

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**ROBERT RYDER DBA RADIO PAGING
SERVICE, JOSEPH B. McNEAL DBA
PAGEDATA AND INTERPAGE OF IDAHO,
AND TEL-CAR, INC.**

Petitioners/Appellants/Cross-Respondents,

v.

IDAHO PUBLIC UTILITIES COMMISSION,

Respondent on Appeal/Cross-Respondent,

and

QWEST CORPORATION,

**Respondent/Respondent on Appeal/Cross-
Appellant.**

**SUPREME COURT
DOCKET NO. 29175**

IPUC CASE NO. USW-T-99-24

ORDER NO. 29603

On August 2, 2004, the Commission issued final Order No. 29555 following the Idaho Supreme Court’s temporary remand of this matter to the Commission. In Order No. 29555, the Commission determined that the Petitioners (hereinafter referred to as the “Pagers”) were entitled to additional refunds consistent with a recent decision issued by the United States Court of Appeals for the District of Columbia Circuit. The Order directed Qwest Corporation to recalculate the refunds due each of the three Pagers. If the refunds exceed the amounts the Pagers owe Qwest (if any), “then Qwest shall provide them with cash reimbursement[s]” no later than August 23. Order No. 29555 at 21.

On August 12, 2004, Qwest filed its recalculation of the refund credits due each Pager. On August 20, 2004, Qwest filed a Motion to Stay Order No. 29555 until the Commission had an opportunity to review Qwest’s request for reconsideration. On August 23, Qwest filed a Petition for Reconsideration, Alteration or Amendment of the Commission’s Order. The following day Qwest requested oral argument on its Motion and Petition.

On August 25, the Pagers filed an Answer to Qwest's Motion to Stay urging the Commission to deny the Stay. The Pagers point out that Qwest has not issued the refunds as directed by the Commission. On September 3, the Pagers filed an Answer to Qwest's Petition for Reconsideration, Alteration or Amendment requesting that the Commission deny reconsideration. On September 13, Qwest filed a Notice of Cross-Appeal regarding Order No. 29555.

After reviewing the record and supplemental pleadings in this matter, the Commission issues this Order on reconsideration. As explained in greater detail below, the Commission grants a limited stay of our Order No. 29555 so that we can reconsider our prior Order on remand and issue this Order on reconsideration pursuant to *Idaho Code* § 61-624.

PROCEDURAL HISTORY

A. Background

The procedural history of this complex and lengthy case is set out in detail in Order Nos. 29064 (R. at 789-92) and 29140 (R. at 863-68) but the pertinent points are summarized here. At the end of the second part (the Credit Phase) of this two-part case, the Commission explained that Federal Communications Commission (FCC) regulations and orders require that a local exchange company (LEC, e.g., Qwest) must cease charging a pager for terminating LEC-originated traffic and must transport that traffic to the pager without charge. Order No. 29064 at 2 *citing* *TSR Wireless v. U S WEST Communications (TSR Order)*.¹ Qwest may not charge pagers "for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under the [FCC's] rules." *TSR Order* at ¶ 32.² Although Qwest must cease charging pagers for terminating Qwest-originated traffic, the Commission found that the *TSR Order* and FCC regulations allow Qwest to charge for "wide area calling or similar services." Order No. 29064 at 5 *citing* *TSR Order* at ¶¶ 30-31. In other words, Qwest may not charge paging carriers for delivering Qwest traffic but Qwest may charge its own customers for calling a paging carrier located in another local calling area.

¹ 15 FCC Rcd 11,166 ¶¶ 3, 25, 28 (2000), *Petition for Recon. dismissed*, 16 FCC Rcd 11,462, *aff'd sub nom. Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

² "MTA" means major trading area which in terms of this case means all calls made to pagers that originate in Qwest and non-Qwest exchanges located in southern Idaho. Order No. 29064 at 2 *citing* *TSR Order* at ¶ 11, n. 102; 47 C.F.R. § 51.701(b)(2).

In Order No. 29140 the Commission found that Qwest had improperly charged the Pagers for certain services and facilities prohibited by the federal Telecommunications Act of 1996, FCC regulations, and FCC orders. The charges for services and facilities were contained in Qwest's Title 62 exchange and network service catalog on file with the Commission. The Commission found that the Pagers were entitled to refunds/credits but less than the amounts they claimed.³ More specifically, the Commission determined the refunds were not due for: (1) non-paging services and facilities; (2) "wide area calling" services and facilities provided by Qwest; and (3) "transit traffic" from non-Qwest carriers. Order Nos. 20964 at 3-4; 29140 at 23-24.

