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IN THE SUPREME COURT OF THE STATE OF IDAHO

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IDAHO PUBLIC
UTILITIES COMMISSION

JOSEPH B. McNEAL DBA PAGEDATA

Petitioner-Appellant,

v.

**IDAHO PUBLIC UTILITIES COMMISSION
AND QWEST CORPORATION,**

Respondents.

)
) **SUPREME COURT**
) **DOCKET NO. 31844**
)
)
)
)
) **BRIEF OF RESPONDENT**
) **IDAHO PUBLIC UTILITIES**
) **COMMISSION**
)

APPEAL FROM THE IDAHO PUBLIC UTILITIES COMMISSION

Commissioner Paul Kjellander, Presiding

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I. STATEMENT OF THE CASE

Respondent on appeal, the Idaho Public Utilities Commission (Commission or PUC), believes the Statement of the Case set forth in PageData's Brief is incomplete. Consequently, pursuant to I.A.R. 35(b)(3), the Commission offers its own Statement of the Case.

A. Nature of the Case

This is an appeal from final Orders of the Commission. In the underlying administrative proceeding the Petitioner, Joseph B. McNeal dba PageData (PageData), filed a Complaint against Qwest Corporation. R. at p. 97.¹ The Commission declined to resolve the dispute and dismissed PageData's Complaint without prejudice finding that the parties must first abide by the arbitration provision of their approved Interconnection Agreement. R. at p. 215; PUC Order No. 29687. PageData's Petition for Reconsideration, alleging that the arbitration clause was unconscionable, was denied. R. at p. 219-20; Order No. 29726.

B. Course of Proceedings

On October 31, 2003, PageData filed a Complaint with the Commission alleging that Qwest Corporation (Qwest) was not in compliance with the reciprocal compensation provisions of their Interconnection Agreement. R. at p. 97-106. On November 26, 2003, Qwest filed a Limited Response to PageData's Complaint arguing that the Complaint should be dismissed because the parties' Interconnection Agreement contains an arbitration clause. R. at p. 108-20. PageData filed a Reply to Qwest's Limited Response. R. at p. 121-42. PageData also filed a Request for Summary Judgment with the Commission on January 29, 2004. R. at p. 143-59. Neither party requested oral argument or a hearing date. *See* R. at p. 173.

¹Because the Record in this matter consists of only one volume, citation to the Record in the PUC's Brief has been abbreviated to omit the continued repetition of "Vol. I."

The parties then undertook a lengthy period of settlement negotiations regarding this and other pending matters. The settlement negotiations were ultimately unsuccessful. *See* R. at p. 181.

On January 19, 2005, the Commission issued Order No. 29687 declining to resolve the dispute and dismissing the Complaint without prejudice. R. at p. 210-16 (Appendix A).² The Commission found that it was appropriate to dismiss the Complaint without prejudice given the presence of a detailed arbitration clause in the parties' Interconnection Agreement. R. at p. 214-15 (Appendix A). PageData filed a Petition for Reconsideration, R. at p. 217, which was denied in Order No. 29726 issued March 9, 2005. R. at p. 224-29 (Appendix B).

On April 19, 2005, PageData filed a Notice of Appeal from Commission Order Nos. 29687 and 29726. R. at p. 230. Following a dispute about the contents of the appellate Record, the Commission issued Order No. 29800 settling the Record on June 14, 2005. R. at p. 239.

C. Statement of Facts

1. Interconnection Agreements. In an effort to promote competition in the telecommunications industry, the federal Telecommunications Act of 1996 (the Act) requires incumbent local exchange carriers (ILECs) such as Qwest to interconnect their facilities with other telecommunications carriers requesting access to markets, such as PageData. 47 U.S.C. § 251(c)(2). The carriers may negotiate and enter into binding interconnection agreements that specify the details and charges for the interconnection of their systems. 47 U.S.C. § 252(a)(1). Among other things, the Act mandates that when carriers interconnect their networks, they have a "duty to establish reciprocal compensation arrangements" for transporting and terminating the calls of each other's customers. 47 U.S.C. § 251(b)(5). A local exchange carrier must make

² For the convenience of the Court, the PUC's final Order No. 29687 is included in Appendix A and the PUC's reconsideration Order No. 29726 is contained in Appendix B.

available any approved interconnection agreement to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided for in the approved agreement. 47 U.S.C. § 252(i).

All interconnection agreements must be submitted to the state regulatory commission (i.e., the Idaho PUC) for approval. 47 U.S.C. § 252(a)(1); § 252(e)(1); *Idaho Code* § 62-615(1). However, the Commission's review of an interconnection agreement is severely limited. The Commission may reject an agreement adopted by negotiation only if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement is not consistent with the public interest, convenience and necessity. 47 U.S.C. § 252(e)(2)(A). Additionally, the Idaho PUC, as well as the Federal Communications Commission (FCC), has acknowledged that carriers voluntarily entering into interconnection agreements "may negotiate terms, prices and conditions that do not comply with either the FCC rules or with the provision of Section 251(b) or (c)." *In re Robert Ryder, et al.*, PUC Order No. 28427 at 11 (emphasis in original), 2000 WL 1055299 (Idaho PUC); 47 C.F.R. § 51.3 ("a state commission shall have authority to approve an interconnection agreement adopted by negotiation even if the terms of the agreement do not comply with the requirements of this part"). Once approved, all interconnection agreements are posted by the Commission. 47 U.S.C. § 252(h).

The underlying Interconnection Agreement in this proceeding was adopted by Qwest and PageData through voluntary negotiations. R. at p. 70. They agreed to adopt a previously approved and amended Qwest/Arch Paging Interconnection Agreement pursuant to 47 U.S.C. § 252(i). R. at p. 73. Mr. McNeal signed the Agreement to adopt the Qwest/Arch Interconnection Agreement on December 22, 2002. R. at p. 74. The Qwest/PageData Interconnection

Agreement was approved by the Commission on February 25, 2003. R. at p. 75, 77. The parties subsequently submitted an amendment to this agreement (R. at p. 81-89), which was approved by the Commission on July 15, 2003. R. at p. 91-96. Mr. McNeal signed and accepted the amendment on May 19, 2003. R. at p. 86. Neither of the approved amendments to the Interconnection Agreement affected the arbitration clause at issue here. The subject Interconnection Agreement was first approved in Case No. USW-T-00-20. R. at p. 6-52.

The parties' Interconnection Agreement contains a mandatory arbitration provision in Section 13.14. This section states in pertinent part:

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"). The arbitration shall be conducted by a single neutral arbitrator familiar with the telecommunications industry and engaged in the practice of law.... The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. The Arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply and the rules used shall be those for the telecommunications industry. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. The prevailing Party, as determined by the arbitrator, shall be entitled to an award of reasonable attorneys' fees and costs. The arbitration shall occur at a mutually agreed upon location. Nothing in this Section shall be construed to waive or limit either Party's right to seek relief from the [Idaho] Commission or the FCC as provided by state or federal law.

