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IDAHO PUBLIC  
UTILITIES COMMISSION

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Attorney for the Respondent on Appeal – Cross Respondent,  
Idaho Public Utilities Commission

**IN THE PUBLIC UTILITIES COMMISSION 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. )

SUPREME COURT  
DOCKET NO. 29175

IPUC CASE NO. USW-T-99-24

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, )

REQUEST FOR  
ADDITIONAL APPEAL  
RECORD

Respondent on Appeal – )  
Cross Respondent, )

and )

QWEST CORPORATION, )

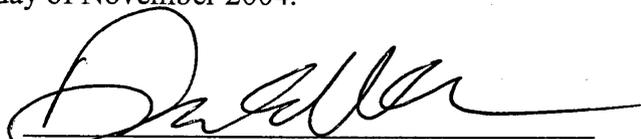
Respondent/Respondent on Appeal – )  
Cross Appellant. )

**TO: THE ABOVE NAMED PARTIES, THEIR ATTORNEYS OF RECORD, AND THE SECRETARY OF THE IDAHO PUBLIC UTILITIES COMMISSION**

NOTICE IS HEREBY GIVEN, that the Cross Respondent, Idaho Public Utilities Commission, in the above-entitled proceeding hereby requests pursuant to Rule 19, I.A.R., the inclusion of the following material in the agency's record in addition to that required to be included by the Appellate Rules and the Qwest Corporation's Notice of Cross Appeal filed September 13, 2004 and its Amended Notice of Cross-Appeal filed November 9, 2004:

1. Reporter's Transcript: N/A
2. Agency's record:<sup>1</sup>
  13. Qwest's Notice of Cross Appeal filed September 13, 2004.
  14. Qwest's Calculations Pursuant to Order No. 29603 filed October 15, 2004.
  15. Qwest's Amended Notice of Cross Appeal filed November 9, 2004.
  16. The Pagers' Motion to Strike Qwest Corporation's Calculations Pursuant to Order No. 29603 filed November 12, 2004.
3. I certify that a copy of this timely request was served upon the Secretary of the Idaho Public Utilities Commission and all parties required to be served pursuant to Rule 20.

DATED this *22nd* day of November 2004.



Donovan E. Walker  
Deputy Attorney General

Attorney for Cross- Respondent,  
Idaho Public Utilities Commission

bls/O:USWT9924\_additional record\_dh2

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<sup>1</sup> For the court's convenience the numbering corresponds to the September 17, 2004 Order Augmenting the Agency Record.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 22<sup>nd</sup> DAY OF NOVEMBER 2004, SERVED THE FOREGOING **REQUEST FOR ADDITIONAL RECORD**, IN SUPREME COURT DOCKET NO. 29175, VIA U S MAIL BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO:

JIM JONES  
JIM JONES & ASSOCIATES  
1275 SHORELINE LANE  
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WILLIAM J. BATT  
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ADAM SHERR  
QWEST COMMUNICATIONS, INC.  
1600 7<sup>TH</sup> AVENUE, ROOM 3206  
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---

SECRETARY

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Attorneys for Respondent/Respondent on Appeal/Appellant

**IN THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE JOINT PETITION  
OF ROBERT RYDER, DBA RADIOPAGING  
SERVICE, JOSEPH MC NEAL, DBA  
PAGEDATE AND INTERPAGE OF IDAHO  
FOR A DECLARATORY ORDER AND  
RECOVERY OF OVERCHARGES FROM U.S.  
WEST COMMUNICATIONS, INC.

SUPREME COURT  
DOCKET NO. 29175

IPUC DOCKET NO. T-99-24

-----  
ROBERT RYDER dba RADIO PAGING  
SERVICE, JOSEPH B. MC NEAL DBA  
PAGEDATE AND INTERPAGE OF IDAHO,  
AND TEL-CAR, INC.,

**NOTICE OF CROSS APPEAL**

Petitioners/Appellants/Cross Respondents,

v.  
IDAHO PUBLIC UTILITIES COMMISSION,

Respondent/Cross Respondent,

and

QWEST CORPORATION,

Respondent/Respondent on Appeal/Cross  
Appellant.