1. Wide Area Calling. "Wide area calling" generally refers to an arrangement or service "that allows a paging carrier to subsidize the cost of calls from [Qwest's] customers to a paging carrier's customer, when the caller and the paging company are located in different local calling areas." Order No. 29140 at 5. By using various facility arrangements and services, paging carriers can create networks so it appears to Qwest callers that their calls to a paging company located in a different local calling area will be "toll-free," or will not be assessed a toll charge for making a long-distance call to the pager. *Id.* at 37.

In Order Nos. 29064 and 29140, the Commission found that PageData and Tel-Car had configured their paging systems in a manner that constituted wide area calling arrangements. Consequently, the Commission determined that the two pagers were not entitled to a refund for wide area calling charges.⁴ All three Pagers used direct inward dialing (DID) services and facilities. DID is typically a PBX or Centrex feature that in this case allowed the Pagers to route calls to non-local DID trunks to connect to Qwest central offices in other local calling areas. In addition, PageData also ordered 500 toll-free "800" numbers as a means to route calls via the DID lines to its paging facilities. Order No. 29555 at 13.

2. Transit Traffic. Transit traffic is traffic that originates from another carrier other than Qwest but is carried over Qwest's network to the paging carrier's network. Order No. 29555 at 5. Based upon the *TSR Order* and other FCC decisions, the Commission found that

³ The refund period for the Pagers began November 1, 1996 and ran until the Pagers entered into interconnection agreements with Qwest. Radio Paging refund period ended May 13, 1999 and PageData's ended September 10, 1999. Because Tel-Car had no interconnection agreement with Qwest, its refund period ended September 24, 1999 (the date the Pagers filed their complaint). Order No. 29140 at 4-5.

⁴ Radio Paging had no wide area calling arrangements.

Qwest was permitted to charge the Pagers for transit traffic. Order Nos. 29064 at 13-19; 29140 at 23-33. The Commission found that 24% of the Pagers' traffic was properly classified as transit traffic. Consequently, Qwest offset the refunds owed to the Pagers by this proportion. Order No. 29140 at 3.

In December 2002, the Pagers filed their Notice of Appeal, R. at 928-32. After the Notice of Appeal was filed, the parties participated in the appellate settlement process. Following unsuccessful negotiations, the Supreme Court reinstated the appeal in November 2003 with the Pagers' opening brief due in February 2004.

B. The Circuit Court's Mountain Opinion

In January 2004 the D.C. Circuit Court held that the FCC's wide area calling decisions in *Mountain Communications v. Qwest Corporation*⁵ are at odds with the FCC's own regulations and with the *TSR Order*. *Mountain Communications v. Federal Communications Commission (FCC)*, 355 F.3d 644 (D.C. Circuit 2004). The Court observed that while the facts of the *TSR Order* and *Mountain Communications* are identical, the results of the two cases "are opposite." Thus, the Court easily concluded that the FCC's wide area calling decision in *Mountain Communications* is logically inconsistent with the FCC's own regulations. The Court also noted that the FCC's regulation found at 47 C.F.R. § 51.703(b) prohibits LECs from levying charges for traffic that originates on their own networks. 355 F.3d at 647. The Court recognized that Mountain's DID system provided "it no advantages other than those to which, presumably, it is entitled for free." *Id.* at 648. Thus, the Court vacated the wide area calling decisions and remanded the case to the FCC.

After dealing with wide area calling, the Court turned to transit traffic. The Circuit Court observed that the FCC allowed Qwest to charge Mountain for transit traffic "but indicated that Mountain could seek reimbursement from the originating carrier for what ever charges [Mountain] paid to Qwest." *Id.* at 649. Mountain argued the prospects of obtaining reimbursements from the originating carriers of the transit traffic was illusory, because Qwest never provided the originating call information to Mountain. Without such information, Mountain maintained it was impossible to seek reimbursement. *Id.*

⁵ *Memorandum Opinion and Order*, 17 FCC Rcd 2,091 ¶¶ 1, 8 (Feb. 4, 2002), *reconsid. denied*, 17 FCC Rcd 15,135 (July 25, 2002).

The Court did not reach the merits of this issue because Qwest advised the Court at oral argument that it would provide Mountain with the originating carrier information. Presumably Mountain could then seek reimbursement. "Under those circumstances," the Court stated "Mountain dropped that part of its petition." *Id.* at 649.

C. The Commission's Remand Order

On February 13, 2004, Qwest, the Pagers and the Commission filed a Stipulated Motion with the Supreme Court to suspend the appeal and temporarily remand this matter to the Commission so that the Parties could consider the recent *Mountain Communications* opinion. The Parties asserted that remanding the matter would allow: (1) the Commission to determine whether to reconsider its Orders in light of the Circuit Court opinion; (2) the FCC to address the issues on remand; and (3) the Parties another opportunity to settle the appeal. Order No. 29491. The FCC has not addressed the two telecommunications issues.

