

Sup-t-05-01

IN THE SUPREME COURT OF THE STATE OF IDAHO

Idaho Public Utilities Commission
Office of the Secretary
RECEIVED

JOSEPH B. MCNEAL, D/B/A PAGEDATA,)
)
Petitioner-Appellant,)

SEP - 7 2005

Boise, Idaho

vs.)

Supreme Court Docket No. 31844

IDAHO PUBLIC UTILITIES COMMISSION)
and QWEST CORPORATION,)

Respondents)

IPUC Docket No. QWE-T-03-25

REPLY BRIEF OF APPELLANT

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

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I. STATEMENT OF THE CASE

A. Course of Proceedings

PageData would like to clarify certain matters regarding the course of proceedings as portrayed by the Idaho Public Utility Commission (“IPUC”) and Qwest Corporation (“Qwest”) in their respective briefs.

Congress had envisioned that section 252(i) would give smaller carriers the ability to adopt interconnection agreements with terms and conditions negotiated by larger carriers (with more financial resources and quality legal representation) that the smaller carriers would not otherwise have been able to negotiate.

On-going litigation between Qwest and PageData is facilitated and kindled by the IPUC’s defiance of its responsibility to enforce the federal Telecommunications Act of 1996 (“Act”) (and specifically Sections 251(b) and (c), and 252(d) and (e)) including requiring Qwest to file all interconnection agreements entered into by Qwest with other carriers who operate within the state of Idaho. The litigation between PageData and Qwest could have been avoided by the IPUC simply having Qwest file previously unfiled interconnection agreements that have been identified by the IPUC counterparts in the states of Iowa, Minnesota, Colorado, New Mexico and Arizona and enforcing those terms and conditions included in commission-approved interconnection agreements.

Specifically affecting PageData are two interconnection agreements identified in Exhibit A). All five state commissions that investigated Qwest for unfiled agreements, identified the Arch and PageNet secret, unfiled agreements as interconnection agreements that were required to be filed with the state commissions. These agreements provided

interconnection facilities (telephone lines), reciprocal compensation (money paid by ILECs such as Qwest to carriers such as PageData for terminating Qwest-originated traffic), and dispute resolutions not available to small Idaho carriers because the IPUC is in continuous violation of federal law for not enforcing federally mandated filing requirements.¹ Exhibit B shows that these unfiled and secret interconnection agreements were effective in the state of Idaho.

Because of the IPUC's lack of enforcement of the Act and the IPUC's failure to act on credible evidence presented by PageData and public utility commissions in five states, PageData has had to litigate for over six years for terms and conditions that it could have simply adopted under section 252(i).² Another case that PageData has before the Supreme Court falls in this same category because PageData could have adopted the unfiled dispute resolution terms and conditions, which included refunds for overcharges and reciprocal compensation on a going forward basis.³

PageData had to bring complaints before the IPUC, Federal Communications Commission ("FCC"), and federal court in order to receive the same terms and conditions that Arch received from voluntary negotiations with Qwest. The terms that should have been available per the Act but were not received by PageData until various complaints

¹ "It is the [Commission's] duty, if it chooses to regulate, not the other party's, to ensure that the agreement meets the requirements of the Act both at the time of arbitration, 47 U.S.C. § 252(c), and at time of approval, 47 U.S.C. § 252(e)(2)(B). Furthermore, it is the [Commission's] function, not the other party's, to enforce the agreement." Michigan Bell Telephone Co. v. Climax Telephone Co., 202 F.3d 862, C.A.6 (Mich.) 2000.

² As of July 13, 2004, individual terms and conditions are no longer available for adoption under section 252(i) using "pick and choose". In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier, CC Docket No. 01-338, 19 FCC Rcd 13494 (rel. July 13, 2004)(FCC adoption of "all or nothing" rule). At the time of the various state commission investigations into Qwest's unfiled interconnection agreements, the option of adopting individual terms and conditions from approved interconnection agreements was still available.

³ Robert Ryder dba Radio Paging Service, Joseph B. McNeal dba PageData and InterPage of Idaho, Inc., and Tel-Car, Inc. v. Idaho Public Utilities Commission and Qwest Corporation, Supreme Court Docket No. 29175.

were filed include 1) the adoption of the Arch interconnection agreement in the first instance; 2) adoption of the Arch amendment for a single point of presence/interconnection; and 3) digital interconnection facilities themselves. This instant complaint was filed because Arch is receiving its flat rate reciprocal compensation per telephone line on its interconnection agreement approved by the IPUC, but Qwest has refused to pay PageData its flat rate reciprocal compensation per the same interconnection agreement approved by the IPUC. The Idaho Supreme Court has a long-standing position that an aggrieved party has the right to his day in court.

The IPUC would have PageData believe that PageData's federally granted statutory rights have not been denied by the IPUC, the old Qwest monopoly is broken, that political donations to IPUC employees, Qwest's indirect hiring of IPUC employees⁴, and extravagant lunches have no influence on the IPUC's enforcement decisions.

