

DONOVAN E. WALKER
DEPUTY ATTORNEY GENERAL
IDAHO PUBLIC UTILITIES COMMISSION
PO BOX 83720
BOISE, IDAHO 83720-0074
(208) 334-0357
IDAHO BAR NO. 5921

RECEIVED
FILED
2005 MAY 19 PM 2:01
IDAHO PUBLIC
UTILITIES COMMISSION

Attorney for the Staff of the
Idaho Public Utilities Commission

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

JOSEPH B. MCNEAL dba PAGEDATA,)	
)	SUPREME COURT
Petitioner/Appellant,)	DOCKET NO. 31844
)	
v.)	IPUC CASE NO. QWE-T-03-25
)	
IDAHO PUBLIC UTILITIES COMMISSION,)	
)	
Respondent on Appeal,)	OBJECTION TO AGENCY'S
)	RECORD ON APPEAL
and)	
)	REQUEST FOR HEARING
QWEST CORPORATION,)	
)	
Respondent/Respondent on Appeal.)	

COMES NOW the Commission Staff, by and through its attorney of record, Donovan E. Walker, Deputy Attorney General, and respectfully objects to certain portions of the Agency's Record on Appeal requested by the Petitioner/Appellant, Joseph B. McNeal dba PageData, in the above-entitled action. In particular, Staff objects to PageData's request to include in the Record on Appeal the entire file from a different Commission case. This objection is made pursuant to Idaho Appellate Rules 29(a) and 13(e).

BACKGROUND

On April 19, 2005, Joseph B. McNeal dba PageData (PageData) filed a Notice of Appeal from Commission Order Nos. 29687 and 29726 in Case No. QWE-T-03-25 to the Idaho

OBJECTION TO AGENCY'S
RECORD ON APPEAL
REQUEST FOR HEARING

Supreme Court. In the Notice of Appeal PageData requested that, in addition to those documents automatically included on appeal pursuant to I.A.R. 28(h)(3), the entire Commission file for a different case (No. QWE-T-03-6) be included in the agency's Record on Appeal. PageData also requests inclusion of: Confidential/Proprietary documents in the Record – Exhibits A-F to the Complaint in Case No. QWE-T-03-25; the Interconnection Agreement between Arch and Qwest that was adopted by PageData, approved by the Commission on February 25, 2003; and the Interconnection Agreement Amendment, approved by the Commission on July 15, 2003.

On May 3, 2005, Commission Staff filed a Request for Additional Record on Appeal asking that documents related to PageData's Interconnection Agreement be included in the Record on Appeal. Staff's request consisted of: the Qwest-Arch Interconnection Agreement, Amendment of that Agreement, and the Orders approving the same from Case No. USW-T-00-20; the adoption of the Qwest-Arch Interconnection Agreement by PageData and the Order approving the same from Case No. QWE-T-03-6; and the Amendment of PageData's Interconnection Agreement and the Order approving the same from Case No. QWE-T-03-6. Staff now files this objection to the remaining portions of the Commission's case file for Case No. QWE-T-03-6 not related to the initial adoption and amendment of the Qwest/Arch Interconnection Agreement by PageData.

THE PROCEEDINGS BELOW

In October 2003, PageData filed a Complaint against Qwest Corporation. PageData alleged that Qwest was not in compliance with the reciprocal compensation provisions of their current Interconnection Agreement. Qwest responded that the Complaint should be dismissed because the parties' Interconnection Agreement contains an arbitration clause. Qwest argued that the dispute should be resolved through arbitration.

On January 19, 2005, the Commission issued Order No. 29687 declining PageData's invitation to resolve its interconnection dispute with Qwest. Because the approved Interconnection Agreement contains an arbitration clause, the Commission found that "the arbitration process is the first and foremost method for resolving disputes under [their] Interconnection Agreement." Order No. 29687 at 6. The Commission ordered that it "declines to accept jurisdiction to resolve PageData's Complaint regarding reciprocal compensation. Consequently, we dismiss PageData's Complaint without prejudice." *Id.*

On February 9, 2005, PageData filed a Petition for Reconsideration primarily asserting that the Commission erred in declining to resolve the Complaint because the arbitration clause is unconscionable. After reviewing PageData's Petition, the Commission issued Order No. 29726 denying reconsideration. The Commission found, among other things, that the construction and enforcement of contracts is generally a matter that lies in the jurisdiction of the courts and not the Commission. Order No. 29726 at 4. On April 19, 2005, PageData filed a Notice of Appeal from Commission Order Nos. 29687 and 29726.

LEGAL STANDARDS

The standards for review of Commission Orders are clear. "No new or additional evidence may be introduced in the Supreme Court, but the appeal shall be heard on the record of the commission as certified by it." *Idaho Code* § 61-629; *Idaho Power Co. v. Idaho Public Utilities Com'n*, 140 Idaho 439, 441-42, 90 P.3d 889, 891-92 (2004). It is a basic tenet of administrative law that a reviewing court is bound by the evidence placed into the record and presented to the agency. *B. Schwartz, Administrative Law*, 2d Ed. § 10.2 (1984). Judicial review is clearly confined to the record presented to the Commission, as finder of fact. *Greenfield Village Apartments v. Ada County*, 130 Idaho 207, 938 P.2d 1245 (1997).