When Qwest and the Pagers were unable to resolve their dispute on remand, the Commission issued Order No. 29491 directing the Pagers and Qwest to provide supplemental briefing regarding the two remand issues: wide area calling and transit traffic. Order No. 29491 at 7. More specifically, the parties were directed to respond to several questions about the two issues. The Order also directed Qwest to prepare exhibits showing the amount of charges it assessed each Pager individually for wide area calling and transit traffic.

In compliance with the Commission's directives, Qwest filed its Supplemental Brief and refund calculations on May 26, 2004. The Pagers filed their Reply Brief on June 8, 2004.

Relying upon the Circuit Court's *Mountain* decision, the Commission issued Order No. 29555 and found that Qwest cannot charge the Pagers for traffic that originates on Qwest's network and is transported to the point of interconnection (POI) with the Pagers. Order No. 29555 at 14. The Commission found that "Qwest may not charge the Pagers for wide area calling services or facilities. However, as the FCC noted in the *TSR Order*, Section 51.703(b) does not prevent Qwest from charging its own end-user customers for calling a pager's POI located in a different local calling area. *TSR Order* at ¶ 31." Order No. 29555 at 14. Pursuant to the Commission's directive, Qwest calculated that it charged Tel-Car \$3,909 for DID wide area calling facilities (\$2,972 for DID facilities and \$937 interest) and PageData \$10,607

(approximately \$4,004 for DID facilities; \$3,613 for "800" service; \$2,655 in interest; and \$400 in taxes).⁶

Turning to the issue of transit traffic, the Commission quoted from the Circuit Court's opinion that "at oral argument, Qwest's counsel obviated any need for us to decide [the transit traffic] issue by indicating that Qwest would provide Mountain with the information necessary so that Mountain could charge the originating carrier for reimbursement." Order No. 29555 at 8 quoting *Mountain Communications*, 355 P.3d at 649.

In its Order No. 29555 the Commission stated Qwest has a choice:

it can either charge the Pagers [for transit traffic] and provide calling information so that they may seek reimbursement; or [not charge the Pagers but] charge the originating carrier. . . . We agree with the Pagers that it is inequitable to offer the calling data to Mountain but not to other similarly situated [paging] carriers. . . . Qwest's statement that the transit traffic calling data 'does not exist,' [in this case] provides only one choice.

Order No. 29555 at 15-16.

In response to the Commission's directive in Order No. 29555, Qwest recalculated the refund amounts due Radio Paging, PageData, and the bankruptcy estate of Tel-Car.⁷ The table below shows the refund calculations as directed by the Credit Phase Order No. 29140 and the additional refunds consistent with Order No. 29555.

REFUND COMPONENTS			
Radio Paging:	\$54,028	Billed Amt thru 4-99	(R. at 825)
	-53,111	Payments	" "
	(917)	Balance Owed Qwest	" "
	34,572	Refund Credit	" "
	33,655	Net Refund	" "
	+ 8,450	Interest on Refund	" "
	\$42,105	Total Refund Due as of Nov 2002	
	+ NA	Wide Area Calling (includes interest)	
	+15,311	Transit Traffic (includes interest)	
	+ 51	1 month interest	
TOTAL	\$57,467		

⁶ The PageData subtotals do not equal the \$10,607 figure because of offsets and the use of multiplier-factors. Qwest Recalculation in Response to Order No. 29491 filed May 26, 2004.

⁷ Tel-Car became a Chapter 7 debtor effective in January 2002. Order No. 29555 at 21.

PageData:	\$123,447	Billed Amt thru 8-99	(R. at 923)
	- 87,390	Payments	" "
	<u>(36,057)</u>	Balance Owed Qwest	
	81,119	Refund Credit	" "
	<u>45,062</u>	Net Refund	" "
	+10,421	Interest on Refund	" "
	<u>\$ 55,483</u>	Total Refund Due as of Nov 2002	
	+ 5,600	Wide Area Calling-DID (incl interest)	
	+ 5,007	Wide Area Calling - 800-service	
		(includes interest)	
	+35,704	Transit Traffic (includes interest)	
	+ 156	1 month interest	
TOTAL	<u>\$101,950</u>		

Tel-Car:	\$56,885	Billed Amount thru 7-00	(R. at 920)
	-45,349	Payments	" "
	<u>(11,536)</u>	Balance Owed Qwest	
	39,162	Refund Credit	" "
	<u>27,626</u>	Net Refund	" "
	+5,886	Interest on Refund	" "
	<u>\$33,512</u>	Total Refund as of Nov 2002	
	+ 3,909	Wide Area Calling (includes interest)	
	+15,362	Transit Traffic (includes interest)	
	+ 65	1 month interest	
TOTAL	<u>\$52,848</u>		

Sources: Order No. 29555; Qwest Response to Order No. 29491 (May 2004); Qwest Recalculation of Credits Due Pursuant to Order No. 29140 (Nov. 2002, R. at 916-923); R. at 825; Qwest Exhibits 201, 202, 203.