TO: THE ABOVE NAMED CROSS-RESPONDENTS, ROBERT RYDER dba RADIO PAGING SERVICE, JOSEPH B. MC NEAL DBA PAGEDATA AND INTERPAGE OF IDAHO, AND TEL-CAR, INC. AND THE IDAHO PUBLIC UTILITIES COMMISSION AND THE PARTIES' ATTORNEYS, JIM JONES, 1275 SHORELINE LANE, BOISE, IDAHO, 83702, DON HOWELL, 472 WEST WASHINGTON, BOISE, IDAHO, 83702 AND THE CLERK OF THE ABOVE ENTITLED ADMINISTRATIVE AGENCY.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Cross-Appellant Qwest Corporation (hereinafter "Qwest") appeals against the above named Cross-Respondents to the Idaho Supreme Court from Idaho Public Utilities Commission Order No. 29555, entered in the above entitled action on the 2<sup>nd</sup> day of August, 2004.

2. The parties have a right to cross appeal to the Idaho Supreme Court. The order described in paragraph 1 above as it is an appealable final order pursuant to Rule 15 of the Idaho Appellate Rules.

3. Preliminary statement of the issues on cross-appeal:

(a) Whether the Commission erred in ordering Cross-Appellant to credit or refund certain charges for facilities used to permit Petitioners/Cross-Respondents to provide wide area calling services, i.e., charges under Qwest's Idaho Service Catalog for dedicated transport used to deliver calls from Qwest subscribers to distant paging customers of Petitioners-Cross Respondents;

(b) Whether the Commission erred in ordering Cross-Appellant to credit or refund certain charges to Petitioners/Cross-Respondents for facilities used to deliver transit traffic, i.e., charges under Qwest's Idaho Service Catalog for dedicated transport used to deliver paging calls to Petitioners/Cross-Respondents from subscribers of third party carriers (telecommunications companies other than Qwest), delivered by third party carriers to Qwest for transport to Petitioners/Cross-Respondents for delivery to their paging customers.

(c) Whether the Commission erred in ordering Cross-Appellant to include interest in its calculations of refunds or credits;

(d) Whether the Commission erred by ordering Cross-Appellant to make refunds or credits based on the Commission's interpretation of unclear decisions of the Federal Communications Commission, and indeed, by predicting future decisions of the decisions of the Federal Communications Commission on issues of first impression under federal telecommunications law.

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

(f) Whether the Commission erred by ordering Cross-Appellant to refund or credit Petitioners/Cross-Respondents for 1-800 Pageline services.

(g) Whether the Commission erred by (i) ignoring its previous findings, conclusions, decisions and orders in this lengthy case, (ii) considering evidence outside the record; (iii) ignoring the law of the case and abusing its discretion by arriving at its findings, conclusion, and holdings without regard to the evidence presented at the trial, without an explanation as to the rationale for its departure from its previous well-reasoned decisions.

(h) Whether Petitioner/Cross-Respondent TelCar, Inc. should be dismissed from this appeal for lack of subject matter jurisdiction, because TelCar, Inc. had been liquidated in bankruptcy and gone out of existence before the original Notice of Appeal was filed in this case and TelCar's bankruptcy trustee did not authorize pursuit of the appeal until some time later.

- (i) Whether the Commission erred in ordering Qwest to make refunds to TelCar, Inc., or the bankruptcy trustee of TelCar, Inc., because:
- a. TelCar, Inc. has been liquidated and gone out of existence;
  - b. TelCar, Inc.'s bankruptcy trustee has not appeared in this matter before the Commission;
  - c. The Supreme Court has no subject matter jurisdiction with respect to the claims of the bankruptcy trustee because said trustee did not timely file a notice of appeal; and,
  - d. This Commission has no jurisdiction on remand from the Supreme Court, and the previous orders of the Commission with respect to the nonexistent entity, TelCar, Inc. became final when no authorized appeal was taken by the trustee.

4. There has not been an order entered sealing any portion of the record regarding this matter.

5. Reporter's Transcript:

(a) No additional reporter's transcript is requested.

