit of its authority to ensure, under federal law, that incumbent LECs provide non-discriminatory terms and conditions to interconnecting carriers. 47 U.S.C. § 251(c)(2)(D); *Rosebud*, 128 Idaho at 618, 917 P.2d at 777. Additionally, the Commission’s findings regarding transit traffic are supported by substantial and competent evidence as outline in its Orders and should be affirmed by this Court. *See Industrial Customers*, 134 Idaho at 258, 1 P.3d at 789.

B. The Commission was not arbitrary or capricious in ordering Qwest to pay cash reimbursements if the refunds exceeded the balances owed Qwest

In the Remand Phase of this proceeding, the Commission substantially increased the amount of refunds that Qwest owed the Pagers. The Commission ordered refunds increased by 36% for Radio Paging, 58% for Tel-Car and 75% for PageData. Qwest maintains in its cross appeal that the Commission's decision that Qwest should provide cash refunds rather than simply applying billing credits, is arbitrary and capricious. Qwest Brief at 30. Qwest also asserts this change in the form of the refund is unfair because the Commission "throughout this case" has ordered billing credits. *Id.*, p. 22.

As an initial matter, Qwest has mischaracterized the course of events regarding the form of the refunds. It is undisputed that in the Liability Phase of this case, the Commission initially found that the Pagers are "entitled to a billing credit or a reimbursement." Order No. 28601, R. Vol. I, p. 144 (emphasis added). The Pagers subsequently filed a Petition to Amend Order No. 28601 to delete the phrase "a billing credit" so that cash reimbursements would be the only form of the refund. *Id.*, p. 144. In opposing the Pagers, Qwest conceded that the Commission's Order "is correct in providing for reimbursement or billing credits." *Id.*, p. 176 (emphasis added). Thus, Qwest clearly agreed with the Commission's position in the Liability Phase that either cash reimbursements or billing credits was appropriate to compensate the Pagers for Qwest's overcharging.

Qwest next insinuates that the change in the type of refund is arbitrary because the Commission offered no explanation for the change. Qwest Brief at 29. However, the Commission's Remand Orders clearly explain the rationale for the change. R. Vol. V (App. 1), p. 993; (App. 2), pp. 1024-26. In its initial Remand Order, the Commission noted that because

the refunds have been substantially increased from those [billing] credits originally calculated by Qwest in July 2002, it is possible that the refund credits might exceed the amounts the Pagers owe Qwest, if any. If the refunds afforded to PageData and Radio Paging exceed the amounts they

owe Qwest, then Qwest shall provide them with cash reimbursements within 21 days of the service date of this Order.

R. Vol. V (App. 1), p. 993. Based upon Tel-Car's bankruptcy, the Commission also found it was appropriate "for Qwest to tender any refund that is due to Tel-Car's estate to the Bankruptcy Court subject to any right of set-off that the Court may order. We believe that the Bankruptcy Court is the appropriate form to determine whether Qwest has any right to set-off." *Id.* (App. 1), pp. 993-94.

Qwest then requested the Commission reconsider its decision ordering cash refunds. Appeal R., Exh. 9. In its subsequent Order denying reconsideration, the Commission noted that a review of Qwest Exhibits 201-203 and its November 2002 calculations (*Id.*, App. 2, pp. 1013-14) appear to support the Pagers' assertion that the refunds exceed the amounts the Pagers owe Qwest. R. Vol. V (App. 2), p. 1026. To address this concern, the Commission directed Qwest "to provide up-to-date calculations to confirm [whether] the refunds apportioned each Payer . . . exceed the amounts the Pagers owed Qwest. . . . 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 within fourteen (14) days of the service date of this Order." *Id.* (emphasis added). As indicated above, the Commission explained that a change from credits to cash was prompted by a substantial increase in the refunds. R. Vol. V (App. 1), pp. 993, App. 2, pp. 1024-26. The Commission reasoned that if the refunds exceed what the Pagers owed Qwest cash refunds would be appropriate.

A departure from prior rulings is neither arbitrary nor capricious so long as the Commission adequately explains the reasons for the change. *Rosebud Enterprises*, 128 Idaho at 618, 617 P.2d at 755. The use of cash refunds would be determined after Qwest filed new calculations "to confirm" the Commission's calculations contained in Order No. 29603. R. Vol.

V (App. 2), pp. 1013-14. The Commission also encouraged “the parties to meet informally to review the data/calculations before it is filed with the Commission.” *Id.*

Qwest’s argument regarding Tel-Car is somewhat puzzling. It was Qwest that recommended that the Bankruptcy Court was the appropriate forum to determine the disposition of any credit or refund owed to Tel-Car’s bankruptcy estate. *Id.*, pp. 926, 993. The Commission agreed with this procedure. R. Vol. V (App. 2), p. 993. Consequently, the Commission ordered Qwest to tender the refund “due to Tel-Car’s estate to the Bankruptcy Court subject to any right of set-off that the Court may order. We believe that the Bankruptcy Court is the appropriate forum to determine whether Qwest has any right to set-off” [against Tel-Car]. *Id.* (App. 2), p. 994.

There is no injustice to require Qwest to pay cash reimbursements for the refund they owe the Pagers over and above any amounts the Pagers owed Qwest. As the Pagers point out, the Pagers have been denied the use of their funds for more than five years and a cash refund of the balance is not unreasonable. Based upon the reasons and the findings contained in the Commission’s Orders, it is clear that the Commission had regularly pursued its authority. *Rosebud*, 128 Idaho at 618, 917 P.2d at 777.

CONCLUSION

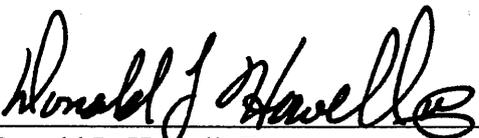
There is an abundance of substantial and competent evidence in the record to support the Commission’s finding that the refunds afforded the Pagers should reasonably exclude: (1) services and facilities used to provide non-paging services; and (2) leased facilities used to connect the Pagers’ points of interconnection. There is also substantial and competent evidence to support the Commission’s decision that Qwest provided the better evidence regarding billing and payment information used to calculate the refunds due each Pager. Although the Pagers

offered conflicting evidence, the clear weight evidence supports the Commission's findings. The Commission also properly construed the holding of the *Mountain Communications* decision and applied the holding to the evidence to conclude that PageData is not entitled to a refund for its 800-service.

Attorney fees against the Commission under *Idaho Code* § 12-120(3) are not proper against the Commission because the Commission was not involved in the commercial transactions with the parties and the statute does not permit attorney fees in appeals from the Commission. Given its jurisdiction to fashion an adequate remedy to the Pagers Complaint under *Idaho Code* § 62-616, the Commission properly exercised its authority in using an appropriate interest rate based upon its Telephone Customer Relations Rule 106.

The Commission's Remand Order Nos. 29555 and 29603 adequately explain the Commission's decision to award the Pagers additional refunds for transit traffic. Given Qwest's offer to provide transit traffic data to Mountain Communications during the Circuit Court's *Mountain* oral argument, the failure to provide the same data to the Pagers would be discriminatory. Finally, the Commission's decision to order cash reimbursements if the refunds exceeded amounts owed Qwest was neither arbitrary nor capricious. Consequently, the Commission's Orders should be affirmed.

DATED at Boise, Idaho this 22nd day of November 2004.



Donald L. Howell, II
Donovan E. Walker
Deputy Attorneys General

Attorneys for the
Idaho Public Utilities Commission

the Commission issued Order No. 29491 on May 11, 2004, directing the Petitioners (collectively referred to as "the Pagers") and Qwest Corporation to file supplemental briefs addressing the transit traffic and wide area calling issues. The Parties also moved the Supreme Court to continue the suspended appeal. On June 7, 2004, the Supreme Court granted the Stipulated Motion to continue the suspension.¹

On May 28, 2004, Qwest Corporation filed its supplemental brief on remand pursuant to Order No. 29491. On June 8, 2004, the Pagers filed their supplemental reply brief. On July 8, 2004, Qwest filed Objections to the Pagers reply brief and a Motion to Strike portions of the reply brief and several attachments to the Pagers' brief. On July 12, 2004, the Pagers filed an Answer to Qwest's Objections and Motion to Strike.

Having reviewed the record, the Circuit Court decision, the supplemental briefs and the subsequent pleadings, the Commission issues this Order on Remand. As explained in greater detail below, the Commission grants in part and denies in part the Pagers' request for additional compensation. Accordingly, the Commission amends and clarifies its prior Order Nos. 29064 and 29140 regarding the issues of transit traffic and wide area calling pursuant to *Idaho Code* § 61-624.

PROCEDURAL HISTORY

A. The Initial Complaint and Liability Phase

The procedural history of this case is set out in detail in Order Nos. 29064 (R. at 789-92) and 29140 (R. at 863-68) but the pertinent points are summarized here. This case was initiated in September 1999 when PageData² and Radio Paging Service filed a Joint Petition for a Declaratory Order against Qwest's predecessor, U S WEST Communications.³ The three Pagers alleged that Qwest had violated provisions of the federal Telecommunications Act of 1996 as well as the FCC's implementing regulations and orders by improperly charged them for certain telecommunications services and facilities used to deliver telephone calls to the Pagers. Because the Pagers sought specific relief from Qwest's conduct and billing practices, the Commission processed the Petition as a "complaint."

¹ On July 9, 2004, the Parties filed a Second Stipulated Motion to continue the suspension until August 2, 2004. The Court subsequently granted this Motion.

² In June 1998 the owner of PageData, Joseph McNeal, purchased the assets of another paging company called InterPage. Order No. 29140 at n. 3; Tr. at 150, 208.

³ In January 2000, Tel-Car, Inc. petitioned to intervene. The Commission granted intervention in February 2000.

In the first part of this two-part case (called the "Liability Phase"), the Commission found that the Pagers were partially entitled to relief. In Order No. 28601 issued in December 2000, the Commission found that Qwest had inappropriately billed the Pagers for certain services and facilities. In compliance with the FCC's *Local Competition Order*,⁴ the Commission found that effective November 1, 1996, Qwest was prohibited from charging the Pagers for transmitting Qwest-originated traffic to the Pagers (with two exceptions discussed in greater detail below). The Commission's orders in the Liability Phase were final orders and no appeal was taken by either Qwest or the Pagers.

B. The Credit Phase

Having determined that the Pagers were due refunds, the Commission instituted the second part of this case known as the "Credit Phase." The Commission ordered the parties to exchange relevant information and attempt to settle the amount of the refund or billing credit owed each Payer. When Qwest and the Pagers were unable to settle the amounts owed each Payer, the Commission appointed a Hearing Examiner to conduct an evidentiary hearing and issue a Proposed Order. The hearing was held in July 2001.

The Hearing Examiner recommended that the Pagers were entitled to refunds but less than the amounts they claimed. The Examiner found that some of the Qwest services and facilities provided to the Payer were used for non-paging services such as two-way voice service, cellular telephone service, data service, and long-distance service. Proposed Order at 3, 6, 10-11. Refunds were not due for these non-paging services. In addition, the Examiner determined that refunds were not due for Qwest's delivery of "transit traffic" originated by other carriers and "wide area calling" arrangements that allow Qwest customers to call the Pagers' toll-free. Proposed Order at 14-15, 17-21, Order No. 29140 at 4. Finally, the Examiner recommended that Qwest offered the better evidence regarding the billing and payment information used to calculate the actual refunds. In December 2001, the Pagers filed exceptions to the Proposed Order.

After reviewing the Hearing Examiner's Proposed Order, the evidentiary record and the Pagers' exceptions, the Commission issued a lengthy order affirming and expanding on the

⁴ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499 (1996), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S.Ct. 721 (1999).

Examiner's proposed findings of fact. Order No. 29064 (July 17, 2002). The Pagers Petitioned for Reconsideration and raised more than 35 points of contention. In September 2002, the Commission granted reconsideration so that it could review the numerous issues raised by the Pagers.