On August 17, 2004, Robert Ryder on behalf of Radio Paging and Joseph McNeal on behalf of PageData each filed affidavits with the Commission. Mr. McNeal indicates in his affidavit that he is "entitled to the full refund" of \$101,950 because he was not in arrears to Qwest at the end of the refund period, ending September 10, 1999. Mr. Ryder also claims that Radio Paging "did not owe Qwest anything" at the end of his refund period, ending May 13, 1999. Thus, he also infers that he, too, is entitled to a full refund in an amount of \$57,467. Qwest did not respond to these claims.

With this background, we now turn to Qwest's request for a stay and reconsideration.

QWEST'S MOTION TO STAY

1. Qwest. Qwest requests that the Commission stay its Order No. 29555 “pending a decision on Qwest’s Petition for Reconsideration.” Motion to Stay at 2. Qwest also requests that the Commission “enter or continue a stay of the Remand Order during the pendency of Qwest’s appeal of the Remand Order to the Idaho Supreme Court, should such an appeal be filed.” *Id.*⁸ As directed by the Commission’s Remand Order, Qwest was to have issued additional billing credits and/or cash refunds to PageData and Radio Paging no later than August 23, 2004. In addition, the Commission directed Qwest to issue the calculated refund to the Bankruptcy Court for the bankruptcy estate of Tel-Car by the same date.

In its Motion to Stay, Qwest notes that the issuance of the remand Order arises in “unusual circumstances.” Qwest Motion at 2. In particular, Qwest maintains that if this were simply a final Order the Commission, then it would be entitled to seek reconsideration of the Commission’s decision. But here the Commission’s Order was issued on remand from the Supreme Court and it is unclear whether reconsideration is appropriate. See *Idaho Code* § 61-626. Qwest also claims that the FCC has not issued any decision on remand and “[n]othing productive has yet taken place at the FCC.” *Id.* at 3.

Qwest insists that its Petition for Reconsideration will argue that the Commission wrongly decided the two remand issues. Qwest asserts the Circuit Court was not called upon to address the transit traffic issue. “In a bizarre turn of circumstances, Mountain withdrew the issue from the appeal based on a discussion among the judges and counsel at oral argument. Accordingly, the Court did not rule on that issue, and on remand to the FCC, the issue is no longer part of the case.” *Id.*

Until the Commission can undertake its review of the Petition for Reconsideration, Qwest asks the Commission to stay the effectiveness of its Order. Qwest insists the Commission’s Order may have broad implications because it is the first articulation of “paging interconnection law following the *Mountain Communications* reversal. . . .” *Id.* at 4. Qwest interconnects with more than 200 paging companies in its 14-state territory. Qwest claims that the revenues associated with transit traffic alone for paging companies is approximately

⁸ As noted above Qwest filed a Cross Appeal on September 13, 2004.

\$300,000 per month. “Qwest’s exposure on past transit charges has not been calculated, but it surely is many millions of dollars.” *Id.*

2. The Pagers Response. The Pagers oppose Qwest’s Motion for Stay. The Pagers maintain the Motion for Stay “is nothing more than [an] effort to further obfuscate and delay this proceeding. . . .During the recovery period, Qwest overcharged Petitioners 100% for their interconnection services and facilities and has not yet had to refund a dime. It should not be permitted the opportunity to further delay its day of reckoning.” Pagers Answer to Motion to Stay at 3. The Pagers assert that Qwest has not made any payments to the Pagers or the Bankruptcy Court by August 23 as required by Order No. 29555. *Id.* at 2; Pagers Answer to Qwest’s Petition at 2; Answer to Motion to Stay at 2.