R. at p. 34, 225 (Appendix A)(emphasis added).

2. PageData's Complaint and the PUC Orders. On October 31, 2003, PageData filed a Complaint with the Commission alleging that Qwest was not in compliance with the reciprocal compensation provisions of their Interconnection Agreement. R. at p. 97-106. Qwest filed a Limited Response asking that the Complaint be dismissed because Section 13.14 of the parties' Interconnection Agreement contains detailed procedures for resolving disputes, including an

arbitration clause. R. at p. 108-20. Qwest argued that the Commission should not exert jurisdiction over this private contract dispute, citing authority that the Commission is not the proper forum for arbitration or mediation of disputed contracts. R. at p. 115. Qwest also maintained there is no federal or state law that clearly grants the Commission jurisdiction over disputes arising from a previously approved interconnection agreement. R. at p. 116. Qwest next argued that the FCC has recognized that a state commission may have no responsibility to hear and decide an interconnection agreement dispute where the agreement contains a dispute resolution mechanism. R. at p. 117. Finally, Qwest asserted that dismissal of PageData's filing is supported by the strong public policy favoring arbitration and alternative dispute resolution. R. at p. 117-18. Qwest did not address the substantive allegations of the Complaint, but argued the dispute should be resolved through arbitration. R. at p. 108-18.

On January 19, 2005, the Commission issued Order No. 29687 declining to accept jurisdiction to hear the Complaint regarding reciprocal compensation and dismissing PageData's Complaint without prejudice. R. at p. 214-15 (Appendix A). After reviewing Section 13.14 of the Interconnection Agreement, the Commission found that: "the parties clearly contemplated utilizing arbitration when they cannot resolve their dispute informally." R. at p. 215. The Commission observed that the Idaho Supreme Court "has recognized that there is a strong public policy in favor of arbitration and that arbitration is a favored remedy for resolving disputes." *Id.* The Commission concluded that although the arbitration clause "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.*

On February 9, 2005, PageData filed a Petition for Reconsideration asserting for the first time that the arbitration clause was unconscionable. R. at p. 217. PageData requested the

Commission schedule a hearing pursuant to *Idaho Code* § 28-2-302 so PageData could present additional evidence regarding unconscionability.³ R. at p. 219. PageData also argued there is no mechanism allowing an arbitrator's decision to be incorporated into an interconnection agreement and made available to other carriers under 47 U.S.C. § 252(i). R. at p. 218.

On March 9, 2005, the Commission issued Order No. 29726 denying PageData's Petition for Reconsideration and affirming its decision to dismiss without prejudice for several reasons. R. at p. 229 (Appendix B). First, the Commission found that *Idaho Code* § 28-2-302 confers jurisdiction upon the court, not the Commission. R. at p. 226-27 (Appendix B). Thus, the Commission was not the appropriate forum to decide whether the arbitration clause was unconscionable. *Id.* Second, under the controlling opinions of this Court, the Commission observed that the construction and enforcement of contracts is generally a matter which lies in the jurisdiction of the courts and not the Public Utilities Commission. R. at p. 227 (Appendix B). Third, the Commission observed that "for an arbitration provision to be voided as unconscionable, it must be both procedurally and substantively unconscionable." *Id.* The Commission ultimately found that, although there is no dispute concerning the Commission's authority to approve interconnection agreements under the Act, it would decline to subsequently engage in interpretation and enforcement of this particular agreement that contains an arbitration clause. R. at p. 228-29 (Appendix B).

The Commission also found PageData's argument, that there is no mechanism in Idaho statute to file a private AAA arbitration decision with the Commission and make it publicly available to other carriers for adoption under 47 U.S.C. § 252(i), was not persuasive. R. at p. 228 (Appendix B). The Commission stated it was not aware of any impediment that would

³ *Idaho Code* § 28-2-302(1) provides in pertinent part that "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract . . ." (emphasis added).

prevent either party to the arbitration from filing an arbitration decision as an amendment or clarification to their interconnection agreement, and that other jurisdictions have found that both parties to the agreement bear responsibility for filing it with the state commissions. *Id.* Lastly, the Commission pointed out that, as referenced in its initial Order No. 29687, there is a strong public policy in favor of arbitration and arbitration clauses, and the parties here had voluntarily negotiated the adoption of the Arch Interconnection Agreement in its entirety which includes the provision for arbitration. *Id.*

On April 19, 2005, PageData filed a Notice of Appeal from the Commission's Order No. 29687 and No. 29726. R. at p. 230. The Commission subsequently issued Order No. 29800 settling the Record on Appeal, resolving the parties' dispute concerning the Record. R. at p. 239.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

While the Commission does not have any additional issues to present on appeal, the five issues cited by PageData can be more succinctly stated as follows:

1. The Commission did not err when it declined jurisdiction and dismissed PageData's Complaint without prejudice because the parties were required to utilize the arbitration provision of their Interconnection Agreement.
2. The Commission did not err when it found that the issue of unconscionability and contract interpretation is best left for the courts.
3. The Idaho Rules of Civil Procedure do not apply to the Commission.
 - a. PageData is not permitted to raise issues for the first time on appeal.
 - b. The Rules of Civil Procedure do not apply to the Commission.
4. PageData has misinterpreted Section 252 of the federal Telecom Act.
 - a. Nothing in Section 252 gives the Commission "exclusive rights" to resolve disputes under approved interconnection agreements.
 - b. There is no statutory impediment to filing an arbitration decision with the Commission.

The Commission does not seek attorney fees on appeal.

III. ARGUMENT

A. Summary of Argument

This appeal presents the straightforward issue of whether the Commission properly exercised its discretion by declining jurisdiction and dismissing PageData's Complaint without prejudice. It did. According to the plain language of the parties' voluntarily negotiated and approved Interconnection Agreement, they are required to arbitrate disputes that they cannot resolve informally. While the dispute resolution clause states that it does not limit the parties' right to seek relief from the Commission, the Commission found that "arbitration remains the first and foremost method of resolving disputes under the interconnection agreement." R. at p. 215 (Appendix A).

This Court recognizes a strong public policy in favor of arbitration, and has held that arbitration is a favored remedy for resolving disputes. The Telecommunications Act and FCC decisions acknowledge that parties may be bound by dispute resolution clauses in their interconnection agreements to seek relief in a particular fashion, such as arbitration. Consequently, a state commission may have no responsibility in the first instance to interpret and enforce provisions of approved interconnection agreements.

The Commission also relied on opinions of this Court that limit the Commission's authority to interpret and enforce contracts. Typically "the construction and enforcement of contracts is generally a matter which lies in the jurisdiction of the courts and not the public utilities commission." R. at p. 227 (Appendix B) (citing cases).

PageData has not demonstrated that the arbitration clause is procedurally or substantively unconscionable, or that it is unenforceable. Additionally, PageData has not alleged

a valid contractual defense to the underlying Interconnection Agreement that would allow it to avoid arbitration by litigating the validity of the entire Agreement itself. The unconscionability of a contract is a matter beyond the Commission's authority. *Idaho Code* § 28-2-302; R. at p. 227 (Appendix B).

The Commission's findings are supported by substantial and competent evidence in the Record. The Commission did not act contrary to law, nor abuse its discretion. The dismissal of the Complaint without prejudice was a regular pursuit of the Commission's authority. The Commission's Orders should be affirmed.

