

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE JOINT PETITION OF)
ROBERT RYDER, DBA RADIO PAGING SERVICE,) CASE NO. USW-T-99-24
JOSEPH MCNEAL, DBA PAGEDATA AND)
INTERPAGE OF IDAHO, FOR A DECLARATORY)
ORDER AND RECOVERY OF OVERCHARGES) ORDER NO. 29140
FROM U S WEST COMMUNICATIONS, INC.)

INTRODUCTION

On July 17, 2002, the Commission issued its final Order No. 29064 in the second part of this case referred to as the "Credit Phase." This case was initiated when three paging companies (referred to as "the Pagers") filed a joint Petition for a Declaratory Order¹ against Qwest Corporation's predecessor, U S WEST Communications. In Order No. 29064, the Commission resolved the underlying issues necessary to calculate the amount of billing refunds that Qwest owed to each of the three Pagers. The Commission's final "Credit" Order directed that Qwest recalculate the refunds due each Pager and issue the respective refunds to the Pagers no later than August 14, 2002. On July 30, 2002, Qwest filed its recalculation of the refunds.

On August 7, 2002, the Pagers submitted a timely Petition for Reconsideration. In their Petition, the Pagers listed more than 35 points of contention with the Commission's final Order No. 29064. The Pagers' Petition also incorporated two pleadings previously filed with the Commission entitled "Supplement to Petitioners' Exceptions" and "Request to Supplement Exceptions."² In Order No. 29064 the Commission found that these two documents were filed after the close of the evidentiary record and declined to consider them. On August 14, 2002, Qwest notified the Commission that it had applied the refunds as credits to the Pagers' accounts. On August 21, 2002, Qwest submitted an Answer to the Pagers' Petition for Reconsideration.

On September 3, 2002, the Commission granted reconsideration so that it could review the numerous issues raised by the Pagers. Order No. 29109. Based upon our review of

¹ The Petition was treated as a "complaint" against Qwest because the Pagers sought specific relief from Qwest's conduct and billing practices. Order Nos. 29064 at n. 1; 28601 at n. 2; and 28427 at 5.

² Also attached to the Petition was a Bankruptcy Court Order showing that one of the Pagers (Tel-Car) became a Chapter 7 debtor effective in January 2002.

the Petition for Reconsideration (including the two untimely pleadings), our prior Credit Order No. 29064 and the record in this case, the Commission issues this Order on Reconsideration. As explained in greater detail below, the Commission grants in part and denies in part the requests of the Pagers. Accordingly, the Commission affirms in part, amends in part, and clarifies prior Order No. 29064.

I. PROCEDURAL HISTORY

A. *The Initial Complaint and Liability Phase*

The procedural history of this case is set out in Order No. 29064 but the pertinent points are summarized here. This case was initiated when the Pagers (PageData³, Radio Paging Service and Tel-Car) complained that Qwest had violated provisions of the federal Telecommunications Act of 1996 and its implementing regulations issued by the Federal Communications Commission (FCC). Qwest is the predominate incumbent Local Exchange Company (LEC) serving southern Idaho. The Pagers asserted that FCC rules and orders prohibit Qwest from charging paging companies for facilities and services used to transport telephone calls to the Pagers' customers. The charges for these services and facilities were specified in Qwest's exchange and network service catalog (i.e., price lists) on file with the Commission.⁴ *Idaho Code* § 62-606.

Typically, paging providers provide one-way paging services to their customers. One-way paging customers only receive calls. In this case, the three Pagers were connected to the Qwest network through a "Type 1" connection. Pagers Exhibit 113 (Diagram 4). With a Type 1 connection, the "interconnection" between a LEC and a paging carrier takes place at a LEC's end office. By way of comparison, "Type 2" interconnection takes place at a LEC's tandem switching office.⁵ Pagers Exhibit 113 (Diagram 3); Tr. at 245, 265. *TSR Wireless v. U S WEST, Memorandum Opinion and Order*, 15 FCC Rcd 11166 ¶ 24, n. 86 (2000), *aff'd sub.nom.*

³ In June 1998, PageData purchased the assets of another paging company, InterPage. Order No. 29064.

⁴ More specifically, the Pagers allege that Qwest is prohibited from charging them for: Dedicated Transport and Channel Facilities under Section 20.1.D.4.A(1); Dedicated Transport under Section 20.1.D.4.b; Channel Performance under Section 20.1.D.4.c; Conductivity under Section 20.1.D.4.d; and Dial Out Pulsing under Section 20.1.D.4.e. U S WEST Exchange and Network Services Tariff, Section 20. See Order No. 28601 at 2; the Hearing Examiner's Proposed Order at 1.

⁵ A "tandem office" is a major switching center for the telephone network. It usually serves as a connection point among smaller switching offices. An "end office" is usually the smallest switching office to which a telephone customer is connected.

Qwest Corporation v. FCC, 252 F.3d 462 (D.C. Cir. 2001) (hereinafter the *TSR Order*). For a Qwest customer to contact a paging customer, the call is originated and transported on Qwest's network, then handed-off to the paging carrier at a Qwest end office, and finally the pager broadcasts the call over its radio network to the called party.

In the "Liability Phase" of this case, the Commission found that the Pagers were entitled to relief. In Order No. 28601 issued in December 2000, the Commission found that Qwest had inappropriately billed the Pagers for services and facilities. In reaching its decision, the Commission relied upon the FCC's *TSR Order* and the *Local Competition Order*.⁶ The Commission found that as of the effective date of the *Local Competition Order* (i.e., Nov. 1, 1996), Qwest was prohibited from charging the Pagers for transmitting Qwest-originated traffic to the Pagers. *TSR Order* at ¶¶ 3, 25, 28. The two FCC orders also prohibited LECs from charging for services and facilities used to deliver Qwest originated traffic to the one-way pagers.

On January 2, 2001, the Pagers filed a Petition to Amend several ordering paragraphs of the Commission's Liability Order No. 28601. The Commission issued a subsequent Order partially granting and partially denying the Petition to Amend. Order No. 28628. The Orders in the Liability Phase were final Orders and no appeal was taken by either party.

B. The Credit Phase

Having determined that the Pagers were due refunds, the Commission instituted the "Credit Phase" of this case. The Commission ordered the parties to meet and attempt to agree upon the amount of billing credit due to each Pager. Order Nos. 28628 at 9-10; 28601 at 13. Both Qwest and the Pagers were represented by counsel. After informing the Commission of their inability to agree on the exact amounts of credit owed each Pager, the Commission appointed a Hearing Examiner to develop the record, take evidence, and issue a Proposed Order containing recommended findings of fact. Order No. 28683. The Hearing Examiner conducted an evidentiary hearing in July 2001 and the parties filed post-hearing briefs. Additional post-hearing briefs were filed in October 2001.

⁶ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499 (1996), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S.Ct. 721 (1999) (hereinafter the *Local Competition Order*).

C. The Examiner's Proposed Order

On November 30, 2001, the Hearing Examiner issued his Proposed Order. The Hearing Examiner recommended that the Pagers were entitled to refunds but not in the amounts they had claimed. The Examiner found that some of the Qwest services and facilities provided to the Pager were used for non-paging services such as two-way voice service, two-way paging, cellular, data service, and long-distance service. Proposed Order at 3, 6, 10-11. Consequently, refunds were not appropriate for these non-paging services. In addition, the Examiner determined refunds were not due for Qwest's delivery of "transit traffic" originated by other carriers and "wide area calling" arrangements that allow Qwest customers to call the Pagers toll-free. Proposed Order at 14-15, 17-21. Finally, the Examiner recommended that Qwest offered the better evidence regarding the billing and payment information used to calculate the refunds.

On December 21, 2001, the Pagers timely filed exceptions to the Proposed Order. The Pagers also filed two subsequent pleadings entitled "Supplement to Petitioners' Exceptions" (filed Dec. 24, 2001) and "Request to Supplement Exceptions" (filed June 24, 2002). In the latter pleading, the Pagers included 12 "'so-called' secret interconnection agreements between Qwest and other telecommunication carriers that have recently been discovered." Order No. 29064 at 8.

D. The Commission's Credit Order No. 29064

The Commission independently reviewed the evidentiary record and the Hearing Examiner's recommended findings of fact. IDAPA 31.01.01.258.02. After conducting its *de novo* review, the Commission issued a lengthy Order affirming and expanding on the Examiner's proposed findings of fact. The Commission's Credit Order No. 29064 issued July 17, 2002, addressed the following issues.

1. The Refund Period. In the Commission's Credit Order, it determined that the refund period for each carrier should begin November 1, 1996 (i.e., the effective date of the FCC's *Local Competition Order*). The Pagers' complaint asked for refunds up until the time they entered into interconnection agreements with Qwest. PageData's agreement with Qwest was approved by the Commission on September 10, 1999. Radio Paging's Interconnection Agreement was approved by the Commission on May 13, 1999. Tel-Car did not have an Interconnection Agreement with Qwest. Consequently, the refund period for each Pager was

determined to be: PageData – Nov. 1, 1996 to Sept. 10, 1999; Radio Paging – Nov. 1, 1996 to May 13, 1999; and Tel-Car – Nov. 1, 1996 to Sept. 24, 1999. Order No. 28601 at 4-5, 12.

2. The Two Late Pleadings. With respect to the Pagers' two late-filed pleadings, the Commission declined to consider them because the record had already closed. Order No. 29064 at 9. The Commission also observed that the "so-called secret" interconnection agreements were not applicable to this case because: 1) the agreements and their terms were not pertinent to the substance of the complaint; and 2) the agreements were (with one exception) all executed after the refund periods. Order No. 29064 at 10.

3. Non-Paging Services. The Commission agreed with the Hearing Examiner that it was inappropriate to credit the Pagers for their non-paging services. Order No. 29064 at 19-23. The Pagers were only entitled to credits for their one-way paging services.

4. Transit Traffic. Although Qwest is prohibited from charging one-way paging carriers for the delivery of Qwest-originated traffic, the Commission recognized that the FCC allows Qwest to charge the Pagers for "transit traffic." Order No. 29064 at 13-19. *See Metrocall v. Southwestern Bell Telephone Company, Memorandum Opinion and Order*, 16 FCC Rcd 18123 at ¶ 9 (Oct. 2, 2001) (hereinafter *Metrocall Order I*), *reconsid. denied*, 17 FCC Rcd 4781 at ¶ 2 (Mar. 15, 2002) (hereinafter *Metrocall Order II*).⁷ In compliance with these controlling FCC orders, Qwest is permitted to charge the Pagers for transit traffic originated by third party carriers. The Commission found that 24% of the Pagers' traffic was properly classified as transit traffic.

5. Wide Area Calling. The Commission also found that Qwest may charge the Pagers for "wide area calling" arrangements. Wide area calling generally refers "to an arrangement that allows a paging carrier to subsidize the cost of calls from a LEC's customers to the paging carrier's customers, when completing such calls requires the LEC to transport them from one of its local calling areas to another of its local calling area." *Mountain Communications I* at ¶ 3. For example, the Commission explained that "Qwest may charge its customers for long-distance calls from its Magic Valley or eastern Idaho local calling regions to

⁷ See also *Mountain Communications v. Qwest Corporation, Memorandum Opinion and Order*, 17 FCC Rcd 2091 at ¶¶ 1, 8 (Feb. 4, 2002) (hereinafter *Mountain Communications I*), *reconsid. denied*, ___ FCC Rcd ___, 2002 WL 1677642 (July 25, 2002) (hereinafter *Mountain Communications II*); *Texcom v. Bell Atlantic, Memorandum Opinion and Order*, 16 FCC Rcd 21493 at ¶¶ 4-6 (Nov. 28, 2001), *reconsid. denied*, 17 FCC Rcd 6275 (Mar. 27, 2002); *Metrocall v. Concord Telephone Company, Memorandum Opinion and Order*, 17 FCC Rcd 2252 at ¶ 11 (Feb. 8, 2002).

a Pager located in Boise.” Order No. 29064 at 5. Thus, Qwest may appropriately charge the Pagers for the use of these wide area calling services and facilities. *Id.* at 5-6, 26-28; *Mountain Communications I* at ¶¶ 11-13, *Mountain Communications II* at ¶¶ 4-6.

6. Calculation of the Refunds. With the exception of calculating additional interest attributable to the passage of time, the Commission found “that Qwest’s evidence [regarding the calculation of the refunds] was clearly superior to the evidence offered by the Pagers. We find Qwest’s evidence to be much more detailed, complete, and persuasive than the evidence offered by the Pagers.” Order No. 29064 at 30. The Commission directed Qwest to update its calculation of the refunds due each Pager through July 31, 2002. The Commission ordered that Qwest provide these updated calculations to the Commission and the parties no later than July 31, 2002. Qwest complied with this directive and filed its updated calculation of the refunds on July 30, 2002.

On August 14, 2002, Qwest filed a notice stating that it had issued refunds in the form of billing credits to the three Pagers. Qwest’s notice stated that it credited the Pagers the following amounts:

<u>Pager</u>	<u>Credit Amount</u>
PageData	\$45,742
Radio Paging	\$42,105
Tel-Car	\$31,997

II. THE PETITION FOR RECONSIDERATION

In their timely Petition for Reconsideration, the Pagers raised more than 35 points of contention in their Petition. The Pagers requested that the Commission’s findings contained in the Credit Order No. 29064 be amended to conform to the arguments contained in their Petition for Reconsideration, the “Supplement to Petitioners Exceptions” (filed Dec. 24, 2001), and the “Request to Supplement Exceptions” (filed June 24, 2002). Petition for Reconsid. at 1. On August 21, 2002, Qwest filed an Answer to the Pagers’ Petition for Reconsideration.⁸ On September 5, 2002, the Pagers filed a Letter with the Commission Secretary providing a citation

⁸ Qwest asserted that the Pagers have had “several opportunities to address every conceivable issue.” Answer at 1. Qwest maintained that the FCC’s decisions issued after the *TSR Order* clearly demonstrate that the Pagers “are not entitled to all facilities and services for free.” *Id.* at 2. In particular, Qwest quotes extensively from the *Mountain Communications II Order*.

to an FCC order dated July 17, 2002, in Docket No. DA 02-1731. The Letter states that this FCC decision “has a bearing on issues relevant” to this matter and directs the Commission’s attention to some 55 paragraphs of the FCC’s 374-page *WorldCom Order*.⁹ In the *WorldCom Order* the FCC arbitrated an interconnection dispute between the incumbent LEC (Verizon) and competitive LECs in Virginia.