The Pagers maintain the Commission’s remand Order “is absolutely correct.” *Id.* They assert the issue of transit traffic is neither uncertain nor undecided. They argue Qwest’s own interpretation of the *Mountain Communications* decision is identical to the findings of the Commission in its Order No. 29555. *Id.* at 2. More specifically, the Pagers point out that Qwest Radio Paging proposed to amend their two interconnection agreements (one in Idaho and one in Oregon) that mirror the Commission’s transit traffic decision. In pertinent part, the July 2004 Idaho interconnection agreement states that Radio Paging “does not have to pay facility charges for Third Party Traffic [i.e., transit traffic] Qwest does not provide the originating company’s calling records to [Radio Paging’s] POC.” *Id.*, Jones Affidavit at 2, Exh. A and B. Qwest submitted the Radio Paging amendment in July 2004 – before the Commission issued its August 2 Remand Order No. 29555. Pagers Answer to Motion at 2. Consequently, the Pagers insist that even Qwest recognizes the Commission’s decision regarding transit traffic is correct and has submitted conforming amendments to its interconnection agreements that prohibit transit traffic charges until Qwest can provide pagers with the originating call data.

Commission Findings. The Commission’s Rule 324 provides that any person may request that the Commission stay any order. IDAPA 31.01.01.324. The filing of a petition for reconsideration does not automatically stay the effectiveness of any Order. Petitions to stay may accompany or precede petitions for reconsideration. IDAPA 31.01.01.333; *Idaho Code* § 61-626(3). In its Motion to Stay, Qwest requests that the Commission in effect grant two stays. First, Qwest moves the Commission to stay Order No. 29555 “pending the decision on Qwest’s

Motion for Reconsideration.” Qwest Motion at 2. Second, Qwest also seeks a stay during the pendency of Qwest’s Cross Appeal. *Id.*

Turning first to Qwest’s request for a stay pending reconsideration, we find that such a request is reasonable given the circumstances of this case. In particular, the Commission issued Order No. 29555 on remand from the Supreme Court. On remand, the Commission changed its previous rulings on the issues of wide area calling and transit traffic. These changes significantly increased the refunds owed to the Pagers. Granting Qwest a limited stay of our prior Order will allow the Commission to review Qwest’s Petition and reconsider our Remand Order. Accordingly, the Commission stays Order No. 29555 so that we may take up Qwest’s Petition for Reconsideration. Our decision regarding Qwest’s request for a stay on appeal will follow our discussion of Qwest’s Petition for Reconsideration.

QWEST’S PETITION FOR RECONSIDERATION, ALTERATION OR AMENDMENT

In its Petition, Qwest argues that the Commission wrongly decided the wide area calling and transit traffic issues. The Company also maintains the Commission made a “calculation error” pertaining to the refund owed PageData for wide area calling. Finally, Qwest seemingly questions the Commission’s jurisdiction over this matter. The Company does not expressly assert the Commission lacks jurisdiction but states that the Commission’s “decisions show that the basis of jurisdiction is tenuous.” Petition for Reconsideration at 3.

In their Answer, the Pagers again insist Qwest’s requests for reconsideration and oral argument are merely designed to delay and obfuscate. Pagers Response to Petition at 2. The Pagers maintained that both Qwest and the Pagers

had an opportunity to provide input and the Commission made its decision. The Supreme Court has taken the case back. . . .If Qwest is unhappy with the Commission’s decision, it must make its case in the Supreme Court. There is absolutely no ground for having the issue litigated both in the Commission and the Supreme Court at the same time.

Id. at 2 (citations omitted).

Commission Findings. We find it appropriate to grant reconsideration so that we may address Qwest’s issues raised on 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). While we recognize that the temporary remand has expired, Appellate Rule 13(e) provides that the Commission “shall have continued jurisdiction of the matter and the parties consistent with the provisions of applicable statutes.” Moreover, in this instance, the Commission finds that granting reconsideration to Qwest is appropriate so that the Commission may address its alleged errors. *Consumer’s Company v. Public Utilities Commission of Idaho*, 40 Idaho 772, 236 P. 732 (1925).

1. Jurisdiction. We first discuss jurisdiction. Although Qwest does not expressly assert the Commission lacks jurisdiction in this matter, we address this issue to eliminate any doubt.

Commission Findings. The Commission is a creature of statute and exercises limited jurisdiction. However, once jurisdiction is clear, the Commission is allowed all power that is either expressly granted by the statute or which may be fairly implied. *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 418, 690 P.2d 350, 353 (1984). In the first phase of this case, the Commission found the “facts clearly establish that these services (for which the Pagers seek refunds) are being provided to the Pagers under Title 62.” Order No. 28427 at 5 (R. at 67). The Commission further noted that it has the “statutory authority to investigate and resolve complaints made by subscribers to Title 62 services pursuant to *Idaho Code* § 62-616.” This finding is consistent with Qwest’s advocacy. In its initial brief regarding jurisdiction, Qwest stated “the Commission has jurisdiction under Idaho Code 62-616 to hear this case.” Qwest Initial Brief at 12 (R. at 43). Consequently, we affirm that the Commission has the statutory jurisdiction to resolve this complaint regarding Title 62 services pursuant to *Idaho Code* § 62-616. *See also Idaho Code* § 62-615(1).