B. Standard of Review

The standards of review for Orders of the Public Utilities Commission are well settled. Under the Idaho Constitution, this Court has only limited jurisdiction to review decisions of the Commission. Idaho Const., Art. 5, § 9; *A.W. Brown Company v. Idaho Power Company*, 121 Idaho 812, 815, 828 P.2d 841, 844 (1992). "The review on appeal shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the constitution of the United States or the state of Idaho." *Idaho Code* § 61-629.

With regard to findings of fact, if the Commission's findings are supported by substantial, competent evidence this Court must affirm those findings, *Industrial Customers of Idaho Power v. Idaho PUC*, 134 Idaho 285, 288, 1 P.3d 786, 789 (2000), even if the Court would have made a different choice had the matter been before it *de novo*. *Hulet v. Idaho PUC*, 138 Idaho 476, 478, 65 P.3d 498, 500 (2003). Substantial, competent evidence is defined as more than a mere scintilla, but something less than the weight of the evidence. *Industrial Customers*, 134 Idaho at 292-93, 1 P.3d at 793-94.

On questions of law, review is limited to the determination of whether the Commission has regularly pursued its authority. *A.W. Brown*, 121 Idaho at 815, 828 P.2d at 844; *Hulet*, 138 Idaho at 478, 65 P.3d at 500. The Commission's Order or ruling will not be set aside unless it has failed to follow the law or has abused its discretion. *Application of Boise Water Corp.*, 82 Idaho 81, 86, 349 P.2d 711, 713 (1960)(citing cases).

The Commission's Orders must contain the reasoning behind its conclusions to sufficiently allow the reviewing court to determine that the Commission did not act arbitrarily. *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996). "What is essential are sufficient findings to permit the reviewing court to determine that the IPUC has not acted arbitrarily." *Id.* at 624, 617 P.2d at 781 (citations omitted).

Contrary to PageData's assertions (Brief at p. 6-7), the Orders of the Commission are not subject to *de novo* review. PageData does not offer any authority for its position. *Id.* Indeed, this Court will not displace the Commission's choice between two fairly conflicting views, "even if the Court would have made a different choice had the matter been before it *de novo*." *Boise Water Company v. Idaho PUC*, 128 Idaho 534, 537, 916 P.2d 1259, 1262 (1996).

Matters may not be raised for the first time on appeal. *Eagle Water Company v. Idaho PUC*, 130 Idaho 314, 316-17, 940 P.2d 1133, 1135-36 (1997). "It is a well settled rule that in an appeal from the commission matters may not be raised for the first time on appeal and that where the objections were not raised in the petition for rehearing, they will not be considered by this court." *Id.* (quoting *Key Transp., Inc. v. Trans Magic Airlines Corp.*, 96 Idaho 110, 112-113, 524 P.2d 1338, 1340-41 (1974)).

C. The Commission Did Not Err When It Declined Jurisdiction and Dismissed PageData's Complaint Without Prejudice Because the Parties Were Required to Utilize the Arbitration Provisions of Their Interconnection Agreement.

In its Order No. 29687, the Commission found that the parties' Interconnection Agreement contains an arbitration clause. R. at p. 214 (Appendix A). PageData acknowledges that an arbitration provision is contained in Section 13.14 of the Agreement. R. at p. 97; PageData's Brief at p. 10. The Commission also noted that this Court recognizes a strong public policy in favor of arbitration, and has held that arbitration is a favored remedy for resolving disputes. *International Assoc. of Firefighters v. City of Boise*, 136 Idaho 162, 168, 30 P.3d 940, 946 (2001). R. at p. 215 (Appendix A).

Both the Idaho State Legislature as well as the U.S. Congress in their enactment of the Uniform Arbitration Act and the Federal Arbitration Act, respectively, have embraced arbitration as a favored remedy. Under both federal and state law, arbitration agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. *Idaho Code* § 7-901; 9 U.S.C. § 2. Here, Section 13.14 states that the "Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes." R. at p. 34, 211 (Appendix A)(emphasis added).

Additionally, the FCC has specifically recognized the validity of dispute resolution provisions contained in interconnection agreements entered into pursuant to the federal Telecommunications Act of 1996, 47 U.S.C. § 251 *et seq.* *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corp. Commission*, CC Docket No. 00-52, FCC 00-52, 15 F.C.C.R. 11,277 at n.14 (2000), 2000 WL 767701 (FCC). The FCC noted, "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.” *Id.* This is the situation in this case, as Section 13.14 of the parties’ Agreement contains a mandatory arbitration clause. R. at p. 34.

The plain language of the arbitration clause in the parties’ Interconnection Agreement requires them to arbitrate any dispute that cannot be resolved through negotiations. Section 13.14 states any dispute that “If any claim cannot be settled through negotiations, it shall be resolved by arbitration.” R. at p. 34, 211 (Appendix A)(emphasis added). When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004); *McKay v. Boise Project Board of Control*, 141 Idaho 463, 111 P.3d 148, 156 (2005). An unambiguous contract will be given its plain meaning. *Id.* A contract is ambiguous if the Court determines that it is “reasonably subject to conflicting interpretation.” *McKay*, 141 Idaho at 463, 111 P.3d at 156.

PageData asserts that the last sentence in Section 13.14 allows it to choose arbitration, the Commission, or the FCC in lieu of federal or state court, and that “Qwest is contractually bound to accept PageData’s selected method of relief without recourse.” PageData’s Brief at 13. The last sentence reads: “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 p. 34. However, the Commission found “the parties clearly contemplated utilizing arbitration when they cannot resolve their dispute informally,” and that the plain language, “shall arbitrate,” requires them to first utilize the arbitration process detailed in their agreement. R. at p. 214-15 (Appendix A). The Commission stated, “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.” R. at p. 215 (Appendix A).

The Commission recognized and found that the enforcement of contracts is generally a matter which lies in the jurisdiction of the courts and not the public utilities commission. R. at p. 227 (Appendix B). *Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 696, 571 P.2d 753, 757 (1977); *see also Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000). This Court recognizes exceptions to this general rule which include instances where both parties agree to let the Commission settle the contractual dispute, and where “the Commission can use its expertise to supply a reasonable contract rate where the parties have an existing contract but are unable to agree to the specific rate.” *Afton Energy v. Idaho Power Co.*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986). The Commission found neither exception applies in this case. R. at p. 227 (Appendix B). The Commission found that because Qwest objected to the Commission’s involvement and urged the Commission to decline to exercise jurisdiction, obviously, the parties did not agree to allow the Commission to resolve their contractual dispute. *Id.*

The language of Section 13.14 is clear and unambiguous. The section, read as a whole, is subject to only one reasonable interpretation. If it is interpreted as PageData has put forth, then the provision regarding mandatory arbitration essentially has no meaning. If the parties’ Agreement was, as PageData suggests, that they could choose a forum – either arbitration, the state commission, or the FCC – then that is what it would have said. It did not. PageData’s interpretation is not reasonable. Section 13.14 clearly states, “If any claim, controversy or dispute between the Parties . . . cannot be settled through negotiation, it shall be resolved by arbitration.” R. at p. 34 (emphasis added). The plain language of the arbitration

clause requires the parties to arbitrate their dispute. The subject matter of PageData's Complaint, reciprocal compensation, is clearly an issue contained in and addressed by the Interconnection Agreement. The strong public policy, as expressed by the Courts and the Legislatures, in favor of arbitration supports the Commission's findings that the parties must first arbitrate their dispute. Declining to resolve this dispute and dismissing PageData's Complaint without prejudice was a proper exercise of the Commission's discretion, and a regular pursuit of its authority. The Commission articulated the reasons for its actions, has followed the law, and has not acted arbitrarily. *Rosebud*, 128 Idaho at 618, 917 P.2d at 775. The Commission's Order should be affirmed.