III. STANDARDS FOR RECONSIDERATION

Reconsideration provides an opportunity for a party to bring to the Commission’s attention any issue previously determined and provides the Commission with an opportunity to rectify any mistake or omission. *Washington Water Power Company v. Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979). In those instances where an aggrieved party asks the Commission to reconsider its decision based upon the record, the Commission may simply do so. The Commission may also grant reconsideration by rehearing if it intends to take additional evidence or argument. If reconsideration is granted, the Commission must complete its reconsideration within 13 weeks after the date for filing Petitions for Reconsideration. *Idaho Code* § 61-626(2).

In Order No. 29106, the Commission granted the Pagers’ Petition for Reconsideration. The Commission noted that because “the Pagers do not seek to introduce additional evidence, the Commission finds the Petition and Answer shall be considered as the parties’ reconsideration briefs. The Commission shall render its decision on reconsideration based on the pleadings of the parties and the record.” Order No. 29109 at 2.

IV. DISPUTED ISSUES ON RECONSIDERATION

Throughout their Petition, the Pagers make various assertions that relate to “interconnection agreements,” including those attached to their June 2002 Supplement and other agreements previously approved by this Commission. They argue that the Commission and the Hearing Examiner erroneously found that 24% of the traffic Qwest delivered to the Pagers was transit traffic. The Pagers also assert that the Commission erred in excluding certain Qwest facilities and service used by the Pagers as either non-paging services or not eligible for credits because they were used for wide area calling services. The Pagers also take issue with the

⁹ *In the Matter of the Petition of WorldCom, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration, et al., Memorandum Opinion and Order*, ___ FCC Rcd ___, 2002 WL 1576912 (July 17, 2002).

calculations of the refunds and raise several other miscellaneous issues. For purposes of the Order, we have divided these issues into several areas: Interconnection Agreements, Transit Traffic, Excluded Facilities, Wide Area Calling Arrangements, Calculation of the Refunds, and Miscellaneous Issues.

A. Interconnection Agreements – Background

In their Petition for Reconsideration, the Pagers raised several procedural and substantive issues regarding interconnection agreements filed with this Commission and alleged “secret” interconnection agreements executed between Qwest and other telecommunication carriers. Concerning the disputed procedural issues, they argue that the Commission: 1) acted unreasonably in failing to compel Qwest to disclose secret interconnection agreements; 2) should have considered and entered into the record the secret agreements; and 3) erred by denying the Pagers access to a particular agreement. In the disputed substantive issues, the Pagers argue that: 1) federal law allows them to “pick and choose” terms from previously approved and undisclosed “secret” interconnection agreements; 2) the Commission’s Order denied the Pagers’ equal protection and discriminate against them; and 3) the Commission should have allowed the Pagers to adopt terms from three specific agreements.

1. The Federal Regulations for Interconnection. Before examining the Pagers’ arguments relating to interconnection agreements, it is helpful to review provisions of the federal Telecommunications Act of 1996 (the Act).¹⁰ Congress enacted the federal Act to promote competition in all telecommunication service markets. To foster this competition, the federal Act preempts state laws which prohibit any entity from providing “any interstate or intrastate telecommunications service” and implements a regulatory scheme that promoted the “interconnection” of all telecommunications carriers. 47 U.S.C. §§ 253(a), 251, 252.

Under the Act, each telecommunications carrier has the duty “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” *Id.* at § 251(a). In addition to this general duty, incumbent LECs (such as Qwest) have a duty to interconnect with “any requesting telecommunications carrier . . . at any technically feasible point within [Qwest’s] network.” *Id.* at § 251(c)(2)(B). Congress envisioned that telecommunications carriers would enter into “agreements” that would include the terms and

¹⁰ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 201(b), 251, *et seq.*).

conditions for interconnection. *See* 47 U.S.C. § 251(c)(1). These agreements are commonly referred to as “interconnection agreements.”

In general, the Act contemplates that parties will enter into interconnection agreements in one of three ways. First, the Act requires that parties negotiate in good faith in an attempt to voluntarily negotiate an interconnection agreement. 47 U.S.C. § 251(c)(1). Second, if parties are unable to negotiate an agreement, either party may request binding arbitration by a state utilities commission to resolve the open issues. *Id.* at § 252(a). To encourage voluntary negotiations, a request for arbitration cannot be filed before the 135th day or after the 160th day from when the incumbent LEC receives a request to negotiate an interconnection agreement. *Id.* at § 252(b).

Third, Section 252(i) of the Act requires that a LEC “make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.” 47 U.S.C. § 252(i). This section is commonly referred to as the “pick and choose” provision of the Act. Rather than constantly renegotiating terms and conditions, Section 252(i) allows a requesting carrier in Idaho to adopt expeditiously any term or condition of an interconnection agreement previously approved by this Commission.¹¹ *Local Competition Order* at ¶ 1321.

Whether voluntarily negotiated, arbitrated, or adopted under Section 252(i), all interconnection agreements must be submitted for approval to the respective state regulatory commission where the carriers are located. 47 U.S.C. § 252(e). The state commission then shall approve or reject the agreement. *Id.* Sections 251 and 252 of the Act “create a time-limited negotiation and arbitration process to ensure that interconnection agreements will be reached between incumbent LECs and telecommunications carriers, including CMRS [Commercial Mobile Radio Service] providers.” *Local Competition Order* at ¶ 1024. Under federal regulations, one-way paging carriers are classified as CMRS carriers. *TSR Order* at ¶ 2.

2. “Secret” Interconnection Agreements. As previously mentioned, attached to the Pagers’ Petition for Reconsideration was a copy of their “Request to Supplement Exceptions” previously filed in June 2002 (more than six months after the record was closed). Order No.

¹¹ “Pick and choose” agreements are routinely approved by the Commission as a pro forma matter based upon Staff review. *See* Order Nos. 29110, 29055, 28396.

29064 at 10. In the Supplement, the Pagers alleged for the first time that the Hearing Examiner committed an error in failing to compel Qwest to provide or disclose certain agreements to the Pagers. Pagers Supplement at 5. In their June 2002 Supplement, the Pagers included 12 documents generally described as the “so-called secret” interconnection agreements between Qwest and other telecommunication carriers that the Pagers allege relate to operations within Idaho. *Id.*, Affidavit of Counsel at 1-2. These documents purportedly are exhibits from a proceeding before the Minnesota Public Utilities Commission.

In their Petition for Reconsideration and the Supplement, the Pagers insist that the alleged secret interconnection agreements have a bearing on this case because the Pagers have a “right to know the terms and conditions of settlements that Qwest had made with other telecommunications carriers for overcharges billed by Qwest for interconnecting.” Supplement at 5. They maintain that if the “secret” agreements had been properly filed with the State Commissions in Minnesota, New Mexico and Iowa, then “the individual provisions became available in those states, and should have been available in Idaho, under the FCC’s ‘pick and choose’ rule.” *Id.* (emphasis added). They suggest that several provisions of the 12 “secret” agreements apply to this case including: (1) cash payments to resolve billing disputes; (2) 24-hour per day provisioning;¹² (3) multi-state “most favored nation” (i.e., pick and choose) terms; (4) best reciprocal compensation rates for local and Internet-related traffic; (5) the placement of Qwest employees on-site to assist the interconnecting carrier; and (6) expedited dispute resolution procedures. *Id.* at 3.

3. The FCC Proceeding. The Pagers assert that several state regulatory commissions have instituted investigations to determine whether these “secret” agreements are indeed interconnection agreements and, if so, whether they should have been filed with the appropriate state regulatory commissions. In a move that may have been prompted to avoid multiple investigations, Qwest filed a Petition for Declaratory Ruling with the FCC on April 23, 2002. Order No. 29087 at 9. In its Petition, Qwest asked the FCC to determine which types of “negotiated contractual arrangements” between incumbent LECs and competitive LECs or

¹² In the telecommunications industry, “provisioning” means the act of supplying services and facilities to a customer.

CMRS carriers must be filed with the state commissions under Section 252(e). The FCC initiated a docket and requested comment on the issues raised by Qwest in its Petition.

On October 4, 2002, the FCC issued its Memorandum Opinion and Order in response to Qwest's Petition for Declaratory Ruling.¹³ Based upon the provisions of the federal Act, the FCC found

that an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1). . . . This standard recognizes the statutory balance between the rights of competitive LECs to obtain interconnection terms pursuant to section 252(i) and removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs.

Qwest Declaratory Order at ¶ 8 (emphasis original and footnote omitted). The FCC's order did recognize distinctions between "settlement" agreements versus "interconnection" agreements. The order states:

we find that a settlement agreement that contains an ongoing obligation relating to section 251(b) or (c) must be filed under section 252(a)(1). Merely inserting the term 'settlement agreement' in a document does not excuse carriers of their filing obligation under section 252(a) or prevent a state commission from approving or rejecting the agreement as an interconnection agreement under section 252(e). However, we also agree with Qwest that those settlement agreements that simply provide for "backward-looking consideration" (e.g., the settlement of a dispute in consideration for a cash payment or the cancellation of an unpaid bill) need not be filed. That is, settlement contracts that do not affect an incumbent LEC's ongoing obligations relating to section 251 need not be filed.

Qwest Declaratory Order at ¶ 12 (emphasis added and footnotes omitted).

4. The PUC Proceeding. In conjunction with its FCC declaratory filing, Qwest filed six "contractual arrangements" with this Commission on August 21, 2002. These "secret" agreements were previously entered into with McLeodUSA Telecommunications (three agreements); Eschelon Telecom (one agreement); and Covad Communications (two agreements). Qwest indicated that it did not believe these contractual arrangements fall within the filing

¹³ *In the matter of Qwest Communications International Inc. for a Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, Memorandum and Order, FCC 02-276, 2002 WL 31204893 (Oct. 4, 2002) (hereinafter *Qwest Declaratory Order*).

requirements of Section 252 and acknowledged that these documents had not previously been filed with the Commission. Application at 2; Order No. 29116 at 3. The Company claimed it has implemented a new policy and is now broadly filing all contract agreements or letters of understanding. Qwest also stated “provisions [of these agreements] that settle past carrier-specific disputes, that do not relate to Section 251, or that are no longer in effect are not subject to Section [252](i) and this offering.” Application at 3.

In Order No. 29916 issued September 19, 2002, the Commission consolidated the six agreements into a single case and issued a public notice seeking comment on the agreements. Initial public comments are due no later than October 25, 2002 and reply comments are due November 8, 2002. With this background information we now turn to the disputed issues.

B. Interconnection Agreements – Disputed Procedural Issues

The Pagers urge the Commission to reconsider three procedural decisions regarding interconnection agreements. First, the Pagers assert that the Hearing Examiner and the Commission should have compelled Qwest to produce settlement documents that the Pagers requested at the hearing. Petition for Reconsid. at 2-3. Second, the Pagers allege that the Commission erred in rejecting their “Request to Supplement Exceptions” filed in June 2002 when the Commission decided not to consider this filing as part of the record. *Id.* at 12. Third, the Pagers claim that the Commission erred when it denied them the opportunity to examine a particular settlement agreement entered into between Metrocall (a paging carrier) and Qwest. *Id.* at 16.

1. The Hearing Examiner’s Ruling. At the evidentiary hearing, the Pagers argued that the Hearing Examiner should have required Qwest to produce certain “settlement agreements.” Tr. at 473; 474-82. Qwest argued that these agreements were not interconnection agreements, but were settlements and did not have to be filed with the Commission. The Examiner did not compel their product and noted that the law favors the settlement of disputes. Tr. at 475. The Pagers did not take timely exception to the Examiner’s ruling but they later filed their “Supplement” in June 2002. Order No. 29064 at 9-10.

Commission Findings. After reviewing the discussion between the Examiner and counsels at the hearing, we find that the Examiner committed no error for two reasons. First, during the exchange with counsel, the Examiner was trying to determine whether the documents in question were agreements settling past disputes or were the documents in question more like

interconnection agreements with terms and conditions affecting ongoing or “offering[s] for the future.” Tr. at 476, l. 12. At the June 2001 hearing, Qwest argued that the agreements in question “were not Interconnection Agreements and shouldn’t have been filed [with the state commission under Section 252(e) of the federal Act].” Tr. at 475-76, ll. 25-1. The Hearing Examiner asked counsel for the Pagers whether he could cite to any authority from the FCC that would require “a party settling a case related to prior transactions is obligated to make the same settlement available to others. . . .” Tr. at 477, ll. 23-25; Tr. at 478-79, ll. 23-3. The Pagers’ counsel could not. *Id.* at 478, ll. 4-6. Of course, the evidentiary hearing was prior to the FCC and State proceedings related to the “so-called secret” interconnection agreements. The Hearing Examiner did allow the Pagers to question Qwest’s witness whether Qwest “is providing any services henceforth from this instance on to anyone else on terms less favorable than what is being provided to [the Pagers] right now.” Tr. at 479, ll. 7-25 (emphasis added).

Based upon our review of the transcript, we find the Hearing Examiner was attempting to distinguish between settlement agreements of past conduct that do not relate to going forward terms and conditions, and interconnection agreements or amendments to interconnection agreements that pertain to ongoing terms and conditions for interconnection. In this respect, the Examiner’s ruling is consistent with the FCC’s recent *Qwest Declaratory Order*. As we noted above, the FCC ruled that settlement agreements that do not affect ongoing Section 251 obligations do not need to be filed with this Commission. *Qwest Declaratory Order* at ¶ 12. In addition, the Pagers were allowed to cross-examine the Qwest witness regarding undisclosed agreements containing ongoing terms and conditions for interconnections. We find no error here.

Second, even if the Hearing Examiner erred by denying the Pagers access to these documents, we find the Pagers failed to timely preserve this issue for reconsideration. As we noted in our Order No. 29064, the Pagers did not take timely exception to the Hearing Examiner’s failure to compel Qwest to produce these documents. Order No. 29064 at 9. Their first allegation of error was filed six months later. They first alleged error in their June 2002 Supplement which contained the “secret” interconnection agreements. We next turn to these agreements.