There is no denying that as well as being a quasi-legislative body, the IPUC is a political body. It is not politically convenient for the IPUC to enforce the Act on interconnection agreements that it has approved. These unfiled interconnection agreements and the lack of enforcement of approved interconnection agreements by the IPUC has decreased competition and caused Idaho consumers to pay more for telecommunications services than they otherwise would have had to pay.

⁴ Mr. John R. Hammond, Jr., is currently employed by Qwest's Counsel of Record (Batt & Fisher LLP), and signed Qwest's Reply Brief in this case (p. 17), but was previously the IPUC's legal staff member assigned PageData's initial complaint against Qwest, which is currently before the Court (Supreme Court Docket No. 29175). Mr. Hammond was also part of the IPUC's decision-making process for the decision not to require Qwest to file all unfiled interconnection agreements identified by counterpart state commissions from their investigations of Qwest.

II. ARGUMENT

A. Non-Applicable Case Law

The IPUC cited numerous cases that are not applicable to telecommunications carriers with an interconnection agreement approved by the IPUC according to 47 U.S.C. § 252 because the cases have been superseded, vacated, or overridden by federal law.

The following cases quoted by the IPUC are not applicable:

Case Law Cited by IPUC	IPUC Stance	Not-Applicable or Overridden By
<i>Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co.</i> , 98 Idaho 692, 696, 571 P.2d 753, 757 (1977)	Enforcement of contracts is matter of courts and not public utilities commission (IPUC Brief, p. 13, 16, 20)	<ul style="list-style-type: none"> • 47 U.S.C. § 252 • I.C. §§ 62-602(5) and 62-615(1) and (3) • <i>In the Matter of Starpower Commun. LLC, Petition for Preemption of Jurisdiction of the Virginia State Corp. Commission Pursuant to Section 252(e)(5) of the Tel. Act of 1996</i>. CC Docket No. 00-52, Memorandum Opinion and Order, FCC 00-216 (re. June 14, 2000) • <i>Bellsouth Tel., Inc. v. MCIMetro Access Trans. Svcs., Inc.</i> 317 F.3d 1270 • <i>Michigan Bell Tel. Co., v. Strand</i>, 305 F.3d 580 (6th Cir.)(2002) • <i>Michigan Bell Tel. Co., v. Climax Tel. Co.</i>, 202 F.3d 862, C.A.6 (Mich.), 2000
<i>Idaho Power Co. v. Cogeneration, Inc.</i> , 134 Idaho 738, 9 P.3d 1204 (2000)	Enforcement of contracts is matter of courts and not public utilities commission	
<i>Afton Energy v. Idaho Power Co.</i> , 111 Idaho 925, 929, 729 P.2d 400, 404 (1986)	Both parties must agree to let the IPUC settle the contractual dispute	
<i>International Assoc. of Firefighters, Local 672 v. City of Boise</i> , 136 Idaho 162, 168, 30 P.3d 940, 946 (2001)	Arbitration is favored remedy.	
<i>Driver v. SI Corporation</i> , 139 Idaho 423, 426, 80 P.3d 1024, 1027 (2003)	Both parties consented to substitute arbitration for judgment of the court	
<i>Hecla Mining Co. v. Bunker Hill Co.</i> , 101 Idaho 557, 562, 617 P.2d 861, 866 (1980)	Both parties consented to substitute arbitration for judgment of the court	

Case Law Cited by IPUC	IPUC Stance	Not-Applicable or Overridden By
<p><i>A.W. Brown Company v. Idaho Power Company</i>, 121 Idaho 812, 815, 828 P.2d 841, 844 (1992)</p>	<p>Supreme Court has limited jurisdiction to review decisions of the Commission (IPUC Brief, p. 9) Questions of law review limited to determination if Commission pursued its authority. (IPUC Brief, p. 10)</p>	<p>“State agency’s interpretation of federal statutes is not entitled to the deference afforded a federal agency’s interpretation of its own statutes under <i>Chevron</i>.” <i>Michigan Bell Telephone Co. v. Strand</i>, 305 F.3d 580 (quoting <i>Orthopaedic Hosp. V. Belshe</i>, 103 F.3d 1491, 1495 (9th Cir. 1997) (referring to <i>Chevron U.S.A, Inc., v. Natural Res. Def. Council, Inc.</i>, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).</p>
<p><i>Industrial Customers of Idaho Power v. Idaho PUC</i>, 134 Idaho 285, 288, 1 P.3d 786, 789 (2000)</p>	<p>If the Commission’s findings are supported by substantial, competent evidence this Court must affirm those findings (IPUC Brief, p. 9)</p>	<p>“Nothing in this Section [13.14] 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.” IPUC-Approved Interconnection Agreement between PageData and Qwest, <i>R., at 34</i></p>
<p><i>Hulet v. Idaho PUC</i>, 138 Idaho 476, 478, 65 P.3d 498, 500 (2003)</p>	<p>If the Commission’s findings are supported by substantial, competent evidence this Court must affirm those findings even if the Court would have made a different choice. (IPUC Brief, p. 9) Questions of law review limited to determination if Commission pursued its authority. (IPUC Brief, p. 10)</p>	<p>“Nothing in this Section [13.14] 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.” IPUC-Approved Interconnection Agreement between PageData and Qwest, <i>R., at 34</i></p>
<p><i>Application of Boise Water Corp.</i>, 82 Idaho 81, 86, 349 P.2d 711, 713 (1960)</p>	<p>Commission’s ruling not set aside unless failed to follow the law or abused its discretion. (IPUC Brief, p. 10)</p>	<p>“Nothing in this Section [13.14] 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.” IPUC-Approved Interconnection Agreement between PageData and Qwest, <i>R., at 34</i></p>
<p><i>Rosebud Enterprises v. Idaho PUC</i>, 128 Idaho 609, 618, 917 P.2d 766 (1996)</p>	<p>Sufficient findings to permit reviewing court to determine the PUC has not acted arbitrarily. (IPUC Brief, p. 10)</p>	<p>“Nothing in this Section [13.14] 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.” IPUC-Approved Interconnection Agreement between PageData and Qwest, <i>R., at 34</i></p>