6. The Cross-Appellate does not request the inclusion of any additional documents, other than those added by the parties as appropriate.

7. I certify that:

(a) The appellate filing fee has been paid.

(b) That service has been made upon all parties required to be served pursuant to Rule 20 of the Idaho Appellate Rules.

DATED this 13<sup>th</sup> day of September, 2004.

Respectfully Submitted,

Adam Sherr  
Qwest Communications, Inc.  
1600 7th Avenue - Room 3206  
Seattle, WA 98191

and



---

William J. Batt  
James B. Alderman  
Batt & Fisher, LLP  
U S Bank Plaza, 5<sup>th</sup> Floor  
101 South Capital Blvd.  
Boise, Idaho 83702  
(208) 331-1000

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13<sup>th</sup> day of September, 2004, I caused a true and correct copy of the above and foregoing document to be served, in the manner indicated, on the following:

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- Facsimile
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By: \_\_\_\_\_  
William J. Batt

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Attorneys for Respondent/ Respondent on Appeal

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

IN THE MATTER OF THE JOINT PETITION  
OF ROBERT RYDER, DBA RADIOPAGING  
SERVICE, JOSEPH MC NEAL, DBA  
PAGEDATE 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. MC NEAL DBA  
PAGEDATE AND INTERPAGE OF IDAHO,  
AND TEL-CAR, INC.,

Petitioners-Appellants,

v.  
IDAHO PUBLIC UTILITIES COMMISSION,

Respondent on Appeal,

and

QWEST CORPORATION,

Respondent-Respondent on Appeal.

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IDAHO PUBLIC  
UTILITIES COMMISSION

SUPREME COURT  
DOCKET NO. 29175

IPUC DOCKET NO. T-99-24

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

**ORIGINAL**

## INTRODUCTION

On October 5, 2004, the Commission issued Order No. 29603 essentially denying Qwest Corporation's Petition for Reconsideration, Alteration or Amendment of the Commission's Order No. 29555. In addition, the Commission discussed the credits previously ordered to provide to the Pagers in this case, and apparently concluded that the amount of refunds ordered exceeded the amounts the Pagers "owed." The Commission ordered Qwest to provide new calculations and data relating to whether the refunds ordered by the Commission exceeded amounts owed by the Pagers to Qwest, stating:

[W]e 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.<sup>1</sup>

Below, Qwest first discusses the Commission's previous orders to explain the difficulty presented by the calculations ordered in Order No. 29063. These difficulties primarily relate to (1) the time at which it is determined how much the Pagers "owe" or "owed" to Qwest, and (2) what services and charges are included in the calculation.

In any event, Qwest review of the data and calculations shows that that refunds previously ordered by the Commission do not exceed amounts "owed" by the Pagers, however defined, and Qwest provides those calculations.

### I.

#### **The Commission's Rulings on Credits vs. Cash Refunds**

Qwest is unsure whether, at this late state in this long litigation, the Commission is now departing from its many previous rulings on the credit vs. cash refund issue. Up until Order No. 29603, Qwest believes the Commission's rulings had been clear that the Pagers were entitled to

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<sup>1</sup> Order No. 29603, p. 19.

billing credits and not cash refunds. The Commission had accepted Qwest's arguments that because the Pagers had ceased paying their bills, it would be unfair to order refunds. Now, the Commission seems to be saying that if the Pagers currently-ordered refunds exceed they "owe" or "owed" at some unspecified point in time, they are now entitled to refunds.