2. Admission of the June 2002 Agreements. In its Order No. 29064, the Commission declined to accept the late-filed June 2002 Supplement containing the 12 so-called “secret”

interconnection agreements. The Commission found that the Supplement and accompanying agreements were untimely. Order No. 29064 at 9. The Pagers generally allege the Commission erred in not accepting this pleading because these documents may “have disclosed more favorable terms than those available to Petitioners during the time frame relevant to this proceeding, including settlement terms more favorable than Qwest has offered here.” Petition for Reconsideration at 3.

Commission Findings. For purposes of reconsideration, the Commission has considered the Pagers’ June 2002 Supplement and the attached agreements between Qwest and other carriers. After reviewing the Pagers’ arguments, the June 2002 pleading and the 12 agreements, we find the introduction of the so-called “secret” interconnection agreements are not relevant to determining the amount of refunds in this proceeding.

This case deals with Qwest’s conduct before the Pagers entered into their interconnection agreements with Qwest. Order No. 29064 at 10 (emphasis added). With one exception, the 12 secret agreements that the Pagers submitted in June 2002, were all executed after the refund periods applicable in this case.¹⁴ Indeed, the Radio Paging and PageData interconnection agreements predate these alleged secret agreements.¹⁵ The Pagers also acknowledged that the secret interconnection agreements were executed beyond the period when credit is due. Pagers’ Request to Supplement at 3, 7.

The only agreement which became effective during the period of the Pagers’ recovery is the US Link and InfoTel Communications Agreement with Qwest which became effective on July 14, 1999. This Agreement contains terms applicable to local tandem switching functionality and transport for certain exchanges located in an approved EAS¹⁶ calling area in Minnesota. In other words, this contract dealt with two-way communications which is not the subject matter of the case before this Commission. In addition, these two carriers do not operate nor have interconnection agreements in Idaho. Consequently, even if this agreement constituted an

¹⁴ The alleged Interconnection Agreements have effective dates as follows: the seven Eschelon and Qwest Agreements are dated: Feb. 28, 2000; July 21, 2000; Nov. 15, 2000; Nov. 15, 2000; July 3, 2001; July 31, 2001; and Oct. 30, 2001. The Covad and Qwest Agreement is dated April 19, 2000. The small CLECs Agreement is dated April 18, 2000. The McLeod and Qwest Agreements are dated April 28, 2000 and October 26, 2000. The US Link/InfoTel Agreement is dated July 14, 1999.

¹⁵ Tel-Car had no Interconnection Agreement with Qwest. Order No. 28427 at 3.

¹⁶ “EAS” means extended area service. Converting toll routes to EAS routes typically enlarges the size of toll-free local calling areas to include adjacent telephone exchanges. See *Idaho Code* § 62-603(7).

interconnection agreement under the Telecommunications Act, it pertains to two-way communications between local exchanges in Minnesota and concerns carriers that do not operate in Idaho. We find that this agreement is not relevant to calculation of the refunds in this case. Although we have now reviewed these documents, we affirm our findings in Order No. 29064 that these agreements are not pertinent.

3. The Metrocall and Qwest “Settlement.” In their Petition, the Pagers observed that the Commission’s Order No. 29064 states that Metrocall (a paging carrier) and Qwest “settled their dispute” concerning inappropriate charges from November 1, 1996 to the date of the FCC’s order. The Pagers argue they have “not been allowed to see this settlement, which may contain more favorable terms and conditions than those afforded Petitioners by Qwest or this Commission.” Petition for Reconsid. at 16. The Pagers insist that this is another instance where they “have not been allowed to see this settlement.” *Id.*

Commission Findings. Here the Pagers have misconstrued the Commission’s Order. In Order No. 29064 at page 13, the Commission was discussing the appropriate starting date for the refund period. The Commission was referring to an FCC order in which Metrocall and Qwest “settled their dispute.” Our characterization of the parties’ conduct was premised upon a footnote contained in *Metrocall v. Southwest Bell Telephone*, 16 FCC Rcd 18123 at n. 7 (October 2, 2001). In this footnote, the FCC stated that

Metrocall and Qwest settled Metrocall’s complaint against Qwest in its entirety and the [FCC] Enforcement Bureau released an order granting the parties’ joint motion to dismiss on January 8, 2001.

Metrocall Order I at n. 7. Our phrase “settled their dispute” was not in reference to an actual “Settlement Agreement” but merely described the actions of the parties. We could have just as easily stated that the parties “resolved their dispute.” We are unaware of whether there was a “Settlement Agreement” in that case or not. That case was before the FCC – not this Commission. The Pagers have misconstrued the language of our Order.

C. Interconnection Agreements – Disputed Substantive Issues

In addition to their procedural arguments regarding the so-called secret agreements and those interconnection agreements actually filed with this Commission, the Pagers assert several substantive arguments regarding the applicability of interconnection agreements to this case. They generally assert they are entitled to the same terms and conditions for purposes of

calculating refunds as available in the “secret” and previously disclosed interconnection agreements filed with this Commission. They also allege the Commission’s Order violated their equal protection rights and discriminated against them. These arguments are without merit.

1. Pick and Choose. The Pagers maintain throughout their Petition that had the “secret” interconnection agreements been properly filed with this Commission, they would have had the ability to “pick and choose” from the terms of such agreements. Petition for Reconsid. at 3. If disclosed, the Pagers could have adopted terms and conditions that may have been more favorable in calculating the refunds. They also assert they can pick and choose terms from other interconnection agreements that were properly filed with the Commission. Whether using the “secret” or filed agreements, the Pagers maintain that these agreement terms would affect the refunds due them in this case.

Commission Findings. Even assuming that the alleged interconnection agreements are in fact interconnection agreements and should have been publicly disclosed, the Pagers’ ability to “pick and choose” is not pertinent to calculating the refunds in this proceeding. This argument fails for several reasons. First, as previously mentioned, 11 of the alleged interconnection agreements became effective after the refund periods. Second, as the FCC has recently ruled, if they were “settlement” agreements for past disputes, they do not have to be filed with (and presumably approved by) this Commission. *Qwest Declaratory Order* ¶ 12.

Third, as the Commission noted in Order No. 29064, the Pagers’ ability to “pick and choose” terms and conditions from interconnection agreements is not pertinent to this proceeding. The ability to pick and choose only pertains to terms and conditions contained in interconnection agreements approved in Idaho. 47 U.S.C. § 252(i); 47 C.F.R. § 51.809. If the Pagers found an interconnection term that they wanted to adopt, they must file such an interconnection agreement with this Commission. If they wanted to adopt specific terms, the established procedure (and remedy) was and is to file the proposed agreement with this Commission. This they did not do. The refund case before the Commission involves not an interconnection agreement but terms and conditions contained in Qwest’s price lists for Idaho. The Pagers’ argument mixes apples and oranges.

Fourth, the Pagers argue they may pick and choose terms from an interconnection agreement between Qwest and another carrier approved by another state commission and apply those terms in Idaho so long as that other carrier “also conducts business in” Idaho. Supplement

at 1, 5. Absent agreement contract language to the contrary, we do not believe this argument comports with the federal Act or FCC regulations. *Local Competition Order* at ¶¶ 1310-21, 1315; 49 C.F.R. § 51.809. The ability to pick and choose applies to interconnection agreements approved by this Commission. We do not, for example, find that the Pagers could adopt terms in a Qwest-WorldCom agreement from Nebraska for use in Idaho. We are unaware of any FCC order or regulation applying this procedure to state interconnection agreements.¹⁷ The requirements to file agreements with the state commission applies to carriers operating in a particular state (unless the parties agree to multi-state applicability). 47 U.S.C. § 252(e). Even Section 252(h) only requires a state commission to make available for inspection those interconnection agreements that it has approved. 47 U.S.C. § 252(h).

Finally, when carriers such as the Pagers, do pick and choose terms for an interconnection agreement with the LEC, that agreement must be submitted to the state commission for approval. 47 U.S.C. §§ 252(e), (i); 49 C.F.R. § 51.809; *Local Competition Order* ¶¶ 1315-16, 1321. As the FCC notes in its implementing regulations, the ability of a carrier to “pick and choose” is not without some parameters. The FCC recognizes that the opportunity to pick and choose interconnection terms and conditions does not apply in instances where the incumbent LEC proves to the state commission that:

- (1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
- (2) the provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.

47 C.F.R. § 51.809(b); *Local Competition Order* at ¶¶ 1315-18. Thus, the FCC regulations contemplate that a carrier desiring to “pick and choose” must file the interconnection agreement with the state commission pursuant Section 252(e) of the federal Act.

In this particular case, the Pagers have not filed any “pick and choose” interconnection agreement during the refund period. Although they could have filed such an

¹⁷ In the *Bell Atlantic-GTE Merger Order*, the FCC “expanded” the reach of section 252(i) by allowing CLECs to import terms from one state to another state. 16 FCC Rcd 22 at ¶ 24 (Dec. 27, 2000). In the *Verizon Maine 271 Order*, the FCC allowed CLECs to adopt terms in other state agreements as a provision in a Section 271 application. 17 FCC Rcd 11659 at ¶ 43 (April 2001); 47 U.S.C. § 271. The first case was a merger and the second case was a component of a Section 271 application.

agreement with this Commission since 1996, they did not. The Pagers cannot rewrite history. The Commission is simply recognizing that they may not unilaterally pick and choose an interconnection term without utilizing the filing procedures of Sections 252(e) and 252(i).

2. Equal Protection. In their Petition for Reconsideration, the Pagers maintain that the Commission has denied them “equal treatment under the law.” Petition for Reconsid. at 12-13. The Pagers make three related arguments. First, the Pagers insinuate that the Commission has not treated them equally in relationship to other telecommunication carriers when it did not accept the alleged interconnection agreements contained in the Pagers’ June 2002 pleading. Second, they assert they should have the same ability to pick and choose terms from interconnection agreements as other carriers. *Id.* at 14.

Finally, the Pagers complain that the Hearing Examiner and the Commission “appear” to view Type 1 pagers as being entitled to fewer benefits than Type 2 pagers or other commercial mobile radio service (CMRS) carriers. The Pagers claim the Commission’s “assumption is faulty” and argue that the FCC’s *TSR Order* requires that Type 1 pagers be treated comparably to Type 2 pagers. Petition for Reconsid. at 6. Elsewhere, the Pagers state the Commission has “pigeonholed [the Pagers] as Type One pagers with limited rights to obtain treatment equal to that granted by Qwest to other types of telecommunication carriers. The *TSR Order* made it clear that Type One carriers are entitled to be treated comparably to Type Two carriers.” *Id.* at 7.

Commission Findings. As the Idaho Supreme Court has recently stated, equal “protection issues focus upon classifications within a statutory scheme that allocates benefits or burdens differently among categories of persons affected. The equal protection clause of the Fourteenth Amendment is designed to ensure that those persons similarly situated with respect to a governmental action should be treated similarly.” *Primary Health Network v. State Department of Administration*, ___ Idaho ___, ___, 52 P.3d 307, 314 (2002). The Equal Protection Clause requires that the classification rationally further legitimate state or federal interests. In this case, the Pagers have not alleged the Commission deliberately discriminated against the Pagers based upon some improper motive like race, sex, religion or some other arbitrary classification. *Anderson v. Spalding*, ___ Idaho ___, 50 P.3d 1004, 1009 (2002). The Pagers also have not alleged that the Commission has violated the exercise of a fundamental

right for equal protection purposes, or that the Commission has taken actions based upon a suspect classification. *Id.*

Contrary to their assertions, the Commission has not treated the Pagers differently from other similarly situated carriers. The Commission recognizes that the Pagers, as other carriers, can “pick and choose” terms of approved interconnection agreements but the Pagers did not do so during the refund period. 47 U.S.C. § 252(i). As to the agreements attached to their June 2002 Supplement, the Commission has considered these documents on reconsideration. As noted above, we find these agreements are all (except for one not pertinent here) effective after the close of the refund periods. Contrary to the “assumptions” of the Pagers, the Commission recognizes that Type 1 Pagers (the Petitioners in this case) are comparable to Type 2 pagers under the federal Telecommunications Act. The Pagers have not directly referenced any part of the Commission’s Order No. 29064 where the Commission makes such assumptions. The Commission has stated that the Pagers in this proceeding are classified by the FCC as CMRS carriers, a classification of carriers that include one-way pagers, two-way pagers, cellular providers, PCS carriers and the like. *TSR Order* at ¶ 2; 47 C.F.R. §§ 20.3, 51.5. The Commission has not pigeonholed or assumed that a Type 1 pager is entitled to any different treatment than a Type 2 or other CMRS carrier.

Having said that, however, the Commission does recognize distinctions between Type 1 and Type 2 carriers especially in the area of network configuration. In other words, Type 1 and Type 2 use different methods of interconnecting to the Qwest network. See Pager Exhibit 113 (Diagrams 3 and 4); *TSR Order* at ¶ 24, nn. 84, 86. In addition, different service options are available to Type 1 and Type 2 carriers. Based upon the findings and reasons set out in this Order, the Commission has acted rationally in this case.

3. Discrimination. The Pagers next argue the Commission’s Order “effectively discriminates” against them because paragraphs 27 and 28 of the *TSR Order* requires Qwest to offer non-discriminatory terms and conditions “regardless of whether they had an Interconnection Agreement or not.” Petition for Reconsid. at 13.

Commission Findings. In the *TSR Order*, Qwest (and other defendants) argued the paging carrier in that case was not entitled to the benefits of reciprocal compensation¹⁸ without engaging in the Section 252 agreement process. *TSR Order* at ¶ 27. The FCC rejected Qwest's argument. The FCC stated in the *TSR Order*, that its *Local Competition Order* requires LECs to immediately cease charging pagers for terminating LEC-originated traffic and LECs must provide that traffic to the Pagers without charge. *Id.* at ¶ 28. The *TSR Order* noted the *Local Competition Order* "does not require Section 252 agreement before imposing such an obligation on the LEC." *Id.* at ¶ 29.

The Commission's Order No. 29064 does not require the Pagers to have an interconnection agreement before Qwest is barred from charging the Pagers for its originating traffic. Like the *TSR Order* and *Local Competition Order*, our Order prohibited Qwest from charging the Pagers for Qwest's originating traffic transported to the Pagers effective November 1, 1996 – the start of the refund period in this case. Consequently, we find no discrimination or inconsistency between our Order and paragraphs 27 and 28 of the *TSR Order*.

