IN THE SUPREME COURT OF THE STATE OF IDAHO

JOSEPH B. MCNEAL, d/b/a PAGEDATA,	)	
	)	
Petitioner/Appellant,	)	
	)	
	)	
vs.	)	Supreme Court Docket No. 31844
	)	
IDAHO PUBLIC UTILITIES COMMISSION,	)	
	)	
Respondent On Appeal	)	IPUC Docket No. QWE-T-03-25
	)	
and	)	
	)	
QWEST CORPORATION,	)	
	)	
Respondent/Respondent on Appeal	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE IDAHO PUBLIC UTILITIES COMMISSION
Commissioner Paul Kjellander, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This action was initially instituted by Petitioner/Appellant ("PageData"), who operated commercial mobile radio services ("CMRS") in southern Idaho on and after November 1, 1996, to compel Respondent on Appeal, Qwest Corporation ("Qwest"), to pay reciprocal compensation for terminating Qwest-originated traffic per the Idaho Public Utilities Commission ("IPUC") approved interconnection agreement and the federal Telecommunications Act of 1996 ("Act"), 47 U.S.C. §§ 251 et seq., and Idaho Code §§ 62-602(5) and 62-615(1) and (3). Subsequently the IPUC ruled on a motion to dismiss filed by Qwest that PageData had contracted away its federally granted statutory right to file a complaint concerning the interconnection agreement at the IPUC. PageData appeals that ruling.

B. Course of Proceedings

This proceeding was commenced at the IPUC by Joseph B. McNeal d/b/a PageData on October 31, 2003. *R, Vol, I, p. 97.* The complaint sought reciprocal compensation payments from Qwest per the interconnection agreement between PageData and Qwest, which was approved by the IPUC on February 21, 2003 in Order No. 29198. *R, Vol. I, p. 75.*

The IPUC dismissed PageData's complaint without prejudice in Order No. 29687, which was issued on January 19, 2005. *R, Vol, I., p. 210.* The IPUC "decline[d] jurisdiction in this case" and found that "although section 13.14 does not limit the parties right to seek relief from this Commission, the arbitration process is the first and foremost method for resolving disputes under the Interconnection Agreement" *Id. at 215.*

PageData filed a timely Petition for Reconsideration on February 9, 2005, contending the Order was "unreasonable, unlawful, erroneous, and not in conformity with law". *R., Vol. I, p. 217.*

The IPUC denied the Petition for Reconsideration on March 9, 2005, in Order No. 29726. *R., Vol. I, p. 224.* The IPUC based its Order on several findings: (1) "arguments and evidence of unconscionability must be presented to a court – not the Commission" (*emphasis in original*); *Id. p. 227.* (2) "the construction and enforcement of contracts is generally 'a matter which lies in the jurisdiction of the courts and not the public utilities commission.'"; *Id.* and (3) "for an arbitration provision to be voided as unconscionable, it must be both procedurally and substantively unconscionable." *Id.* The IPUC declined to "engage in interpretation and enforcement of this particular agreement that contains an arbitration clause." *Id. at 229.*

PageData filed a timely Notice of Appeal to this Court on April 19, 2005. *Id. p. 230.*

C. Statement of Facts

The Act establishes the requirement for all local exchange carriers ("LECs") "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). The Act further states:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement...
>
> 47 U.S.C. § 252(e)(1).

Both PageData and Qwest are obligated to abide by 47 U.S.C. § 415, Limitations of Actions:

> (a) Recovery of charges by carrier
>
> All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.

Also, both PageData and Qwest are obligated to abide by Section 13.14 of the interconnection agreement:

> No dispute, regardless of the form of action, arising out of this Agreement, may be brought by either Party more than two (2) years after the cause of action accrues.

R, Vol. I, at 34.

II. ISSUES PRESENTED ON APPEAL

Because of the immense complexity of the case and a contractual two-year statute of limitation on a cause of action between Qwest and PageData, PageData is satisfied to let the two-year statute of limitation become the trier of fact on the monetary issues filed in PageData's original complaint. The IPUC dismissed PageData's complaint without prejudice. To this day Qwest continues not to pay reciprocal compensation as outlined in the IPUC-approved interconnection agreement. PageData limits this appeal to the narrow issues of:

(1) Whether the IPUC erred by granting Qwest's request for motion to dismiss?

(2) Whether the IPUC erred by blue-penciling the interconnection agreement?