2. Wide Area Calling. Qwest next maintains that the Pagers are procedurally barred from recovering for wide area calling services because this issue was previously determined in the first phase of this proceeding (the Liability Phase) in Order No. 28601. In particular, Qwest relies upon a footnote in Commission Order No. 28601 that states the Pagers “are not entitled to recover the amounts charged for foreign exchange service or wide area calling services, i.e., WATS. . . .” Order No. 28604 at 10 n. 15 (emphasis added). Qwest argues “Order Nos. 28601 (the Liability Order) and 28626 (on the Petition to Amend) were both final, appealable orders. No party appealed, thus making matters decided in the Liability Phase settled as a matter of law,

and establishing the law of the case on those issues.” Qwest Petition at 6. Because Order No. 28601 was a final Order on Reconsideration and the Pagers did not appeal this Order, they should now be barred from arguing that they are entitled to receive refunds for wide area calling. Qwest infers the same principle should prohibit the Commission from revisiting this issue. The Company suggests the Commission should avoid getting ahead of the FCC and Courts, and refrain from ruling on the wide area calling issue. *Id.* at 9.

Commission Findings. We find Qwest’s procedural argument unpersuasive for several reasons. First, we find Qwest’s reliance upon the footnote misplaced. The footnote accompanied a finding where the Commission stated that the Pagers “are entitled to a billing credit or reimbursement for the charges they have incurred for the facilities used to deliver local LEC-originated traffic. . . .” Order No. 28601 at 10 (emphasis added). In the context of the Commission’s Order, we were applying the substantive holding of the FCC’s *TSR Order* to the facts of the case. Thus, the Commission reinstated Count I of the Pagers’ complaint.

At the time Order No. 28601 was issued, the scope and extent of the “wide area calling” issue were not fully developed. We had not yet decided whether DID facilities were encompassed in the concept of wide area calling arrangements. In our view, more controlling is the Commission’s statement in the ordering paragraphs of that Order that the Pagers are “entitled to a billing credit or reimbursement for services and facilities that should have been provided free of charge according to FCC authority.” *Id.* at 12 (R. at 139). Exactly what services and facilities was still in question. Thus, the question to be examined in the Credit Phase was whether the Pagers were inappropriately charged (thus entitled to a billing credit) for wide area calling arrangements (both DID and 800 services) used for the delivery of Qwest-originated traffic. In *Mountain Communications* the Circuit Court answered this question and determined that Qwest cannot charge a pager for the use of DID trunks to deliver Qwest-originated traffic. 355 F.3d at 647-49.

Second, both the Pagers and Qwest fully litigated the issue of wide area calling in the Credit Phase (the second part) of this case. Both parties submitted evidence regarding whether the Pagers had “voluntarily” entered into wide area calling arrangements and the type of such arrangements. Qwest did not raise this procedural argument in the Credit Phase. Qwest’s failure to raise the issue some two years ago constitutes a waiver of its argument, especially at this late

date. We find that the issue of wide area calling was not fully litigated and decided until completion of the Credit Phase and issuance of Order No. 29140.

Finally, Qwest agreed in the Stipulation Motion for the issue of wide area calling to be temporarily remanded to the Commission so that the Parties could re-examine the issue in light of the Circuit Court's opinion. Having joined in the Stipulation to remand the issue of wide area calling, it is unreasonable now for Qwest to assert that this issue should not be addressed. Consequently, we find that neither the Pagers nor the Commission is procedurally barred from addressing the wide area calling issue in either the Second Phase of this case or in reconsideration of the remand Order No. 29555.

3. Calculation Error. Qwest next urges the Commission to reconsider its Order because there is an alleged calculation error regarding 800-service. Qwest argues that the Commission appears to have "accidentally included 800 Pageline in the services to be credited, contrary to the language of the Remand Order itself." *Id.* at 10. As indicated *supra* page 7, only PageData used 800-service. Qwest calculated that the refund attributable to PageData's 800-service was \$3,613 plus about \$1,394 of taxes and interest (for a total of about \$5,007).⁹

Commission Findings. After reviewing our prior Order, the Circuit Court opinion and other FCC orders, we find that Qwest's argument has merit. Our resolution of this issue requires us to revisit the FCC's *TSR* and *Mountain Communications Orders*, in conjunction with the concept of a single point of interconnection (POI).