4. **The Western Wireless Agreement.** The Pagers next maintain that they have been denied equal treatment because terms and conditions of an interconnection agreement approved by this Commission on January 17, 1997, were "not made available to Petitioners." Petition for Reconsid. at 14. More specifically, the Pagers allege that this interconnection agreement "includes provisions for one-way paging and which specifies such things as traffic delivery without charge to the receiving carrier, including transit traffic, LATA-wide delivery of land-to-mobile calls to a single point of interconnection, and other material benefits [were] not made available to [the Pagers]." *Id.* at 13-14, 7.

Commission Findings. This argument is without merit for two primary reasons. First, the Pagers apparently refer to an interconnection agreement dated January 17, 1997. However, the Pagers have not indicated where in the record this document is located nor does our search of the record in this matter disclose such an interconnection agreement. Indeed, this issue was first raised on reconsideration. Consequently, the Petitioners are referring to a matter

¹⁸ Under Section 251(b)(5) of the Act, all LECs have a duty to establish reciprocal compensation arrangements with other carriers for the transport and termination of telecommunications traffic. *See generally, Local Competition Order* at ¶¶ 1008; 1033-35.

outside the record. Moreover, the Pagers did not seek to introduce new evidence on reconsideration. *Idaho Code* § 61-626.

Second, a review of our public records reveals that the Commission did approve an arbitrated Interconnection Agreement between U S WEST (now Qwest) and Western Wireless Corporation in an Order dated January 17, 1997 (service dated Jan. 21, 1997). Once this Order was published by the Commission on January 21, 1997, its terms and conditions were available for other carriers, including the Pagers, to adopt under Section 252(i) of the federal Act. 47 U.S.C. § 252(i). Contrary to the assertions of the Pagers, the terms and conditions contained in the Western Wireless Interconnection Agreement were available to the Pagers but apparently the Pagers did not seek to adopt such terms during the refund period. *Id.*; 47 C.F.R. § 51.809. The Pagers had ample opportunity to adopt terms from this agreement but did not do so. They have not offered any reason why they did not seek to adopt such terms. Now, well after the close of the refund period, we find the Pagers cannot seek to adopt terms retroactively without complying with the filing requirements of Sections 252(e) and 252(i). *See* 47 C.F.R. § 51.809; *Local Competition Order* at ¶ 1321.¹⁹ FCC regulations recognize that adoption of terms under Section 252(i) must occur with a reasonable period of time after the Commission approves the interconnection agreement in question. 47 C.F.R. § 51.809(c). The Pagers simply did not seek to adopt terms from the Qwest-Western Wireless Agreement.

5. The McLeod Agreement. The Pagers specifically point to the McLeod Agreement submitted in their June 2002 Supplement as an agreement that is pertinent to the Pagers' claim for additional refunds before the Commission. *Petition for Reconsid.* at 3. This agreement entitled "Confidential Billing Settlement Agreement" was dated April 28, 2000. *Pagers Supplement*, Exh. 9 to Exh. A.

Commission Findings. An examination of the McLeod Agreement is instructive. In this settlement agreement, McLeod agreed to withdraw its opposition to the Qwest – U S WEST merger in all states and dismiss its pending FCC complaint regarding subscriber list information

¹⁹ The Petitioners also argue that Tel-Car is entitled to comparable treatment to provisions of the Western Wireless Interconnection Agreement with Qwest. *Petition for Reconsid.* at 5. The Pagers argue that Tel-Car is entitled to the cost-free delivery of mobile traffic as contained in the Western Wireless Interconnection Agreement. *Id.* Again, the Western Wireless Agreement is not a part of the record before the Commission. In addition, the Commission does not believe "mobile traffic" is synonymous with the traffic at issue here, i.e., one-way paging traffic. Finally, Tel-Car could have but apparently did not seek to adopt the interconnection terms contained in the Western Wireless Agreement.

charges. ¶ 1 at p. 2. In consideration for McLeod's action in these cases, U S WEST agreed to pay McLeod \$4.2 million to resolve past blocked Centrex service and subscriber list information billing disputes incurred through March 31, 2000. *Id.* at 3. "The form of payment will consist of bill credits (if payment has not been made) or cash payments to McLeodUSA." *Id.* (emphasis added).

On a going-forward basis, McLeod agreed to rates for subscriber list information. *Id.* at ¶ 2b (emphasis added). In addition, the parties agreed to resolve their reciprocal compensation dispute for the period of March 1, 2000 through December 31, 2002. Both parties agreed not to bill usage to one another in any state where McLeod operates currently or in the future between March 1, 2000 and the date of merger closure. *Id.* at ¶ 2c at p. 3-4. The parties also agreed that all interim rates except for reciprocal compensation rates will be treated as final in any of the 14 U S WEST states through "April 30, 2000, and on a going-forward basis through December 31, 2002 . . . will be applied perspective to McLeodUSA, and not retroactively." *Id.* at ¶ 2d at p. 4 (emphasis added). Finally, those McLeod five-year Centrex Service Agreements that expire before December 31, 2002, will be extended under the existing terms and prices of those agreements until December 31, 2002. *Id.* at ¶ 2e at p. 5 (Page Q 110439).

As explained in greater detail above, we believe there are several reasons why this agreement is not pertinent to calculation of the Pagers' refunds. First, the settlement agreement is dated April 28, 2000 – well after the close of the refund period. Second, portions of the settlement related to past disputes. As the FCC has recognized, the settlement of past disputes do not need to be filed with the Commission. Third, the past services in disputes (Centrex and subscriber list information) are not one-way paging services. Fourth, the "going-forward" provisions of the settlement agreement pertain to time frames after the refund periods in this case. Finally, even if the Pagers wanted to pick and choose terms from this agreement, the Commission must approve it and Qwest has the opportunity to show that the interconnection costs are different in this case. 47 U.S.C. §§ 252 (e), (i); 47 C.F.R. § 51.809(b). Consequently, the Commission does not grant reconsideration on this issue.

6. The Eschelon Agreement. The Pagers also insist in their June 2002 Supplement that the Eschelon Agreement in Minnesota applies to Eschelon operations in Idaho. In particular, they point to the Agreement's language that states "reciprocal compensation for terminating

Internet traffic shall be paid at the most favorable rates and terms contained in an agreement executed to date by USWC.” Supplement at 7-8.

Commission Findings. This argument is misplaced. Compensation for Internet traffic is not subject to the paging complaint before the Commission. This matter involves the refund of overcharges for the Pagers’ one-way paging services.²⁰

D. Disputed Transit Traffic Issues

In Order No. 29064, the Commission observed that the FCC’s *TSR Order* and the *Local Competition Order* “prohibit LECs from charging for facilities used to delivery LEC-originated traffic, in addition to prohibiting charges for the traffic itself.” Order No. 29064 at 4, *citing TSR Order* at ¶ 25. Qwest is an incumbent LEC that delivers traffic to the Pagers. Although Qwest may not charge the Pagers for the delivery of any traffic that its customers originate, the FCC has ruled that Pagers “are required to pay for ‘transit traffic,’ that is, traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to the paging carrier’s network.” Order No. 29064 at 4, *citing TSR Order* at n. 70 (emphasis original).²¹ Consequently, it is appropriate for Qwest to levy charges on the Pagers for traffic that originates on other carrier networks (e.g., other non-Qwest network such as competitive LECs, long-distance carriers, cellular carriers, or other mobile wireless carriers). Based upon the Hearing Examiner’s recommendations, the Commission found that 24% of the traffic Qwest delivered to the Pagers was properly classified as “transit traffic.” Order No. 29064 at 18-19.

During the course of the Credit Phase of this case, the Pagers have changed their position regarding transit traffic several times. At the evidentiary hearing, they argued that there should be no adjustments to the refunds for transit traffic and they were entitled to a refund of all the charges assessed by Qwest. Tr. at 104, 154, 157. In their later Exceptions to the Proposed Order, the Pagers concede that Qwest may possibly charge for transit traffic but the amount of such traffic should be no greater than 5.5%. Exceptions at 14, 28; Order No. 29064 at n. 9. Now on reconsideration, the Pagers return to their original position that the “Commission should strike

²⁰ See *infra* section 3 on pages 47-48.

²¹ See also *Texcom v. Bell Atlantic, Memorandum Opinion and Order*, 16 FCC Rcd 21493 at ¶¶ 4-6 (Nov. 28, 2001) *reconsid. denied*, 17 FCC Rcd 6275 (March 27, 2002); *Metrocall v. Concord Telephone Company, Memorandum Opinion and Order*, 17 FCC Rcd 225 at ¶ 11 (Feb. 8, 2002); *Mountain Communications I* at ¶ 8; *Mountain Communications II* at ¶¶ 2-3.

the transit factor set-off entirely and order a refund of the entire amount.” Petition for Reconsid. at 8. The disputed transit traffic issues are addressed below.

1. Plead Set-off. In their Exceptions to the Hearing Examiner’s Proposed Order and again in the Petition for Reconsideration, the Pagers urge the Commission to bar Qwest’s transit traffic evidence because a “set-off was not pled by Qwest and it should not have been allowed to claim one for transit traffic.” Petition for Reconsid. at 7. In Order No. 29064, the Commission declined the Pagers’ invitation finding that this issue was fully litigated before the Examiner and the Pagers have not been disadvantaged. Order No. 29064 at 15.

Commission Findings. We affirm our previous findings on this issue. When the Commission initiated its inquiry in this matter, we were primarily concerned about jurisdiction. Rather than have Qwest file an answer, we directed the parties to file briefs addressing whether the Commission had jurisdiction to hear this matter. Order No. 29064 at 14-15. Consequently, Qwest’s initial pleading addressed jurisdiction and was not a traditional Answer complete with affirmative defenses.

More importantly, the Commission noted that both Qwest and the Pagers have thoroughly litigated the issue of transit traffic at the hearing. Order No. 29064 at 15. The Commission found that it would “be unreasonable [now] to procedurally bar Qwest from arguing this issue. The Pagers have been afforded an adequate opportunity to refute this issue. We also note that the FCC has rejected a similar argument in the *Metrocall Order* [*I* at ¶ 9].” *Id.* Consequently, the Commission rejects the Pagers’ renewed request to deny Qwest’s recovery of transit traffic costs because the issue was not pled as a set-off.

2. Qwest Exhibit 205. The Pagers next assert the Hearing Examiner and the Commission committed error when the Examiner admitted Qwest Exhibit 205 at the hearing. Petition for Reconsid. at 9. This exhibit portrays the results of a Qwest cellular study which indicates the amount of transit traffic between December 1999 and July 2000 was 35%. When Exhibit 205 was offered for admission on rebuttal, the Pagers objected. Tr. at 545. The Pagers argue this exhibit should have been offered during Qwest’s direct case. Petition for Reconsid. at 9.

Commission Findings. After reviewing the transcript from the evidentiary hearing and the exhibit, we deny the Pagers’ request. The omission or exclusion of evidence at trial is reviewed under the abuse of discretion standard. *Highland Enterprises v. Barker*, 133 Idaho 330,

986 P.2d 996 (1999). The test for determining the abuse of discretion is based on a three-part inquiry: (1) whether the Hearing Examiner/Commission correctly perceived the issue as one of discretion; (2) whether the Examiner/Commission acted within the outer boundaries of discretion and consistently with the legal standards applicable to the specific choices available; and (3) whether the Examiner/Commission reached the decision by an exercise of reason. *Sun Valley Shopping Ctr. v. Idaho Power Company*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

When Qwest attempted to introduce this exhibit, counsel for the Pager objected that the exhibit should have been introduced during the witness' direct testimony and that the exhibit should not be admitted because it dealt with a transit traffic study outside the refund period. Tr. at 575, 577. In overruling the objection, the Hearing Examiner noted that "just about every witness" on direct, cross-examination, and rebuttal discussed the issue of transit traffic. Tr. at 576. As to the timeliness question, the Examiner overruled that objection and said the objection "goes to the weight, not to the admissibility [of the exhibit]." Tr. at 577.

More importantly, the Hearing Examiner also overruled the objection because the Qwest witness had already testified to the contents of the document in her direct testimony. Tr. at 580-81, 577, ll. 8-11. On direct, Qwest witness Sheryl Fraser testified that Qwest had made a "more recent study" that showed cellular transit traffic of 35%. Tr. at 314-15, ll. 25-3. In response to a question from the Hearing Examiner, she also disclosed that the new transit study was conducted from December 1999 through July 2000. Tr. at 316, ll. 8-11. The Pagers did not object to this testimony.

We find the Pagers' arguments regarding the admission of Exhibit 205 are unfounded. Exhibit 205 merely provides the underlying documentation for Qwest's direct testimony. The Pagers did not object when the witness provided this testimony on direct and should not be allowed to later object when Qwest offered the exhibit purporting to show the underlying calculations for the 35% transit factor. Even if Exhibit 205 was stricken, the direct testimony would remain. We find the Examiner acted within the bounds of discretion and did not err in admitting this exhibit. Consequently, we decline to strike Exhibit 205.

3. Inconsistent Pager Testimony. In reviewing the Pagers' testimony concerning the appropriate calculation for computing the amount of transit traffic, the Commission noted that its decision regarding the amount of transit traffic was made "more difficult by the shifting positions of the Pagers." Order No. 29064 at 18-19. In assigning less weight to the Pagers' transit traffic

testimony, the Commission observed that “the Pagers offered inconsistent testimony.” *Id.* In their Petition for Reconsideration, the Pagers argue the Commission’s findings about the inconsistency of the Pagers’ testimony regarding transit factor should be stricken. Petition for Reconsid. at 8-9. The Pagers offer two arguments why the Commission’s findings are wrong. First, they maintain the Commission relied upon evidence not in the record. In particular, the Commission pointed to a summary of the testimony the Pagers would present at the hearing submitted by counsel at the direction of the Examiner. Second, the Pagers assert it was error for the Commission to “disregard” Tel-Car witness (Mr. Casper’s) testimony “regarding the three surveys he made of transit traffic on his system.” *Id.* at 8.