(3) Whether the IPUC erred by relying on non-applicable cases?

(4) Whether Qwest is contractually bound to accept PageData's selected method of relief and is without recourse?

(5) Whether the IPUC erred by not holding a hearing on the unconscionability of the arbitration clause?

III. ARGUMENT

A. Summary of Argument

All interconnection agreements must be filed with the IPUC for approval, whether or not they were entered into privately or through intervention of the FCC, the IPUC, or an arbitrator. 47 U.S.C. § 252(e)(1).

It is in the public interest that the Idaho Supreme Court rule that the IPUC is responsible for the enforcement of interconnection agreements that the IPUC approves in the State of Idaho. 47 U.S.C. § 251 et seq. and I.C. §§ 62-602(5) and 62-615(1) and (3)

Commission Rule of Procedure No. 13 provides that the IPUC's rules "will be liberally construed to secure just, speedy and economical determination of all issues presented to the Commission." IDAPA 31.01.01.013

A private arbitrator has the authority to settle disputes, but the private arbitrator does not have the authority to immediately approve the amended interconnection agreement under 47 U.S.C. § 252 like the state commission can. The private arbitrator cannot affect other carriers, nor can the arbitrator allow other carriers to adopt the revised interconnection agreement. There is no judicial economy in arbitrating every dispute because then it becomes an issue of the company with the largest pocketbook wins every dispute through financial attrition.

B. Standard of Review

This instant case involves the interpretation of applicable federal law, which is not within the expertise of the IPUC. It would be appropriate for the Court to apply a heightened standard of review. In this regard, it might be mentioned that this is the first case of this nature to be considered by the IPUC.

The Idaho Supreme Court discussed the standard of review for IPUC proceedings in Application of Hayden Pines Water Co., 111 Idaho 331, 723 P.2d 875 (1986). After noting that the standard of review for IPUC orders is addressed in I.C. § 61-629, the Court observed that it had applied a substantial evidence rule for such cases. *Id. at 334-5.* The substantial evidence standard was adopted in recognition that the IPUC "is a fact finding, quasi-legislative body authorized to investigate and determine issues presented by a utility's petition for increased rates." *Id. at 335.*

It is important from a standpoint of the standard of review to recognize that the main substantive issue involved in this case – PageData's federal statutory right to have its complaint heard by the IPUC – is a primary function of the Act and subsequent federal rulings. This case is a mixture of federal and state law. The Act is the controlling law on the question of whether or not PageData's complaint is adjudicated by the IPUC, while the more procedural aspect of addressing the complaint is primarily a function of state law. Any modifications or interpretations of an interconnection agreement that has been previously approved by the state commission must be filed with the state commission to be available without delay for 1) execution of the terms and conditions by carriers with the same interconnection agreement and 2) adoption of the complete interconnection

agreement by other telecommunications carriers. 47 U.S.C. § 252(i) and IDAPA 31.01.01.013

The Supremacy Clause of the United States Constitution requires that the IPUC give way to federal authority.

The standard of review of IPUC orders is constitutionally unique under Idaho state law, but IPUC orders are subject to *de novo* review when the IPUC deprives entities of their federally granted statutory rights. For example, when the IPUC issues rulings or orders that create economic barriers or create a legal requirement that prohibits the ability of any entity to provide any interstate or intrastate telecommunications service in violation of 47 U.S.C. § 253, then the ruling or order is subject to *de novo* review.

47 U.S.C. § 252(h) requires the IPUC to make a copy of each agreement approved by the IPUC available for public inspection. 47 U.S.C. § 252(i) requires the LEC to make interconnection agreements available to other telecommunications carriers for adoption. When the IPUC issues orders that hinder or delay the filing of interconnection agreements or the enforcement of previously approved interconnection agreements and deprive carriers of their federally granted rights, the orders are subject to *de novo* review. IDAPA 31.01.01.013

When the IPUC issues an order to dismiss, makes a summary judgment, or judgment in the pleadings for a complaint that is not in line with the standard set by the Supreme Court and ignores the IPUC's own regulations about timely filings, then the order is subject to *de novo* review.

Because of the Supremacy Clause in the United States Constitution, it is expected that the IPUC will follow federally mandated orders issued by the FCC and when the IPUC does not, then the IPUC orders are subject to *de novo* review.