When objection is made to the requested record on appeal, the Commission must determine, after hearing, what is to be included in the Agency's Record that is sent to the Supreme Court. I.A.R. 29(a)-(b). "In administrative appeals from the Public Utilities Commission, . . . the administrative agency shall have continued jurisdiction of the matter and the parties . . . including the power to settle the transcript and record on appeal." I.A.R. 13(e). Once settled by the Commission, the Agency's Record is then filed with the Supreme Court. I.A.R. 29(b).

OBJECTION TO DOCUMENTS

The Staff specifically objects to PageData's request to include in the Agency's Record on Appeal the entire Commission file in Case No. QWE-T-03-6. This case file is included in the proposed Agency's Record on Appeal at pages 69 through 217 of Volume I. (R. Vol. I, pp. 69-217). Staff has requested, as indicated in its Request for Additional Record, that four documents from Case No. QWE-T-03-6 be included in the record, but objects to the remaining documents from that case file. These four documents are simply those that evidence

the adoption and subsequent amendment of the underlying Qwest/Arch Interconnection Agreement by PageData, as well as the Commission Orders approving such adoption and amendment.¹ These four documents are relevant to the current appeal of the final Orders in Case No. QWE-T-03-25, and were considered by the parties and this Commission in the resolution of this case on appeal, No. QWE-T-03-25.

The remaining documents in the Commission's file of Case No. QWE-T-03-6 are not relevant to the current appeal, were not considered by the Commission in the resolution of Case No. QWE-T-03-25, and concern an entirely separate matter with separate issues that were resolved by its own final Order No. 29604 and Order No. 29655 (denying reconsideration). The final Order denying reconsideration in the 03-6 case was issued on December 9, 2004. PageData did not file a Notice of Appeal in that case, and it is now well past the deadline to do so. PageData cannot now in the appeal from Case No. QWE-T-03-25, argue issues decided in a different case, No. QWE-T-03-6. The documents objected to (R. 90-92 and 100-217) should be stricken from the Record on Appeal.

For clarification, Case No. QWE-T-03-6 has three distinct matters that are dealt with throughout the life of that case. First, there is the original action, jointly filed by Qwest and PageData to adopt the Qwest/Arch Interconnection Agreement – which was approved. Second there is the jointly filed amendment to the adopted Qwest/PageData Agreement – which was approved. Lastly, there is a unilaterally filed amendment, where PageData alleged that a Qwest e-mail submitted to the FCC as part of an informal complaint, actually amended the Interconnection Agreement. This alleged amendment was opposed by Qwest, and the Commission ultimately issued final Orders referring the matter to the FCC.

There is no object to the first two matters mentioned above. However, the remaining matter, was not considered by the Commission and was not part of the record and decision in this case, No. QWE-T-03-25. The matter regarding the McKenna letter contained in Case No. QWE-T-03-6 should not be included in the Agency's Record in this Appeal.

REQUEST FOR HEARING

¹ These four documents consist of: (1) Application for Adoption of Qwest/Arch Paging Interconnection Agreement by PageData and Qwest, dated Feb. 7, 2003 (R Vol. I, pp. 69-74); (2) Commission Order No. 29198, service dated Feb. 25, 2003 (approving adoption of Qwest/Arch Paging Agreement by PageData) (R Vol. I, pp. 75-80); (3) Application for Amendment of Interconnection Agreement, dated June 24, 2003 (R Vol. I, pp. 81-89); and (4) Commission Order No. 29293, service dated July 22, 2003 (approving the Amendment) (R Vol. I, pp. 93-99).

“Any objection made to . . . the agency’s record must be accompanied by a notice setting the objection for hearing and shall be heard and determined by the . . . administrative agency from which the appeal is taken.” I.A.R. 29(a). Staff requests that the Commission schedule a hearing for this matter to commence following the scheduled Decision Meeting on Wednesday, June 8, 2005 in the Commission’s Hearing Room. IDAPA 31.01.01.241.

CONCLUSION

Based upon the reasons set forth above, Staff requests that the Commission schedule a hearing to consider Staff’s objections to the Record. After the hearing, the Commission should exclude all documents not considered by the Commission in Case No. QWE-T-03-25. The specific documents that Staff objects to are found in the proposed Record on Appeal, pages 90-92 and 100-217 (R. Vol. I, pp. 90-92 and pp.100-217).

Respectfully submitted this 19th day of May 2005.



Donovan E. Walker
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 19th DAY OF MAY 2005, SERVED THE FOREGOING **OBJECTION TO AGENCY'S RECORD ON APPEAL AND REQUEST FOR HEARING**, IN SUPREME COURT DOCKET NO. 31844, VIA U S MAIL BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO:

JOSEPH McNEAL
dba PAGEDATA
PO BOX 15509
BOISE ID 83715

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

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



SECRETARY