Commission Findings. A bit of procedural background is helpful in examining this issue. On June 4, 2001, the Hearing Examiner issued a Notice of Hearing and a Procedural Schedule. In the Notice, the Hearing Examiner directed the parties to file summaries of their testimony and exhibits with the Commission and the Examiner in lieu of the usual prefiled testimony. Notice of Hearing at 1-2; Rule 231, IDAPA 31.01.01.231. Both the Pagers and Qwest subsequently filed summaries of their proposed testimony. The Pagers’ summary states that the witness for Radio Paging (its owner Mr. Ryder) “is willing to accept a transiting factor of 15%.” Pagers’ Summary at 2. In addition, the summary for PageData’s witness (its owner, Joseph McNeal) indicates that he would accept the 15% transiting factor. *Id.*; see Order No. 29064 at 18.

These summaries represent the positions of the parties and, contrary of the assertion of the Pagers (Petition for Reconsid. at 8), are part of the record in this case. Although the prefiled summaries “were never spread upon the record,” we find it is not error to refer to them. The Hearing Examiner ordered that they be provided by the parties to both the Commission and the Examiner in lieu of our normal practice of prefiled testimony.²² The summaries were not offers for settlement – the parties were unable to settle. The summaries were previews of the testimony to be offered by the parties’ witnesses at the evidentiary hearing.

We next turn to the assertion that the Commission “disregarded” testimony provided by Tel-Car’s owner, Mr. Casper, simply because he had no written documentation. Petition for

²² The summary may also constitute an omission of a party-opponent. I.R.E. 801(d)(2).

Reconsid. at 8-9. The Pagers' Petition mischaracterizes our review of Mr. Casper's testimony. In the Credit Order, we describe his testimony as follows:

In rebuttal, the Pagers presented the testimony of Arden Casper, owner of Tel-Car, who testified that a more appropriate transit traffic figure would be between 5% and 8%. Tr. at 553. He testified that he monitored traffic and conducted [three] surveys from January 2000 to July 2001. *Id.* at 554. On cross-examination, he acknowledged that he did not retain any records from these surveys and that his data was obtained over three days [between the hours of 8:00 – 5:00] during the last 18-month period. Tr. at 556-57.

Order No. 29064 at 17. In explaining the three one-day surveys, Mr. Casper testified he conducted the surveys on three of his Meridian trunks out of a total of 15 trunks located in Meridian, Twin Falls, and Pocatello. Tr. at 558. After reviewing this testimony, the Commission "questioned[ed] whether sampling for three days over 18 months is sufficient to support his contention." Order No. 29064 at 19.

The Commission did not disregard Mr. Casper's testimony; it accorded it little weight. The credibility and the weight of evidence is within the province of the trier of fact. *Basic American v. Shatila*, 133 Idaho 726, 992 P.2d 175 (1999). Our Hearing Examiner found that the study offered by Mr. Casper was not credible. Proposed Order at 14. Given the limited nature of the sampling (3 days over 18 months on only 3 of 15 trunk lines), we agreed with the Hearing Examiner and accorded the survey little weight.²³ While we may find Mr. Casper to be a credible witness (i.e., we believe he conducted the three samples), we find the results of his studies have little credibility and should be weighed accordingly. *Bouten Const. Co. v. H. F. Magnuson Co.*, 133 Idaho 756, 992 P.2d 751 (2000). We find the persuasiveness of this evidence to be lacking. *Sherdian v. St. Lukes*, 135 Idaho 775, 25 P.3d 88 (2001).

We further find that these two points were not the only reasons the Commission "discounted" the Pagers' testimony on the issue of transit traffic. Order No. 29064 recounts the evidence the Commission relied upon to support our finding that the Pagers' testimony should receive less weight. The Order states

We discount the Pagers' testimony for several reasons. First, two of the Paging witnesses did not correctly define "transit traffic." Mr. Ryder defined it as calls originating outside the LATA, which is too narrow a definition.

²³ There are approximately 370 business days in 18 months (excluding holidays). Consequently, the sampling period of 3 days out of 370 represents a sample size of less than 1% (.0081). We also note that the survey was only over 3 trunks out of 15 trunk lines for the 3 samples.

[Tr. at 107, ll. 9-10.] In addition, Mr. McNeal defined it as “spent and unspent” traffic and estimated that it would be less than a hundredth of one percent. [Tr. at 173-76.] In the *Metrocall Order*, the FCC specifically noted that some percentage of the traffic constitutes transit traffic. *Id.* at ¶ 9. In addition as discussed above, we find transit traffic is not subject to reciprocal compensation.

Second, as noted above, the Pagers offered inconsistent testimony. Although two of the pager witnesses acknowledge that they would accept a transit traffic figure of 15% [in their prehearing summaries], they also argued that the transit figure should be between 3% and 8%, or that there was not transit traffic. [Tr. at 107, ll. 11-15; 112, 123, 173-74, 553.] Even the Pagers’ expert acknowledged that the 24% figure [adopted by the Commission] was “within the realm of possibility.” Tr. at 294, 295.

Order No. 29064 at 18-19 (emphasis in original). Having reviewed the record in this matter, we find there is substantial and competent evidence to support our finding. We adhere to our previous decision that the Pagers’ evidence regarding the amount of transit traffic was inconsistent and should be discounted in terms of its weight.

4. Sufficiency of Qwest’s Evidence. The Pagers also challenge the sufficiency of Qwest’s evidence regarding the amount of transit traffic. Both the Hearing Examiner in his Proposed Order and the Commission in its Credit Order found that 24% of the traffic Qwest delivered to the Pagers was properly classified as transit traffic. Proposed Order at 14; Order No. 29064 at 13. The Pagers assert the Commission made several errors by relying upon Qwest’s evidence to support the 24% figure.

First, the Pagers maintain the Commission “quotes an FCC Order that is technically incorrect and use[d] this technically incorrect statement as a basis for allowing Qwest to unlawfully assess the [Pagers] transit charges.” *Id.* at 8. Second, the Pagers insist Qwest has not carried its “burden of proof” regarding the amount of transit traffic. Petition for Reconsid. at 8. Third, the Pagers state they offered “uncontroverted” evidence that the transit traffic was less than 24%. Consequently, it was error for the Commission to disregard this uncontroverted evidence. *Id.* Finally, the Pagers again argue that Qwest is already compensated for other carriers’ transit traffic. They maintain that the Commission has allowed Qwest “double recovery of [its] transit charges.” Petition for Reconsid. at 14. They insist that Qwest’s “own cost study records filed with the Commission with respect to reciprocal compensation charges” in interconnection agreements with other carriers reflect that Qwest is already recovering for transit

traffic. *Id.* The Petitioners urge the Commission to strike the transit factor “entirely and order a refund of the entire overpayment.”²⁴ *Id.*

Commission Findings. Having reviewed the testimony and arguments of the Pagers, the Commission affirms that the evidence in this case, albeit conflicting, supports a transit traffic figure of 24%. The Pagers’ arguments mischaracterize the evidence and seek a result which is contrary to both the law and the evidence in this case. We first address the “incorrect” FCC order.

a. **“Incorrect” FCC Order.** The Pagers maintain that the Commission relied upon a “technically incorrect” FCC order that allowed Qwest to improperly assess transit charges against the Pagers. Petition for Reconsid. at 15-16. The Commission’s Procedural Rule 331.01 provides that petitions for reconsideration must “set forth specifically the ground” why the Commission’s Order is in error. IDAPA 31.01.01.331.01. In the part of Order No. 29064 that addresses transit traffic, the Commission quoted from two FCC orders and cited to four FCC orders. Order No. 29064 at 13-19. However, the Pagers have failed to identify which order “they believe is ‘technically incorrect.’” Moreover, they do not explain why the order was incorrect. The Commission will not search for evidence to sustain an argument of error. *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000). Consequently, we are unable to reconsider this issue.

b. **Burden of Proof.** The Pagers next maintain the *Metrocall Order I*, 16 FCC Rcd 18123 (Oct. 2, 2001), prescribes that Qwest “has the burden of establishing any transit factor.” Petition for Reconsid. at 7. However, as an initial matter, our review of the *Metrocall Order I* does not reveal that the FCC clearly articulated that the LEC has the burden of proof. In the *Metrocall Order I*, the FCC noted Metrocall “never offered a means of determining its transiting traffic charges. Instead, Metrocall avers in its Reply that it owes nothing for charges relating to transit traffic. . . .” *Metrocall Order I* at ¶ 8. Because Metrocall offered no evidence, the FCC

²⁴ The Pagers also allege that Qwest is double recovering its transit charge because Qwest is already recovering the cost of such traffic “in the originating transit charges levying on originating carriers” as indicated in “numerous Interconnection Agreements filed in Idaho since January 17, 1997, including Western Wireless.” Petition for Reconsid. at 14. For reasons already outlined, the Commission declines to address this allegation in greater detail except to note that these interconnection agreements are not in the record; and even if the Pagers’ assertion were true, they could have previously adopted such terms and conditions under Section 252(i) of the Act.

accepted the evidence offered by the two LECs that their transit traffic amounts were 26% and 23%, respectively. *Id.* ¶¶ 11, 14.

This Commission's Order recognized the distinction between Metrocall's lack of transit traffic evidence and the Pagers' evidence regarding transit traffic in this case. Order No. 29064 at 15, ¶ 2. As the FCC stated in *Metrocall Order I*, the pagers

are required to pay for 'transiting traffic,' that is traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to the Paging Carrier's network. Some percentage of the interconnection-related charges imposed by the [LEC] defendants on Metrocall constitutes such traffic, and they are entitled to charge for it. We reject Metrocall's claim that the [LEC] defendants had to raise the issue of Metrocall's liability for transiting traffic charges as a counterclaim for those charges to be considered here.

Metrocall Order I at ¶ 9 (footnotes omitted and emphasis added). Consequently, LECs may charge for transit traffic – the question is how much transit traffic occurs. Accordingly, the Pagers claim for a full refund is unreasonable.

From the outset, the Commission recognized that both parties offered conflicting evidence regarding the appropriate amount of transit traffic. Qwest witness Fraser testified Qwest's calculation of 24% was based upon an analogy using cellular traffic. Tr. at 314. She explained that for Qwest to actually capture originating data for transit traffic would require sophisticated facilities commonly referred to as SS7.²⁵ *Id.* at 312, 87-88. She explained that in 1998 only one pager in Qwest's 14-state territory was equipped with SS7 technology. Tr. at 387. She also explained that SS7 technology was not available for pagers with Type 1 interconnections. Tr. at 386. The Hearing Examiner found that Qwest's reasons for using a cellular study as a surrogate for Idaho transit traffic was adequately explained and recommended that the Commission adopt Qwest's closest analogue of using cellular data. Proposed Order at 14. Moreover, Qwest's subsequent cellular study over a six-month period showed a transit factor of 35%. Tr. at 314-15; Qwest Exh. 205.

In addition to the Pagers' evidence described above, they offered a broad range of transit traffic evidence. At various times they asserted that the appropriate amount of transit

²⁵ SS7 means "Signaling System 7." SS7 and its supporting software has the ability to "actually capture call data for [where] calls originated and terminated via SS7 trunks." Tr. at 314. Simply put, SS7 allows a company to determine who is calling and, hence the origination of the call. For example, SS7 information is used in Caller ID service to let the called party know the identity and telephone number of the calling party.

traffic in this case was: zero, 3%, between 3% and 5%, between 3% and 8%, around 5%, 5.5%, between 5% and 8%, 8%, 15%, and even acknowledged that Qwest's 24% figure was "within the realm of possibility." Order No. 29064 at 19. See Tr. at 112, 174, 294, 295, 552, 553; Exceptions at 7, 10, 14, 29.

After weighing the evidence, both the Examiner and the Commission found that Qwest met its burden of persuasion regarding the amount of transit traffic. As our Supreme Court has noted, findings of the Commission will be liberally construed in favor of the prevailing party in light of the Commission's role as trier of fact. *Conley v. Whittlesey*, 133 Idaho 265, 985 P.2d 1127 (1999). Substantial and competent evidence is where reasonable minds might accept such evidence as adequate to support a conclusion. The function of the Commission is to determine the creditability of witnesses, weight to be assigned the testimony, and to draw reasonable inferences from the record as a whole. *ASARCO v. Industrial Special Indem. Fund*, 127 Idaho 928, 931, 908 P.2d 1235, 1238 (1996). Findings of the Commission will not be set aside if supported by substantial and competent evidence. *Erickson v. State*, 132 Idaho 208, 970 P.2d 1 (1998). The Supreme Court does not weigh evidence or consider whether it would reach a different conclusion from the evidence presented. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001). Given the totality of the evidence, the witnesses' creditability and the assigned weight of the evidence, the Commission found that Qwest met its burden of persuasion that the reasonable transit figure was 24%.

c. Uncontroverted Testimony. The Pagers claim they offered "uncontroverted" evidence that transit traffic was less than 24% for their respective companies. Petition for Reconsid. at 8. The Pagers state that the "only evidence" offered by Qwest was the 1998 transit traffic survey of cell phone usage. However, the record clearly denotes that this issue was a hotly contested issue and that Qwest offered other evidence to support its transit traffic. As set out above, the Pagers themselves offered a broad range of transit traffic figures.

In addition to the Qwest evidence mentioned in the preceding section, Qwest offered a later transit traffic study to support its 24% figure. Moreover, the one transit study of the only SS7 pager in 1999 showed transit traffic at 27%. Order No. 29064 at n. 7; Tr. at 389. Qwest resorted to using "the closest analogue for which substantial data is available, which is cellular service. The failure of Qwest to offer a study of Idaho paging traffic was adequately explained." Proposed Order at 14. The Commission readily admits that there was much conflicting evidence

regarding the appropriate calculation of transit traffic. However, after reviewing the totality of the evidence and assigned it weight as indicated in our prior Order, we find there is substantial and competent evidence supporting the Commission's decision regarding the 24% transit traffic figure.

d. Double Recovery of Transit Charges. To support their double recovery theory, the Pagers point to the cross-examination of Qwest witness Fraser where the Pagers' counsel asked her a hypothetical billing question. Mr. Jones asked her whether Qwest would bill the originating carrier for transit traffic if the pager had a Type 2 connection with Qwest. Tr. at 482-83. Ms. Fraser replied that Qwest would bill the originating carrier for transit traffic to the pagers. However, she noted that such a billing configuration would only be available for Type 2 carrier but not for a Type 1 carrier. As stated above, a Type 1 interconnection does not offer SS7 capability – that is the capability to determine where the call originates. This capability is only available to Type 2 carriers. She also explained that Type 1 pagers do not interconnect at LEC tandem switches. Tr. at 484. We find that her answer to the hypothetical question does not support the double recovery argument of the Type 1 pagers.