B. The IPUC Erred by Treating Interconnection Agreements as Any Other Contract

Qwest has asserted and the IPUC erred by agreeing with Qwest that interconnection agreements should be treated as contracts and thereby not in the jurisdiction of the IPUC. Qwest and the IPUC cited cases (Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co., 98 Idaho 692, 696, 571 P.2d 753, 757 (1977) and Idaho Power Co. v. Cogeneration, Inc., 134 Idaho 738, 9 P.3d 1204 (2000) in which the Idaho Supreme Court ruled the IPUC did not have authority to enforce contracts. Since the implementation of the Act the rulings cited by the IPUC only apply to non-telecommunications utility monopolies under the jurisdiction of the IPUC. As far as telecommunications companies, these rulings are superseded by the Act itself, I.C. §§ 62-602(5) and 62-615(1)⁵ and (3), and U.S. Court of Appeals rulings that specifically state that interconnection agreements are not regular contracts and are enforced by the state commissions unless that federally granted statutory right is specifically waived in the interconnection agreement.

In Jackson Transit Auth. v. Local Div. 1285, 457 U.S. 15, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982), the Supreme Court held that a contract enforcement action stated a federal claim, “if Congress intended that [the contracts] . . . be ‘creations of federal law,’ . . . and that the rights and duties contained in those contracts be federal in nature.” *Id.* At 23, 102 S.Ct. at 2207 (quoting Machinists v. Central Airlines, Inc., 372 U.S. 682, 692, 83 S.Ct. 956, 962, 10 L.Ed.2d 67 (1963)). The interconnection agreement signed by PageData and Qwest is indeed a creation of federal law—namely, the Act—and does

⁵ “The commission shall have full power and authority to implement the federal telecommunications act of 1996...” I.C. § 62-615(1)

contain federal rights and duties—specifically, those enumerated in section 251 of that Act. It is the responsibility of the IPUC to enforce the provisions on an interconnection agreement approved by the IPUC in the first instance.⁶

The U.S. Court of Appeals, Eleventh Circuit ruled that:

It would be illogical to say that the [IPUC's] interest in an interconnection agreement is extinguished as soon as the agreement is approved, and that the agreement should thereafter be treated as any other contract.

Bellsouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.
317 F.3d 1270

C. The State Commission has the Authority to Enforce Interconnection

Agreements After the Agreements have been Approved

To address the natural monopoly in place in the telecommunications industry and promote competition in local telephone service, Congress passed the Act in 1996. Its regulatory scheme was designed to counteract the deterrence of competition inherent in the high, fixed initial cost of telephone service and the need for all telecommunications companies to interconnect with one another. Thus, in order to open telephone markets to competition, it required incumbent Local Exchange Carriers, such as Qwest, to share access with companies like PageData. The Act established the duty for local exchange carriers to “establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5)

As a result the state commissions have the duty to ensure compliance with the approved interconnection agreement, including the enforcement of reciprocal

⁶ 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)

compensation payment, and ensure the regulatory scheme envisioned by Congress to promote competition in an area that was once a monopoly.

The U.S. Court of Appeals, Eleventh Circuit ruled that:

Footnote 9: A state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved. . . . To deprive the state commission of authority to interpret the agreement that it has approved would thus subvert the role that Congress prescribed for state commissions.

Bellsouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.
317 F.3d 1270

To promote competition, the state commission's interpretation must be in accordance with sections 251 and 252 of the Act.

At least one circuit has described state commissions as "deputized federal regulator[s]" authorized to exercise regulatory power and ensure compliance with federal law as set out in the [Act]. MCI Telcoms. Corp. v. Illinois Bell Tel. Co., 222 F.3d 323, 344 (7th Cir. 2000). Interconnection agreements are tools through which the [Act] is enforced.

Id.

In Michigan Bell Telephone Co. v. Strand the U.S. Sixth Circuit Court of Appeals ruled:

Access to an ILEC's network facilities comes only through specified procedures for forming "interconnection agreements," the Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth in the Act. The Act requires ILECs to enter into these agreements ... requires submission of the final agreement to the appropriate state commission for approval; gives the state commission authority to interpret and enforce agreements when post-approval disputes arise, *see* 47 U.S.C. § 252(c), (e)(1) and (2), and Michigan Bell Tel. Co. v. Climax Tel. Co., 202 F.3d 862, 868 (6th Cir.)