A review of the Commission's prior Orders shows that the law of this case developed from the Commission's view that because the Pagers were not paying their bills to Qwest, it would not be fair to order refunds:

**Order No. 28626**

In Order No. 28626, the Commission rejected the Pagers' request that ordering language providing for "a billing credit" be struck. The Commission stated:

If this language were removed, the Petitioners would presumably be entitled "reimbursements" but not billing credits. In response, Qwest alleges that Petitioners did not seek cash reimbursements in their Petition for a Declaratory Ruling (hereinafter "Complaint"), but did request recovery of amounts charged in the past. Furthermore, Qwest argues that PageData is not entitled to cash reimbursements because it will still owe Qwest a substantial amount of money after any credits are given to it. . . . The Commission finds that Petitioners have not provided any justification for striking the language "a billing credit or" as they have requested. For this reason, they have failed to comply with Commission Rules 326 and 331. IDAPA 31.01.01.326 and .331. Accordingly, this request is denied.<sup>2</sup>

**Evidentiary Hearing and Proposed Order:**

In the trial of the case in mid-2001, long after the "recover period" established by the Commission in this case, the Hearing Officer routinely admitted evidence that the Pagers had stopped paying their bills. For example, Arden Caspar, TelCar's owner, testified:

3 . . . . Well, as a matter of fact, I  
4 think the reason that we stopped paying the bills is  
5 that we had made several efforts to get this thing  
6 all resolved, and these were efforts that seemed

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<sup>2</sup> Order No. 28626, February 5, 2001.

7 very fair in accordance with our side of the  
8 picture, and we presented these over time and again  
9 and never got response from the Qwest people, so  
10 consequently, we then stopped paying the bills if  
11 for no other reason, to get attention.

12 Q. Okay. And do you believe it's proper  
13 that you not pay your bills because Qwest  
14 overcharged you illegally?

15 A. Yes. In other words, it's the same  
16 company. In my opinion, Qwest owes us money. Why  
17 should we pay Qwest then?

18 Q. So you're looking at it as a setoff?

19 A. Yes.

20 Q. And you're not contending that you  
21 have a right not to pay the bill --

22 A. Oh, no.

23 Q. -- and to collect the amount  
24 100 percent from Qwest?

25 A. Right.<sup>3</sup>

Mr. Ryder testified as follows on cross-examination:

Q. Have you stopped paying all your bills  
17 from Qwest?

18 A. Yes. Uh-huh. I can't -- I don't have  
19 the exact date that we -- we stopped paying, but we  
20 have stopped paying all of the -- all of the bills  
21 that we had received and had paid promptly. And so,  
22 yes, we have stopped.

23 Q. What's the justification for that?

24 A. Primarily, as a means of saying that,  
25 Hey, these charges are in dispute because Qwest owes<sup>4</sup>

1 us considerably more money than these bills  
2 represent.

3 Q. Well, which bills are you not paying?

4 A. We're not paying the specific bills  
5 involving the transport of number -- I mean, of  
6 these numbers. That's where I gather we'd call them  
7 the -- the transport charges. And we get two of  
8 these bills: One involving Oregon transport, and  
9 then also Boise or Idaho transport.  
10 And then we had a -- we have a

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<sup>3</sup> Transcript, p. 128.

<sup>4</sup> Transcript, p. 120.

11 commercial business line, which we are -- have not  
12 been paying on, along with several other business  
13 lines that we have not been paying on.

14 Q. Are those ordinary telephone lines?

15 A. They're business lines, yes.

16 Q. And the transport charges that you're  
17 talking about, those are covered by your  
18 Interconnection Agreement, are they not?

19 A. Yes. However, we have difficulty in  
20 determining exactly what those charges are, in that  
21 they are varied from time to time.

22 Q. Well, would you agree that you do owe  
23 Qwest some amounts for facilities provided under the  
24 Interconnection Agreement?

25 MR. JONES: Objection, I don't know<sup>5</sup>

1 that we've talked about the appropriate time frame.

2 Are we talking about under the Interconnection

3 Agreement? What time?

4 MR. BATT: Well, this really is in  
5 response to Jim's question about why the mention of  
6 the Interconnection Agreement amount due is proper  
7 on the matrix.

8 HEARING OFFICER: Yeah, I think that's  
9 fair response to that issue that was raised during  
10 direct.

11 THE WITNESS: So repeat the question,  
12 please.

13 Q. BY MR. BATT: Yeah, sure. Would you  
14 agree that today, you owe Qwest charges under your  
15 Interconnection Agreement that you haven't paid?