In November 2002 the Commission issued its final Order on Reconsideration No. 29140 (R. at 863-913). On reconsideration the Commission determined that refunds were not due for: (1) non-paging services and facilities; (2) "transit traffic" from non-Qwest carriers; and (3) "wide area calling" services and facilities provided by Qwest that effectively allowed Qwest customers to call the Pagers toll-free. Order Nos. 29064 at 3-4; 29140 at 23-41. The Commission affirmed its prior order but did increase the amount of billing credit owed each Pager. In December 2002, the Petitioners filed their Notice of Appeal, R. at 928-32.⁵

C. Remand Issues Before the Commission

As previously mentioned, Qwest, the Pagers and this Commission filed a Stipulated Motion to remand this matter to the Commission so that the Parties could consider the D.C. Circuit Court Opinion of *Mountain Communications v. Federal Communications Commission (FCC)*, 355 F.3d 644 (D.C. Cir. 2004). In *Mountain Communications*, the Circuit Court overturned two FCC decisions. The Circuit Court concluded that the FCC's decision to allow Qwest to charge the pager for "wide area calling" arrangements was arbitrary and capricious and remanded the case to the FCC. The other issue discussed in the Circuit Court's Opinion was "transit traffic." These issues are the same two issues that were remanded to this Commission for further consideration.

As a preliminary matter, the FCC's *TSR Order*⁶ and *Local Competition Order* prohibit local exchange carriers (LECs) like Qwest from charging for facilities used to deliver LEC-originated traffic, in addition to prohibiting charges for the traffic itself. *TSR Order* at ¶ 25. The *TSR Order* also provided that as of the effective date of the *Local Competition Order*, a LEC must cease charging pagers for terminating LEC-originated traffic and must provide that traffic

⁵ After the Notice of Appeal was filed, the Parties agreed to participate in the appellate settlement process. In January 2003, the Court issued an order staying the appeal pending settlement negotiations. Following unsuccessful negotiations, the Supreme Court reinstated the appeal in November 2003 with the Pagers' opening brief due in February 2004.

⁶ *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).

to a pager without charge. *Id.* ¶¶ 3-28; Order No. 29140 at 5, 23. Despite these prohibitions, the FCC also determined in the *TSR Order* that pagers “are required to pay for ‘transit traffic.’” *TSR Order*, 15 FCC Rcd at 11177 n. 70. Later FCC decisions also allowed LECs to charge pagers for “wide area calling” arrangements or services.

1. Transit Traffic. Transit traffic are calls that originate from a carrier other than the interconnecting LEC (in this case Qwest) but nonetheless are carried over Qwest’s network to the paging carrier’s network. Order No. 29140 at 23, *quoting TSR Order* at n. 70 (emphasis added). In other words, traffic that originates on a non-Qwest network and is transported over the Qwest network to a pager’s network may incur charges. An Idaho specific example would be a call from a Silver Star Telephone customer in Driggs would traverse or transit the Qwest network to reach PageData’s paging terminal in Idaho Falls. PageData would then “page” its customer by sending a radio signal. Based upon the *TSR Order* and other FCC decisions, the Commission found that Qwest was permitted to charge the Pagers for transit traffic originated by third-party carriers. *See also Qwest Corporation v. FCC*, 252 F.3d 462, 468 (D.C. Cir. 2001) (the FCC requires pagers to pay for transit traffic). The Commission found that 24% of the Pagers’ traffic was properly classified as transit traffic. Consequently, Qwest offset the refund credits owed to the Pagers. Order No. 29140 at 3.

2. Wide Area Calling. In addition to charging for transit traffic, the *TSR Order* and other FCC decisions held that LECs may charge pagers for LEC services and facilities not necessary for interconnection and the delivery of LEC-originated traffic to pagers. For example, “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 customer, 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. By using various facility arrangements and services, paging carriers can create networks so that it would appear to Qwest callers that their calls to a paging company located in a different local calling area will be toll-free, or will not be assessed a toll charge. *Id.* at 37; *Mountain Communications I*, 17 FCC Rcd 2091 at ¶¶ 3, 13 (Feb. 4, 2002); *Mountain Communications II*, 17 FCC Rcd 15135 at ¶¶ 4-6 (July 25, 2002).

In the underlying proceeding, the Commission found that PageData and Tel-Car had configured their paging systems in a manner that constituted wide area calling arrangements.

Order No. 29140 at 37. Consequently, the Commission determined that the two Pagers were not entitled to a refund for wide area calling charges. Order Nos. 29064 at 25-28; 29140 at 36-41.

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 predominate provider of local service within each of the three Colorado calling areas. Although Mountain serves in 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 mentioned above, normally 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 normally be considered a toll call. A Qwest customer making such a call normally would be charged for a toll call. Conversely, a Qwest call originating in the local calling area where Mountain's POI is located, would be considered a local call and normally transported without charge. In the *Mountain* case, Qwest charged the pager for wide area calling arrangements for Qwest calls made from the two local calling areas into Mountain's POI in the third area. Qwest also charged Mountain for transit traffic.

1. The FCC Decision. Mountain filed a complaint with the FCC arguing that the FCC's regulation at 47 C.F.R. § 51.703(b) bars Qwest from assessing wide area charges for Qwest-originated traffic. 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 area⁷ 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. *Mountain Communications I*, 17 FCC Rcd 2091 at ¶¶ 8-10, 12-13; see also *TSR Order* at ¶ 32. Mountain also insisted that Qwest should be prohibited from charging for transit traffic.

⁷ As a commercial mobile radio service (CMRS) provider, Mountain's local paging area is defined by the FCC as a major trading area (MTA). For purposes of our Idaho case, the MTA encompasses the entire Boise LATA, i.e., all of southern Idaho.

The FCC rejected Mountain's wide area calling argument. The FCC observed that Qwest may charge its customers a toll charge when the customer calls Mountain's POI located in another calling area. When Mountain requested dedicated toll facilities from each Qwest calling area to Mountain's POI, it "effectively entered into such [a wide area calling] arrangement with Qwest." *Mountain Communications I*, 17 FCC Rcd at ¶ 13. These dedicated facilities allowed Mountain to "buy-down" the cost of toll calls "to make it appear to [Qwest's customers] that they have made a local call rather than a toll call." *Id.* at ¶ 11. The FCC also decided that "wide area calling services are not necessary for interconnection" to the pager. *Id.*; *Mountain Communications II*, 17 FCC Rcd 15135 at ¶¶ 5-6.

The FCC also determined Qwest may lawfully charge Mountain for transit traffic. In allowing Qwest to charge for transit traffic, the FCC relied upon its *TSR Order* and other paging orders. *TSR Order* at ¶ 19 n. 70; *TexCom v. Bell Atlantic, Memorandum Opinion and Order*, 16 FCC Rcd 21493 at ¶¶ 4-6 (Nov. 28, 2001), *reconsid. denied*, 17 FCC Rcd 6275 at ¶ 4 (March 27, 2002). The FCC noted that Mountain could seek reimbursement from the carrier that originated the transit traffic. *Mountain Communications II*, 17 FCC Rcd 15135 at ¶ 2 n. 30.

2. The Circuit Court Opinion. On appeal, the Circuit Court held that the FCC's wide area calling decision is at odds with the FCC's own regulation and with the *TSR Order*. The Court observed that while the facts of the *TSR Order* and *Mountain* are identical, the results of the two cases "are opposite." *Mountain Communications v. FCC*, 355 F.3d at 646. Thus, the Court easily concluded that the FCC's *Mountain* decision is "logically inconsistent with [the FCC's] *TSR* decision." *Id.* at 647. The Court also found the FCC decision "seemingly comes into direct conflict with its own regulation" at 47 C.F.R. § 51.703(b), which prohibits LECs from levying charges for traffic that originate on their own networks. *Id.*, 355 P.3d at 648. Consequently, the Court rather easily concluded that the FCC's decision on this issue is arbitrary and capricious. The Court vacated the decision and remanded the case to the FCC. *Id.* at 649.

After dealing with wide area calling, the Court turned to the transit traffic issue. The Circuit Court observed that the FCC allowed Qwest to charge Mountain for transit traffic "but indicated that Mountain could seek reimbursement from the originating carrier for whatever charges [Mountain] paid to Qwest." *Id.* Mountain argued that this decision 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 prospects for reimbursement from the originating carrier of the transit

traffic was illusory, because Qwest never provided the calling information to Mountain. Without such information, Mountain maintained it was impossible to seek reimbursement. *Id.*

The Court did not reach the merits of this argument because Qwest advised the Court that it would provide Mountain with the originating carrier information. The Court observed that the FCC

suggested that Mountain was essentially correct in claiming that the originating carrier should bear *all* [of the transit traffic] 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.

Id. (emphasis original). See also Order No. 29491 at 5-6.

REMAND PROCEEDINGS

Given the Circuit Court's ruling on wide area calling, Qwest's concession on transit traffic, the lack of any FCC orders on remand and the unfruitful settlement negotiations, the Commission issued Order No. 29491 directing the Pagers and Qwest to provide supplemental briefing regarding the two telecommunications issues. Order No. 29491 at 7. The Commission noted that it was undisputed that Qwest need not absorb transit traffic costs. What the Circuit Court opinion did not answer was whether Qwest should charge the originating carrier for transit traffic, or whether Qwest could provide the call detail to the Pagers who could in turn seek reimbursement from the originating carriers. *Id.* at 7. The Parties were directed to address the following pertinent 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. Did any of the Pagers voluntarily enter into a "buy-down agreement" 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.

Transit Traffic

1. Describe in detail the call data provided to Qwest by the originating carrier of transit traffic.
2. Given Qwest's offer at the Circuit Court's oral argument to provide transit traffic data to Mountain, is Qwest in a position to provide transit traffic data to the Pagers in this case?
3. If such transit traffic data is no longer available, is it appropriate to credit the Pagers for transit traffic?
4. What was the amount of transit traffic charged to each Pager during the relevant time periods?

Order No. 29491 at 7-8.⁸ This Order also directed Qwest to prepare exhibits showing the amount of charges it assessed each Pager individually for wide area calling and transit traffic. In addition to the refund/credit calculations, Qwest was directed to include an itemization of interest through July 1, 2004. *Id.* Once Qwest filed its supplemental brief and calculations, then the Pagers were to file their supplemental brief replying to Qwest's brief and the calculations. *Id.* at 8.

In compliance with the Commission's directives, Qwest filed its supplemental brief and calculations on May 26, 2004.⁹ The Pagers filed their timely supplemental reply brief on June 8, 2004. The Pagers' reply brief included seven "exhibits" and an appendix with 13 more "exhibits."

A. Qwest's Motion to Strike

On July 8, 2004, Qwest filed Objections to the Pagers' brief and a Motion to Strike. Qwest argued the Pagers' brief went far beyond simply addressing the wide area calling and transit traffic issues. Qwest asserted the Pagers were attempting to reopen or re-argue issues already decided and beyond the scope of the remand and the Commission's Order No. 29491. Qwest further asserted the Pagers' supplemental brief introduced "new evidence not in the record" and makes "arguments based on facts that are not before the Commission in this case." Motion to Strike at 3. Qwest moved to strike those portions of the Pagers' supplemental brief

⁸ One other question asked whether cost recovery mechanisms for creating Qwest's local calling areas contemplated transit traffic. The Parties offered no pertinent information in response to this question.

⁹ On May 27, Qwest filed a "corrected" response to the Commission's Order.

that address issues beyond the scope of the two issues identified in Order No. 29491 and strike attachments to the brief that are not in the record.

Qwest also moved to strike in its entirety the 57-page appendix to the Pagers' brief prepared by Joseph McNeal, the owner of PageData. Qwest raised more than 20 specific points of contention with the appendix. The Company urged the Commission to strike the McNeal appendix because: (1) it is non-responsive to the two issues on remand and beyond the scope of the remand proceeding; (2) it addresses several issues that are beyond the scope of the underlying proceeding or the appeal itself; (3) it is in practical terms a second legal brief but "does not appear to be sponsored by the Pagers' attorney"; and (4) Mr. McNeal is not an attorney and cannot represent the two other pagers. Motion to Strike at 9, *citing* Commission Rule 43 (Representation of Parties), IDAPA 31.01.01.043.

On July 12, 2004, the Pagers filed an Answer to Qwest's Objections and the Motion to Strike. In their Answer, the Pagers asserted that most of the attachments to the supplemental brief and the appendix are either exhibits previously admitted or are documents already in the record. The Pagers acknowledged that "exhibit A," "exhibit E,"¹⁰ and Mr. McNeal's appendix are not contained in the record of this proceeding. Pagers Answer at 2.

As to the unsigned appendix, the Pagers maintained it was prepared by Mr. McNeal and it was "fully incorporated by reference into 'the Pagers' Reply [brief] as stated at page 3 thereof.'" *Id.* at 2. The Pagers contend that much of the information in Mr. McNeal's appendix is contained in the record but acknowledged that some of the information is not. *Id.* The Pagers suggested that the "Commission is obviously able to separate the wheat from the chaff and determine the relevance of the points made" in the appendix. *Id.* at 3-4.