Michigan Bell Tel. Co. v. Strand, 305 F.3d 580 (6th Cir.)(2002).

In Michigan Bell Telephone Co. v. Climax Telephone Co. the U.S. Sixth Circuit

Court of Appeals ruled:

It is the [Commission's] duty, if it chooses to regulate, not the other party's, to ensure that the agreement meets the requirements of the Act both at the time of arbitration, 47 U.S.C. § 252(c), and at time of approval, 47 U.S.C. § 252(e)(2)(B). Furthermore, it is the [Commission's] function, not the other party's, to enforce the agreement.

Michigan Bell Telephone Co. v. Climax Telephone Co., 202 F.3d 862, C.A.6 (Mich.), 2000.

D. The IPUC Misapplied the Starpower Decision

Both Qwest and the IPUC refer to the FCC's Starpower Memorandum and Order footnote number 14, which is a circumstance in which a carrier waives its federal statutory right to seek dispute resolution from the state commission or the FCC in favor of arbitration only. A more detailed look at the FCC's Starpower decision is in order.

In the FCC's Starpower Memorandum and Order⁷, the FCC stated:

In applying Section 252(e)(5), we must first determine whether a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' "responsibility" under section 252. We conclude that it is. In reaching this conclusion, we find federal court precedent to be instructive. Specifically, at least two federal courts of appeal have held that inherent in state commissions' express authority to mediate, arbitrate, and approve interconnection agreements under section 252 is the authority to interpret and enforce previously approved agreements.^{FN13} These court opinions implicitly recognize that, due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements. Thus, we conclude that a state commission's failure to "act to carry out its responsibility" under section 252 can in some circumstances include that failure to interpret and enforce existing interconnection agreements.^{FN14}

⁷ 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) *emphasis added*

^{FN13.} *Southwestern Bell Telephone Co., v. Public Utility Commission of Texas*, 208 F.3d 475 (5th Cir. 2000) (“[T]he Act’s grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.”); *Illinois Bell Telephone Company v. WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir. (Ill.) Jun 18, 1999) *as amended* (Aug. 19, 1999) (holding that the Act “specifically provides state commissions with an important role to play” in interpreting and enforcing interconnection agreements).

^{FN14.} *See* Petition at 7; Comments of MCI at 4-5. 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 express specify how the disputes shall be resolved. *See* Interconnection Agreement between Starpower LLC and Bell Atlantic-Virginia, Inc., dated March 9, 1998, para. 2.3, and October 19, 1999, § 24; and Interconnection Agreement between Starpower, LLC and GTE South, Inc., effective March 11, 1998, § XVIII.

In footnote 14 of the Starpower Memorandum and Order, the FCC conditions the only exception in which a state commission would have no responsibility under section 252 to enforce an existing agreement is if the parties are bound by a dispute resolution clause in their interconnection agreement to seek relief in a particular fashion. Therefore, the federally granted statutory right for a telecommunications carrier to have complaints resolved by a state commission can only be denied if it is specifically written in the interconnection agreement as such. Any doubt in the language must favor Commission-handled enforcement.

There is no language in Section 13.14 of the interconnection agreement waiving PageData’s right to seek relief from the Commission. *R. at 34*. In fact, Section 13.14 specifically retains the right of PageData to seek relief from the Commission or the FCC by stating:

Nothing in this Section [13.14] 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. at 34 (emphasis added)

This sentence negates any previous requirements that could or would limit PageData's right to seek relief from the Commission in the first instance. Therefore the IPUC erred by not enforcing PageData's federally granted statutory right to have the IPUC enforce the terms and conditions of the interconnection agreement.

E. PageData's Interconnection Agreement Unambiguously Contains the Option of Seeking Relief from the IPUC in the First Instance.

The IPUC erred by accepting the false assertion by Qwest that PageData's interconnection agreement with Qwest contains an exclusive dispute resolution condition for arbitration in the first instance. Qwest and the IPUC continue to put a spin on the dispute resolution clause. A look at the statements themselves in the interconnection agreement is appropriate.

If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents ("Dispute") cannot be settled through negotiation, it shall be resolved by arbitration under the then current rules of the American Arbitration Association ("AAA"). . . . **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. at 34 (emphasis added)

The phrase, "Nothing in this Section shall be construed to waive or limit either Party's right to seek relief from the Commission," nullifies any previous requirements that may be construed for arbitration as the first instance of dispute resolution.

At this point a look at the definitions will shed some light on the plain meaning of the words "nothing," "limit," and "construe."

Nothing:

- 1) Not any thing: no thing <leaves *nothing* to the imagination>
- 2) No part

- 3) One of no interest, value, or consequence <they mean *nothing* to me>

Merriam-Webster's Dictionary

Limit:

- 1) to assign certain limits to: PRESCRIBE <reserved the right to *limit* use of the land>
- 2a) to restrict the bounds or limits of <the specialist can no longer *limit* himself to his specialty> b) to curtail or reduce in quantity or extent <we must *limit* the power of aggressors>

Merriam-Webster's Dictionary

Construe:

To analyze and explain the meaning of (a sentence or passage), <the court construed the language of the statute>.