16 A. I -- I would say, yes, we owe you  
17 charges as you had billed them. Now, the amount  
18 that you had billed seems to be in question,  
19 however.<sup>6</sup>

13 Q. Okay. Did I understand your testimony  
14 that you believe the Commission has ordered that you  
15 are entitled to a refund as opposed to a credit, or  
16 did I misunderstand that?

17 A. Well, I -- I would be satisfied with  
18 either, I suppose, credit or a refund.<sup>7</sup>

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<sup>5</sup> Transcript, p. 121.

<sup>6</sup> Transcript. p. 122.

<sup>7</sup> Transcript, p. 126.

In his Proposed Order, the Hearing Officer discussed and ordered only billing credits. The Hearing Officer required Qwest to provide new calculations of billing credits, which Qwest filed on January 15, 2002.<sup>8</sup>

**Order No. 29064:**

The Commission issued its Order No. 29064 on July 17, 2002, adopting for the most part the recommendations of the Hearing Officer, including the ordering of billing credits rather than cash refunds. The Commission deemed this part of the case the "Credit Phase." The Pagers sought to raise their claim to a cash refund, rather than a billing credit, again, this time claiming that the McLeod "unfilled agreement" had provided for cash refunds of certain charges. The Commission rejected the Pagers' attempt to raise the issue on several grounds, and stated in part:

[T]he Commission has already rejected the Pagers request to require Qwest to provide them with cash reimbursements rather than billing credits. In Order No. 28626, the Commission declined the Pagers' request to amend its final prior Order to require Qwest to provide the Pagers with cash reimbursements rather than billing credits. Order No. 28626 at 2. Having previously declined to require cash reimbursements in Order No. 28626, the Pagers could have sought judicial review of that issue from the Idaho Supreme Court. The Pagers did not appeal that decision and the Commission declines to revisit the issue now.<sup>9</sup>

Qwest calculated the billing credits ordered the Commission, which were filed with and approved by the Commission. In accordance with the Commission's Orders, the Commission applied those credits to the Pagers' accounts.<sup>10</sup>

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<sup>8</sup> Qwest's Recalculation of Billing Credits, filed January 15, 2002.

<sup>9</sup> Order No. 29064, p. 10.

<sup>10</sup> Qwest's Recalculation of Billing Credits, filed July 30, 2002; Qwest's Application of Billing Credits, filed August 14, 2004. Qwest acknowledges and agrees that because TelCar was already in bankruptcy at that point in time, payment rather than credit to the trustee is appropriate, subject to Qwest's rights of setoff under bankruptcy law.

**Order No. 29140**

The Pagers petitioned for reconsideration, and the Commission granted their motion in part in Order No. 29140. The Commission, however, steadfastly refused to depart from its previous rulings on the propriety of billing credits. It is this Order that the Commission now seems to be saying required Qwest to issue refunds rather than credits. When read in whole, however, the Order simply does not so provide. For example:

2. **Credits vs. Reimbursements.** The Pagers also take issue with the “form” of the refund due each Payer. In the Commission’s Liability Order, we found the Pagers were entitled “to reimbursement or billing credits.” Order No. 28601 at 11. In the Commission’s Credit Order No. 29064, we directed Qwest to “issue the respective [billing] credits to the Pagers no later than 28 days from the service date of this Order.” Order No. 29064 at 31. The Pagers do not claim that Qwest has failed to issue the billing credits but take issue with the actual form of the refunds. More specifically, the Pagers assert Qwest should have issued them reimbursements rather than simply issue credits to their accounts. The Pagers also claim they requested reimbursement in their initial Petition for Declaratory Order. “They never asked for a billing credit.” Petition for Reconsid. at 2. In the alternative, the Pagers argue they should have the option of deciding how the credits should be applied to their Qwest accounts. *Id.*

**Commission Findings.** We decline the Pagers requests and find that it was appropriate to direct Qwest to issue billing credits in this case for four reasons.<sup>11</sup> First, the Pagers’ Petition for Declaratory Order simply stated that they “are entitled to recovery” of amounts paid or overcharged. Petition for Declaratory Order at 5. In other words, the Pagers’ initial pleading simply sought recovery – they did not specify the form or manner of refund.