We further note that the Commission's Credit Order rejected the Pagers' argument that Qwest is double recovering its transit charges. The Commission found that the FCC dismissed an identical argument in its *Texcom Order on Reconsideration* noting that FCC "reciprocal compensation rules do not provide for such compensation to a transiting carrier." 17 FCC Rcd 6275 ¶ 4 (March 27, 2002). In the initial *Texcom Order*, the FCC said that "the terminating CMRS [i.e., the paging] carrier's customers pay for the cost of transporting that [transit] traffic from the LEC's network to their network." *Texcom Order* at ¶ 6, 16 FCC Rcd 21493 (Nov. 28, 2001).

The initial *Texcom Order* is instructive in addressing this issue. In that case, the one-way pager argued that the transit carrier receives adequate compensation for carrying transit traffic from long-distance carriers and other interconnecting LECs and CMRS carriers. *Texcom* argued that "permitting LECs to charge for transiting traffic allows them to recover their costs twice over." *Texcom Order* at ¶ 11. The FCC found that *Texcom's*

"double recovery" claims are deficient. The [FCC] has previously concluded that LECs cannot assess charges on interexchange carriers ("IXCs") for the facilities used to connect the CMRS provider's network to that of the LEC because those facilities are not common lines for purposes of the access

charge rules. Thus, access charge revenue received by [the transit LEC] from an IXC cannot lawfully include the cost of the interconnection facilities associated with transiting traffic between [in our case the Pagers and Qwest]. Because [the Pagers have] presented no evidence indicating that [Qwest] access charges do, in fact, include such costs, we concluded that [the Pagers are] not using access charge revenue to recover twice for the same facilities.

The same argument holds true with respect for reciprocal compensation – the LECs that carries the call from the originating LEC to the CMRS provider is prohibited from recovering the cost associated with the facilities used to interconnect to the CMRS provider’s network. . . . [The LEC] is prohibited from recovering the costs associated with the interconnection facilities between it and [the pager] through reciprocal compensation arrangements with competing LECs.

Texcom Order at ¶¶ 12-13 (footnotes omitted and emphasis added). Other than bare assertions the Pagers have not provided evidence that Qwest will double recover its transit traffic costs.

e. Qwest Cost Studies. The Pagers also allege the Commission’s findings with respect to double recovery are not consistent with Qwest’s “own cost study records filed with the Commission with respect to reciprocal compensation charges to other carriers. . . .” *Petition for Reconsid.* at 14. However, the Pagers do not direct our attention to any cost studies contained within our present record. As we have previously indicated, reciprocal compensation terms in interconnection agreements with Qwest that were approved by this Commission have been available for adoption by the Pagers under Section 252(i). Cost studies associated with interconnection agreements are not relevant to our inquiry here.

D. Excluded Facilities

The Hearing Examiner recommended and the Commission found that the Pagers are entitled to receive credits for one-way paging traffic and those facilities and services necessary to transmit such traffic to the Pagers. *Proposed Order* at 3; *Order No. 29064* at 23. However, both the Examiner and the Commission found it was reasonable and appropriate to exclude from the calculation of the credits those Qwest charges for non-paging services and facilities. *Id.* The Commission found all of the Pagers provide other telecommunication services in addition to one-way paging. *Order No. 29064* at 21. Consequently, the Commission held that it was appropriate that refunds not include credits for these other non-paging services and facilities which the Pagers obtained from Qwest.

In their Petition for Reconsideration, the Pagers make several arguments regarding this issue. First, the Pagers maintain they offered “unrebutted” testimony that “all of the lines and facilities for which [the Pagers] sought reimbursement were necessary for interconnection.” Petition for Reconsid. at 5. The Pagers argued that if a specific Qwest facility is not used exclusively for one-way traffic, then the Commission’s Order assumes that “the pager is responsible for paying for the entire facility and for all traffic delivered either way.” *Id.* at 6. The Pagers also argue that: (1) Tel-Car’s credit should include Qwest charges for mobile service; and (2) PageData’s credit should include its payments for frame relay,²⁶ private²⁷ lines (leased) and POTS lines.²⁸ The Pagers claim that Qwest offered no evidence about how the Pagers’ systems were configured or what facilities or lines were necessary to deliver one-way paging traffic to the Pagers. *Id.* at 5.

Commission Findings. The Pagers arguments fail for several reasons. At the evidentiary hearing, the Pagers argued that “Qwest is responsible for the delivery for all called traffic to” the Pagers. Exceptions at 15-16. However, the FCC has recognized that this assertion is too broadly stated. As the FCC held in its *Mountain Communications I* Order, “Qwest may lawfully charge [the Pagers] for costs associated with ‘transiting traffic’ and for facilities used to provide ‘wide area calling’.” 17 FCC Rcd 2091 at ¶ 1 (Feb. 4, 2002). Second, all the Pagers acknowledged that they provide other types of telecommunication services. The Commission found that it was unreasonable for the Pagers to receive credits for their use of non-paging services and facilities. Order No. 29064 at 22. We do not find that the Pagers’ testimony was unrebutted.

Tel-Car and PageData insinuate that some of the facilities that were excluded from their credits carry one-way paging traffic. They maintain that Qwest offered no evidence about how their systems were configured or what actual facilities were used to deliver one-way paging

²⁶ “Frame relay” is a method of achieving high-speed, packet-switched data transmissions within digital networks at transmission speeds between 56 kbps and 1.544 million bps. Access to a frame relay is usually accomplished by using a dedicated digital T-1 circuit. Telecom Lingo Guide at 96 (8th Ed. 1996); Newton’s Telecom Dictionary at 373-74, (16th Ed. 2000).

²⁷ A “private line” is a dedicated telephone access line provided to a single customer for that customer’s exclusive use. Using private line facilities eliminates dial-up delays and avoids potential congestion problems that may be associated with LEC common lines.

²⁸ “POTS” means plain old telephone service.

traffic to the Pagers. This argument, however, is misdirected. In calculating credits owed each Pager, Qwest utilized its billing account information broken down by Uniform Service Order Codes (USOCs).²⁹ Qwest used the USOCs to bill (and then calculate the credits) for services and facilities provided to the Pagers. As Qwest witness Fraser testified, the Company utilized its USOC codes to determine what services are appropriately classified as “paging” services. Tr. at 328. Those services that were identified by their USOC codes as non-paging (e.g., mobile service, frame relay, long-distance, private line, or POTS) were excluded. Consequently, credit for these services were not included. The Hearing Examiner determined the Pagers made no effort to show that the USOCs in Qwest Exhibits 201, 202, and 203 were incorrectly assigned to non-paging services. Order No. 29064 at 20. Consequently, it is reasonable to charge PageData for Qwest frame relay, leased private lines and POTS.

Other than its bare assertion, Tel-Car has not pointed to any evidence in the record that supports its position that it should be compensated for mobile service. Qwest did not apply a credit for mobile service because the USOC for this service was a non-paging code. As the Commission found in its Credit Order, “Tel-Car’s witness, Mr. Casper, said that his company provides one-way paging, two-way answering services, and cellular services. Tr. at 131. He testified that some of his circuits are utilized to provide paging and non-paging services. Tr. at 147.” Order No. 29064 at 21 (emphasis added). Given this admission, we find it was incumbent upon Tel-Car to provide evidence regarding the usage ratio between one-way paging and non-paging traffic over the joint use circuits. Tel-Car did not provide any such evidence.

The Commission specifically rejected the Pagers argument that it was Qwest’s responsibility to show the amount of paging traffic, if any, that utilize these facilities. The Commission noted that once Qwest excluded credits for non-paging services, “it was incumbent upon the Pagers to refute this evidence.” Order No. 29064 at 22. The Examiner and Commission found that the Pagers

presented scant evidence to support their claim that all their bills from Qwest were for interconnection for the purpose of receiving one-way paging traffic from Qwest. Their assertions about their bills were not creditable given the other kinds of businesses they operate across the same networks (some of

²⁹ The Uniform Service Order process utilities “codes” comprised of letters and numbers to generically refer to all telecommunications services and equipment. USOCs are used to provision, bill and maintain each service and type of facility. Bell Operating Companies and many other telecommunication carriers use the USOCs to communicate with each other in a common language. Newton’s Telecom Dictionary at 946 (16th Ed. 2000).

which were for two-way traffic), nor was it creditable to believe that they had no business operation needs for other telecommunications services from Qwest. Qwest's exhibits, in contrast, took each billing element and assigned it to interconnection or other types of services based on logical categorizations. Moreover, months before hearings, Qwest provided detailed billing elements for each month of the reimbursement period involved. [The Pagers] . . . made no effort to show that specific billings elements detailed for them by Qwest and included in [Qwest's] Exhibit 201, 202 and 203 were incorrectly assigned to non-[paging] interconnection use.

Order No. 29064 at 22-23 *quoting* Proposed Order at 11-12. The Pagers did not attempt to calculate a "percentage of use factor" to determine the portion of paging and non-paging traffic which may have utilized these joint use facilities. *WorldCom Order* at ¶ 57. The Pagers have not persuaded us nor pointed to any specific evidence to support their position.

E. Wide Area Calling Arrangements

In addition to allowing Qwest to charge for transit traffic, the *TSR Order* held that LECs may also charge for LEC services and facilities not necessary for interconnection and the delivery of what would otherwise be toll traffic to the Pagers. More specifically, the FCC found Qwest may properly charge a paging company for "wide area calling or similar services." Order No. 29064 at 5, *citing* *TSR Order* at ¶¶ 30-31.³⁰ In their Petition for Reconsideration, the Pagers recognized that this Commission and the FCC are allowed to define local calling areas for certain telecommunication services. Petition for Reconsid. at 15. However, they generally contend they did not create wide area calling arrangements or networks. The Pagers also argue PageData's use of a frame relay network to establish a single point of interconnection was not "voluntary." *Id.* at 11. Finally, they also assert that Qwest's use of a "20-mile rule" to distinguish between local and toll calls is contrary to the *Local Competition Order* (paragraph 1043) and is arbitrary. *Id.* at 15.

Commission Findings.

1. Wide Area Calling Arrangements. In its Credit Order, the Commission found that Qwest may properly charge the Pagers for facilities used for wide area calling arrangements. Order No. 29064 at 26-27. The Credit Order quoted the FCC's finding in the *TSR Order* that

³⁰ *Mountain Communications I*, 17 FCC Rcd 2091 (Feb. 4, 2002); *Mountain Communications II*, 2002 WL 1677642 (July 24, 2002).

nothing prevents U S WEST from charging its end users for toll calls completed over a [toll route] T-1 [facility]. Similarly, Section 51.703(b) does not preclude [the Pager] and U S WEST from entering into wide area calling or reversed billing arrangements whereby [the pager] can “buy-down” the cost of such toll calls to make it appear to end users that they have made a local call rather than a toll call [to reach the pager]. Should paging providers and LECs decide to enter into wide area calling or reversed billing arrangements, nothing in the [FCCs] rules prohibit a LEC from charging the paging carrier for those services.

Order No. 29064 at 5, *quoting TSR Order* at ¶ 31 (footnotes omitted).

In *Mountain Communications I*, the FCC recognized that pagers could create and use a number of different wide area calling arrangements so that it would appear to callers that toll charges were not applicable when calling a paging company located in a different local calling area. “These arrangements include: 800 service, DID³¹ configurations, reverse billing or reverse toll, FX (foreign exchange), and other possible configurations such as frame relay.” Order No. 29064 at 28 *citing Mountain Communications I* at ¶ 3. In particular, the Commission found that PageData and Tel-Car had configured their systems in a manner that constituted wide area calling arrangements. Order No. 29064 at 27; Tr. at 145, 163; *Mountain Communications II* at ¶ 5. For example, Tel-Car’s wide area calling arrangement allowed it to “provide toll-free service from Hailey, Idaho to Twin Falls, Idaho without a toll charge to . . . our potential customers or subscribers or the person that would be calling [the paging customer]. Tr. at 145, ll. 14-18 (emphasis added). Qwest is the incumbent LEC in both Hailey and Twin Falls.

In PageData’s case, the Commission found that it wanted to consolidate its “four points of interconnection into a single LATA-wide³² point of interconnection so that [PageData’s] paging and other services could all be transported by T-1 facilities and frame relay services.” Order No. 29064 at 24 (emphasis original, footnote added). PageData’s witness, Mr. McNeal, acknowledged on cross-examination that “all the traffic that PageData carries – paging

³¹ DID is the acronym for “Direct Inward Dialing.” It is a feature of a PBX or Centrex system that allows a caller to directly dial an internal telephone number. As used here, a DID trunk from a LEC central office passes a call to the internal system of the pager. Order No. 29064 at n. 6; *Mountain Communications II* at ¶¶ 4-5.

³² A LATA (local access and transport area) is a geographic area designed by the United States District Court in the Modification of Final Judgment in the divestiture of AT&T and the Bell Operating Companies (BOCs). The LATAs were created to facilitate the division of assets between AT&T and the BOCs, and to mark the boundaries within which the BOCs could transport calls. As approved by the Court, all of the Qwest local exchanges south of the Salmon River are included in a single LATA, called the Boise LATA. Eight exchanges served by Qwest North (formerly Pacific Northwest Bell) in the Lewiston area are included in the Spokane LATA.

traffic, long-distance, signal traffic, e-mails, and data – goes over that facility [frame relay] . . . that’s available to us at no charge.” Tr. at 199, 148 (emphasis added).

We further find the FCC’s recent pronouncements in the *Mountain Communications* Orders, persuasive and controlling. In the *Mountain Communications II* Order, the pager denied that

the T-1 facilities it obtains from Qwest to connect the DID numbers used by Mountain’s customers in each of Qwest’s local calling areas to Mountain’s interconnection point are “dedicated toll facilities” because those facilities do not carry “toll” traffic. Mountain maintains that the T-1 lines provisioned by Qwest are simply facilities required to effectuate a single point of interconnection with a local access and transport area (“LATA”), for which Qwest is responsible pursuant to section 51.703(b) of the Commission’s rules.