C. The IPUC Erred by Granting Qwest's Request for Motion to Dismiss

The IPUC erred by granting Qwest's motion to dismiss. Qwest did not meet the high burden of proof threshold in order for the IPUC to grant Qwest's motion to dismiss. Qwest's response to PageData's complaint was a request to dismiss the complaint:

> Qwest does not address PageData's allegations and contentions, but raises only a single point that the Commission should consider before determining whether to open a complaint docket. For the reasons stated below, the Commission should decline to open a complaint docket, and should dismiss PageData's filing.
>
> *R., Vol. I, p. 109.*

1. Motion to Dismiss

A motion to dismiss pursuant to Rule 12 of the Idaho Rules of Civil Procedure is generally disfavored, and is rarely granted. In deciding a motion to dismiss under I.C.R.P. Rule 12, the standard of review has been stated by the Supreme Court to be as follows:

> On appeal from the dismissal of a complaint pursuant to Rule 12(b)(6), I.R.C.P., the nonmoving party is entitled to have all inferences from the record viewed in its favor. Orthman v. Idaho Power Co., 126 Idaho 960, 961, 895 P.2d 561, 562 (1995). In order to withstand a motion to dismiss, the nonmoving party must allege all essential elements of the claims presented. If the plaintiff can prove no set of facts upon which the court could grant relief, the complaint should be dismissed. See Garner v. Hollifield, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975).

Johnson v. Fairfield, 138 Idaho 331, 334 (2003). Therefore, in the instant case, Petitioner/Appellant, as the nonmoving party, is entitled to have all inferences from the record viewed in its favor, and the motion should not be granted if the Petitioner/Appellant has made all allegations essential to the claim it has presented.

IPUC accepts as true the well-pleaded factual allegations contained in the Petitioner's complaint. Taking the facts alleged in the complaint as true, if it appears certain that the Petitioner cannot prove any set of facts that would entitle it to the relief it seeks, dismissal is proper. It must appear beyond any doubt that the Petitioner can prove no set of facts in support of his claim that would entitle him to relief. Even if it appears an almost certainty that the facts as alleged in the complaint cannot be proved to support the claim, the complaint cannot be dismissed so long as a claim is stated. If a required element, a prerequisite to obtaining the requested relief, is lacking in the complaint, dismissal is proper. While dismissal under ICRP Rule 12(b)(6) ordinarily is determined by whether the facts allege, if true, give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings.

If, in a IRCP Rule 12(b)(6) motion to dismiss, matters outside the pleading are presented to and not excluded by the IPUC, the motion shall be treated as one for summary judgment and disposed of as provided in IRCP Rule 56.

2. Motion for Summary Judgment

A motion for summary judgment requires that the movant has the initial burden of showing the absence of a genuine issue of material fact. Under Rule 56(e) of the IRCP the burden shifts to the non-movant to go beyond the pleadings and by affidavits, or by the depositions, answers to interrogatories, and admissions on file designate specific facts showing that there is a genuine issue for trial/hearing. That burden is not discharged by mere allegations or denials. All legitimate factual inferences must be made in favor of the non-movant.

IRCP 56(c) states summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. Thomson v. Idaho Ins. Agency, Inc., 126 Idaho 527, 529, 887 P.2d 1034, 1036 (1994).

The initial burden of establishing the absence of a genuine issue of material fact rests with the moving party. *See* Thomson v. Idaho Ins. Agency, Inc. 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994). Once the moving party meets the initial burden, the "adverse party may not rest upon the mere allegations or denials of that party's pleadings but . . . must set forth the specific facts showing that there is a genuine issue for trial." IRCP 56(e). The non-movant must rely on something more than speculation. *See* G&M Farms v. Funk Irrigation Co., 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). A mere scintilla of evidence is not enough to create a genuine issue. *Id.*

On appeal, the Supreme Court exercises free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct.App. 1986). The Court should exercise free review over the IPUC's conclusions of law. Marshall v. Blair, 130 Idaho 675, 946 P.2d 975 (1997). Thus the Supreme Court may substitute its view for that of the IPUC on any legal issue.

3. Judgment on the Pleadings

By its own admission, Qwest did not answer the complaint. "Qwest's Limited Response is not an answer under the IPUC Rules of Procedure." *R, Vol I, p. 110.* Qwest sought instead to exercise its rights under IDAPA 31.01.01.057.02, but it is clear and indisputable that Qwest's response was not timely filed and did not comply with IDAPA 31.01.01.057. In addition the IPUC did not issue an Order granting any extensions of time.