Second, this is the second time the Pagers have pursued this issue. In their Petition to Amend the Liability Order No. 28601, the Pagers asked the Commission to remove the language “a billing credit or” so that the form of the refund would be a reimbursement. The Commission denied this request finding that the Pagers provided no justification for this change. Order No. 28626 at 2. That Order was a final decision appealable to the Supreme Court. *Id.* at 10. The

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<sup>11</sup> We noted in Order No. 29064 at nn. 8, 17 that “billing credits may not be appropriate” for Tel-Car because the company is no longer in business.

Pagers did not appeal. At that time, the Pagers remedy was to seek judicial review. The Commission will not permit the Pagers to now collaterally attack the prior Order in violation of *Idaho Code* § 61-625 (final and conclusive decisions shall not be attacked collaterally).

Third, as set out above, at least two pagers acknowledged they stopped paying their paging bills from Qwest. This fact coupled with the fact they sought much larger refunds than the Commission eventually ordered, leads us to infer that the credits may not exceed the arrearages.<sup>12</sup> If this is the case, it would be unreasonable to require cash reimbursements. See *Metrocall Order I* at ¶¶ 4, 12 (Oct. 2, 2001). Finally, *Idaho Code* § 61-641 (concerning overcharges by a utility) empowers the Commission to order Qwest to “make due reparation to the complainant therefore, with interest from the date of collection provided, no discrimination will result from such reparation.” (Emphasis added). The statute does not prescribe the form of the refund. In this instance, we find providing cash reimbursements would be discriminatory.

## II.

### Calculation of Amounts Due vs. Amounts Owed

We do not believe that the Commission’s intent, in its original orders in this case, was to determine what amounts were owed by the Pagers to Qwest at some time past on certain accounts, and compare that to the credit amounts, and thereby determine if the Pagers were entitled to cash payments or billing credits. Because the Pagers stopped paying their bills, it was clear to Qwest – and we believe to the Commission – that the Pagers would ultimately owe Qwest much larger amounts than the Commission-ordered credits.

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<sup>12</sup> In Qwest’s Motion to Dismiss and Answer to the Petition to Amend, the Company states that “PageData still owes Qwest a substantial sum after credits are applied.” Answer at 5.

Thus, Qwest understood the Commission to intend in Order No. 29555, that Qwest would perform that type of calculation. In fact, the Commission stated, “[b]ecause 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.”<sup>13</sup>

Indeed, that is the case today. PageData owes Qwest in excess of \$200,000, and Radio Paging’s balance is approximately \$20,000. Accordingly, Qwest did not understand the Commission to have made reference past point in time in determining what the Pagers “owe” Qwest.

However, even a 1999 date, and looking solely at wholesale interconnection services, Qwest believes that amounts owed by the Pagers exceeded the credits that would later be granted. The following table was prepared by Sheryl Fraser, Qwest’s expert:

Pager	Exhibit	Page	Service	Date	Balance
PageData	Qwest 203	70	Type 1 Paging	8-99	Billed \$120,246 Payments/Adjustments \$87,390 Balance \$32,856
		69 & 1	Private Line CRIS	8-99	\$3,750.50
		2-3	POTS	8-99	\$6,632.28
				9-99	\$7,170.64
		5-6	DID CRIS	8-99	\$5,144.92
				9-99	\$5,502.49
		12	DID CRIS	8-99	(\$8,223.52)
			Note: This credit balance was moved to IABS as part of the conversion process.		
				9-99	\$1,463.67
		13	Private	8-99	\$7,212.93

<sup>13</sup> Order No. 29555 at p. 21.