As the Commission recognized in Order No. 29140, the FCC has ruled that a pager has "the right to request a single point of interconnection." Order No. 29140 at 39 *citing* 47 U.S.C. § 251(c)(2); *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*, 17 FCC Rcd 27,039 at ¶ 52 (July 17, 2002); *U S WEST Communications v. Jennings*, 304 F.3d 950, 961 (9th Cir. 2002). In addition, the FCC's regulation at 51.703(b) prohibits Qwest from charging the Pagers for facilities used to deliver Qwest-originated local traffic to the Pagers' points of interconnection

⁹ The charge for 800-service (\$3,613) is shown in Qwest's calculations for wide area calling in response to Order No. 29491 and Qwest's Recalculation of Credit Due Pursuant to Order No. 29555, Exhibit 4. *See also* Qwest Exhibit 203; Tr. at 467.

(POIs). Order No. 29555 at 14, 20; *Mountain Communications*, 355 F.3d at 648; *MCIMetro Access Transmission Services v. BellSouth Telecommunications*, 352 F.3d 872, 881 (4th Cir. 2003); *TSR Order* at ¶ 31. “However, nothing prevents [Qwest] from charging its end-users for toll calls” to the pagers’ facilities. *TSR Order* at ¶ 31; Order Nos. 29064 at 5; 29555 at 14. Finally, the Circuit Court in *Mountain Communications* overturned the FCC’s decision that Qwest could charge Mountain for DID services and facilities used to transport Qwest-originated calls to the pager’s POI in a different local calling area. 355 F.3d at 647-49.

However, by using 800-service with DID lines, PageData makes it appear to any Qwest or other non-Qwest customers that they can call a paging customer without making a toll call. With 800-service, a toll call is paid for by the called party, rather than the calling party. We agree that the idea of toll-free 800-service “is to entice customers to call the number, with the theory being that if the call was a toll call and therefore cost the customer something, he or she might be less inclined to call.” *Newton’s Telecom Dictionary* at 19. In other words, PageData can “buy down” the cost of toll calls by using Qwest’s 800-service. *TSR Order* at ¶ 31.

Returning to the facts of this case, Qwest argues that PageData should not be compensated \$5,007 for use of 800 Pageline service to transport calls to PageData. We agree and find that PageData ordered 800-service as a means to direct calls to its points of interconnection. Based upon our view of the FCC orders and the various Court opinions noted above, we find that PageData should not receive a refund for its use of 800-service. We start with the premise that Qwest is required to transport its customers’ calls to the pagers without charge to the pagers. However, the FCC and the Circuit Court recognize that Qwest could charge its own customers for what would otherwise be a toll call to the paging carrier’s POI. *Mountain Communications*, 355 F.3d at 645, 647. Although the *Mountain* Court vacated the FCC’s decision regarding the use of DID lines to carry Qwest traffic, it did not address the use of 800-service. We find PageData’s ordering of the 800 numbers is substantially different than its use of DID lines and effectively denied Qwest the ability to charge its own customers for toll calls made to PageData. Even the Pagers’ expert testified at the evidentiary hearing that the paging carriers did not oppose paying Qwest for the 800 calls. Tr. at 250. *See also* Tr. at 354 (Qwest “will direct the 800 traffic to [the Pagers’] DID numbers so there is an additional charge for that service.”).

In summary, although we find that PageData is entitled to refunds for its use of DID services and trunks consistent with the *Mountain Communications* decision, we also find that Qwest may properly charge PageData for 800-service where such 800-service deprives Qwest of the opportunity to charge its own customers for making toll calls to a pager. This holding is restricted to the facts of this case and the use of 800-service to deliver traffic to pagers. Accordingly, we clarify and amend our Order No. 29555 to reflect that PageData is not due a wide area calling refund for 800-service. *Idaho Code* § 61-624. Consequently, PageData's refund is reduced by \$5,007.

4. Transit Traffic. Finally, Qwest seeks reconsideration of the transit traffic issue. If reconsideration is granted, Qwest intends to present "evidence regarding the difficulty in the measurement of [transit] traffic." Petition at 10. Qwest does not know "if it will be able to develop a transit record product for purchase of Type 1 [paging] services." *Id.* Qwest maintains that the Commission's decision on transit traffic will "have huge ramifications in the industry." *Id.* Qwest believes that the Commission's ruling "based on Qwest's answers to a few limited questions asked by the Commission, simply does not provide enough procedural due process, and certainly does not put the Commission in the best position of receiving all critical information before taking such a bold step out front of other regulators of the telecommunications industry." *Id.* at 10-11. Consequently, Qwest requests the Commission grant rehearing on this issue and convene a scheduling conference "to discuss what type of hearing would provide a sufficient factual record for the Commission's decision." *Id.* at 11.