Black's Law Dictionary, Eight Edition, p. 333

Therefore, through adoption of the interconnection agreement PageData has not waived or limited its right to seek relief from the IPUC in the first instance. It is unambiguous that the interconnection agreement emphatically retains PageData's federally granted statutory right to seek relief from the IPUC in the first instance. The IPUC erred by construing the language any other way.

In contrast to PageData's interconnection agreement with Qwest, the recently approved interconnection agreement between Qwest and Teton Communications in Idaho⁸ does **not** include provisions for seeking enforcement relief from the IPUC or the FCC. Therefore, in that agreement Teton and Qwest mutually agreed to limit their outside dispute resolution to arbitration in Denver, Colorado according to the American Arbitration Association rules and the Federal Arbitration Act, not state law.

⁸ Interconnection Agreement Between Qwest Corporation and Teton Communications, Case No. QWE-T-05-16, Approved by IPUC Order No. 29858, dated August 29, 2005.

14.14. Dispute Resolution

14.14.1 If any claim, controversy or dispute between the Parties their agents, employees, officers, directors or affiliated agents should arise, and the Parties do not resolve it in the ordinary course of their dealings (the "Dispute"), then it shall be resolved in accordance with the dispute resolution process set forth in this Section. Each notice of default, unless cured within the applicable cure period, shall be resolved in accordance herewith.

14.14.2 At the written request of either Party, and prior to any other formal dispute resolution proceedings, each Party shall designate an officer-level employee, at no less than the vice president level, to review, meet, and negotiate, in good faith, to resolve the Dispute. The Parties intend that these negotiations be conducted by non-lawyer, business representatives, and the locations, format, frequency, duration, and conclusions of these discussions shall be at the discretion of the representatives. By mutual agreement, the representatives may use other procedures, such as mediation, to assist in these negotiations. The discussions and correspondence among the representatives for the purposes of these negotiations shall be treated as Confidential Information developed for purposes of settlement, and shall be exempt from discovery and production, and shall not be admissible in any subsequent arbitration or other proceedings without the concurrence of both of the Parties.

14.14.3 If the vice-presidential level representatives have not reached a resolution of the Dispute within thirty (30) calendar days after the matter is referred to them, then either Party may demand that the Dispute be settled by arbitration. Such an arbitration proceeding shall be conducted by single arbitrator, knowledgeable about the telecommunications industry. The arbitration proceedings shall be conducted under the then current rules of the American Arbitration Association ("AAA"). The Federal Arbitration Act, 9 U. C. Sections 1-16, not state law, shall govern the arbitrability of the Dispute. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator award shall be final and binding and may be entered in any court having jurisdiction thereof. Each Party shall bear its own costs and attorneys fees, and shall share equally in the fees and expenses of the arbitrator. The arbitration proceedings shall occur in the Denver, Colorado metropolitan area. It is acknowledged that the Parties, by mutual, written agreement, may change any of these arbitration practices for a particular some, or all Dispute(s).

14.14.4 Should it become necessary to resort to court proceedings to enforce a Party's compliance with the dispute resolution process set

forth herein, and the court directs or otherwise requires compliance attorney fees, incurred by the Party requesting such enforcement shall be reimbursed by the non-complying Party to the requesting Party.

14.14.5 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.

Interconnection Agreement Between Qwest Corporation and Teton Communications, Case No. QWE-T-05-16, Approved by IPUC Order No. 29858, dated August 29, 2005.

These terms and conditions differ greatly from the dispute resolution clause between PageData and Qwest.

F. The IPUC May Not Blue-Pencil An Approved Interconnection Agreement After A Complaint Has Been Filed

When the IPUC staff reviewed the interconnection agreement and determined that it did not discriminate against parties not a party to the agreement and the IPUC voted to approve the agreement on February 25, 2003, the IPUC bound itself to Section 13.14 that it would not construe or waive PageData's right to seek relief from the IPUC. *R. at 34.* Now that PageData has filed a complaint, the IPUC cannot go back and blue-pencil the interconnection agreement to construe that arbitration is the only mandatory course to handle disputes initially. In its Order No. 29687 and No. 29726 the IPUC has construed PageData's rights by giving more weight to the arbitration provisions of Section 13.14 of the interconnection agreement than the provisions for seeking relief from the IPUC, also in Section 13.14. *R. at 34.*

G. The IPUC Promotes Discrimination by Not Enforcing Approved

Interconnection Agreements

The IPUC bound itself to enforce the agreement when it approved the interconnection agreement. The IPUC is bound to enforce Congress' intent to promote competition in the state of Idaho in Qwest's monopolistic territory. This includes timely enforcement of interconnection agreements that the IPUC has approved.

If the IPUC does not enforce the payments of reciprocal compensation by Qwest, then Qwest can discriminate from one carrier to another. Although various carriers may have the same interconnection agreement, if Qwest pays the flat rate reciprocal compensation per telephone line to favored carriers (such as Arch), but not other carriers such as PageData, and the IPUC does not enforce the terms and conditions of the interconnection agreement, then there is discrimination. When PageData is not receiving the flat rate reciprocal compensation in the approved agreement, then in essence PageData is paying a higher rate for facilities from Qwest than favored carriers, such as Arch. This is totally against the Act's purpose of promoting open and fair competition in a non-discriminatory manner. The IPUC's lack of enforcement increases Idaho consumers' costs for telecommunications services and decreases the choice of services.