Qwest sought and was granted an extraordinary remedy from the IPUC without meeting its burden for a motion to dismiss, motion for summary judgment, or judgment on the pleadings without any explanation from the IPUC. The IPUC exceeded its authority by issuing an Order to Dismiss on Qwest's pleadings without Qwest meeting its burden of extinguishing general issues of material facts.

D. The IPUC Erred by Blue-Penciling the Interconnection Agreement

The interdependent aspects of the arbitration clause should not be severed. In effect, the IPUC unlawfully blue-penciled the dispute resolution Section 13.14 of the interconnection agreement and rewrote it. Severing allows the IPUC to treat independent clauses independently, whereas blue-penciling implies actual editing of the interdependent sections to fix the interconnection agreement. As the drafter of the interconnection agreement, Qwest has the obligation and responsibility to make the contract language clear.

The difference between the options to go to the IPUC, FCC, or AAA arbitration should be read in light of the Act to promote competition and the public interest to make interconnection agreements publicly available for adoption under 47 U.S.C. § 252(i).

Compelling AAA arbitration, which cannot accomplish the aspects of 47 U.S.C. § 252(i), is unlawful editing of the interconnection agreement. The IPUC's Order deprives PageData of its judicial economical and speedy ruling. There is no Idaho statute to make an AAA arbitration ruling available to other similarly situated carriers as required by 47 U.S.C. § 252. This is the exclusive domain of state commissions.

E. The IPUC Erred by Relying on Non-applicable Cases

In reaching its decision, the IPUC erred by relying upon several cases that are not applicable. International Assoc. of Firefighters, Local 672 v. City of Boise, 136 Idaho 162, 168, 30 P.3d 940, 946 (2001) and Driver v. SI Corportion, 139 Idaho 423, 426, 80 P.3d 1024, 1027 (2003) *quoting* Hecla Mining Co. v. Bunker Hill Co., 101 Idaho 557, 562, 617 P.2d 861, 866 (1980). No rational relationship can be made between these cases cited and PageData's complaint against Qwest. For example, the International Association of Firefighters' arbitration decision is not required by federal and state statute to be publicly available for review with the same terms and conditions being made available to every other fire department in the state of Idaho, as is the case with interconnection agreements under the Act.

47 U.S.C. § 252 gives the state commissions the exclusive right to make first instance determinations with regard to interconnection disputes, which supercedes the AAA arbitration option unless both parties agree otherwise. Unlike the cases cited by the IPUC in support of their decision, 47 U.S.C. § 252(i) requires that the resolution of a reciprocal compensation dispute be filed and approved at the IPUC as a clarification or amendment to the interconnection agreement and available for adoption by other carriers.

Currently there is no mechanism in Idaho statutes to immediately incorporate a private AAA arbitration decision into filed interconnection agreements to make the decision available to other carriers under 47 U.S.C. § 252(i). The AAA arbitration decision would not be legally binding for adoption under 47 U.S.C. § 252(i) and therefore would be a violation of the Act. There is also no mechanism for the IPUC to approve the AAA arbitration decision. The only two options in the dispute resolution Section 13.14 of the interconnection agreement that will satisfy 47 U.S.C. § 252, is a formal complaint either filed at the IPUC or the FCC.

In its Order No. 29726, the IPUC stated, "although there may be no statutory mechanism to publish an arbitration decision, we are unaware of any impediment why either party to the arbitration could not file such a decision as an amendment or clarification to their Interconnection Agreement." *R, Vol. I, at 228.* This flatly contradicts the IPUC Order No. 29655 dated December 9, 2004 and Order No. 29604 dated October 6, 2004 (*In the Matter of the Application of PageData for Approval of an Amendment to a Paging Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(e)*). The IPUC claimed that it was not a party to the proceedings, that the parties still disagreed to amendments to the interconnection agreement, there was not enough specificity in the amendment, and claimed that because the FCC staff was a party to the negotiations the FCC was better able to remedy the continuing dispute.

The same parameters would apply if PageData were to take this complaint to a private arbitrator. The IPUC would not be a party to the arbitration. Qwest would likely disagree with any ruling. The IPUC would believe that any remedy to the continuing

dispute would be better resolved by re-arbitrating. This potential quagmire is avoided by having the IPUC adjudicate the complaint in the first instance.