D. The Commission Did Not Err When It Found that the Issue of Unconscionability and Contract Interpretation is Best Left for the Courts.

An arbitration clause may be avoided or invalidated if it is shown to be unconscionable. Both the Idaho Uniform Arbitration Act, *Idaho Code* § 7-901 *et seq.*, and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, provides that arbitration agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. Consequently, because unconscionability can be grounds for voiding a contract, it can be a basis to revoke or invalidate an agreement to arbitrate. *Lovey v. Regence Blueshield of Idaho*, 139 Idaho 37, 41, 72 P.3d 877, 881 (2003). The Commission found that for an arbitration provision to be voided as unconscionable, "it must be both procedurally and substantively unconscionable." R. at p. 227 (Appendix B) *quoting Lovey*, 139 Idaho at 42, 72 P.3d at 882. "Procedural unconscionability relates to the bargaining process leading to the agreement [or provision] while substantive unconscionability focuses upon the terms of the agreement [or provision] itself." *Id.* Additionally, the PUC noted this Court recognizes that, independent of the concept of unconscionability, an agreement to arbitrate may be unenforceable

if large arbitration costs preclude a party from effectively pursuing their claim. R. at p. 227 (Appendix B) citing *Murphy v. Mid-West National Life Ins. Co.*, 139 Idaho 330, 332, 78 P.3d 766, 768 (2003).

In its Petition for Reconsideration from the PUC's first Order No. 29687, PageData for the first time argued that the "arbitration clause is unconscionable" and requested a hearing pursuant to *Idaho Code* § 28-2-302 to present evidence that the arbitration clause is unconscionable.⁴ R. at p. 217, 221. The Commission found this "argument unavailing for several reasons." R. at p. 226 (Appendix B).

First, the Commission found *Idaho Code* § 28-2-302 confers jurisdiction on the courts, not the Commission. R. at p. 226-27 (Appendix B). The Commission stated, Section 28-2-302 is part of the Idaho Uniform Commercial Code – Sales . . . [and] provides in pertinent part:

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

R. at p. 226-27 (Appendix B); *Idaho Code* § 28-2-302 (emphasis added).

Idaho Code § 28-2-302 only references the court, and grants no authority to the Commission. The Commission is an agency of the legislative branch of government and may only exercise those powers delegated to it by the Legislature. *A.W. Brown*, 121 Idaho at 819,

⁴ PageData does not challenge the underlying contract, the Interconnection Agreement itself, as unconscionable or void. See, R. p. 217-22; PageData's Brief at p. 15-16. Instead, PageData argues, both at the Commission and on appeal, that the Commission's ruling makes the arbitration clause unconscionable. R. at p. 217, 220; PageData's Brief at p. 15.

828 P.2d at 848; *Industrial Customers*, 134 Idaho at 289, 1 P.3d at 790. The Commission is not a court of law. *Natatorium Company v. Erb*, 34 Idaho 209, 200 P. 348 (1921). Therefore, *Idaho Code* § 28-2-302 does not apply in this case and the appropriate forum to decide unconscionability is a court of competent jurisdiction.

Second, as the Commission recognized, interpretation and enforcement of contracts is generally a “matter which lies in the jurisdiction of the courts and not the public utilities commission.” R. at p. 227 (Appendix B) quoting *Lemhi Telephone Company v. Mountain States Tel. & Tel. Company*, 98 Idaho 692, 696, 571 P.2d 753, 757 (1977). See also *Idaho Power Company v. Cogeneration*, 134 Idaho 738, 9 P.3d 1204 (2000). When recently examining the scope of the Federal Arbitration Act, the United States Supreme Court recognized that there are limited circumstances when courts may decide “gateway matters.” *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 2407 (2003). Such gateway matters include “whether the parties have a valid arbitration agreement at all. . . .” *Id.* Thus, the decision of whether the parties must resort to arbitration or whether the arbitration clause is unconscionable, are both questions for the courts to decide.

Third, PageData also suggested that the arbitration clause may be “struck down” on the grounds that the arbitration fees are prohibitive. R. at p. 220. However, the Commission found the arbitration clause in Section 13.14 is not unenforceable due to prohibitive costs. R. at p. 227-28 (Appendix B). The Commission distinguished the arbitration clause in this case from that which was found to be unenforceable as prohibitively expensive in *Murphy*. R. at p. 228 (Appendix B). The Commission found that Section 13.14 of the parties’ Interconnection Agreement provides for a single arbitrator and states that the prevailing party shall be entitled to an award of reasonable attorney fees and costs. *Id.* In contrast, the arbitration clause in *Murphy*

“required each party to pay for its own arbitrator and equally share the expenses of a third arbitrator and all other expenses of arbitration. In addition, the [*Murphy*] arbitration agreement provided that attorney fees and expenses for witnesses must be borne by the party incurring them. *Murphy*, 139 Idaho at 332, 78 P.3d at 768.” *Id.* Finally, the arbitration clause in *Murphy* was applicable only to claims of \$10,000 or less. 139 Idaho at 332, 78 P.3d at 768. There is no such limitation in Section 13.14 of the Interconnection Agreement. PageData’s suggestion that arbitration is cost-prohibitive is not supported by the evidence in the record. As the Commission concluded, the arbitration clause in Section 13.14 “stands in stark contrast to the arbitration provision in *Murphy*.” R. at p. 228 (Appendix B). The Commission properly rejected PageData’s argument that the arbitration clause was unconscionable and unenforceable. The Commission articulated the reasons for its actions, has followed the law, and has not acted arbitrarily. *Rosebud*, 128 Idaho at 618, 917 P.2d at 775. The Commission’s Orders should be affirmed.

E. The Idaho Rules of Civil Procedure Do Not Apply to the Commission.

PageData argues on appeal that, “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.” PageData’s Brief at p. 10. PageData argues that the Commission should have addressed the standards set forth in the Idaho Rules of Civil Procedure 12(b)(6) and 56. *Id.* at p. 7-10. This argument is without merit for two reasons. First, PageData may not raise this argument for the first time on appeal. Second, the Idaho Rules of Civil Procedure do not apply to the Public Utilities Commission.

1. PageData May Not Raise Arguments for the First Time on Appeal.

“It is a well settled rule that in an appeal from the commission matters may not be raised for the first time on appeal and that where the objections were not raised in the petition for rehearing, they will not be considered by this court.” *Eagle Water Company v. Idaho PUC*, 130 Idaho 314, 316-17, 940 P.2d 1133, 1135-36 (1997)(quoting *Key Transp., Inc. v. Trans Magic Airlines Corp.*, 96 Idaho 110, 112-113, 524 P.2d 1338, 1340-41 (1974)). PageData did not raise the issue of the Idaho Rules of Civil Procedure in its Complaint, its numerous responses including a “Request for Summary Judgment,” or in its Petition for Reconsideration. In fact, PageData did not have one single citation or reference in this Record to the Idaho Rules of Civil Procedure prior to the filing of its Brief with this Court. Consequently, PageData is precluded from raising this issue here for the first time on appeal.