			Line IABS		
				9-99	\$7,911.46
Radio Paging	Qwest 201	1	Type 1	4-99	Billed \$53,335 Payments/Adjustments \$50,034 Balance \$3,301

Thus, Qwest does not believe that refunds are appropriate. Moreover, how would such refunds be calculated; that is, at what point in time would debits and credits be compared? What services would be counted in determining whether there is a positive or negative balance? What about the billing credits previously ordered by the Commission and already applied – should they now be reversed?<sup>14</sup>

### CONCLUSION

Qwest respectfully requests the Commission to look at this issue once more. If the Commission still believes, after considering Qwest's comments, that refunds should be provided to the Pagers, then Qwest requests further guidance on the questions stated above. Qwest would welcome an informal meeting of the parties and staff to discuss how these would be calculated. In the meantime, though, it might be helpful to convene the parties, with Sheryl Fraser attending, to try to work through the calculations.

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<sup>14</sup> Qwest applied the billing credits for Radio Paging and PageData more than one month ago.

DATED this 15<sup>th</sup> day of October, 2004.

Respectfully Submitted,

Adam Sherr  
Qwest Communications, Inc.  
1600 7th Avenue - Room 3206  
Seattle, WA 98191

and



---

William J. Batt  
James B. Alderman  
Batt & Fisher, LLP  
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Boise, Idaho 83702  
(208) 331-1000

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15<sup>th</sup> day of October, 2004, I caused a true and correct copy of the above and foregoing document to be served, in the manner indicated, on the following:

Jim Jones  
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By:   
\_\_\_\_\_  
William J. Batt

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Attorneys for Respondent/Respondent on Appeal/Appellant

**IN THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE JOINT PETITION  
OF ROBERT RYDER, DBA RADIOPAGING  
SERVICE, JOSEPH MC NEAL, DBA  
PAGEDATE 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. MC NEAL DBA  
PAGEDATE AND INTERPAGE OF IDAHO,  
AND TEL-CAR, INC.,

Petitioners/Appellants/Cross Respondents,

v.  
IDAHO PUBLIC UTILITIES COMMISSION,

Respondent/Cross Respondent,

and

QWEST CORPORATION,

Respondent/Respondent on Appeal/Cross  
Appellant.

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IDAHO PUBLIC  
UTILITIES COMMISSION

SUPREME COURT  
DOCKET NO. 29175

IPUC DOCKET NO. T-99-24

**AMENDED NOTICE OF  
CROSS APPEAL**

TO: THE ABOVE NAMED CROSS-RESPONDENTS, ROBERT RYDER dba RADIO PAGING SERVICE, JOSEPH B. MC NEAL DBA PAGEDATA AND INTERPAGE OF IDAHO, AND TEL-CAR, INC. AND THE IDAHO PUBLIC UTILITIES COMMISSION AND THE PARTIES' ATTORNEYS, JIM JONES, 1275 SHORELINE LANE, BOISE, IDAHO, 83702, DON HOWELL, 472 WEST WASHINGTON, BOISE, IDAHO, 83702 AND THE CLERK OF THE ABOVE ENTITLED ADMINISTRATIVE AGENCY.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Cross-Appellant Qwest Corporation (hereinafter "Qwest") appeals against the above named Cross-Respondents to the Idaho Supreme Court from Idaho Public Utilities Commission Order No. 29555, entered in the above entitled action on the 2<sup>nd</sup> day of August, 2004, and Order No. 29603, entered in the above entitled action on the 5<sup>th</sup> day of October, 2004.

2. The parties have a right to cross appeal to the Idaho Supreme Court. The orders described in paragraph 1 above as they are appealable final orders pursuant to Rule 15 of the Idaho Appellate Rules.

3. Preliminary statement of the issues on cross-appeal:

(a) Whether the Commission erred in ordering Cross-Appellant to credit or refund certain charges to Petitioners/Cross-Respondents for facilities used to deliver transit traffic, i.e., charges under Qwest's Idaho Service Catalog for dedicated transport used to deliver paging calls to Petitioners/Cross-Respondents from subscribers of third party carriers (telecommunications companies other than Qwest), delivered by third party carriers to Qwest for transport to Petitioners/Cross-Respondents for delivery to their paging customers.

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

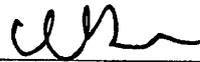
4. There has not been an order entered sealing any portion of the record regarding this matter.
5. Reporter's Transcript:
  - (a) No additional reporter's transcript is requested.
6. The Cross-Appellate does not request the inclusion of any additional documents, other than those added by the parties as appropriate.
7. I certify that:
  - (a) The appellate filing fee has been paid.
  - (b) That service has been made upon all parties required to be served pursuant to Rule 20 of the Idaho Appellate Rules.