Commission Findings: After reviewing the supplemental briefs, the various attached documents, the Motion to Strike and the Answer, we grant in part and deny in part Qwest's Motion to Strike. A Motion to Strike is reviewed under the abuse of discretion standard. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 50, 995 P.2d 816, 820 (2000). The test for determining an abuse of discretion is based upon a three-part inquiry: (1) whether the Commission correctly perceived the issue as one of discretion; (2) whether the Commission acted within the outer boundaries of discretion and consistently with applicable legal standards;

¹⁰ "Exhibits" A and E are not "admitted" exhibits but are documents that were attached to the Pagers supplemental brief. They are not currently in the record on appeal.

and (3) whether the Commission reached its decision by an exercise of reason. *Sun Valley Shopping Ctr. v. Idaho Power Company*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

1. The Pagers Brief. We partially grant the Motion to Strike for two primary reasons. First, portions of the brief and appendix are beyond the scope of the remand issues. As is evident in the three Stipulated Motions filed with the Supreme Court, the Parties requested that this matter be remanded to the Commission. The Parties stipulated that it was appropriate to remand so the Commission could “reconsider its Orders in light of the recent [D.C.] Circuit Court opinion.” Stipulated Motion to Suspend Appeal and Remand to the Administrative Agency at 3, 4. The only telecommunications issues discussed in the *Mountain Communications* opinion are wide area calling and transit traffic. Moreover, in the Supreme Court’s order issued March 8, 2004, the Court granted the Parties’ Stipulated Motion to allow “the Public Utilities Commission to review their decision in this case in light of the above [D.C.] Circuit Court opinion.” Sup. Ct. Order 29175 (March 8, 2004). Thus, it is apparent that the Parties only contemplated addressing the issues of wide area calling and transit traffic on remand. Moreover, the Supreme Court’s order granted the remand to review the Circuit Court’s opinion.

Second, our Order No. 29491 directed the parties to address several questions all focused on wide area calling or transit traffic. Order No. 29491 at 7-8. It was neither our intent then or now to expand the scope of reconsideration beyond the two issues in the Court’s opinion nor entertain new arguments or re-arguments on other issues.

We first examine the “exhibits” that accompanied the Pagers’ supplemental brief. Of the 11 attachments to the Pagers’ brief, two were Circuit Court slip opinions addressing transit traffic and two were copies of transcript pages or excerpts from a previous Pager brief. Of the seven other “exhibits,” three were actual exhibits already admitted (B, F, G) and two other “exhibits” are documents already included in the record on appeal (C and D). These documents are appropriate and relevant and are not stricken.

Pager “exhibit” A is a diagram purportedly showing the “Configuration of PageData Paging System.” Qwest maintains this diagram “does not even remotely factually represent the [PageData/InterPage] network during the time period in question in this case.” Motion to Strike at n. 24. Although we agree with Qwest’s basic premise that this diagram does not accurately portray the PageData/InterPage network during most of the refund period, it does show four paging terminals (POIs) and the current configuration. We shall allow it to remain in the record

but accord it little weight. We also note that Qwest submitted a diagram with its brief purporting to show PageData/InterPage facilities leased from Qwest as of July 1998.

Finally, "exhibit" E is a letter dated April 30, 2004 on Qwest letterhead to Joseph McNeal concerning what appears to be the elimination of analog private line service by Qwest on June 15, 2004. A proper foundation for this hyper-technical letter has not been made and it clearly falls well beyond PageData's refund window: November 1, 1996 to September 10, 1999. Order No. 29140 at 5. Consequently, we strike this "exhibit."

2. The Appendix. We next turn to the McNeal appendix. The Pagers' reply brief notes that the McNeal appendix is "attached and incorporated" as an "overview analysis prepared by Joseph McNeal on behalf of PageData." Pagers Answer to Motion to Strike at 3. Consequently, Qwest's fears that the McNeal appendix applies to the other two pagers is unfounded. Nevertheless, we agree with Qwest that there are several portions of the appendix that are beyond the scope of our reconsideration on remand. More specifically, some portions of the appendix and its 13 attachments are re-arguing issues that are not subject to reconsideration, introducing new arguments and/or evidence, or are issues in other PUC proceedings involving Mr. McNeal. Mr. McNeal is a pro se litigant in three other PUC proceedings involving disputes with Qwest. Two issues present in these other proceedings have been included in the appendix. Thus, we find it is appropriate to strike portions of the appendix including: Table 1 (pp. 3-4); 800 numbers (p. 8); reciprocal compensation (p. 14); and section 252(i) interconnection agreements (pp. 15-18). These topics are outside the scope of the remand. While other parts of the appendix (and the reply brief) stray beyond the scope of the remand, we are not inclined to attempt to surgically remove bits and pieces. However, we will exercise our ability "to separate the wheat from the chaff" as we evaluate the relevance and weight to be accorded the arguments in the brief and the appendix.

Turning next to the "exhibits" attached to the appendix, we find it appropriate to strike "exhibits" 1, 2, 8-13. The interconnection agreements in 1 and 2 are not relevant and beyond the scope of remand. The diagrams and text in exhibits 10-13 are redundant to the Pagers' "exhibit" A and do not accurately portray PageData/InterPage's network during the majority of the refund period. "Exhibits" 8-9 present new evidence about old arguments beyond the scope of remand. The remaining "exhibits" attached to the appendix are either admitted exhibits (5-7) or are already contained in the record on appeal (3-4). We now turn to the merits.

B. Wide Area Calling

1. Qwest. In response to the Commission's wide area calling questions, Qwest stated that both PageData and Tel-Car utilized wide area calling services. PageData and Tel-Car utilized both "non-local Type 1 facilities" and PageData also ordered 500 toll-free "800" numbers to route traffic to its facilities. Qwest Brief at 3-4. Qwest maintained it did not provide any wide area calling services to Radio Paging and the Pagers do not contest this assertion. *Id.* at 5. Qwest stated that PageData used two non-local Type 1 wide area calling arrangement between: (1) Qwest's central offices located in Meridian and Payette; and (2) Qwest's central offices in Twin Falls and Hailey. These facilities measured 48 miles and 68 miles, respectively. *Id.* at 3-4. Qwest also asserted that Tel-Car utilized Type 1 dedicated facilities extending between Twin Falls and Hailey. *Id.* at 4-5.

Qwest argued that additional refunds for wide area calling were not appropriate because both PageData (and its predecessor InterPage) and Tel-Car "voluntarily entered into toll buy-down agreement by ordering the wide-calling services from Qwest's tariff/price lists." *Id.* at 5. Qwest quoted extensively from Order No. 29064 where the Commission found that PageData and Tel-Car were properly charged for ordering facilities that constituted wide area calling arrangements. Qwest calculated the refund value for wide area calling (with interest to July 1, 2004) to be \$10,607 for PageData and \$3,909 for Tel-Car.

2. The Pagers. For their part, the Pagers asserted that PageData and Tel-Car are entitled to additional refunds in accordance with the holding in the D.C. Circuit's *Mountain Communications* decision. The Pagers maintained the *Mountain Communications* decision "made it absolutely clear that Qwest could not charge [the Pagers] for transportation of Qwest-originated traffic . . . even if the traffic was across local calling areas established for business and retail customers." Pagers Brief at 8. They insisted that neither PageData nor Tel-Car "voluntarily" entered into any wide area calling arrangement. *Id.* at 11. Despite Qwest's arguments to the contrary, the Pagers observed that the concept of "construction agreement" for the acquisition of wide area calling facilities was specifically overruled by the Circuit Court. *Id.* at 2, 12.

Commission Findings: Although Qwest continues to argue that it is entitled to charge the Pagers for wide area calling arrangements, the Circuit Court in *Mountain Communications* overruled this line of reasoning. In particular, the Court recognized that the

FCC regulation found at 47 C.F.R. § 51.703(b) “unequivocally prohibits LECs from levying charges for traffic originating on their networks, and, by its own terms, admits of no exceptions.” *Mountain Communications*, 355 F.3d at 648, quoting *MCIMetro Access Transmission Services v. Bellsouth Telecommunications*, 352 F.3d 872, 881 (4th Cir. 2003). The Court went on to observe that the federal Telecommunications Act obligates Qwest to interconnect its facilities at a single “technically feasible” POI for pagers. *Id.* at 649. In other words, Qwest cannot charge the Pagers for traffic originating on Qwest’s network and transported to the point of interconnection with the Pagers. *MCIMetro*, 352 F.3d at 881. The two types of wide area calling arrangements discussed above transports traffic originating on Qwest’s network (as well as transit traffic) to the Pagers. Based upon the facts of this case, Qwest may not charge the Pagers for wide area calling services or facilities. However, as the FCC noted in the *TSR Order*, Section 51.703(b) does not prevent Qwest from charging its own end-user customers for calling a pager’s POI located in a different local calling area. *TSR Order* at ¶ 31.

Qwest apparently appreciates its dilemma given the holding of *Mountain Communications*. Qwest did not attempt to distinguish the holding of *Mountain Communications* from the present case. Based upon our application of the facts in our case to the holding of *Mountain Communications*, we find that PageData and Tel-Car are entitled to an additional refund for wide area calling charges assessed by Qwest. The calculations of these additional refunds are discussed below.

C. Transit Traffic

1. Qwest. In response to the Commission’s transit traffic questions, Qwest stated that there is no existing data which identifies the originating carrier of the transit traffic in this case nor the amount of traffic pertaining to individual carriers. Qwest Brief at 6. Consequently, “Qwest is not in a position to provide transit traffic data to the Pagers.” *Id.* at 7. Despite the lack of data, Qwest insisted it is inappropriate to credit the Pagers for the 24% transit traffic for three reasons. First, Qwest argued that the Pagers’ position has always been that Qwest was itself the “originating carrier of the transit traffic and thus the identity of the initiating carrier is irrelevant.” Qwest insisted the Pagers never asserted that Qwest must supply originating carrier data.

Second, Qwest asserted the Pagers are not entitled to additional refunds or credits because “the Pagers were charged for transit traffic in accordance with the law existing at the

time. The FCC has repeatedly ruled that LECs may charge paging companies for interconnection facilities to the extent that those facilities carry traffic.” *Id.* (footnote omitted). Qwest argued that until the Circuit Court issued its *Mountain Communications* opinion, the FCC had repeated and consistently held that LECs may charge paging carriers for transit traffic.¹¹ Finally, Qwest disclosed it is working to develop a “records product” that if successful, would make transit calling information available for purchase by paging companies. Assuming that the product can be developed, Qwest intends to sell the service “to interconnecting carriers that wish to purchase it.” *Id.* at 8. Thus, such a service would not be made available to pagers for free. If the Pagers want to seek reimbursement from the originating carrier, then the Pagers can purchase the “records service.”

As directed by the Commission, Qwest calculated the amount of transit traffic at issue for each of the three Pagers with interest through July 1, 2004. The calculated refund credits for each carrier would be: Radio Paging – \$15,311; Tel-Car – \$15,362; and PageData (including InterPage) – \$35,701.

2. The Pagers. The Pagers insisted they are entitled to a full refund for transit traffic. They argued it would be inequitable for Qwest to charge the Pagers for transit traffic, while at the same time not providing the Pagers with the necessary third-party information. Pagers Brief at 13. Just as Qwest offered at the Circuit Court’s oral argument to provide the necessary information to Mountain, the Pagers here assert they are entitled to equal treatment and to receive the calling data. *Mountain Communications*, 355 F.3d at 649. The Pagers insisted that it would be discriminatory for Qwest to provide the calling information to Mountain but not provide similar information to the Pagers. 47 U.S.C. § 251(c)(2)(D).

Commission Findings: The issue of transit traffic was vigorously contested in this case. As the Circuit Court noted, Qwest incurs costs for switching and routing calls originating with other carriers, and transported over Qwest’s network to paging carriers. In its *Mountain* decision, the FCC allowed Qwest to charge for transit traffic “but indicated that [the Pagers] could seek reimbursement from the originating carrier for whatever charges it paid to Qwest.” *Id.* at 649. In other words, Qwest has a choice: it can either charge the Pagers and provide calling information so that they may seek reimbursement; or it could charge the originating carrier. *Id.* Although the Circuit Court never reached the merits of this dilemma, it is plain in

¹¹ In a footnote, Qwest lists most if not all the FCC Orders cited by the Commission in its prior Orders.

the Court's analysis and ours that Qwest cannot have it both ways. Qwest's statement that the transit traffic calling data "does not exist," provides only one choice.