2. The Idaho Rules of Civil Procedure Do Not Apply to the Commission.

Even if the issue regarding the applicability of the Idaho Rules of Civil Procedure had been properly raised and preserved for appeal, the Rules apply to courts, and do not apply to the Commission. The Idaho Public Utilities Law directs the Commission to promulgate rules of practice and procedure. *Idaho Code* § 61-601. “All hearings and investigations before the commission or any commissioner shall be governed by this act and by rules of practice and procedure to be adopted by the commission. . . .” *Id.* The Commission has adopted Rules of Procedure pursuant to its statutory authority. IDAPA 31.01.01. The Idaho Rules of Civil Procedure apply only to the courts. I.R.C.P. 1(a). The Commission is not a court of law. *Natatorium Company v. Erb*, 34 Idaho 209, 200 P. 348 (1921). Therefore, the Idaho Rules of Civil Procedure do not apply to proceedings before the Commission.

F. PageData Has Misinterpreted Section 252 of the Federal Telecommunications Act.

1. Noting in 47 U.S.C. § 252 Gives the Commission “Exclusive Rights” to Resolve Disputes Under Approved Interconnection Agreements.

PageData argues in its Brief that Section 252 of the federal Telecommunications Act “gives the state commissions the exclusive right to make first instance determinations with regard to interconnection disputes.” PageData Brief at p. 11 (emphasis added); *See also* PageData Brief at p. 13, 14. However, PageData does not cite any specific language to support its characterization of Section 252. On the contrary, by its expressed terms, Section 252(a)(2) only permits a state regulatory commission to assist the parties in mediating an initial interconnection agreement, or to arbitrate any disputed issue in an initial interconnection agreement. 47 U.S.C. § 252(a)(2) and 252(b)(4)(C). Nowhere in Section 252 is there an explicit grant of authority for a state commission to enforce and resolve disputes under existing interconnection agreements.

The FCC recognizes that parties may be bound by dispute resolution clauses in their interconnection agreements, and thus, “the State commission would have no responsibility under Section 252 to interpret and enforce an existing [interconnection] agreement.” *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, 15 FCC Rcd 11,277 at n.14 (2000) 2000 WL 767701 (FCC). This appeal presents such a case because Section 13.14 of the Interconnection Agreement contains a mandatory arbitration clause.

Moreover, there is nothing in 47 U.S.C. § 252 that compels the Commission to resolve and enforce a dispute under an existing interconnection agreement. Section 252(e)(5) recognizes that if a state commission fails to carry out its duties under Section 252, then the FCC

“shall assume the responsibilities of the State commission under this section with respect to the proceeding or matter and act for the State commission.” While some courts have recognized state commissions may enforce interconnection agreements pursuant to Section 252, this Court has held that interpretation of contracts is generally a matter for the Idaho courts and not this Commission. R. at p. 227 (Appendix B); *Lemhi Telephone*, 98 Idaho at 696, 571 P.2d at 757; *cf. Bellsouth Telecommunications, Inc. v. MCIMetro Access Transmission Svs., Inc.*, 317 F.3d 1270, 1274 (11th Cir. 2003). The Commission did not reach this issue here, and neither this Court, the 9th Circuit Court of Appeals, nor the U.S. Supreme Court have directly addressed the issue of state commission authority to enforce interconnection agreements. PageData’s argument that the Commission has exclusive authority to enforce the contract is incorrect and contrary to Section 252(e)(5).

2. There is No Statutory Impediment to Filing an Arbitration Decision with the Commission.

PageData argued on reconsideration and on appeal that there is no mechanism in Idaho statute to file a private arbitration decision with the Commission and make it publicly available to other carriers for adoption under Section 252(i) of the Act. PageData’s Brief at p. 11-12. This argument is without merit. As the Commission stated in its reconsideration Order, “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. at p. 228 (Appendix B). The parties’ Interconnection Agreement contains “Changes in Law,” Section 1.1, and “Amendment,” Section 13.23, provisions which specifically recognize changing and amending the Interconnection Agreement. R. at p. 7, 37. Indeed, the parties in the past have amended the underlying agreement by submitting an application for the Commission to approve the change. R. at p. 82-96.

The Commission noted that either party could file an arbitration decision with the Commission. R. at p. 228 (Appendix B). 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. *Id.*; 47 U.S.C. § 252. There is nothing to prohibit the prevailing party in an arbitration dispute from filing the arbitrator's decision with the Commission. Through this process the Commission could, and would, assure that the obligations it has with regard to Sections 252(e) and 252(i) of the Act are met.

IV. CONCLUSION

The Commission in this case declined to resolve PageData's Complaint and dismissed it without prejudice. The Commission found that the parties must first comply with the mandatory arbitration clause of their voluntarily negotiated and approved Interconnection Agreement. The Commission also found that issues of unconscionability are best directed to the Courts and not the Commission. The Commission's action was consistent with the law, the state and federal policy favoring arbitration, as well as the parties' own agreement. The Commission regularly pursued its authority, and its findings are based on substantial and competent evidence in the record. Consequently, the Commission's Order Nos. 29687 and 29726 should be affirmed.

DATED at Boise, Idaho this 16th day of August 2005.



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

Attorneys for the
Idaho Public Utilities Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 16th DAY OF AUGUST 2005, SERVED THE FOREGOING **RESPONDENT BRIEF OF THE IDAHO PUBLIC UTILITIES COMMISSION**, IN SUPREME COURT DOCKET NO. 31844, VIA U S MAIL BY MAILING TWO COPIES 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

Appendix A

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

JOSEPH B. McNEAL, DBA PAGEDATA,)	
)	CASE NO. QWE-T-03-25
COMPLAINANT,)	
)	
vs.)	
)	
QWEST CORPORATION, INC.)	ORDER NO. 29687
)	
RESPONDENT.)	

On October 31, 2003, Joseph McNeal dba PageData filed a "formal" Complaint against Qwest Corporation. PageData alleged that Qwest is not in compliance with the reciprocal compensation provisions of their Interconnection Agreement. In November 2003 Qwest submitted a "limited" response to PageData's Complaint. Qwest urged the Commission to refrain from opening a docket and suggested that PageData's Complaint should be dismissed. Qwest did not address the merits of PageData's Complaint. In December 2003 PageData filed a Reply to Qwest's limited response.

In January 2004 PageData filed a Request for Summary Judgment. On August 18, 2004, PageData filed a Supplemental Memorandum supporting its Complaint. Attempts by the parties to settle this Complaint (and other cases) have been unsuccessful. For reasons set out in greater detail below, the Commission declines jurisdiction to resolve this Interconnection Agreement dispute.