DATED this 9<sup>th</sup> day of November, 2004.

Respectfully Submitted,

Adam Sherr  
Qwest Communications, Inc.  
1600 7th Avenue - Room 3206  
Seattle, WA 98191

and



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William J. Batt  
James B. Alderman  
Batt & Fisher, LLP  
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101 South Capital Blvd.  
Boise, Idaho 83702  
(208) 331-1000

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 9<sup>th</sup> day of November, 2004, I caused a true and correct copy of the above and foregoing document to be served, in the manner indicated, on the following:

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By:   
\_\_\_\_\_  
William J. Batt

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IDAHO PUBLIC  
UTILITIES COMMISSION

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Attorney for Petitioners/Appellants/Cross-Respondents

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

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

Supreme Court Docket No. 29175

*USW-*

IPUC Docket No. T-99-24

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

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

vs. )

IDAHO PUBLIC UTILITIES )  
COMMISSION, )

Respondent on Appeal, )

and )

QWEST CORPORATION, )

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

MOTION TO STRIKE QWEST CORPORATION'S CALCULATIONS PURSUANT TO  
ORDER NO. 29603 - 1

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

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

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

When this proceeding was initiated, the Petitioners alleged that Qwest had charged them for facilities and services that were required to be provided without charge under federal law. The Petitioners sought "recovery of amounts paid" commencing in September of 1996. *See, Agency Record on Appeal ("R"), p. 5.* At no time did Qwest file an answer asserting any affirmative defenses. Set-off is an affirmative defense which must be pleaded and proven by the person asserting it. According to Commission Rule 57.02.a and b, affirmative defenses must be separately stated in the answer and failure to do so generally prohibits the party wishing to rely on the affirmative defense from asserting it in the proceeding. *ADAPA 31.01.01.057.02.a. and b.* Not only must an affirmative defense be asserted in the answer, it

MOTION TO STRIKE QWEST CORPORATION'S CALCULATIONS PURSUANT TO  
ORDER NO. 29603 - 2

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

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

According to the Idaho Supreme Court:

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

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

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

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

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

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

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

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

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

MOTION TO STRIKE QWEST CORPORATION'S CALCULATIONS PURSUANT TO  
ORDER NO. 29603 - 4

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

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

MOTION TO STRIKE QWEST CORPORATION'S CALCULATIONS PURSUANT TO  
ORDER NO. 29603 - 5

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

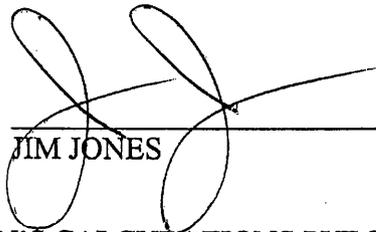
Moreover, how would such refunds be calculated; that is, at what point in time would debits and credits be compared? What services would be counted in determining whether there is a positive or negative balance? What about the billing credits previously ordered by the Commission and already applied –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

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

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

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

DATED this 10<sup>th</sup> day of November, 2004.

  
\_\_\_\_\_  
JIM JONES

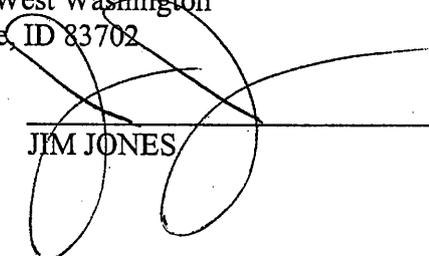
MOTION TO STRIKE QWEST CORPORATION'S CALCULATIONS PURSUANT TO  
ORDER NO. 29603 - 6

**CERTIFICATE OF SERVICE**

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

WILLIAM J. BATT  
Marshall, Batt & Fisher  
P.O. Box 1308  
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DON HOWELL  
Idaho Public Utilities Commission  
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Boise, ID 83702

  
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JIM JONES