Qwest's arguments on why the Pagers should not receive refunds for transit traffic are unpersuasive. We agree with the Pagers that it is inequitable to offer the calling data to Mountain but not to other similarly situated carriers. 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. Qwest's reliance upon the FCC orders is unavailing. While we recognize that the FCC and our prior Order both "validated" Qwest charging the Pagers for transit traffic, even the FCC recognized in *Mountain* that the Pagers could seek reimbursement from the originating carrier provided Mountain was given the necessary data to identify such carriers. *Mountain Communications*, 355 F.3d at 649, citing *Mountain Communications II*, 17 FCC Rcd at 15137 n. 13. We infer this lack of data prompted Qwest to develop a service to record the transit data.

CALCULATIONS OF THE REFUNDS

Having determined that the Pagers are due additional refunds/credits for wide area calling and transit traffic, we turn to the calculation of these additional refunds. Order No. 29491 directed Qwest to prepare exhibit(s) showing the amount of transit traffic charged to each pager and the amount of charges for wide area calling (if any). These calculations were also to include appropriate interest calculated up to July 1, 2004. Order No. 29491 at 7-8. Once Qwest filed its calculations, "then the Pagers will have an opportunity to respond to the questions and reply to Qwest's information/calculations." *Id.* at 8.

Pursuant to the Commission's directive, Qwest calculated the refund amounts at issue for wide area calling and transit traffic. Starting with the refund credits issued each pager in November 2002 pursuant to Reconsideration Order No. 29140 (R. at 916), Qwest calculated the amounts at issue as shown in the table below.

The Pagers maintained that they "are entitled to a refund of all sums that they paid to Qwest during the time periods relevant to this proceeding." Pagers Brief at 3 (emphasis added). In addition, PageData now seeks a larger refund than it initially requested at the evidentiary hearing. Although Radio Paging did not seek any refunds for wide area calling, it asserted that it was due additional credit for transit traffic. *Id.* at 16. Radio Paging requested a refund totaling \$57,309.16 (without interest).

The Pagers asserted Tel-Car is owed a total of \$67,098.07. *Id.* They maintained that Tel-Car is entitled to reimbursement for wide area calling totaling \$21,749.07. This amount is the sum of \$4,174.35 “for what Qwest characterized as ‘T-1 non-local’” and \$17,574.72 for “mobile charges.” *Id.* at 10 citing Qwest Exh. 202 p. 8 and pp. 24-27, respectively. The Pagers argued again on remand that Tel-Car is entitled to reimbursement for its mobile telephone services and facilities because “mobile services were part of the Tel-Car paging system, utilized to deliver paging traffic to its point of [inter]connection.” *Id.* at 11. These amounts should be added to the \$45,349 shown on Exhibit 105. Thus, Tel-Car asserted that it should receive a total refund of \$67,098.07, not including interest. *Id.* at 16.

In the Credit Phase of this case, PageData argued it was entitled to a refund of approximately \$240,756.03. In the Pagers’ response to Qwest’s wide area calling and transit traffic calculations, PageData asserted that it is now entitled to even a greater refund than previously requested. Pagers Brief at 7, 16. Relying upon an attachment to Qwest’s post-hearing reply brief, PageData insisted that the starting point for its refund is \$245,628.51. Added to this figure is an additional \$14,926.80 “for the T-1 lines and the frame relay,” which results in a total refund of \$260,555.31. *Id.* at 16. The table below shows the refund positions of Qwest and the Pagers.

REFUND CALCULATIONS/REQUESTS

| | <u>QWEST</u> <i>(includes interest)</i> | | <u>PAGERS</u> <i>(without interest)</i> |
|---------------------|--|--|--|
| <u>Radio Paging</u> | \$ 42,105 (Nov. 2002 Amount) | | |
| | NA (Wide Area Calling) | | |
| | <u>\$ 15,311</u> (Transit Traffic) | | |
| TOTAL | \$ 57,416 | | \$ 57,309.16 |
| <u>Tel-Car</u> | \$ 33,512 (Nov. 2002 Amount) | | \$ 45,349.00 (Exh. 105) |
| | \$ 3,909 (Wide Area Calling) | | \$ 4,174.35 (Wide Area Calling) |
| | <u>\$ 15,362</u> (Transit Traffic) | | <u>\$ 17,574.72</u> (Mobile) |
| TOTAL | \$ 52,783 | | \$ 67,098.07 |
| <u>PageData</u> | \$ 55,486 (Nov. 2002 Amount) | | \$245,628.51 (Qwest, Exh. 5) |
| | \$ 10,607 (Wide Area Calling) | | <u>\$ 14,926.80</u> (T-1, Frame Relay) |
| | <u>\$ 35,701</u> (Transit Traffic) | | |
| TOTAL | \$101,794 | | \$260,555.31 |

Commission Findings: At the outset, we reaffirm the findings in our previous Orders that Qwest presented the better evidence regarding the billing and payment information necessary to calculate refunds.¹² Order No. 29064 at 19-23; Order No. 29140 at 35-36, 44-46. We also reaffirm that the refund credits should be limited to paging charges and not allowed for non-paging services. Order No. 29064 at 22; Order No. 29140 at 34-36.

1. Radio Paging. For Radio Paging, Qwest calculates the refund for transit traffic (with interest) would be \$15,331.¹³ We adopt Qwest's calculations and further find that Radio Paging's appropriate total refund with interest as of July 1, 2004 is \$57,416. We also observe that this amount is comparable to Radio Paging's request of \$57,309.16 (without interest).

2. Tel-Car. Tel-Car seeks a total refund in the amount of \$67,098.07. Pagers Brief at 16. This amount is the sum of \$45,349 shown on Pager Exhibit 105, plus \$4,174.35¹⁴ in wide area calling charges, and \$17,574.72 for a refund of its mobile cellular charges. *Id.* For its part, Qwest starts at the amount ordered by the Commission in Order No. 29140 of \$33,512 in November 2002. To this amount, Qwest adds \$3,909 for the wide area calling refund and \$15,362 for the transit traffic refund, or a total refund of \$52,783.

We adopt Qwest's calculations for the refund owed to Tel-Car. We again reject Tel-Car's argument that it is entitled to a refund for its cellular services for several reasons. First, as we noted above, the scope of the issues to be examined in this remand were narrow and specific. What Tel-Car attempts to do is to re-argue the cellular service issue. This issue was previously decided and is beyond the scope of this remand. As we have consistently held, the Pagers are not entitled to a refund for non-paging services. Tel-Car again argues that it was using its mobile cellular facilities for paging. Pagers Brief at 10. However, as the Commission noted in Order No. 29140,

Tel-Car has not pointed to any evidence in the record that supports its position that it should be compensated for mobile service. Qwest did not apply a credit for mobile service because the USOC for this service was a non-paging code. As the Commission found in its Credit Order, "Tel-Car's witness, Mr. Casper, said that his Company provides one-way paging, two-way answering services, and cellular services. Tr. at 131. He testified that some of his circuits are utilized to provide paging and non-paging services.

¹² Consistent with our adjustments in this Order for wide area calling and transit traffic.

¹³ As previously mentioned, Radio Paging had no wide area calling charges.

¹⁴ This figure appears in Qwest's calculations.

Tr. at 147.” Order No. 29064 at 21 (emphasis added). Given this admission, we find it was incumbent upon Tel-Car to provide evidence regarding the usage ratio between one-way paging and non-paging traffic over the [alleged] joint use circuits. Tel-Car did not provide any such evidence.

Order No. 29140 at 35 (emphasis original).

We find Tel-Car is due additional refunds for wide area calling and transit charges totaling \$52,783, plus an additional one month’s interest to August 1, 2004. After subtracting the requested mobile services refund, Tel-Car’s proposed refund of \$49,523.35 (without interest) is comparable to Qwest’s calculated refund of \$52,783 (with interest).

3. PageData. Based upon our review of the pleadings and the evidentiary record, we find that PageData has overstated its claimed refund. We also reject PageData’s refund calculations for several reasons. First, in the Credit Phase evidentiary hearing, PageData sought a refund of \$240,756.03. Tr. at 154. This amount was the combined refund request for both PageData (\$52,282.47) and InterPage (\$188,473.56). Tr. at 154, 496. Now on remand, PageData asserts it is owed \$245,628.51 as shown in Qwest’s post-hearing brief on “exhibit” 5.¹⁵ To this amount PageData adds for the first time \$14,926.80 for T-1 and frame relay charges. It now seeks a total refund (without interest) of \$260,555.31. We find the request for a larger refund unreasonable. The law of the case compels use of the original request. Arguing for the additional \$14,926 is clearly beyond the scope of the remand. Second, PageData has not cited and we have not found any basis for the calculation of the \$14,926 attributed to T-1 lines and frame relay charges.

Third, in Order No. 29064, the Commission found unpersuasive the Pagers’ argument that they were entitled to a full credit for all charges. Order No. 29064 at 22. The Commission adopted its Hearing Examiner’s proposed findings that the Pagers

presented scant evidence to support their claim that all their bills from Qwest were for interconnection for the purpose of receiving one-way paging traffic from Qwest. Bare assertions that their bills were not credible given the other kinds of businesses they operated across the same networks (some of which were for two-way traffic), nor was it credible to believe that they had no business operations needs for other telecommunications services from Qwest. Qwest’s exhibits, in contrast, took each billing element and assigned it to interconnection or other types of service based on logical categorizations. Moreover, months before hearings, Qwest provided the detailed billing

¹⁵ “Exhibit” 5 is not an admitted exhibit but was attached to Qwest’s post-hearing brief.

elements for each month of the reimbursement period involved. [The Pagers] . . . made no effort to show that specific billing elements detailed for them by Qwest and included in Exhibits 201, 202 and 203 [were] incorrectly assigned to non-interconnection use.

Order No. 29064 at 22-23 and Order No. 29140 at 35-36, *quoting* Proposed Order at 11-12.

Fourth, PageData's argument that it is entitled to a recovery of all its payments (even without the additional \$14,926) is a re-argument beyond the scope of the issues on remand. As both the Hearing Examiner and the Commission found below: "it was reasonable and appropriate to exclude from the calculation of the credits those Qwest charges for non-paging services and facilities." Order No. 29140 at 33; Order No. 29064 at 23; Proposed Order at 3. We found in Order No. 29064, PageData (and its predecessor InterPage) 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). Tr. at 148, 199, 352, 499-500. Mr. McNeal also testified that all his traffic, paging and non-paging alike, travels over the same facilities "that's available to us at no charge." Tr. at 199. There is no compelling reason to alter this previous finding.

At this juncture, a review of PageData and InterPage's networks would be helpful. Mr. McNeal of PageData purchased InterPage in June 1998. Tr. at 150, 208. At the time, InterPage and PageData had five points of interconnection (POIs): Idaho Falls, Pocatello, Twin Falls, Meridian, and Boise. Tr. at 164; Pagers Exh. 111 at p. 10. As Mr. McNeal testified at the evidentiary hearing, he attempted on or about September 1, 1998, to take advantage of the Telecommunications Act's single POI entitlement (47 U.S.C. § 251(c)(2)(B)) and the FCC's regulation 51.703(b) that prohibits Qwest from charging for delivery of its traffic to the pagers. Tr. at 504; Pagers Exhibit 111 at p. 10. What appears undisputed is that for the first 22 months of the 34-month refund period (Order No. 29140 at 5), PageData/InterPage had at least four (if not five) POIs scattered throughout Qwest's southern Idaho service area. Pursuant to FCC regulation 51.703(b), facilities transporting Qwest local traffic to these POIs should have been without charge to the Pagers. However, charges for facilities used by PageData/InterPage to connect parts of their networks on the paging side of the POIs (such as connecting the multiple POIs together), are costs appropriately borne by the Pagers. *Qwest Corporation v. FCC*, 252 F.3d 462, 468 (D.C. Cir. 2001).