H. The IPUC Must Provide Enforcement of IPUC-Approved Interconnection Agreements on a Nondiscriminatory Basis Using the Guidelines of Sections 251 and

252

Shortly after the IPUC denied PageData's petition for reconsideration by Order No. 29726 (dated March 9, 2005), McLeodUSA filed a petition for enforcement of its

interconnection agreement with Qwest at the IPUC⁹. In its petition, McLeodUSA alleged that Qwest was not following the dispute resolution per their interconnection agreement and Qwest sought to unilaterally collect a security deposit from McLeodUSA or disconnect facilities.

McLeodUSA outlined the IPUC's jurisdiction to hear the case.

State commissions have the authority to interpret and enforce agreements they approve when post-approval disputes arise. *Michigan Bell Tel. Co. v. Strand* 305 F.3d 580, 583 (6th Cir. 2002); *Michigan Bell Tel. Co. v. Climax Tel. Co.* 202 F.3d 862, 868 (6th Cir.), cert. Denied, 531 U.S. 816 (2000).

Thus, the Commission has clear jurisdiction to interpret the terms of the Interconnection Agreement as alleged herein.

Petition of McLeodUSA Telecommunications Services, Inc., For Enforcement of Interconnection Agreement with Qwest Corporation, IPUC Case No. MTI-T-05-01, p. 2

Unlike PageData's case, in the McLeodUSA case the IPUC took jurisdiction over the case and required Qwest to answer. Also unlike the current case between PageData and Qwest, in Qwest's reply brief concerning McLeodUSA, Qwest admitted that the IPUC had jurisdiction.

Qwest asserts that state commissions have authority to interpret and enforce interconnection agreements to the extent granted by the Telecommunications Act, to the extent granted under state law, and subject to the terms of interconnection agreements.

Qwest's Answer to McLeod Petition, IPUC Docket No. MTI-T-05-01, *In the Matter of Petition of McLeodUSA Telecommunications Services, Inc., for Enforcement of Interconnection Agreement with Qwest Corporation.*

A detailed look at McLeod's dispute resolution clause is warranted.

⁹ *In the Matter of Petition of McLeodUSA Telecommunications Services, Inc., for Enforcement of Interconnection Agreement with Qwest Corporation.* IPUC Docket No. MTI-T-05-01, petition filed March 30, 2005.

(A)3.17 Dispute Resolution

(A)3.17.1 If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents should arise, and the Parties do not resolve it in the ordinary course of their dealings (the "Dispute"), then it shall be resolved in accordance with the dispute resolution process set forth in this Section. Each notice of default, unless cured within the applicable cure period, shall be resolved in accordance herewith.

(A)3.17.2 At the written request of either Party, and prior to any other formal dispute resolution proceedings, each Party shall designate an officer-level employee, at no less than the vice president level, to review, meet, and negotiate, in good faith, to resolve the Dispute. The Parties intend that these negotiations be conducted by non-lawyer, business representatives, and the locations, format, frequency, duration, and conclusions of these discussions shall be at the discretion of the representatives. By mutual agreement, the representatives may use other procedures, such as mediation, to assist in these negotiations. The discussions and correspondence among the representatives for the purposes of these negotiations shall be treated as Confidential Information developed for purposes of settlement, and shall be exempt from discovery and production, and shall not be admissible in any subsequent arbitration or other proceedings without the concurrence of both of the Parties.

(A)3.17.3 If the vice-presidential level representatives have not reached a resolution of the Dispute within thirty (30) calendar days after the matter is referred to them, then either Party may demand that the Dispute be settled by arbitration. Such an arbitration proceeding shall be conducted by single arbitrator, knowledgeable about the telecommunications industry. The arbitration proceedings shall be conducted under the then current rules of the American Arbitration Association ("AAA"). The Federal Arbitration Act, 9 U.S.C. Sections 1-16, not state law, shall govern the arbitrability of the Dispute. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator award shall be final and binding and may be entered in any court having jurisdiction thereof. Each Party shall bear its own costs and attorneys fees, and shall share equally in the fees and expenses of the arbitrator. The arbitration proceedings shall occur in the state where the dispute occurs in a mutually agreed upon city. It is acknowledged that the Parties, by mutual, written agreement, may change any of these arbitration practices for a particular, some, or all Dispute(s).

(A)3.17.4 Should it become necessary to resort to court proceedings to enforce a Party's compliance with the dispute resolution process set

forth herein, and the court directs or otherwise requires compliance herewith, then all of the costs and expenses, including its reasonable attorney fees, incurred by the Party requesting such enforcement shall be reimbursed by the non-complying Party to the requesting Party.

(A)3.17.5 Nothing in this Section is intended to divest or limit the jurisdiction and authority of the Commission or the Federal Communications Commission as provided by state or federal law.

(A)3.17.6 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.