F. Qwest is Contractually Bound to Accept PageData's Selected Method of Relief and is Without Recourse

The parties have agreed in advance through the dispute resolution clause (Section 13.14) in the interconnection agreement that three venues of relief are acceptable (arbitration, the Commission, and the FCC) in lieu of federal and state court. *R, Vol. I, at 34.*

Qwest used selective wordsmithing to interpret FCC decisions and Idaho law[1] in their points 3 and 4. *R, Vol. I, at 117.* Qwest said, "The FCC recognized that a state commission may not have responsibility to decide a dispute under an interconnection agreement if the parties have contractually agreed to a dispute resolution." *R, Vol. I, at 117.* The FCC recognized:

> We note that, in other circumstances, parties **may** be bound by dispute resolution clauses in their interconnection agreement to seek relief in a particular fashion, and, therefore, the state commission would have no responsibility under section 252 to interpret and enforce an existing agreement. In this case, however, the relevant interconnection agreements do not expressly specify how the disputes shall be resolved. *(emphasis added)*[2]

47 U.S.C. § 252 gives the state commission the responsibility to interpret and enforce existing agreements. In this circumstance the interconnection agreement dispute resolution clause between PageData and Qwest specifically excludes state and federal court and includes options for the state commission, the FCC or private arbitration.

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[1] Previous Commission Orders (including Order 29219) and I.C. § 62-615(1) give the Commission full power to implement the Act, including interconnection agreements that are filed in Idaho.

[2] In the Matter of Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-52, Memorandum Opinion and Order, FCC 00-216 (re. June 14, 2000)

Specifically the interconnection agreement says, "Nothing in this Section shall be construed to waive or limit either Party's right to seek relief from the Commission or the FCC as provided by state or federal law." *R, Vol, I. at 34.* Therefore, it is clear that the IPUC does have authority to decide a dispute under the interconnection agreement, if that venue is selected by either PageData or Qwest.

Under various circumstances of disputes each particular option for dispute resolution, namely the IPUC, FCC, or private arbitration, is better suited for relief than the other two options. In this instance, PageData chose the IPUC.

Private arbitration can only exist by express contractual agreement and the powers of the arbitrator so appointed are strictly limited to the contractual provision referring the dispute to arbitration. PageData did not waive or limit its right to bring disputes under the interconnection agreement before the IPUC or the FCC for resolution.

It should be noted that 47 U.S.C. § 252(b) specifically excludes private arbitration in the resolution of disputes for initial negotiation of an interconnection agreement in favor of arbitration by the state commission. Again, 47 U.S.C. § 252 gives the state commission the authority to interpret and enforce existing interconnection agreements.

PageData notified Qwest in writing that there was a dispute under the interconnection agreement. Letters were passed back and forth between the companies. PageData asked Qwest how it wanted to resolve the dispute and Qwest responded by stonewalling and not answering. Therefore, Qwest left it to PageData to choose the mechanism for relief. PageData selected the IPUC option for resolution of the dispute as provided in the interconnection agreement. After PageData filed the complaint with the IPUC, Qwest claimed PageData should have sought AAA arbitration. Qwest is

contractually bound and without recourse to accept PageData's decision and to take action to resolve the dispute.

PageData had personal knowledge that there were at least two other carriers with the same interconnection agreement approved by the IPUC in which Qwest was not paying reciprocal compensation. PageData chose the IPUC because it was the most direct and cost-efficient resolution and would clarify the issue for other telecommunications carriers under 47 U.S.C. § 252(i). Qwest should be prohibited from filing an untimely motion to dismiss which violates the dispute resolution clause and IDAPA 31.01.01.057.02 by limiting the venue that PageData has chosen.

The IPUC was in error when it limited PageData in the IPUC's Order No. 29687 by excluding PageData's contractual option to seek relief from the IPUC. *R, Vol. I, at 215.*

G. The IPUC Erred by not Holding a Hearing on the Unconscionability of the Arbitration Clause

In its Petition for Reconsideration, PageData asserted that I.C. § 28-2-302 requires the IPUC to convene a hearing so PageData may present evidence regarding the unconscionability of the arbitration clause due to the IPUC's actions. *R, Vol. I, p. 217.* The IPUC made the arbitration clause procedurally unconscionable because the IPUC granted Qwest's motion to dismiss based on the arbitration clause without holding a hearing. According to the Act, state and local governments may not enact laws, regulations, or rules which act as barriers to market entry.

In Order No. 29726, dated March 9, 2005, the IPUC ruled that the statute I.C. § 28-2-302 "does not confer jurisdiction upon this Commission" because the IPUC is not a