Mr. McNeal testified that InterPage leased lines connecting its paging terminals (i.e., the POIs) to Boise. Tr. at 164, 195. He stated that "there was a lease line that went from Idaho Falls to Pocatello, from Pocatello to Twin Falls, from Twin Falls into Boise, and so if you made a phone call into . . . Idaho Falls, then it would travel along that network back to Boise." Tr. at 195. PageData's August 29, 1998 letter to Qwest explains that the pager's "network sends TMPP packets between the paging terminals." Exh. 111 at p. 10. In other words, for at least 22 months, the Qwest facilities that transported traffic among the POIs was appropriately charged to InterPage. Order No. 29140 at 44.

Taking account of the non-paging services, the inter-POI facilities, the 22 months of the 34-month period with multiple POIs, the majority of the paging payments (\$188,473.56) were attributed to InterPage, Qwest's better calculating evidence, and the less weight attributed to Mr. McNeal's explanation of exhibits 109 and 122, we find there is substantial and competent evidence to reject PageData's calculations and adopt Qwest's calculations. Accordingly, we find that PageData/InterPage should receive a total refund credit of \$101,794.

In summary, we find Radio Paging is due a refund credit of \$57,416, Tel-Car is due a refund credit of \$52,783 and PageData is due a refund credit of \$101,794 as of July 1, 2004. Given the fact that the parties requested that the remand be continued until August 2, we further find it is appropriate for Qwest to include one additional month of interest up to August 1, 2004.

Because the refunds have been substantially increased from those credits originally calculated by Qwest in July 2002, it is possible that the refund credits might exceed the amounts the Pagers owe Qwest, if any. If the refunds afforded to PageData and Radio Paging exceed the amounts they owe Qwest, then Qwest shall provide them with cash reimbursement within 21 days of the service date of this Order.

One other refund issue remains to be addressed. When the Commission issued its initial Credit Order No. 29064 in July 2002, we were unaware that Tel-Car was in bankruptcy. It was not until the Pagers filed their Petition for Reconsideration in August 2002 that we were advised that Tel-Car became a Chapter 7 debtor effective in January 2002. R. at 848. Given this circumstance, Qwest suggested in its credit notice of November 29, 2002 that "any credit due Tel-Car in this case is due, if at all, to the bankruptcy estate of Tel-Car, Inc." R. at 926. Qwest concluded that disposition of any credit or refund owed to Tel-Car "is properly a matter for the Bankruptcy Court." *Id.* We agree. Consequently, we find that it is appropriate for Qwest to

tender any refund that is due to Tel-Car's estate to the Bankruptcy Court subject to any right of set-off that the Court may order. We believe that the Bankruptcy Court is the appropriate forum to determine whether Qwest has any right to set-off.

CONCLUSION

The Commission finds on remand that the Pagers are entitled to additional refunds or credits for transit traffic and wide area calling arrangements. The Commission further finds that there is substantial and competent evidence to support its findings regarding the continued exclusion of non-paging services and the calculations of the appropriate refunds/credits for each Payer. Consequently, the Commission amends its Order Nos. 29064 and 29140 to conform to the decisions reached in this Order regarding transit traffic and wide area calling.

ORDER

IT IS HEREBY ORDERED that the Commission grants in part and denies in part the Pagers' requests for additional compensation. The Commission's Order Nos. 29064 and 29140 are amended to reflect the changes contained in this Order regarding transit traffic and wide area calling. *See Idaho Code* § 61-624. As of July 1, 2004, Radio Paging is due a refund of \$57,416 and PageData is due a refund of \$101,794.

IT IS FURTHER ORDERED that Qwest's Motion to Strike is granted in part and denied in part.

IT IS FURTHER ORDERED that Qwest recalculate the refund amounts due the three Pagers to reflect the one-month of additional interest from July 1 to August 1, 2004. Qwest shall file this updated credit information with the Commission and the Pagers within 10 days from the service date of this Order.

IT IS FURTHER ORDERED that Qwest issue the respective additional billing credits and/or refunds to PageData and Radio Paging no later than 21 days from the service date of this Order.

IT IS FURTHER ORDERED that Qwest issue the \$52,783 refund to the bankruptcy estate of Tel-Car, Inc. (plus one additional month of interest) and shall file said refund with the appropriate Bankruptcy Court within 21 days from the service date of this Order.

THIS IS A FINAL ORDER ON REMAND. Any party aggrieved by this Order may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 2nd day of August 2004.



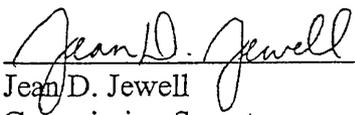
PAUL KJELLANDER, PRESIDENT



MARSHA H. SMITH, COMMISSIONER

Commissioner Hansen Out of the Office
DENNIS S. HANSEN, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

b1s/O:USWT9924_dh

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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

SUPREME COURT
DOCKET NO. 29175

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-Appellant.)

ORDER NO. 29603

On August 2, 2004, the Commission issued final Order No. 29555 following the Idaho Supreme Court's temporary remand of this matter to the Commission. In Order No. 29555, the Commission determined that the Petitioners (hereinafter referred to as the "Pagers") were entitled to additional refunds consistent with a recent decision issued by the United States Court of Appeals for the District of Columbia Circuit. The Order directed Qwest Corporation to recalculate the refunds due each of the three Pagers. If the refunds exceed the amounts the Pagers owe Qwest (if any), "then Qwest shall provide them with cash reimbursement[s]" no later than August 23. Order No. 29555 at 21.

On August 12, 2004, Qwest filed its recalculation of the refund credits due each Pager. On August 20, 2004, Qwest filed a Motion to Stay Order No. 29555 until the Commission had an opportunity to review Qwest's request for reconsideration. On August 23, Qwest filed a Petition for Reconsideration, Alteration or Amendment of the Commission's Order. The following day Qwest requested oral argument on its Motion and Petition.

On August 25, the Pagers filed an Answer to Qwest's Motion to Stay urging the Commission to deny the Stay. The Pagers point out that Qwest has not issued the refunds as directed by the Commission. On September 3, the Pagers filed an Answer to Qwest's Petition for Reconsideration, Alteration or Amendment requesting that the Commission deny reconsideration. On September 13, Qwest filed a Notice of Cross-Appeal regarding Order No. 29555.

After reviewing the record and supplemental pleadings in this matter, the Commission issues this Order on reconsideration. As explained in greater detail below, the Commission grants a limited stay of our Order No. 29555 so that we can reconsider our prior Order on remand and issue this Order on reconsideration pursuant to *Idaho Code* § 61-624.

PROCEDURAL HISTORY

A. Background

The procedural history of this complex and lengthy case is set out in detail in Order Nos. 29064 (R. at 789-92) and 29140 (R. at 863-68) but the pertinent points are summarized here. At the end of the second part (the Credit Phase) of this two-part case, the Commission explained that Federal Communications Commission (FCC) regulations and orders require that a local exchange company (LEC, e.g., Qwest) must cease charging a pager for terminating LEC-originated traffic and must transport that traffic to the pager without charge. Order No. 29064 at 2 *citing* *TSR Wireless v. U S WEST Communications (TSR Order)*.¹ Qwest may not charge pagers "for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under the [FCC's] rules." *TSR Order* at ¶ 32.² Although Qwest must cease charging pagers for terminating Qwest-originated traffic, the Commission found that the *TSR Order* and FCC regulations allow Qwest to charge for "wide area calling or similar services." Order No. 29064 at 5 *citing* *TSR Order* at ¶¶ 30-31. In other words, Qwest may not charge paging carriers for delivering Qwest traffic but Qwest may charge its own customers for calling a paging carrier located in another local calling area.

¹ 15 FCC Rcd 11,166 ¶¶ 3, 25, 28 (2000), *Petition for Recon. dismissed*, 16 FCC Rcd 11,462, *aff'd sub nom. Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

² "MTA" means major trading area which in terms of this case means all calls made to pagers that originate in Qwest and non-Qwest exchanges located in southern Idaho. Order No. 29064 at 2 *citing* *TSR Order* at ¶ 11, n. 102; 47 C.F.R. § 51.701(b)(2).

In Order No. 29140 the Commission found that Qwest had improperly charged the Pagers for certain services and facilities prohibited by the federal Telecommunications Act of 1996, FCC regulations, and FCC orders. The charges for services and facilities were contained in Qwest's Title 62 exchange and network service catalog on file with the Commission. The Commission found that the Pagers were entitled to refunds/credits but less than the amounts they claimed.³ More specifically, the Commission determined the refunds were not due for: (1) non-paging services and facilities; (2) "wide area calling" services and facilities provided by Qwest; and (3) "transit traffic" from non-Qwest carriers. Order Nos. 20964 at 3-4; 29140 at 23-24.

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 customer, when the caller and the paging company are located in different local calling areas." Order No. 29140 at 5. By using various facility arrangements and services, paging carriers can create networks so it appears to Qwest callers that their calls to a paging company located in a different local calling area will be "toll-free," or will not be assessed a toll charge for making a long-distance call to the pager. *Id.* at 37.

In Order Nos. 29064 and 29140, the Commission found that PageData and Tel-Car had configured their paging systems in a manner that constituted wide area calling arrangements. Consequently, the Commission determined that the two pagers were not entitled to a refund for wide area calling charges.⁴ All three Pagers used direct inward dialing (DID) services and facilities. DID is typically a PBX or Centrex feature that in this case allowed the Pagers to route calls to non-local DID trunks to connect to Qwest central offices in other local calling areas. In addition, PageData also ordered 500 toll-free "800" numbers as a means to route calls via the DID lines to its paging facilities. Order No. 29555 at 13.

2. Transit Traffic. Transit traffic is traffic that originates from another carrier other than Qwest but is carried over Qwest's network to the paging carrier's network. Order No. 29555 at 5. Based upon the *TSR Order* and other FCC decisions, the Commission found that

³ The refund period for the Pagers began November 1, 1996 and ran until the Pagers entered into interconnection agreements with Qwest. Radio Paging refund period ended May 13, 1999 and PageData's ended September 10, 1999. Because Tel-Car had no interconnection agreement with Qwest, its refund period ended September 24, 1999 (the date the Pagers filed their complaint). Order No. 29140 at 4-5.

⁴ Radio Paging had no wide area calling arrangements.

Qwest was permitted to charge the Pagers for transit traffic. Order Nos. 29064 at 13-19; 29140 at 23-33. The Commission found that 24% of the Pagers' traffic was properly classified as transit traffic. Consequently, Qwest offset the refunds owed to the Pagers by this proportion. Order No. 29140 at 3.

In December 2002, the Pagers filed their Notice of Appeal, R. at 928-32. After the Notice of Appeal was filed, the parties participated in the appellate settlement process. Following unsuccessful negotiations, the Supreme Court reinstated the appeal in November 2003 with the Pagers' opening brief due in February 2004.

B. The Circuit Court's Mountain Opinion

In January 2004 the D.C. Circuit Court held that the FCC's wide area calling decisions in *Mountain Communications v. Qwest Corporation*⁵ are at odds with the FCC's own regulations and with the *TSR Order*. *Mountain Communications v. Federal Communications Commission (FCC)*, 355 F.3d 644 (D.C. Circuit 2004). The Court observed that while the facts of the *TSR Order* and *Mountain Communications* are identical, the results of the two cases "are opposite." Thus, the Court easily concluded that the FCC's wide area calling decision in *Mountain Communications* is logically inconsistent with the FCC's own regulations. The Court also noted that the FCC's regulation found at 47 C.F.R. § 51.703(b) prohibits LECs from levying charges for traffic that originates on their own networks. 355 F.3d at 647. The Court recognized that Mountain's DID system provided "it no advantages other than those to which, presumably, it is entitled for free." *Id.* at 648. Thus, the Court vacated the wide area calling decisions and remanded the case to the FCC.

After dealing with wide area calling, the Court turned to transit traffic. The Circuit Court observed that the FCC allowed Qwest to charge Mountain for transit traffic "but indicated that Mountain could seek reimbursement from the originating carrier for what ever charges [Mountain] paid to Qwest." *Id.* at 649. Mountain argued the prospects of obtaining reimbursements from the originating carriers of the transit traffic was illusory, because Qwest never provided the originating call information to Mountain. Without such information, Mountain maintained it was impossible to seek reimbursement. *Id.*

⁵ *Memorandum Opinion and Order*, 17 FCC Rcd 2,091 ¶¶ 1, 8 (Feb. 4, 2002), *reconsid. denied*, 17 FCC Rcd 15,135 (July 25, 2002).

The Court did not reach the merits of this issue because Qwest advised the Court at oral argument that it would provide Mountain with the originating carrier information. Presumably Mountain could then seek reimbursement. "Under those circumstances," the Court stated "Mountain dropped that part of its petition." *Id.* at 649.