Interconnection Agreement Between Qwest Corporation and McLeodUSA
Telecommunications Services Inc., Case No. QWE-T-00-7.

Take note that the dispute resolution language in Qwest and McLeodUSA's interconnection agreement includes language similar to PageData's interconnection agreement, as are the vast majority of Qwest dispute resolution clauses filed after 1998 at the IPUC.

Nothing in this Section is intended to divest or limit the jurisdiction and authority of the Commission or the Federal Communications Commission as provided by state or federal law.

Qwest and McLeodUSA Interconnection Agreement, QWE-T-00-7.

The IPUC accepted McLeodUSA's case and other cases (with dispute resolution clauses similar to PageData's) concerning enforcement of IPUC-approved interconnection agreements between telecommunications carriers in the state of Idaho. The IPUC is obligated to accept PageData's interconnection agreement enforcement complaint. Therefore, the IPUC erred when it denied PageData's federally granted statutory right to have the state commission hear the complaint in the first instance. 47 U.S.C. § 252 and FCC Starpower Memorandum and Order.

Unless otherwise stated in the interconnection agreement, the IPUC must enforce the rates, terms, and conditions of approved interconnection agreements to ensure nondiscrimination consistent with the requirements of Sections 251(b) and (c), and 252(d) of the Act.

Section 252(d) sets forth the applicable pricing standards for interconnection and network element charges as well as for transport and termination of traffic. Section 252(d)(1) states that "[d]eterminations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment. . . and the just and reasonable rate for the network elements. . . shall be (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and (B) may include a reasonable profit." Section 252(d)(2)(A) further states in pertinent part that "a State commission shall not consider the terms and conditions for reciprocal compensation (for transport and termination) to be just and reasonable unless (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of another carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. § 252(d)(2)(A).

I. The IPUC's Blue-Penciling of the Interconnection Agreement Made it Unconscionable; the IPUC is not Afforded State Agency's Deference; and is Subject to De Novo Review

By its Orders 29687 and 29726, the IPUC made the interconnection agreement unconscionable and unenforceable at the state level when the IPUC blue-penciled the dispute resolution clause. Under the Act and the FCC Starpower Memorandum and Order, the IPUC has the power and the authority to have a hearing on the effects of their decision rendering the interconnection agreement unconscionable. The IPUC changed the meaning of the interconnection agreement after it was approved.

The IPUC erred by concluding that PageData, and effectively every other carrier with the same or similar dispute resolution clause, had given up their federal statutory right to request the IPUC enforce the interconnection agreement in the first instance and therefore ruling that private arbitration was the only way to settle disputes in the first instance. The IPUC effectively blue penciled or nullified the sentence in the agreement that says “[n]othing 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. at 34.*

The IPUC erred by declaring that the interconnection agreement that PageData signed was a private contract beyond the IPUC’s jurisdiction, despite the clear language of the interconnection agreement. The IPUC’s orders are arbitrary and capricious. The IPUC is not afforded deference when dealing with federal statutes because the IPUC is not an expert in federal statutes. A “state agency’s interpretation of federal statutes is not

entitled to the deference afforded a federal agency's interpretation of its own statutes under *Chevron*." Orthopaedic Hosp. V. Belshe, 103 F.3d 1491, 1495 (9th cir. 1997) (referring to Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694). Therefore, the IPUC's decisions are subject to *de novo* review and the Court can replace the IPUC's opinion with the Court's opinion.

J. There is a Prohibition for Filing Interconnection Agreement Amendments and Clarifications with the IPUC

The IPUC has stated that, "The Commission acknowledged that the Washington Commission has ruled that both parties to an agreement had a responsibility to file an agreement or amendment with the Commission." IPUC Brief, at 21. When PageData independently submitted an amendment to the interconnection agreement, the IPUC referred the matter to the FCC, which referred the matter back to the IPUC. Then the IPUC failed to act within 90 days, which means the amendment automatically became part of the interconnection agreement. 47 U.S.C. § 252(e)(4). The IPUC issued Order No. 29655 (December 9, 2004) after the 90th day and attempted to usurp federal authority with a ruling of its own liking and denied the amendment in violation of 47 U.S.C. § 252(e)(4). To this day, the IPUC has not added the amendment to the interconnection agreement according to federal law. Therefore this is a case of a dog chasing its tail.

K. The Dispute Resolution Clause Does Not Have Provisions for Attorney Fees For Proceedings at the IPUC

Qwest has requested attorneys' fees, but there is no provision in the interconnection agreement for attorney fees in any venue, except in arbitration. "The prevailing Party, as determined by the arbitrator, shall be entitled to an award of

reasonable attorneys' fees and costs." *R. at 34 (emphasis added)*. Since this is not an arbitration proceeding, Qwest should be denied attorneys' fees.

Further, PageData initiated this case in good faith because Qwest was in violation of the interconnection agreement by not paying the flat rate reciprocal compensation to PageData. Qwest has not denied that it owes reciprocal compensation to PageData and is obligated to pay. The IPUC's decision was arbitrary and capricious and the IPUC erred. Therefore Qwest should be denied attorneys' fees.