BACKGROUND

In Order No. 28499 issued September 1, 2000, the Commission approved an Interconnection Agreement between Qwest and Arch Paging. In January 2003, the Qwest-Arch Interconnection Agreement was amended and subsequently approved by the Commission in Order No. 29178. In February 2003, Qwest and PageData jointly filed an Application requesting that the Commission approve PageData's adoption of the Arch Interconnection Agreement (as amended) under the federal Telecommunications Act of 1996, 47 U.S.C. § 252(i). The joint Application stated that the parties' adoption of the Arch Agreement "was reached through voluntary negotiations." The Commission subsequently approved PageData's adoption of the amended Arch Agreement. Order No. 29198 at 3, 5.

PAGEDATA'S COMPLAINT

In its Complaint, PageData alleged first that Qwest has misbilled PageData under the adopted Arch Agreement, and second that Qwest has refused to correct the billing. PageData requested that the Commission direct Qwest to correct the billing on Account BAN208R51-0454-454. In addition, PageData sought an Order from this Commission to require Qwest to remit cash payments to PageData for reciprocal compensation or, at a minimum, to issue credits for the reciprocal compensation to specific accounts designated by PageData.

Under the adopted Arch Agreement, PageData asserted it is "in a unique position [because] Qwest owes PageData more money per month than PageData owes Qwest" as a result of reciprocal compensation. Complaint at 2. PageData maintained Qwest has refused to issue cash payments for reciprocal compensation "because of prior disputed accounts." *Id.* at 3.¹ PageData alleged Qwest's failure to make reciprocal compensation payments or provide credits violates Section 12.3 of the parties' Interconnection Agreement. Section 12.3 allows either party to dispute any portion of the monthly billing and both parties agree to expedite investigation of any dispute. This section also provides that either party may withhold "up to four months worth of disputed charges not to exceed \$100,000 in the aggregate." *Id.*

PageData argued Qwest should not be allowed to violate the terms of the approved Interconnection Agreement by mixing current interconnection disputes with "past disputes that are before authoritative bodies that have jurisdiction to settle those disputes...." Complaint at 7. PageData insisted the terms of its Interconnection Agreement should control regardless of past disputes with Qwest.

PageData stated it filed its formal complaint pursuant to the federal Telecommunications Act of 1996 and Section 13.14 (Dispute Resolution) of its Interconnection Agreement. Section 13.14 of the Interconnection Agreement addresses disputes. This section provides in pertinent part:

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"). The arbitration shall be conducted by a single neutral arbitrator familiar with the

¹ PageData and Qwest are opposing parties in Idaho Supreme Court Appeal No. 29175. The appeal concerns billing disputes that arose before the parties entered into their first Interconnection Agreement.

telecommunications industry and engaged in the practice of law. ...The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply and the rules used shall be those for the telecommunications industry. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. The prevailing Party, as determined by the arbitrator, shall be entitled to an award of reasonable attorneys' fees and costs. The arbitration shall occur at a mutually agreed upon location. Nothing in this Section shall be construed to waive or limit either Party's right to seek relief from the [Idaho] Commission or the FCC as provided by state or federal law.

Adopted Qwest-PageData Interconnection Agreement, § 13.14 (emphasis added).

QWEST'S RESPONSE

In its "limited" response to PageData's Complaint, Qwest asserted the Commission should decline to docket a complaint proceeding and "should dismiss PageData's Filing." Qwest Response at 2. Qwest specifically stated that its limited response does not constitute an "Answer" under the Commission's procedural Rule 57, IDAPA 31.01.01.057. Qwest maintained that the parties' Interconnection Agreement sets out detailed procedures for resolving disputes "but PageData has entirely ignored that contractual obligation." *Id.* at 2. Because the substance of PageData's Complaint is a contract dispute under their Interconnection Agreement, Qwest urged the Commission to decline jurisdiction and instead direct the parties to utilize the dispute resolution provisions of their Agreement.

Qwest further asserted that the procedures for addressing PageData's Complaint are addressed by Section 13.14 (set out above) of the parties' Interconnection Agreement. Given that the subject matter of PageData's Complaint arises under their adopted and Commission-approved Interconnection Agreement, Qwest insisted PageData is contractually bound to follow the dispute resolution procedures called out in the Agreement.

Qwest next asserted there is no federal or state law clearly granting the Commission jurisdiction over disputes arising from an Interconnection Agreement. The Company maintained that generally the construction and enforcement of contract rights in Idaho is a matter that lies in the jurisdiction of the courts and not this Commission. *Bunker Hill Company v. Washington Water Power Company*, 101 Idaho 493, 616 P.2d 272 (1980). Thus, Qwest questioned whether the Commission is the proper forum to address PageData's contract Complaint.

Finally, Qwest asserted that Idaho law strongly favors the enforcement of contractual arbitration clauses. As set out above, Section 13.14 provides that unresolved disputes between the parties shall be resolved by arbitration. Qwest noted arbitration is a favored remedy for disputes. *International Assoc. of Firefighters, Local No. 672 v. City of Boise*, 136 Idaho 162, 30 P.3d 940 (2001). For these reasons, Qwest urged the Commission to dismiss the complaint and not initiate a complaint proceeding.

PAGEDATA'S REPLY

In its Reply, PageData urged the Commission to reject Qwest's assertion that the Commission has no jurisdiction over this complaint. The Pager insisted the Commission has jurisdiction to resolve disputes concerning interconnection agreements. More specifically, PageData asserted that *Idaho Code* §§ 62-614 and 62-615(1) provides the Commission with the requisite statutory authority to investigate and resolve this dispute. PageData relied on the Commission's Order No. 29219 in the *ITA/Illuminet v. Qwest* case (No. QWE-T-02-11) for support. In that case, the Commission noted that *Idaho Code* § 62-615(1) gives the Commission "full power and authority to implement the federal telecommunications act of 1996." PageData Reply at 326 quoting Order No. 29219 at n.1. In addition, the Pager maintained that *Idaho Code* § 62-614² provides broad authority to the Commission so that it may "resolve disputes between incumbent telephone companies, like Qwest, and other telephone service providers." *Id.*, quoting Order No. 29219 at 4. Consequently, PageData believes that the Commission has jurisdiction to entertain PageData's Complaint.

PageData also asserted that the Commission "is responsible for enforcing the pricing schedules and reciprocal compensation terms on interconnection agreements that [the Commission] approved (*Idaho Code* § 62-614)." PageData Reply at 9. PageData insisted the Commission "is compelled by Idaho statute to investigate all commercially filed formal complaints and enforce all provisions of interconnection agreements that are filed within the state of Idaho...." *Id.*

² *Idaho Code* § 62-614(1) states:

If a telephone corporation providing basic local exchange service which has exercised the election provided in section 62-604(2)(a), *Idaho Code*, and any other telephone corporation subject to title 61, *Idaho Code*, or any mutual, nonprofit or cooperative telephone corporation, are unable to agree on any matter relating to telecommunication issues between such companies, then either telephone corporation may apply to the commission for determination of the matter.

PageData explained that Section 13.14 of the Interconnection Agreement provides for three methods of dispute resolution. "Qwest has the ability to take PageData to arbitration; file a complaint at the [Idaho] Commission where the services are being provided; or file a complaint at the FCC in order that Qwest may request an order to demand payment or disconnect services." *Id.* at 16. Instead of pursuing one of these three methods of dispute resolution, Qwest took unilateral action by withholding reciprocal compensation. Consequently, PageData stated that Qwest's conduct leaves the decision on which dispute resolution alternative to utilize "to PageData alone." *Id.* at 1. After PageData filed this complaint, Qwest should now be prohibited from dictating a different course of dispute resolution. *Id.* at 19.