C. *The Commission's Remand Order*

On February 13, 2004, Qwest, the Pagers and the Commission filed a Stipulated Motion with the Supreme Court to suspend the appeal and temporarily remand this matter to the Commission so that the Parties could consider the recent *Mountain Communications* opinion. The Parties asserted that remanding the matter would allow: (1) the Commission to determine whether to reconsider its Orders in light of the Circuit Court opinion; (2) the FCC to address the issues on remand; and (3) the Parties another opportunity to settle the appeal. Order No. 29491. The FCC has not addressed the two telecommunications issues.

When Qwest and the Pagers were unable to resolve their dispute on remand, the Commission issued Order No. 29491 directing the Pagers and Qwest to provide supplemental briefing regarding the two remand issues: wide area calling and transit traffic. Order No. 29491 at 7. More specifically, the parties were directed to respond to several questions about the two issues. The Order also directed Qwest to prepare exhibits showing the amount of charges it assessed each Pager individually for wide area calling and transit traffic.

In compliance with the Commission's directives, Qwest filed its Supplemental Brief and refund calculations on May 26, 2004. The Pagers filed their Reply Brief on June 8, 2004.

Relying upon the Circuit Court's *Mountain* decision, the Commission issued Order No. 29555 and found that Qwest cannot charge the Pagers for traffic that originates on Qwest's network and is transported to the point of interconnection (POI) with the Pagers. Order No. 29555 at 14. The Commission found that "Qwest may not charge the Pagers for wide area calling services or facilities. However, as the FCC noted in the *TSR Order*, Section 51.703(b) does not prevent Qwest from charging its own end-user customers for calling a pager's POI located in a different local calling area. *TSR Order* at ¶ 31." Order No. 29555 at 14. Pursuant to the Commission's directive, Qwest calculated that it charged Tel-Car \$3,909 for DID wide area calling facilities (\$2,972 for DID facilities and \$937 interest) and PageData \$10,607

(approximately \$4,004 for DID facilities; \$3,613 for "800" service; \$2,655 in interest; and \$400 in taxes).⁶

Turning to the issue of transit traffic, the Commission quoted from the Circuit Court's opinion that "at oral argument, Qwest's counsel obviated any need for us to decide [the transit traffic] issue by indicating that Qwest would provide Mountain with the information necessary so that Mountain could charge the originating carrier for reimbursement." Order No. 29555 at 8 quoting *Mountain Communications*, 355 P.3d at 649.

In its Order No. 29555 the Commission stated Qwest has a choice:

it can either charge the Pagers [for transit traffic] and provide calling information so that they may seek reimbursement; or [not charge the Pagers but] charge the originating carrier. . . . We agree with the Pagers that it is inequitable to offer the calling data to Mountain but not to other similarly situated [paging] carriers. . . . Qwest's statement that the transit traffic calling data 'does not exist,' [in this case] provides only one choice.

Order No. 29555 at 15-16.

In response to the Commission's directive in Order No. 29555, Qwest recalculated the refund amounts due Radio Paging, PageData, and the bankruptcy estate of Tel-Car.⁷ The table below shows the refund calculations as directed by the Credit Phase Order No. 29140 and the additional refunds consistent with Order No. 29555.

| REFUND COMPONENTS | | |
|-------------------|----------|---------------------------------------|
| Radio Paging: | \$54,028 | Billed Amt thru 4-99 (R. at 825) |
| | -53,111 | Payments " " |
| | (917) | Balance Owed Qwest |
| | 34,572 | Refund Credit " " |
| | 33,655 | Net Refund " " |
| | + 8,450 | Interest on Refund " " |
| | \$42,105 | Total Refund Due as of Nov 2002 |
| | + NA | Wide Area Calling (includes interest) |
| | +15,311 | Transit Traffic (includes interest) |
| | + 51 | 1 month interest |
| TOTAL | \$57,467 | |

⁶ The PageData subtotals do not equal the \$10,607 figure because of offsets and the use of multiplier-factors. Qwest Recalculation in Response to Order No. 29491 filed May 26, 2004.

⁷ Tel-Car became a Chapter 7 debtor effective in January 2002. Order No. 29555 at 21.

| | | |
|--------------|------------------|--|
| PageData: | \$123,447 | Billed Amt thru 8-99 (R. at 923) |
| | - 87,390 | Payments " " |
| | <u>(36,057)</u> | Balance Owed Qwest |
| | 81,119 | Refund Credit " " |
| | <u>45,062</u> | Net Refund " " |
| | +10,421 | Interest on Refund " " |
| | <u>\$ 55,483</u> | Total Refund Due as of Nov 2002 |
| | + 5,600 | Wide Area Calling-DID (incl interest) |
| | + 5,007 | Wide Area Calling - 800-service (includes interest) |
| | +35,704 | Transit Traffic (includes interest) |
| | + 156 | 1 month interest |
| TOTAL | <u>\$101,950</u> | |

| | | |
|--------------|-----------------|---------------------------------------|
| Tel-Car: | \$56,885 | Billed Amount thru 7-00 (R. at 920) |
| | -45,349 | Payments " " |
| | <u>(11,536)</u> | Balance Owed Qwest |
| | 39,162 | Refund Credit " " |
| | <u>27,626</u> | Net Refund " " |
| | +5,886 | Interest on Refund " " |
| | <u>\$33,512</u> | Total Refund as of Nov 2002 |
| | + 3,909 | Wide Area Calling (includes interest) |
| | +15,362 | Transit Traffic (includes interest) |
| | + 65 | 1 month interest |
| TOTAL | <u>\$52,848</u> | |

Sources: Order No. 29555; Qwest Response to Order No. 29491 (May 2004); Qwest Recalculation of Credits Due Pursuant to Order No. 29140 (Nov. 2002, R. at 916-923); R. at 825; Qwest Exhibits 201, 202, 203.

On August 17, 2004, Robert Ryder on behalf of Radio Paging and Joseph McNeal on behalf of PageData each filed affidavits with the Commission. Mr. McNeal indicates in his affidavit that he is "entitled to the full refund" of \$101,950 because he was not in arrears to Qwest at the end of the refund period, ending September 10, 1999. Mr. Ryder also claims that Radio Paging "did not owe Qwest anything" at the end of his refund period, ending May 13, 1999. Thus, he also infers that he, too, is entitled to a full refund in an amount of \$57,467. Qwest did not respond to these claims.

With this background, we now turn to Qwest's request for a stay and reconsideration.

QWEST'S MOTION TO STAY

1. Qwest. Qwest requests that the Commission stay its Order No. 29555 “pending a decision on Qwest’s Petition for Reconsideration.” Motion to Stay at 2. Qwest also requests that the Commission “enter or continue a stay of the Remand Order during the pendency of Qwest’s appeal of the Remand Order to the Idaho Supreme Court, should such an appeal be filed.” *Id.*⁸ As directed by the Commission’s Remand Order, Qwest was to have issued additional billing credits and/or cash refunds to PageData and Radio Paging no later than August 23, 2004. In addition, the Commission directed Qwest to issue the calculated refund to the Bankruptcy Court for the bankruptcy estate of Tel-Car by the same date.

In its Motion to Stay, Qwest notes that the issuance of the remand Order arises in “unusual circumstances.” Qwest Motion at 2. In particular, Qwest maintains that if this were simply a final Order the Commission, then it would be entitled to seek reconsideration of the Commission’s decision. But here the Commission’s Order was issued on remand from the Supreme Court and it is unclear whether reconsideration is appropriate. See *Idaho Code* § 61-626. Qwest also claims that the FCC has not issued any decision on remand and “[n]othing productive has yet taken place at the FCC.” *Id.* at 3.

Qwest insists that its Petition for Reconsideration will argue that the Commission wrongly decided the two remand issues. Qwest asserts the Circuit Court was not called upon to address the transit traffic issue. “In a bizarre turn of circumstances, Mountain withdrew the issue from the appeal based on a discussion among the judges and counsel at oral argument. Accordingly, the Court did not rule on that issue, and on remand to the FCC, the issue is no longer part of the case.” *Id.*

Until the Commission can undertake its review of the Petition for Reconsideration, Qwest asks the Commission to stay the effectiveness of its Order. Qwest insists the Commission’s Order may have broad implications because it is the first articulation of “paging interconnection law following the *Mountain Communications* reversal. . . .” *Id.* at 4. Qwest interconnects with more than 200 paging companies in its 14-state territory. Qwest claims that the revenues associated with transit traffic alone for paging companies is approximately

⁸ As noted above Qwest filed a Cross Appeal on September 13, 2004.

\$300,000 per month. “Qwest’s exposure on past transit charges has not been calculated, but it surely is many millions of dollars.” *Id.*

2. The Pagers Response. The Pagers oppose Qwest’s Motion for Stay. The Pagers maintain the Motion for Stay “is nothing more than [an] effort to further obfuscate and delay this proceeding. . . .During the recovery period, Qwest overcharged Petitioners 100% for their interconnection services and facilities and has not yet had to refund a dime. It should not be permitted the opportunity to further delay its day of reckoning.” Pagers Answer to Motion to Stay at 3. The Pagers assert that Qwest has not made any payments to the Pagers or the Bankruptcy Court by August 23 as required by Order No. 29555. *Id.* at 2; Pagers Answer to Qwest’s Petition at 2; Answer to Motion to Stay at 2.

The Pagers maintain the Commission’s remand Order “is absolutely correct.” *Id.* They assert the issue of transit traffic is neither uncertain nor undecided. They argue Qwest’s own interpretation of the *Mountain Communications* decision is identical to the findings of the Commission in its Order No. 29555. *Id.* at 2. More specifically, the Pagers point out that Qwest Radio Paging proposed to amend their two interconnection agreements (one in Idaho and one in Oregon) that mirror the Commission’s transit traffic decision. In pertinent part, the July 2004 Idaho interconnection agreement states that Radio Paging “does not have to pay facility charges for Third Party Traffic [i.e., transit traffic] Qwest does not provide the originating company’s calling records to [Radio Paging’s] POC.” *Id.*, Jones Affidavit at 2, Exh. A and B. Qwest submitted the Radio Paging amendment in July 2004 – before the Commission issued its August 2 Remand Order No. 29555. Pagers Answer to Motion at 2. Consequently, the Pagers insist that even Qwest recognizes the Commission’s decision regarding transit traffic is correct and has submitted conforming amendments to its interconnection agreements that prohibit transit traffic charges until Qwest can provide pagers with the originating call data.

Commission Findings. The Commission’s Rule 324 provides that any person may request that the Commission stay any order. IDAPA 31.01.01.324. The filing of a petition for reconsideration does not automatically stay the effectiveness of any Order. Petitions to stay may accompany or precede petitions for reconsideration. IDAPA 31.01.01.333; *Idaho Code* § 61-626(3). In its Motion to Stay, Qwest requests that the Commission in effect grant two stays. First, Qwest moves the Commission to stay Order No. 29555 “pending the decision on Qwest’s

Motion for Reconsideration.” Qwest Motion at 2. Second, Qwest also seeks a stay during the pendency of Qwest’s Cross Appeal. *Id.*

Turning first to Qwest’s request for a stay pending reconsideration, we find that such a request is reasonable given the circumstances of this case. In particular, the Commission issued Order No. 29555 on remand from the Supreme Court. On remand, the Commission changed its previous rulings on the issues of wide area calling and transit traffic. These changes significantly increased the refunds owed to the Pagers. Granting Qwest a limited stay of our prior Order will allow the Commission to review Qwest’s Petition and reconsider our Remand Order. Accordingly, the Commission stays Order No. 29555 so that we may take up Qwest’s Petition for Reconsideration. Our decision regarding Qwest’s request for a stay on appeal will follow our discussion of Qwest’s Petition for Reconsideration.

**QWEST’S PETITION FOR RECONSIDERATION,
ALTERATION OR AMENDMENT**

In its Petition, Qwest argues that the Commission wrongly decided the wide area calling and transit traffic issues. The Company also maintains the Commission made a “calculation error” pertaining to the refund owed PageData for wide area calling. Finally, Qwest seemingly questions the Commission’s jurisdiction over this matter. The Company does not expressly assert the Commission lacks jurisdiction but states that the Commission’s “decisions show that the basis of jurisdiction is tenuous.” Petition for Reconsideration at 3.