L. Summary Judgment Rules are the Same Whether Under Commission Rules or Idaho Rules of Civil Procedure

Summary judgment with a dismissal for a reciprocal compensation complaint goes against the vital core of the ILEC's responsibility to establish and pay reciprocal compensation under the Act. The settlement of reciprocal compensation issues is a fundamental fiduciary duty of the IPUC and Qwest alike. A Commission's responsibility to settle reciprocal compensation complaints goes to the Commission's primary responsibility to its local state carriers to ensure that local small potato companies get the same treatment as publicly held national companies.

The principals for initiating summary judgment are the same regardless of whether it is initiated under the Commission Rules (IDAPA 31.01.01.00 et seq.) or the Idaho Rules of Civil Procedure.

The IPUC's actions were arbitrary and capricious when the IPUC did not address their acceptance of untimely filings by Qwest. The IPUC failed to lay out a well articulated reason for abandoning common law, federal law, and Commission rules when the IPUC awarded Qwest one of the most precious and coveted decisions -- which

translates into a ruling that interconnection agreements are private contracts and every telecommunications carrier in Idaho had contracted away their federally granted statutory right to file a complaint with the IPUC concerning interconnection agreements approved by the IPUC.

The IPUC's ruling was contrary to the clear language in interconnection agreements filed after 1998 at the IPUC that includes the following or similar clause:

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. at 34.

This unprecedented shift by the IPUC in the jurisdiction of interconnection agreement disputes in the state of Idaho should not be allowed to stand because it is in violation of the Act and other case law.¹⁰

III. CONCLUSION

Within the broad powers of equitable relief, it is inherent in the Idaho Supreme Court to rectify obvious violations of federal law by the IPUC, because federal law is not in the expertise of the IPUC.

Handling the enforcement of the IPUC-approved interconnection agreement at the IPUC is the most economical and cost-efficient method for resolution and prevents the loss of federally granted statutory rights of other carriers.

The IPUC did not dismiss PageData's complaint without prejudice. It was a conditional dismissal that required arbitration for PageData and all other Idaho carriers with the same or similar dispute resolution clause. It also bars PageData from bringing

¹⁰ See FCC Starpower Memorandum and Order; Bellsouth v. MCIMetro; Michigan Bell v. Strand; and Michigan Bell v. Climax.

other complaints concerning the interconnection agreement to the IPUC in the first instance.

The IPUC's actions were not consistent with federal policy. The IPUC erred in its reliance on superseded, outdated, vacated, or overridden state and federal cases. Because the case law depended upon by the IPUC has been superseded, vacated, or overridden, the IPUC cannot be afforded agency deference until the IPUC is in compliance with the law. While in violation of the law and the fact that the IPUC is not a federal agency, its decisions are subject to *de novo* review and can be replaced by the Court.

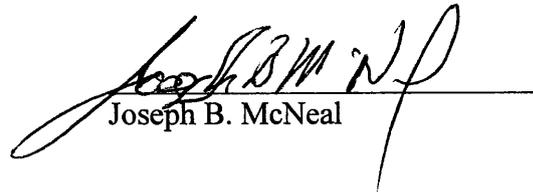
The IPUC has failed to pursue its enforcement authority under the Act and the FCC Starpower Memorandum and Order. The IPUC's findings were not based on substantial and complete evidence in the record. Therefore, IPUC Orders 29687 and 29726 should not be affirmed.

It is respectfully requested that the Court rule that:

- a) The IPUC erred by dismissing the complaint because PageData met all the elements of the claim presented;
- b) The IPUC erred by dismissing the complaint because Qwest did not meet its burden under IRCP 12 in its motion to dismiss the complaint;
- c) Section 13.14 of the current interconnection agreement does not waive or limit either Party's right to seek relief from the IPUC;
- d) PageData is not limited to AAA arbitration to mediate disputes under the interconnection agreement;
- e) PageData has the right to seek relief from the IPUC for disputes under the interconnection agreement;

- f) If Qwest does not reply with a desired method of resolving a dispute under the interconnection agreement, then Qwest is contractually bound to accept the method chosen (state commission, FCC, or arbitration) by PageData;
- g) The Idaho legislature authorized the IPUC to fully implement the Act, a part of which includes hearing disputes concerning interconnection agreements approved by the IPUC.
- h) The complaint was filed in good faith and Qwest is not entitled to attorneys' fees.

Respectfully submitted this 6th day of September, 2005.


Joseph B. McNeal

CERTIFICATE OF SERVICE

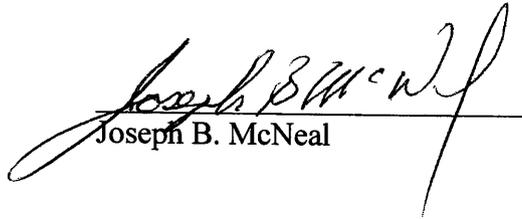
I HEREBY CERTIFY that on this 6th day of September, 2005, I caused a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to be served by depositing the same in the United States mail, postage prepaid, in envelopes addressed to the following:

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**COULD NOT CREATE
SEARCHABLE TEXT FOR
APPENDICES A AND B –
PLEASE SEE FILE**