THE REQUEST FOR SUMMARY JUDGMENT

In January 2004 PageData filed a "Request for Summary Judgment." In its Request, PageData stated that Qwest is correcting the disputed invoices in this matter but is "still not agreeing to remit payment for reciprocal compensation due PageData." PageData Summary Judgment at 2. PageData insisted that its entitlement to reciprocal compensation under the Interconnection Agreement more than offsets the charges billed by Qwest.

DISCUSSION AND FINDINGS

After having reviewed the pleadings in this case, we decline PageData's invitation to resolve its Interconnection Agreement dispute with Qwest. It is undisputed that both Qwest and PageData voluntarily agreed to adopt the Qwest-Arch Paging Interconnection Agreement pursuant to 47 U.S.C. § 252(i). Section 13.14 of the Interconnection Agreement contains an arbitration provision for the resolution of disputes between the parties. The Commission approved PageData's Interconnection Agreement with Qwest in Order No. 29198. A review of the arbitration provision is instructive.

Section 13.14 provides that any dispute between parties "shall be resolved by arbitration." (Emphasis added.) This section states that the arbitration will be conducted under the rules of the American Arbitration Association (AAA) and the arbitrator's decision "shall be final and binding." The parties also agreed to utilize all "expedited procedures prescribed by the AAA rules" and the prevailing party "shall be entitled to an award of reasonable attorneys' fees and cost." Simply put, the Interconnection Agreement contains detailed procedures for utilizing the AAA arbitration rules to resolve disputes.

Based upon our review of Section 13.14, we find that the parties clearly contemplated utilizing arbitration when they cannot resolve their dispute informally. Our Supreme Court has recognized that there is a strong public policy in favor of arbitration and that arbitration "is a favored remedy" for resolving disputes. *International Assoc. of Firefighters, Local 672 v. City of Boise*, 136 Idaho 162, 168, 30 P.3d 940, 946 (2001). The Supreme Court recognizes that the:

essential nature of arbitration is that the parties, by consensual agreement, have decided to substitute the final and binding judgment of an impartial entity conversant with the [telecommunications and] business world for the judgment of the courts. They seek to avoid the cost, in both time and money, of formal judicial dispute resolution.

Driver v. SI Corporation, 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). Here the parties agreed to include an arbitration clause in their contract. 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.

We further find PageData's reliance on *Idaho Code* § 62-614 is misplaced. This statute authorizes the Commission to resolve disputes between a Title 61 local exchange company (LEC) and a telephone corporation that has elected to remove its non-local services from regulation under Title 61 (i.e., Qwest). However, PageData is not a Title 61 LEC providing local exchange service. Under Idaho law, telephone corporations providing radio paging services "are exempt from any requirements of title 61, or chapter 6, title 62, Idaho Code." *Idaho Code* § 61-121. See also *Idaho Code* §§ 62-603 (13) and (14).

Even though the Commission declines jurisdiction in this case, PageData is not without a remedy. As PageData recognized, it may submit this dispute to arbitration or the FCC under Section 13.14. Consequently, we decline PageData's request to resolve its reciprocal compensation complaint against Qwest.

ORDER

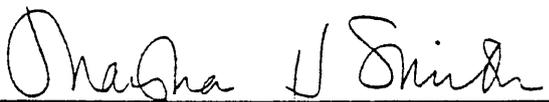
IT IS HEREBY ORDERED that the Commission declines to accept jurisdiction to resolve PageData's Complaint regarding reciprocal compensation. Consequently, we dismiss PageData's Complaint without prejudice.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this Case No. QWE-T-03-25 may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this Case No. QWE-T-03-25. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

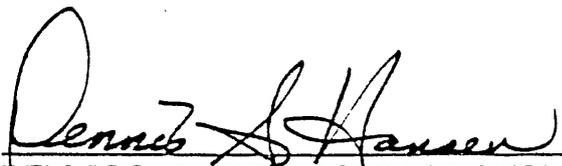
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 19th day of January 2005.



PAUL KJELLANDER, PRESIDENT

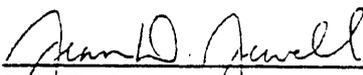


MARSHA H. SMITH, COMMISSIONER



DENNIS S. HANSEN, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

b1s/O:QWET0325_dh

Appendix B

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

JOSEPH B. McNEAL, DBA PAGEDATA,)	
)	CASE NO. QWE-T-03-25
COMPLAINANT,)	
)	
vs.)	
)	
QWEST CORPORATION, INC.,)	ORDER NO. 29726
)	
RESPONDENT.)	

In October 2003 Joseph McNeal dba 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. Consequently, the Commission dismissed the Complaint without prejudice.

On February 9, 2005, PageData filed a timely Petition for Reconsideration. PageData primarily asserts that the Commission erred in declining to resolve the complaint because the arbitration clause is unconscionable. After reviewing PageData's Petition, the Commission denies reconsideration as explained in greater detail below.

BACKGROUND

The procedural history of this case is contained in Order No. 29687. Briefly, on February 7, 2003, Qwest and PageData jointly filed an Application to adopt a previously approved Interconnection Agreement between Qwest and Arch Paging, Inc. pursuant to 47 U.S.C. § 252(i). The Application notes that PageData and Qwest reached agreement "through voluntary negotiation" to adopt the Arch-Qwest Agreement in its entirety. The parties' Agreement to adopt the amended Arch Interconnection Agreement was executed by both Qwest

and Mr. McNeal dba PageData. The Commission approved the Qwest-PageData Interconnection Agreement in Order No. 29198 issued February 25, 2003.

PageData filed its Complaint against Qwest pursuant to the federal Telecommunications Act of 1996 (47 U.S.C. § 251 *et seq.*) and Section 13.14 (“Dispute Resolution”) of its Interconnection Agreement. Complaint at 1. Section 13.14 provides in pertinent part:

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”). The arbitration shall be conducted by a single neutral arbitrator familiar with the telecommunications industry and engaged in the practice of law. ...The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply and the rules used shall be those for the telecommunications industry. The arbitrator’s award shall be final and binding and may be entered in any court having jurisdiction thereof. The prevailing Party, as determined by the arbitrator, shall be entitled to an award of reasonable attorneys’ fees and costs. The arbitration shall occur at a mutually agreed upon location. Nothing in this Section shall be construed to waive or limit either Party’s right to seek relief from the [Idaho] Commission or the FCC as provided by state or federal law.

§ 13.14, Qwest-PageData Interconnection Agreement (emphasis added).