We are not persuaded by Mountain’s arguments. . . .A reverse billing arrangement is *only one of several types* of wide area calling services, and the T-1 lines that constitute the “dedicated toll facilities” in Mountain’s interconnection arrangement with Qwest are referred to as such because their sole function is to route the DID numbers to Mountain’s point of interconnection in Pueblo. By establishing a point of interconnection in Pueblo [and other Qwest central offices] and then requesting T-1 lines from Qwest to connect those DID numbers to its point of interconnection in Pueblo, Mountain ensures that calls to the DID numbers in each of the relevant Qwest central offices appear local and involve no toll charges to callers in those areas. By configuring its interconnection arrangement in this manner, Mountain prevents Qwest from charging its customers for what would ordinarily be toll calls to access Mountain’s network. Accordingly, Mountain has obtained a wide area calling service for which it must compensate Qwest. Mountain’s position that the lack of a written agreement between the parties indicates that no wide area calling arrangement with Qwest exists is meritless. Mountain’s ordering and acceptance of the T-1 facilities from a tariff that create a wide area calling arrangement constitutes an agreement between the parties regarding the provisioning of this service.

Mountain Communications II at ¶¶ 4-5, 2002 WL 1677642 (July 25, 2002) (footnotes omitted, italicized original and underline added). The Pagers are not entitled to credits for their wide area calling arrangements.

2. PageData’s Frame Relay. The Pagers next assert that PageData did not “voluntarily obtained [its] frame relay” service. Petition for Reconsid. at 11. In constructing a paging system that has a single point of interconnection, PageData apparently contends that it did not voluntarily obtain its frame relay services. In its Order, the Commission found that

PageData's "ordering of certain dedicated facilities from Qwest was the equivalent of 'effectively enter[ing] into such an arrangement with Qwest by requesting dedicated toll facilities to transport calls made to the DID numbers.'" *Mountain Communications I* at ¶ 13." Order No. 29064 at 27.

As an initial matter, the Commission recognizes that a pager may request interconnection at any technically feasible point. 47 U.S.C. § 251(c)(2); *WorldCom Order* at ¶ 52. The FCC has stated that a competitive LEC or CMRS has "the right to request a single point of interconnection in a LATA." *WorldCom Order* at ¶ 52; *U S WEST Communications v. Jennings*, 304 F.3d 950, 961 (9th Cir. 2002). However, both the FCC and the Ninth Circuit recognize there is a competing cost issue regarding a single point of interconnection. *WorldCom Order* at ¶¶ 52, 54. As the Court explained, "to the extent that AT&T's desired interconnection points proved more expensive to U S WEST, we agree that the [Arizona Commission] should consider shifting costs to AT&T." *U S WEST*, 304 F.3d at 961 citing *Bell Atlantic-Pa.*, 271 F.3d at 518.³³ We find this reasoning relevant here because there was no reciprocal compensation given the nature of one-way paging. Compare *WorldCom Order* at ¶ 52 and *Mountain Communications II* at ¶¶ 4-6.

We affirm our finding in Order No. 29064 that PageData entered into a wide area calling arrangement when it requested the frame relay facilities to transport its network traffic. Order No. 29064 at 27. As we quoted above in the *Mountain Communications II* Order, PageData's "ordering and acceptance of the T-1 facilities from a tariff that create a wide area calling arrangement constitutes an agreement between the parties regarding the provisioning of this service." *Mountain Communications II* at ¶ 5. In addition, Mr. McNeal testified that PageData "signed a contract with the [Qwest] small business group" so that frame relay facilities would "route our numbers across the state. . . ." Tr. at 170, ll. 21-23. There is substantial and competent evidence in the record to sustain the Commission's finding that PageData obtained the frame relay facilities as a wide area calling network for its paging service as well as carry its other non-paging traffic.

³³ The FCC is currently examining the interplay of reciprocal compensation and single points of interconnection in a pending rulemaking proceeding. *WorldCom Order* at ¶ 52 (referring to Inter-Carrier Compensation NPRM, 16 FCC Rcd. at 9617, ¶ 14).

3. The 20-Mile Rule. In its Order, the Commission adopted a recommendation of the Hearing Examiner that allowed Qwest to determine when telephone calls might be appropriately classified as long-distance under a wide area calling arrangement (as opposed to a local call). The Commission adopted a “20-mile rule” based upon Qwest’s region-wide data showing the break point between local and long-distance calling. Order No. 29064 at 25. The Examiner noted that the 20-mile rule was calculated upon data from Qwest’s 14 states rather than restricted merely to Idaho. Proposed Order at 20. However, he noted that the Pagers did not present any evidence to contradict the 20-mile rule. *Id.* The Commission found that 20-mile rule was an appropriate mechanism to distinguish between local calling on the one hand, and various forms of wide area calling arrangements on the other. *Id.* at 28.

The Pagers argue that use of the 20-mile rule to determine those calls which may be subject to toll charges is arbitrary and not in conformance with paragraph 1043 of the *Local Competition Order*. Petition for Reconsid. at 15. The Pagers recognized that this Commission and the FCC define local calling areas with respect to certain telecommunication services. *Idaho Code* § 62-603(7); *Local Competition Order* at ¶¶ 1035-37. Our review of paragraph of 1043 in the *Local Competition Order* does not support the Pagers’ objection to the 20-mile rule. That portion of the *Local Competition Order* addresses the distinction between “local” traffic related to CMRS providers (and subsequently subject to transport and termination rates) versus interstate or intrastate access charges.

Although the Pagers have not articulated any specific reason why the 20-mile rule is arbitrary, on reconsideration we find that they have raised an appropriate issue. In our prior Order, the Commission recognized that the 20-mile rule was based upon Qwest data from its 14-state service territory and questioned whether the rule was appropriate for Idaho. Order No. 29064 at 27. Upon reconsideration, we find that although 20 miles may be the average distance for a local call in other states, this is not the case in Idaho.

In Order No. 26672 issued November 1, 1996, the Commission authorized Qwest to establish three large regional calling areas across southern Idaho. More specifically, the Treasure Valley local calling area initially encompassed the communities of Boise, Caldwell, Emmett, Idaho City, Kuna, Middleton, Star and other communities within the valley. A similar local calling area was created in the Magic Valley, originally encompassing 14 Qwest local exchanges. Finally, the Eastern Idaho local calling area contains 24 Qwest local exchanges extending from

Idaho Falls to Montpelier. In subsequent Orders, the Commission expanded these three local calling regions to include adjacent non-Qwest exchanges. All of these calling regions exceed a radius of 45 miles as measured by toll billing (air miles) coordinates. Thus, it is reasonable to increase the mileage threshold used to classify telephone calls as local or long-distance calls when transported over wide area calling arrangements.

Taking into consideration the geographic size of these local calling areas, the density within each of these areas, the date when the local calling areas were created and the volume of calls in each of these areas, we find it reasonable to increase the threshold to 45 miles. Consequently, we amend Order No. 29064 to amend the 20-mile rule to the 45-mile rule. Based upon the change to the threshold, we find it appropriate for Qwest to update its calculations of the credits due each Payer as it relates to the amendment of the mileage threshold rule. Qwest shall submit to the Commission and the Pagers updated credit calculations conforming with our finding in this Order no later than 14 days from the service date of this Order. Additional interest resulting from this change shall also be computed up to November 1, 2002. The increased amount of credit resulting from this change shall be credited to the Pagers respective accounts within 28 days from the service date of this Order.

F. Calculation of the Refunds

In the Credit Order the Commission adopted the recommendations of the Hearing Examiner and found that Qwest presented the better evidence regarding the billing and payment information necessary to calculate the refunds. Order No. 29064 at 20. The Commission found that “Qwest’s billing and credit information derived from its billing [system] and included payments made by the Pagers.” *Id.* On reconsideration, the Pagers raise three issues regarding the calculation of the refunds. First, they insist that the *TSR Order* expressly prohibits Qwest from charging for several specific services identified by USOC. Petition for Reconsid. at 12. Next, the Pagers assert that the Commission overlooked the fact that PageData (including InterPage) paid more than \$240,000 for paging services. *Id.* Finally, the Pagers assert that the Hearing Examiner and the “Commission erred in failing to make their own calculations with regard to the amounts Qwest is required to refund to [the Pagers].” *Id.* at 16. The Pagers maintain that the Commission did not go “through the evidence to determine the amounts to be refunded, either deferring wholly to Qwest’s exhibits or delegating the task to Qwest.” *Id.*

1. The *TRS Order* and Specific USOCs. The Commission first takes up the issue of whether the *TSR Order* specifically prohibits Qwest from charging for certain services identified by USOCs. The Pagers allege that many of the Qwest charges listed by USOCs in “Exhibit 2”³⁴ to their Exceptions “are still excluded under the FCC’s Local Competition Order and *TSR Order*.” Petition for Reconsideration at 12. In their Exceptions, the Pagers argued that Exhibit 2 shows billing codes that were used for charging [the Pagers] and the citation to the *TSR Order* which precludes charging for each code.” Pagers Exceptions at 27 ¶ 4. This document contains a list of 36 USOC billing codes³⁵ and a name for each code. A third column entitled “Not Allowed in *TSR Order*” purportedly references five paragraphs from the *TSR Order* that expressly prohibit Qwest from charging for these specific USOCs.

Commission Findings. After reviewing the *TSR Order*, the Commission finds this argument without merit. The Pagers assert that five paragraphs (Nos. 25, 29, 31, 32, 33) in the *TSR Order* prohibit Qwest from charging for these services identified by specific USOCs. However, our review of the *TSR Order* does not support this allegation. None of the referenced *TSR Order* paragraphs specifically cite any USOCs. These paragraphs simply stand for the proposition that the FCC’s *Local Competition Order* and its implementing regulations prohibit Qwest from charging for traffic and facilities used to deliver Qwest originated traffic to the Pagers. *TSR Order* at ¶¶ 25, 31. Paragraphs 32 and 33 generally discuss the prohibition of LECs billing for recurring charges (i.e., monthly charges) for DID numbers. In particular, paragraph No. 33 specifically notes that LECs are prohibited from charging recurring charges solely for the use of DID numbers.

Several of the listed codes in Exhibit 2 do relate to DID numbers/facilities. Paragraph 33 of the *TSR Order* does allow LECs to assess a “reasonable initial connection charge to compensate the costs of software and other charges associated with new [DID] numbers.” *TSR Order* at ¶ 33, citing the *1986 Interconnection Order*, 59 R.R.2d 1275, 1284 (1986). Moreover, the FCC does recognize that the use of dedicated toll facilities that connects DID numbers as part of a wide area calling arrangement may properly be charged by Qwest. *Mountain Communications I* at ¶ 13; *Mountain Communications II* at ¶¶ 4-6.

³⁴ “Exhibit 2” is really not an admitted exhibit. It was not introduced at the hearing by any specific witness. It is a table of information that contains a listing of Qwest USOCs.

³⁵ See *supra* note 29.

We find the distinction between when Qwest may and may not charge for DID numbers depends upon whether the DID services are used as part of a wide area calling arrangement or not. In this case, we are unable to determine whether the DID USOC codes listed in Exhibit 2 should be refunded. Except for their reference to the *TSR Order*, the Pagers have not directed us to any evidence in the record to support their assertion that these specific USOCs are refundable. The Commission also noted in its Credit Order, the Pagers' expert Mr. Jackson testified that the Pagers used DID numbers to transport paging traffic "over what would be called dedicated facilities to another exchange." Tr. at 252; Order No. 29064 at 27. He also explained that PageData uses a frame relay system "to pick up calls from other areas" and deliver them to [its] point of interconnection. Tr. at 248. Qwest's witness Ms. Fraser testified Qwest does not deliver LEC originated traffic over private line circuits to pagers. Tr. at 243. Finally, the Commission's Credit Order found that PageData and Tel-Car "ordered various network facilities and configurations that constitute wide area calling arrangements. We further find Qwest may properly charge for those facilities and services that support wide area calling arrangements." Order No. 29064 at 22, 27. In this instance, the Pagers have not sufficiently demonstrated nor persuaded us that these DID services are not used for wide area calling or to deliver the Pagers other non-paging traffic.

2. PageData's Payments. The Pagers next allege the Hearing Examiner and the Commission "overlooked" evidence regarding the amount that PageData paid to Qwest for its paging services. More specifically, PageData's witness testified that the Payer paid Qwest over "\$240,000 in billings for [PageData's] paging service." Petition for Reconsid. at 10, 11. The Pagers contend that this testimony was not "directly rebutted." *Id.* at 11. They point to an "Exhibit 5"³⁶ which was submitted with their Exceptions. This document shows a side-by-side comparison of payments reported by PageData and reported by Qwest. The document shows payments by account number (different than USOCs) divided into four major categories: DID service; private line accounts (leased lines); business lines (POTs); and "other" accounts. The document further indicates that the cumulative payments for the four categories reported by PageData was \$240,756.03 and \$245,628.51 as reported by Qwest.

³⁶ Exhibit 5 is not an admitted exhibit but appears to be a Qwest-generated document that compares billing payments reported by Qwest and PageData for the accounts listed.

Commission Findings. The apparent disagreement between Qwest and the Pagers in this instance centers on exactly what the approximate \$240,000 paid for – one-way paging services or for both paging and other non-paging services. PageData insists that this cumulative amount represents payments solely for paging services. On the other hand, Qwest argued below that this payment amount includes payment for non-paging services such as frame relay, private line, business lines (POTs), and other facilities used to create wide-area calling networks. Qwest Post-Hearing Reply Brief at 22-24. Qwest maintained that it is not required to provide services for PageData

to connect its network together. Qwest agrees that it must provide facilities to the extent that those facilities carry Qwest-originated calls. Qwest is not, however, obligated to provide facilities, dedicated or otherwise, to PageData that are used by PageData on its side of the network. Neither is Qwest obligated to provide facilities to PageData to deliver traffic originated by a carrier other than Qwest. The relevant question is not whether facilities were used in PageData's paging business; the facilities must be used to deliver paging traffic from Qwest. PageData provided no evidence regarding which accounts carry what types of traffic.

Id. at 23.