In their Answer, the Pagers again insist Qwest’s requests for reconsideration and oral argument are merely designed to delay and obfuscate. Pagers Response to Petition at 2. The Pagers maintained that both Qwest and the Pagers

had an opportunity to provide input and the Commission made its decision. The Supreme Court has taken the case back. . . .If Qwest is unhappy with the Commission’s decision, it must make its case in the Supreme Court. There is absolutely no ground for having the issue litigated both in the Commission and the Supreme Court at the same time.

Id. at.2 (citations omitted).

Commission Findings. We find it appropriate to grant reconsideration so that we may address Qwest’s issues raised on reconsideration. Reconsideration provides an opportunity for a party to bring to the Commission’s attention any issue previously determined and provides the Commission with an opportunity to rectify any mistake or omission. *Washington Water*

Power Company v. Kootenai Environmental Alliance, 99 Idaho 875, 591 P.2d 122 (1979). While we recognize that the temporary remand has expired, Appellate Rule 13(e) provides that the Commission “shall have continued jurisdiction of the matter and the parties consistent with the provisions of applicable statutes.” Moreover, in this instance, the Commission finds that granting reconsideration to Qwest is appropriate so that the Commission may address its alleged errors. *Consumer’s Company v. Public Utilities Commission of Idaho*, 40 Idaho 772, 236 P. 732 (1925).

1. Jurisdiction. We first discuss jurisdiction. Although Qwest does not expressly assert the Commission lacks jurisdiction in this matter, we address this issue to eliminate any doubt.

Commission Findings. The Commission is a creature of statute and exercises limited jurisdiction. However, once jurisdiction is clear, the Commission is allowed all power that is either expressly granted by the statute or which may be fairly implied. *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 418, 690 P.2d 350, 353 (1984). In the first phase of this case, the Commission found the “facts clearly establish that these services (for which the Pagers seek refunds) are being provided to the Pagers under Title 62.” Order No. 28427 at 5 (R. at 67). The Commission further noted that it has the “statutory authority to investigate and resolve complaints made by subscribers to Title 62 services pursuant to *Idaho Code* § 62-616.” This finding is consistent with Qwest’s advocacy. In its initial brief regarding jurisdiction, Qwest stated “the Commission has jurisdiction under Idaho Code 62-616 to hear this case.” Qwest Initial Brief at 12 (R. at 43). Consequently, we affirm that the Commission has the statutory jurisdiction to resolve this complaint regarding Title 62 services pursuant to *Idaho Code* § 62-616. *See also Idaho Code* § 62-615(1).

2. Wide Area Calling. Qwest next maintains that the Pagers are procedurally barred from recovering for wide area calling services because this issue was previously determined in the first phase of this proceeding (the Liability Phase) in Order No. 28601. In particular, Qwest relies upon a footnote in Commission Order No. 28601 that states the Pagers “are not entitled to recover the amounts charged for foreign exchange service or wide area calling services, i.e., WATS. . . .” Order No. 28604 at 10 n. 15 (emphasis added). Qwest argues “Order Nos. 28601 (the Liability Order) and 28626 (on the Petition to Amend) were both final, appealable orders. No party appealed, thus making matters decided in the Liability Phase settled as a matter of law,

and establishing the law of the case on those issues.” Qwest Petition at 6. Because Order No. 28601 was a final Order on Reconsideration and the Pagers did not appeal this Order, they should now be barred from arguing that they are entitled to receive refunds for wide area calling. Qwest infers the same principle should prohibit the Commission from revisiting this issue. The Company suggests the Commission should avoid getting ahead of the FCC and Courts, and refrain from ruling on the wide area calling issue. *Id.* at 9.

Commission Findings. We find Qwest’s procedural argument unpersuasive for several reasons. First, we find Qwest’s reliance upon the footnote misplaced. The footnote accompanied a finding where the Commission stated that the Pagers “are entitled to a billing credit or reimbursement for the charges they have incurred for the facilities used to deliver local LEC-originated traffic. . . .” Order No. 28601 at 10 (emphasis added). In the context of the Commission’s Order, we were applying the substantive holding of the FCC’s *TSR Order* to the facts of the case. Thus, the Commission reinstated Count I of the Pagers’ complaint.

At the time Order No. 28601 was issued, the scope and extent of the “wide area calling” issue were not fully developed. We had not yet decided whether DID facilities were encompassed in the concept of wide area calling arrangements. In our view, more controlling is the Commission’s statement in the ordering paragraphs of that Order that the Pagers are “entitled to a billing credit or reimbursement for services and facilities that should have been provided free of charge according to FCC authority.” *Id.* at 12 (R. at 139). Exactly what services and facilities was still in question. Thus, the question to be examined in the Credit Phase was whether the Pagers were inappropriately charged (thus entitled to a billing credit) for wide area calling arrangements (both DID and 800 services) used for the delivery of Qwest-originated traffic. In *Mountain Communications* the Circuit Court answered this question and determined that Qwest cannot charge a pager for the use of DID trunks to deliver Qwest-originated traffic. 355 F.3d at 647-49.

Second, both the Pagers and Qwest fully litigated the issue of wide area calling in the Credit Phase (the second part) of this case. Both parties submitted evidence regarding whether the Pagers had “voluntarily” entered into wide area calling arrangements and the type of such arrangements. Qwest did not raise this procedural argument in the Credit Phase. Qwest’s failure to raise the issue some two years ago constitutes a waiver of its argument, especially at this late

date. We find that the issue of wide area calling was not fully litigated and decided until completion of the Credit Phase and issuance of Order No. 29140.

Finally, Qwest agreed in the Stipulation Motion for the issue of wide area calling to be temporarily remanded to the Commission so that the Parties could re-examine the issue in light of the Circuit Court's opinion. Having joined in the Stipulation to remand the issue of wide area calling, it is unreasonable now for Qwest to assert that this issue should not be addressed. Consequently, we find that neither the Pagers nor the Commission is procedurally barred from addressing the wide area calling issue in either the Second Phase of this case or in reconsideration of the remand Order No. 29555.

3. Calculation Error. Qwest next urges the Commission to reconsider its Order because there is an alleged calculation error regarding 800-service. Qwest argues that the Commission appears to have "accidentally included 800 Pageline in the services to be credited, contrary to the language of the Remand Order itself." *Id.* at 10. As indicated *supra* page 7, only PageData used 800-service. Qwest calculated that the refund attributable to PageData's 800-service was \$3,613 plus about \$1,394 of taxes and interest (for a total of about \$5,007).⁹

Commission Findings. After reviewing our prior Order, the Circuit Court opinion and other FCC orders, we find that Qwest's argument has merit. Our resolution of this issue requires us to revisit the FCC's *TSR* and *Mountain Communications Orders*, in conjunction with the concept of a single point of interconnection (POI).

As the Commission recognized in Order No. 29140, the FCC has ruled that a pager has "the right to request a single point of interconnection." Order No. 29140 at 39 *citing* 47 U.S.C. § 251(c)(2); *In the Matter of the Petition of WorldCom, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration, et. al, Memorandum Opinion and Order*, 17 FCC Rcd 27,039 at ¶ 52 (July 17, 2002); *U S WEST Communications v. Jennings*, 304 F.3d 950, 961 (9th Cir. 2002). In addition, the FCC's regulation at 51.703(b) prohibits Qwest from charging the Pagers for facilities used to deliver Qwest-originated local traffic to the Pagers' points of interconnection

⁹ The charge for 800-service (\$3,613) is shown in Qwest's calculations for wide area calling in response to Order No. 29491 and Qwest's Recalculation of Credit Due, Pursuant to Order No. 29555, Exhibit 4. *See also* Qwest Exhibit 203; Tr. at 467.

(POIs). Order No. 29555 at 14, 20; *Mountain Communications*, 355 F.3d at 648; *MCIMetro Access Transmission Services v. BellSouth Telecommunications*, 352 F.3d 872, 881 (4th Cir. 2003); *TSR Order* at ¶ 31. “However, nothing prevents [Qwest] from charging its end-users for toll calls” to the pagers’ facilities. *TSR Order* at ¶ 31; Order Nos. 29064 at 5; 29555 at 14. Finally, the Circuit Court in *Mountain Communications* overturned the FCC’s decision that Qwest could charge Mountain for DID services and facilities used to transport Qwest-originated calls to the pager’s POI in a different local calling area. 355 F.3d at 647-49.

However, by using 800-service with DID lines, PageData makes it appear to any Qwest or other non-Qwest customers that they can call a paging customer without making a toll call. With 800-service, a toll call is paid for by the called party, rather than the calling party. We agree that the idea of toll-free 800-service “is to entice customers to call the number, with the theory being that if the call was a toll call and therefore cost the customer something, he or she might be less inclined to call.” *Newton’s Telecom Dictionary* at 19. In other words, PageData can “buy down” the cost of toll calls by using Qwest’s 800-service. *TSR Order* at ¶ 31.

Returning to the facts of this case, Qwest argues that PageData should not be compensated \$5,007 for use of 800 Pageline service to transport calls to PageData. We agree and find that PageData ordered 800-service as a means to direct calls to its points of interconnection. Based upon our view of the FCC orders and the various Court opinions noted above, we find that PageData should not receive a refund for its use of 800-service. We start with the premise that Qwest is required to transport its customers’ calls to the pagers without charge to the pagers. However, the FCC and the Circuit Court recognize that Qwest could charge its own customers for what would otherwise be a toll call to the paging carrier’s POI. *Mountain Communications*, 355 F.3d at 645, 647. Although the *Mountain* Court vacated the FCC’s decision regarding the use of DID lines to carry Qwest traffic, it did not address the use of 800-service. We find PageData’s ordering of the 800 numbers is substantially different than its use of DID lines and effectively denied Qwest the ability to charge its own customers for toll calls made to PageData. Even the Pagers’ expert testified at the evidentiary hearing that the paging carriers did not oppose paying Qwest for the 800 calls. Tr. at 250. *See also* Tr. at 354 (Qwest “will direct the 800 traffic to [the Pagers’] DID numbers so there is an additional charge for that service.”).

In summary, although we find that PageData is entitled to refunds for its use of DID services and trunks consistent with the *Mountain Communications* decision, we also find that Qwest may properly charge PageData for 800-service where such 800-service deprives Qwest of the opportunity to charge its own customers for making toll calls to a pager. This holding is restricted to the facts of this case and the use of 800-service to deliver traffic to pagers. Accordingly, we clarify and amend our Order No. 29555 to reflect that PageData is not due a wide area calling refund for 800-service. *Idaho Code* § 61-624. Consequently, PageData's refund is reduced by \$5,007.

4. Transit Traffic. Finally, Qwest seeks reconsideration of the transit traffic issue. If reconsideration is granted, Qwest intends to present "evidence regarding the difficulty in the measurement of [transit] traffic." Petition at 10. Qwest does not know "if it will be able to develop a transit record product for purchase of Type 1 [paging] services." *Id.* Qwest maintains that the Commission's decision on transit traffic will "have huge ramifications in the industry." *Id.* Qwest believes that the Commission's ruling "based on Qwest's answers to a few limited questions asked by the Commission, simply does not provide enough procedural due process, and certainly does not put the Commission in the best position of receiving all critical information before taking such a bold step out front of other regulators of the telecommunications industry." *Id.* at 10-11. Consequently, Qwest requests the Commission grant rehearing on this issue and convene a scheduling conference "to discuss what type of hearing would provide a sufficient factual record for the Commission's decision." *Id.* at 11.

Commission Findings. Having reviewed Qwest's Petition and the record, we affirm our transit traffic decision in Order No. 29555 for several reasons. First, our procedural Rule 331 addresses the required contents of petitions for reconsideration. In particular, petitions for reconsideration "must set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous or not in conformity with the law, and a statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted." IDAPA 31.01.01.331.01. In its Petition for Reconsideration, Qwest has not set forth the specific grounds why the Commission's Order No. 29555 is "unreasonable, unlawful, erroneous or not in conformity with the law." Qwest alleges that the decision will have a huge ramification in the industry but does not specify the reasons it believes the Commission's transit traffic decision is in error.