THE COMMISSION’S PRIOR ORDER

In Order No. 29687 the Commission observed that the Interconnection Agreement contains an arbitration clause at Section 13.14. This arbitration clause provides that any disputes between the parties “shall be resolved by arbitration.” Order No. 29687 at 5 (emphasis original). Given the presence of the detailed arbitration clause in their Interconnection Agreement, the Commission found that “the parties clearly contemplated utilizing arbitration when they cannot resolve their dispute informally.” *Id.* at 6. The Commission also noted that the Supreme Court had recognized that arbitration “is a favored remedy” for resolving disputes. *Id. citing International Assoc. of Firefighters, Local 672 v. City of Boise*, 136 Idaho 162, 30 P.3d 940 (2001). Although Section 13.14 does not limit the parties’ right to seek relief from this Commission or the Federal Communications Commission (FCC), the Commission found the

presence of a detailed arbitration clause should be “the first and foremost method for resolving disputes under the Interconnection Agreement.” *Id.*

THE PETITION FOR RECONSIDERATION

PageData generally argues that the Commission erred in dismissing its Complaint in reliance upon the arbitration clause in Section 13.14. The Company maintains the Commission’s reliance on the arbitration clause is misplaced for two reasons. First, PageData “claims the arbitration clause is unconscionable” and requests that the Commission schedule a hearing pursuant to *Idaho Code* § 28-2-302. Petition for Reconsideration at 3. PageData requests a hearing so that the parties may present evidence “to aid the Commission in making a determination” whether the arbitration clause is unconscionable.

Second, even if the Complaint is referred to arbitration, PageData insists that Section 252(i) of the federal Telecommunications Act requires “that the resolution of a reciprocal compensation dispute be filed . . . and available for adoption by other carriers.” *Id.* at 2. It alleges there is “no mechanism in Idaho statutes” to make a private arbitration decision “available for adoption by other carriers.” *Id.* In addition, PageData suggests that the arbitration decision must be approved by the Commission.

DISCUSSION AND FINDINGS

A. Unconscionability

PageData claims that the arbitration clause contained in its Interconnection Agreement is unconscionable and requests that the Commission convene an evidentiary hearing on that claim. The Company suggests that the arbitration fees imposed by the American Arbitration Association’s (AAA) commercial rules and the costs of arbitration are prohibitive. Petition at 4. PageData’s theory is the AAA arbitration fees and costs are so excessive that they effectively remove arbitration as a remedy for resolving the parties’ dispute. We find PageData’s argument unavailing for several reasons.

First, PageData asserts that *Idaho Code* § 28-2-302 requires the Commission to convene a hearing so PageData may present evidence regarding the alleged unconscionability of the arbitration clause. However, this statute does not confer jurisdiction upon this Commission. Section 28-2-302 is part of the Idaho Uniform Commercial Code – Sales. *Idaho Code* § 28-2-101. This section provides in pertinent part:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Idaho Code § 28-2-302 (emphasis added). As is evident from the plain text of this section, arguments and evidence of unconscionability must be presented to a court – not the Commission. As our Supreme Court noted in *Natatorium Co. v. Erb*, the Commission is not a court of law. 34 Idaho 209, 200 P. 348 (1921).

Second, the construction and enforcement of contracts is generally “a matter which lies in the jurisdiction of the courts and not the public utilities commission.” *Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 696, 571 P.2d 753, 757 (1977); see also *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000). Our Supreme Court recognizes that there are exceptions to this general rule. One exception is where both parties agree to let the Commission settle their contract dispute. *Afton Energy v. Idaho Power Co.*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986).¹ In this case, Qwest objected to our involvement and urges the Commission to decline to exercise jurisdiction. Qwest Response at 6-10. Thus, both parties do not agree.

Third, for an arbitration provision to be voided as unconscionable, it must be both procedurally and substantively unconscionable. *Lovey v. Regence Blue Shield of Idaho*, 139 Idaho 37, 42, 72 P.3d 877, 882 (2003). “Procedural unconscionability relates to the bargaining process leading to the agreement [or provision] while substantive unconscionability focuses upon the terms of the agreement [or provision] itself.” *Id.* However, the Court held that an arbitration clause that required each party to pay its own costs is not unconscionable. *Id.* at 45, 72 P.3d at 885.

Our Supreme Court also recognizes that an arbitration clause “may be unenforceable if large arbitration costs preclude the party from effectively vindicating the party’s federal statutory rights in the arbitral forum.” *Murphy v. Mid-West National Life Insurance Co.*, 139

¹ The other exceptions are not pertinent here.

Idaho 330, 332, 78 P.3d 766, 768 (2003) quoting *Lovey*, 139 Idaho at 45, 72 P.3d at 885. This concept is independent from the doctrine of unconscionability. In *Murphy*, the arbitration clause in question required each party to pay for its own arbitrator and equally share the expenses of a third arbitrator and all other expenses of arbitration. In addition, the arbitration agreement provided that attorney fees and expenses for witnesses must be borne by the party incurring them. *Murphy*, 139 Idaho at 332, 78 P.3d at 768. The arbitration provision in *Murphy* stands in stark contrast to the arbitration provision contained in Section 13.14 of the parties' Interconnection Agreement. In particular, Section 13.14 provides for a single arbitrator and the prevailing party "shall be entitled to an award of a reasonable attorneys' fees and costs." Thus, the arbitration process encompassed in the Interconnection Agreement allows the prevailing party to fully recover arbitration costs and attorney fees. We do not believe that the terms of Section 13.14 render this arbitration provision unenforceable.

B. Filed Arbitration Decisions

We next turn to PageData's argument that there is "no mechanism in Idaho statute to [file] a private AAA arbitration decision" with the Commission and make it publicly available to other carriers for adoption under Section 252(i). We find this argument unpersuasive. 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. Indeed, the Washington Utilities and Transportation Commission recently ruled that both parties to an interconnection agreement bear responsibility for filing the initial agreement with state commissions. *Washington UTC v. Advanced Telecom Group, et al.*, Order No. 7 at ¶¶ 3, 14, 21 (Docket No. UT-033011, June 2, 2004); 2004 WL 1597624 (Wash. UTC). The Washington Commission also noted that other state commissions have recognized that both parties to an interconnection agreement are responsible for filing the agreement with state commissions. *Id.* at ¶ 23. While these decisions deal primarily with interconnection agreements, we see no reason why they would not be applicable to amendments or clarifications to interconnection agreements.

Finally, as we noted in our prior Order No. 29687, there is a strong public policy in favor of arbitration and arbitration clauses. Here the parties "voluntarily negotiated" the adoption of the Arch Interconnection Agreement in its entirety. While there is no dispute concerning the Commission's authority to approve interconnection agreements, we decline to

subsequently engage in interpretation and enforcement of this particular agreement that contains an arbitration clause. *Accord, Idaho Power Co. v. Cogeneration, Inc.*, 129 Idaho 46, 921 P.2d 746 (1996). Consequently, we deny reconsideration.

ORDER

IT IS HEREBY ORDERED that PageData's Petition for Reconsideration is denied.

THIS IS A FINAL ORDER DENYING RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this case may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 9th day of March 2005.



PAUL KJELLANDER, PRESIDENT

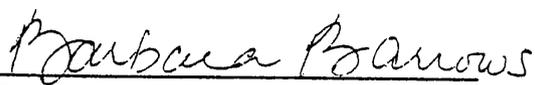


MARSHA H. SMITH, COMMISSIONER



DENNIS S. HANSEN, COMMISSIONER

ATTEST:



Barbara Barrows
Assistant Commission Secretary

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