Qwest asserted there are several reasons why the \$240,000 is too high. First, in this credit phase, PageData used September 24, 1996, as the start date of the refund period instead of the date of the *Local Competition Order* – November 1, 1996. *Id.* at 24. Second, this figure includes payments for facilities that are not one-way paging services such as: nonlocal paging facilities, mobile accounts, POTs, private line, 800 Pageline, DID number activation charges, and frame relay accounts. Qwest claimed that “PageData provide[d] no account detail other than on the Type 1 Paging account to itemize what the[se] charges were for. Qwest has limited its credit calculation to Type 1 local paging facilities.” *Id.* Third, PageData only estimated the amounts billed based on the amounts claimed to have been paid according to the Pagers' Exhibits 109 and 122.³⁷ However, Qwest argued that PageData produced no evidence that the accounts in these two exhibits matched what Qwest billed. Finally, Qwest maintained this amount was not reduced to reflect the amount of transit traffic (24%). *Id.*

³⁷ Pagers Exhibit 109 is a single-page spreadsheet document prepared by PageData listing 38 “accounts” (phone numbers, lines, billing accounts, DIDs) in which PageData alleges it paid Qwest \$248,473.56. Pager Exhibit 122 is a 48-page document prepared by PageData that consists of Transaction Ledgers, annual Profit and Loss Statements for InterPage, and Transaction Detail by Account for InterPage. PageData acquired InterPage in June 1998. Order No. 29064 at n. 2.

As the Commission set out above, it is reasonable to adjust the amount of credit due each Payer for: non-paging services; transit traffic; and wide area calling arrangements. In addition, we found that Qwest's use of USOC paging codes to calculate the appropriate credit carried greater weight than the request of the Pagers to recover all of their charges billed by Qwest. We further find that the appropriate starting date for the refund period is November 1, 1996.

At the hearing, PageData claimed it was entitled to a credit of \$248,473.56 as portrayed on the single-page Exhibit 109. PageData's witness, Mr. McNeal testified that PageData was owed a refund of \$52,282.47 and InterPage (the paging company he purchased) was owed a refund of \$188,473.56. Order No. 29064 at 29; Tr. at 154. His counsel explained that he was unable to produce any canceled check to substantiate the InterPage payments because the Company was purchased and the poor business relationship with InterPage's accountant. Tr. at 221; Proposed Order at 9; Tr. at 222, 530. There are no underlying workpapers to support Exhibit 109.

On rebuttal, Mr. McNeal offered Exhibit 122 in support of Exhibit 109. Tr. at 495-96. However, on cross-examination he conceded that he did not "know all the records [where] they got the information from. I'm not an accountant." Tr. at 516-17. The Hearing Examiner accorded Mr. McNeal's testimony about Exhibits 109 and 122 little weight. Proposed Order at 6-7, 4. The Commission adopted the Examiner's recommendation regarding this evidence. The Commission found that Qwest's evidence "was clearly superior to the evidence offered by the Pagers." Order No. 29064 at 30. Mr. McNeal was unable to correlate Qwest Exhibit 203 with his Exhibits 109 and 122. Tr. at 531-34. There is substantial and competent evidence, albeit conflicting, to support the Examiner and Commission's decision that accorded less weight to Mr. McNeal's testimony and exhibits.

3. The Calculations. Finally, the Pagers assert that the Commission erred by relying on Qwest to calculate the appropriate refunds. Petition for Reconsid. at 16. The Pagers maintain that the Commission did not go through the evidence to determine the amount to be refunded.

Commission Findings. In the Credit Order, the Commission found that Qwest presented the better evidence regarding the billing and credit information. At the outset, the parties started from vastly different positions. On the one hand, the Pagers argued they were entitled to a refund for all their traffic charges. They asserted Qwest was not entitled to a transit

traffic adjustment or an adjustment for wide-area calling. On the other hand, Qwest utilized its billing information system based upon USOCs to determine the appropriate credit for one-way paging services. As Qwest explained in its Post-Hearing Brief, it made adjustments for: (1) transit traffic; (2) wide-area calling arrangements and dedicated facilities used behind the Pagers' switches; and (3) non-paging services such as two-way answering, cellular traffic, data, signal traffic and long-distance services. Qwest Post-Hearing Brief at 22-24. We affirm our finding that Qwest's evidence was much more detailed, complete, and persuasive than the evidence offered by the Pagers.

Contrary to the Pagers' assertion, the Commission did review the underlying testimony, the methodology, and Qwest Exhibits 201, 202 and 203 (including the corrections and subsequent updates of the credit calculations). *See* Proposed Order 7-10; Tr. at 303-04, 320-44, 351-77, 429-36, 441-69. We also reviewed the exhibits and supporting testimony of the Pagers. Based upon our review of the entire record, we find there is substantial and competent evidence in the record to support the Commission's finding that Qwest's methodology and exhibits reasonably calculate the credits due the Pagers.

G. Miscellaneous Issues

The Pagers assert that the Commission made several miscellaneous errors in Credit Order No. 29064. These issues are discussed below.

1. References to Arrearages. The Pagers claim the fact that any Pager stopped paying their Qwest bills "is irrelevant to any issue in this matter. . . . Any references to non-payment of bills should be deleted" from the Commission's Order. Petition for Reconsideration at 11.

Commission Findings. We decline to delete the references in our Order that reflect at least two of the Pagers stopped paying their Qwest bills. Moreover, we find the issue of arrearage is relevant to this inquiry. Both Mr. McNeal (PageData) and Mr. Ryder (Radio Paging) acknowledged at the hearing that they had stopped paying their Qwest bills. Mr. McNeal stated he "quit paying Qwest for my [paging] interconnection facilities" in 1999. Tr. at 196, 197. Mr. Ryder testified he stopped paying all of his Qwest bills. Tr. at 120-121, 128. The fact that unpaid bills or arrearages existed is relevant to the "form" of the refund due each Pager – the issue we turn to next.

2. Credits vs. Reimbursements. The Pagers also take issue with the "form" of the refund due each Pager. In the Commission's Liability Order, we found the Pagers were entitled

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

Commission Findings. We decline the Pagers requests and find that it was appropriate to direct Qwest to issue billing credits in this case for four reasons.³⁸ First, the Pagers’ Petition for Declaratory Order simply stated that they “are entitled to recovery” of amounts paid or overcharged. Petition for Declaratory Order at 5. In other words, the Pagers’ initial pleading simply sought recovery – they did not specify the form or manner of refund.

Second, this is the second time the Pagers have pursued this issue. In their Petition to Amend the Liability Order No. 28601, the Pagers asked the Commission to remove the language “a billing credit or” so that the form of the refund would be a reimbursement. The Commission denied this request finding that the Pagers provided no justification for this change. Order No. 28626 at 2. That Order was a final decision appealable to the Supreme Court. *Id.* at 10. The Pagers did not appeal. At that time, the Pagers remedy was to seek judicial review. The Commission will not permit the Pagers to now collaterally attack the prior Order in violation of *Idaho Code* § 61-625 (final and conclusive decisions shall not be attacked collaterally).

Third, as set out above, at least two pagers acknowledged they stopped paying their paging bills from Qwest. This fact coupled with the fact they sought much larger refunds than the Commission eventually ordered, leads us to infer that the credits may not exceed the arrearages.³⁹ If this is the case, it would be unreasonable to require cash reimbursements. *See Metrocall Order I* at ¶¶ 4, 12 (Oct. 2, 2001). Finally, *Idaho Code* § 61-641 (concerning

³⁸ We noted in Order No. 29064 at nn. 8, 17 that “billing credits may not be appropriate” for Tel-Car because the company is no longer in business.

³⁹ In Qwest’s Motion to Dismiss and Answer to the Petition to Amend, the Company states that “PageData still owes Qwest a substantial sum after credits are applied.” Answer at 5.

overcharges by a utility) empowers the Commission to order Qwest to “make due reparation to the complainant therefore, with interest from the date of collection provided, no discrimination will result from such reparation.” (Emphasis added). The statute does not prescribe the form of the refund. In this instance, we find providing cash reimbursements would be discriminatory.

3. Reference to Internet Services. The Pagers next object to a proposed finding of the Hearing Examiner indicating that PageData provided Internet access services in addition to its paging and other services during the refund period. They also object to references to Internet services in the Commission’s Credit Order No. 29064 at pages 3, 21, and 24. Petition for Reconsid. at 4-5. The Pagers insist that the evidence established that PageData did not provide Internet services during the refund period and they propose “any conclusions based on [this] erroneous findings should be stricken” from the Commission’s Order. *Id.* at 5.

Commission Findings. The Pagers are correct that the evidence indicates that PageData did not offer Internet services during the relevant time frame. Consequently, we believe it is appropriate to clarify Order No. 29064. The source of this confusion is portrayed on page 21 of the Commission’s Order. On that page, the Commission quotes the testimony of PageData’s witness, Mr. McNeal. When asked what kind of traffic PageData carries, Mr. McNeal listed in his response that the Company transports Internet traffic. *See* Order No. 29064 at 21, *citing* Tr. at 198-99. On rebuttal, he clarified that he did not begin his Internet business until after the close of the refund period. Tr. at 545-46. This correction was not overlooked by the Commission. We specifically noted Mr. McNeal’s subsequent correction in a footnote to his quoted testimony. Order No. 29064 at 22, n. 11; *see also* n. 16. Consequently, the Commission was aware PageData did not carry Internet traffic during the refund period. Consequently, we clarify Order No. 29064 and specifically the Commission’s findings at page 24 that PageData did not provide “Internet” services during the refund period.

4. Interest Rate. In their Petition for Reconsideration, the Pagers renewed their argument that the appropriate rate to be used to calculate the interest on the refund amounts should be 12%. The Commission found that the interest rate set out in its rule for telephone customer deposits (6% and 5%) was appropriate. IDAPA 31.41.01.106.01. The Petitioners rely on the interest rate provision of *Idaho Code* § 28-22-104. Petition for Reconsid. at 12.

Commission Findings. We shall deny the Pagers’ request to use a 12% interest rate for two reasons. First, we adhere to the rationale laid out in our prior Order No. 28626 where the

Commission determined that the appropriate interest rate for the credits was the rate on utility deposits established in Telephone Customer Relations Rule 106. Order No. 28626 at 6, *citing* IDAPA 31.41.01.106.01. In that Order, we determined that the interest rates on the credit amounts accumulated was 6% from 1996 through the end of 1998, and 5% for 1999. *Id.* at 7.

Second, *Idaho Code* § 61-625 prohibits collateral attacks on prior Commission Orders. As we previously indicated, Order No. 28626 was a final decision appealable to the Supreme Court. *See* Order No. 28626 at 10. The Pagers' remedy from this finding was to seek judicial review but they have not done so. In *Utah-Idaho Sugar v. Intermountain Gas Company*, the Idaho Supreme Court noted that final Orders on Reconsideration should be challenged by appeal. 100 Idaho 368, 597 P.2d 1058 (1979). "A different rule would lead to endless consideration of matters previously presented to the Commission and confusion about the effectiveness of Commission orders." *Id.* at 373-74, 597 P.2d at 1063-64.

5. T-1 Trunk Lines. The Pagers next take issue with the "Commission's determination that no T-1 work orders were unfilled." Petition for Reconsid. at 12. At the evidentiary hearing, PageData's witness Mr. McNeal testified Qwest refused his service orders for T-1 trunks.⁴⁰ Tr. at 163-67. The Pagers apparently reference a sentence in the Commission's Order that states: "Qwest's witness Ms. Fraser testified that Qwest could find no T-1 work orders for PageData or InterPage that were unfilled." Order No. 29064 at 24.

Commission Findings. The Pagers have misconstrued this portion of the Commission's Order. In this part of the Order, the Commission was reciting the testimony of a Qwest witness. The quoted sentence did not constitute "a finding" of the Commission. In addition, the issue of whether T-1 work orders were filled or unfilled is beyond the scope of this proceeding. This case pertains to the calculation of the refunds owed the Pagers for services and facilities provided by Qwest. In this instance, PageData alleges that Qwest has not provided it with requested T-1 facilities. However, this issue is not relevant to the scope of this proceeding because no credit is due for facilities not provided. The Commission agreed with the Hearing Examiner that the "only question related to this issue" was to determine the appropriate refund

⁴⁰ A "T-1" line or trunk is the standard for digital transmission circuits in North America. Unchannelized T-1 trunks may transport not only voice but data, video and IP telephony. Unchannelized T-1 lines are commonly used to access a frame relay network. Order No. 29064 at n.12.

due the Pagers for the delivery of one-way paging traffic. Order No. 29064 at 24, *citing* Proposed Order at 16. Consequently, the Commission denies reconsideration on this issue.

CONCLUSION

In summary, the Commission finds that there is substantial and competent evidence to support its findings regarding the issues of transit traffic, wide-area calling arrangements, the exclusion of non-paging services, and the calculations of the refund credits in this matter. At the same time, however, the Commission acknowledges that there was often conflicting testimony regarding some of these issues. After carefully considering the issues raised in the Pagers' Petition and the record, the Commission affirms the majority of its Credit Order No. 29064 with the exception of the 20-mile rule and other minor issues of clarification.

ORDER

IT IS HEREBY ORDERED that the Pagers' Petition for Reconsideration is granted in part and denied in part. The Commission's Order No. 29064 is affirmed in part, amended in part, and clarified consistent with this Order.

IT IS FURTHER ORDERED that Qwest recalculate the billing credits due each pager caused by an increase of the mileage threshold used to differentiate between local and toll calls for wide area calling. The mileage threshold is increased from 20 miles to 45 miles. Qwest shall recalculate the credit and the respective interest up to November 1, 2002. Qwest shall file this updated credit information with the Commission and the Pagers within 14 days of the service date of this Order.

IT IS FURTHER ORDERED that Qwest issue the respective additional credits to the Pagers no later than 28 days from the service date of this Order.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in the Credit Phase of Case No. USW-T-99-24 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 31st
day of October 2002.



PAUL KJELLANDER, PRESIDENT

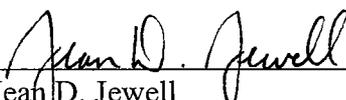


MARSHA H. SMITH, COMMISSIONER

Commissioner Hansen did not participate
in this decision

DENNIS S. HANSEN, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

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