In addition, Qwest requests the Commission convene “a scheduling conference to discuss what type of hearing” the Commission should hold on reconsideration. The Company states that if rehearing is granted, it will present evidence regarding the difficulties in “the measurement” of such transit traffic. The Commission finds this statement ambiguous. The issue the Commission addressed on remand was not the “measurement” of transit traffic, but whether Qwest may charge the Pagers for transit traffic. In our prior Orders, the Commission agreed with Qwest’s advocacy that 24% of the traffic was the appropriate measure of transit traffic. Order Nos. 29064 at 18-19; 29140 at 5, 25-33. Evidence of measuring transit traffic is not relevant and simply asking for a hearing is not responsive to describing the “nature and quantity of evidence” required by Rule 331.

As we recognized in Order No. 29555, the D.C. Circuit Court did not reach the merits of the transit traffic issues. What is more important is the reason why the Court did not reach the merits. As indicated above, Qwest’s counsel at oral argument indicated “Qwest would provide Mountain with the information necessary so that Mountain could charge the originating carrier for reimbursement.” *Mountain Communications*, 355 F.3d at 649. It is disingenuous for Qwest to insist that “the issue was simply dropped” by Mountain. Mountain withdrew that part of its petition because Qwest agreed to provide the pager with the originating call data so Mountain could then seek reimbursement from the originating carrier. The significant detail is that Qwest agreed to provide the calling data.

Second, it was Qwest’s offer to provide Mountain with the originating call data that was the basis for our decision in Order No. 29555. We agreed with the Pagers that it is discriminatory for Qwest to provide the calling information to Mountain but not to the Pagers in our case. Order No. 29555 at 15 *citing* 47 U.S.C. § 251(c)(2)(D). Our departure from Order No. 29140 was premised on the *Mountain* opinion and Qwest’s offer to provide the calling data to Mountain. Our Order No. 29555 recognizes that Qwest may charge the Pagers for transit traffic so long as it provides the originating call data – like it agreed to provide Mountain. Our finding in Order No. 29555 is also consistent with prior FCC decisions that recognize that the transit carrier (Qwest) may charge the pager for transit traffic; and the pager “may then seek reimbursement of the costs associated with transport and termination of that traffic from the carriers that originated the transiting traffic in question.” *Mountain Communications v. Qwest*, 17 FCC Rcd 2,091 n. 30; *Mountain Communications v. Qwest*, 17 FCC Rcd 15,136 at n. 13;

TEXCOM v. Bell Atlantic, Order on Reconsideration, 17 FCC Rcd 6,275 at ¶ 4 (March 27, 2002). Because Qwest offered Mountain the originating data, we believe that the same offer should be made to the Pagers. When Qwest advised the Commission that the transit traffic calling data “does not exist,” then the Commission was left with only one choice. “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.” Order No. 29555 at 16.

Finally, Qwest’s transit traffic argument is inconsistent with its own actions. As the Pagers point out in their Answer to Qwest’s Motion to Stay, Qwest has recently amended its interconnection agreements with Radio Paging to provide that Qwest will not charge the pager for transit traffic until Qwest is able to provide the originating billing data to Radio Paging. Pagers Answer to Motion to Stay at 2. On July 19, 2004, Qwest and Radio Paging filed a Joint Application to Amend their previously approved interconnection agreement. Pager Answer to Stay, Exh. A (Case No. USW-T-03-27). The voluntarily agreed upon amendment provides in pertinent part that Radio Paging does not have to pay Qwest for transit traffic facilities charges “if Qwest does not provide the originating company’s calling records to” Radio Paging. Amendment § 1.B. The Commission approved this amendment in Order No. 29595 issued September 16, 2004. The amendment filed before Qwest’s Motion and Petition, comports with Qwest’s concession at the *Mountain* oral argument.

Having reviewed Qwest’s Petition for Reconsideration and the Pagers’ Answer, we correct the calculation error and otherwise affirm our findings and conclusions in Order No. 29555. In addition, we deny Qwest’s request for further hearing for the reasons set out above. We also deny Qwest’s request for oral argument because is not necessary and it would delay resolution of this proceeding.¹⁰ Qwest’s request did not indicate why oral argument was necessary.

CALCULATION OF THE REFUNDS

Having concluded our reconsideration of Remand Order No. 29555, we return to the calculation of the refunds. In Order No. 29555, the Commission recognized that it was possible

¹⁰ Qwest’s entire request for oral argument was a single sentence. Qwest “requests oral argument on Qwest Corporation’s Motion to Stay Order No. 29555 and Qwest Corporation’s Petition for Reconsideration, Alteration or Amendment of Order No. 29555.”

that the refunds due the Pagers “might exceed the amounts the Pagers owe Qwest, if any,” because the refunds have substantially increased from those originally calculated by Qwest in November 2002. The Commission went on to say that if refunds afforded to PageData and Radio Paging exceed the amounts they owe Qwest, then Qwest shall provide them with cash reimbursements no later than August 23, 2004. Order No. 29555 at 21. The Commission also directed Qwest to tender any refund that is due to Tel-Car’s estate to the Bankruptcy Court. *Id.* at 22. Qwest has not provided any cash refunds to the Pagers or the Bankruptcy Court. Instead, the Company filed its Petition to Stay Order No. 29555.

A review of our prior Orders is helpful in examining the issue of billing credits or cash reimbursements. In the first phase (the Liability Phase) of this case, the Commission determined that the Pagers were “entitled to a billing credit or reimbursement for services and facilities. . . .” Order No. 28601 at 12 (emphasis added) (R. at 139). After Order No. 28601 was issued in December 2000, the Pagers filed a Petition to Amend that Order. Among other things, the Pagers requested the Commission strike the words “a billing credit or” from the ordering paragraphs. The Commission rejected this request. Order No. 28626 at 2 (R. at 183).

In the second phase (the Credit Phase) of this case, the Pagers again raised the issue of cash reimbursements. The Commission listed several reasons why cash reimbursements may not be appropriate. In particular, the Commission noted that:

At least two pagers [Radio Paging and PageData] acknowledged they stopped paying their paging bills from Qwest. This fact coupled with the fact that they sought much larger refunds than the Commission eventually ordered, leads us to infer that the credits may not exceed the arrearages. If this is the case, it would be unreasonable to require cash reimbursements.

Order No. 29140 at 47 (emphasis added). In other words, if the refunds were less than the amounts the Pagers owed Qwest, it made little sense to issue cash reimbursements instead of billing credits. Conversely, if the refunds were greater than the amounts owed Qwest, cash reimbursements for the balances would be appropriate. Following Order No. 29140 Qwest advised the Commission in November 2002 that it had issued “billing credits” to the Pagers. R. at 925-26.

As noted above, PageData and Radio Paging again assert that they are entitled to cash reimbursements primarily because their refund amounts exceed the amounts they owed Qwest. A review of Qwest Exhibits 201-203 and its November 2002 calculations appears to support the

Pagers assertions. Qwest Exhibits 201-203 and its November 2002 calculations show: (1) the amounts Qwest billed each Pager during the respective refund periods; (2) the refund credits due each Pager; and (3) the payments that each Pagers made to Qwest. Qwest Recalculation of Credits Due Pursuant to Order No. 29140 (Nov. 2002) (R. at 915-23). As portrayed in the Table on pages 6-7, each Pager owed Qwest ("Balanced Owed Qwest"), but the Commission ordered refunds exceeded the arrearages. The November 2002 calculations indicate that the Pagers refunds exceed the amounts they owed Qwest by: Radio Paging – \$42,105; PageData – \$55,483; and Tel-Car's estate – \$33,512. Consequently, we believe that Qwest should have issued billing credits to cover the amounts owed and cash reimbursements to the two Pagers and the Bankruptcy Court for the balance of the refunds.

Order No. 29140 issued in November 2002 directed Qwest to recalculate and issue refund "credits" to the Pagers. Order No. 29140 at 50. Qwest did not appeal from that Order. Thus, it appears that Qwest does not contest that the Pagers are due these refunds—over and above what they owed Qwest.

On remand, the Commission found in Order No. 29555 that additional refunds were due the Pagers for transit traffic and wide area calling (minus the 800-service for PageData). *See supra* pp. 6-7. Although Qwest has filed a Cross Appeal, most if not all of the issues identified in its Cross Appeal relate to the remand issues of wide area calling and transit traffic. Consequently, we direct Qwest to provide up-to-date calculations to confirm that the refunds apportioned to each Pager: (1) as of November 2002; and (2) for the additional refunds for wide area calling and transit traffic (with the "800" adjustment), exceed the amounts the Pagers owed Qwest. We order Qwest to provide this data to the Commission within ten (10) days of the service date of this Order. We encourage the Parties to meet informally to review the data/calculations before it is filed with the Commission. If the Pagers' refunds exceed the amounts they owed Qwest, then Qwest shall issue cash reimbursements for the balances to PageData, Radio Paging and Tel-Car's estate within fourteen (14) days of the service date of this Order.

STAY ON APPEAL

Having concluded our reconsideration of the issues raised by Qwest, we turn to its request for a stay pending appeal. After reviewing Qwest's Motion for Stay and the Pagers' Answer, we decline to stay our Order No. 29555 and this Order pending appeal. While we

recognize that the Pagers as well as Qwest may contest these Orders, we do not find it reasonable to further stay these Orders pending appeal. This is especially true if the refunds exceed the amounts that the Pagers owed Qwest. Consequently, we shall lift our stay fourteen (14) days from the date of this Order.

ORDER

IT IS HEREBY ORDERED that Qwest Corporation's Motion to Stay is granted in part and denied in part. The Commission stays Order No. 29555 to allow sufficient time for us to consider and review Qwest's Petition for Reconsideration. The Commission's limited stay on reconsideration will expire fourteen (14) days from the date of this Order. Qwest's request for a stay pending appeal is denied.

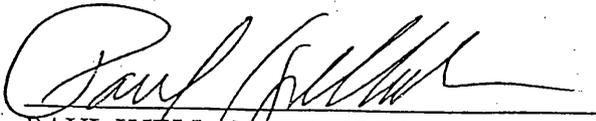
IT IS FURTHER ORDERED that Qwest's Petition for Reconsideration, Alteration or Amendment of Order No. 29555 is granted. Having completed our reconsideration of the issues raised in Qwest's Petition, the Commission issues this Remand Order on Reconsideration. As set out in the body of this Order, the Commission amends its prior Order No. 29555 to decrease PageData's refund in the amount of \$5,007 for 800 Pageline service. *Idaho Code* §§ 61-624 and 62-619.

IT IS FURTHER ORDERED that Qwest's Request for Oral Argument is denied.

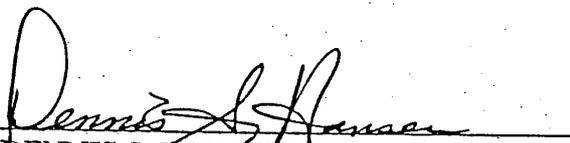
IT IS FURTHER ORDERED that Qwest file a confirmation with calculations showing whether the refunds authorized in Order No. 29140 and this Order exceed the amounts the Pagers owed Qwest. Qwest shall make this filing within ten (10) days of the service date of this Order. If the refunds exceed the amounts the Pagers owed Qwest, then Qwest shall issue cash reimbursements for the remaining balance of the refunds to the two Pagers and to Tel-Car's bankruptcy estate within fourteen (14) days of the service date of this Order. *Idaho Code* §§ 61-624 and 62-619.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order may appeal to the Supreme Court of Idaho as provided by the Public Utilities Law and the Idaho Appellate Rules.

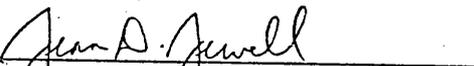
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 5th
day of October 2004.


PAUL KJELLANDER, PRESIDENT


MARSHA H. SMITH, COMMISSIONER


DENNIS S. HANSEN, COMMISSIONER

ATTEST:


Jean D. Jewell
Commission Secretary

Vid/O:USWT9924_dh2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 22nd DAY OF NOVEMBER 2004, SERVED THE FOREGOING **RESPONDENT AND CROSS RESPONDENT'S BRIEF OF THE IDAHO PUBLIC UTILITIES**, IN SUPREME COURT DOCKET NO. 29175, IPUC CASE NO. USW-T-99-24, BY MAILING TWO COPIES THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

JIM JONES
JIM JONES & ASSOCIATES
1275 SHORELINE LANE
BOISE ID 83702-6870

WILLIAM J. BATT
BATT & FISHER LLP
5TH FLOOR
101 S CAPITOL BLVD
PO BOX 1308
BOISE ID 83701

ADAM SHERR
QWEST COMMUNICATIONS, INC.
1600 7TH AVENUE, ROOM 3206
SEATTLE, WA 98191



SECRETARY