Commission Findings. Having reviewed Qwest's Petition and the record, we affirm our transit traffic decision in Order No. 29555 for several reasons. First, our procedural Rule 331 addresses the required contents of petitions for reconsideration. In particular, petitions for reconsideration "must set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous or not in conformity with the law, and a statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted." IDAPA 31.01.01.331.01. In its Petition for Reconsideration, Qwest has not set forth the specific grounds why the Commission's Order No. 29555 is "unreasonable, unlawful, erroneous or not in conformity with the law." Qwest alleges that the decision will have a huge ramification in the industry but does not specify the reasons it believes the Commission's transit traffic decision is in error.

In addition, Qwest requests the Commission convene “a scheduling conference to discuss what type of hearing” the Commission should hold on reconsideration. The Company states that if rehearing is granted, it will present evidence regarding the difficulties in “the measurement” of such transit traffic. The Commission finds this statement ambiguous. The issue the Commission addressed on remand was not the “measurement” of transit traffic, but whether Qwest may charge the Pagers for transit traffic. In our prior Orders, the Commission agreed with Qwest’s advocacy that 24% of the traffic was the appropriate measure of transit traffic. Order Nos. 29064 at 18-19; 29140 at 5, 25-33. Evidence of measuring transit traffic is not relevant and simply asking for a hearing is not responsive to describing the “nature and quantity of evidence” required by Rule 331.

As we recognized in Order No. 29555, the D.C. Circuit Court did not reach the merits of the transit traffic issues. What is more important is the reason why the Court did not reach the merits. As indicated above, Qwest’s counsel at oral argument indicated “Qwest would provide Mountain with the information necessary so that Mountain could charge the originating carrier for reimbursement.” *Mountain Communications*, 355 F.3d at 649. It is disingenuous for Qwest to insist that “the issue was simply dropped” by Mountain. Mountain withdrew that part of its petition because Qwest agreed to provide the pager with the originating call data so Mountain could then seek reimbursement from the originating carrier. The significant detail is that Qwest agreed to provide the calling data.

Second, it was Qwest’s offer to provide Mountain with the originating call data that was the basis for our decision in Order No. 29555. We agreed with the Pagers that it is discriminatory for Qwest to provide the calling information to Mountain but not to the Pagers in our case. Order No. 29555 at 15 *citing* 47 U.S.C. § 251(c)(2)(D). Our departure from Order No. 29140 was premised on the *Mountain* opinion and Qwest’s offer to provide the calling data to Mountain. Our Order No. 29555 recognizes that Qwest may charge the Pagers for transit traffic so long as it provides the originating call data – like it agreed to provide Mountain. Our finding in Order No. 29555 is also consistent with prior FCC decisions that recognize that the transit carrier (Qwest) may charge the pager for transit traffic; and the pager “may then seek reimbursement of the costs associated with transport and termination of that traffic from the carriers that originated the transiting traffic in question.” *Mountain Communications v. Qwest*, 17 FCC Rcd 2,091 n. 30; *Mountain Communications v. Qwest*, 17 FCC Rcd 15,136 at n. 13;

TEXCOM v. Bell Atlantic, Order on Reconsideration, 17 FCC Rcd 6,275 at ¶ 4 (March 27, 2002). Because Qwest offered Mountain the originating data, we believe that the same offer should be made to the Pagers. When Qwest advised the Commission that the transit traffic calling data “does not exist,” then the Commission was left with only one choice. “On Remand, we find it reasonable for Qwest to provide either refunds or the calling data. Because Qwest has no data to give, we are left with no choice but to order Qwest to refund the transit traffic charges to the Pagers.” Order No. 29555 at 16.

Finally, Qwest’s transit traffic argument is inconsistent with its own actions. As the Pagers point out in their Answer to Qwest’s Motion to Stay, Qwest has recently amended its interconnection agreements with Radio Paging to provide that Qwest will not charge the pager for transit traffic until Qwest is able to provide the originating billing data to Radio Paging. Pagers Answer to Motion to Stay at 2. On July 19, 2004, Qwest and Radio Paging filed a Joint Application to Amend their previously approved interconnection agreement. Pager Answer to Stay, Exh. A (Case No. USW-T-03-27). The voluntarily agreed upon amendment provides in pertinent part that Radio Paging does not have to pay Qwest for transit traffic facilities charges “if Qwest does not provide the originating company’s calling records to” Radio Paging. Amendment § 1.B. The Commission approved this amendment in Order No. 29595 issued September 16, 2004. The amendment filed before Qwest’s Motion and Petition, comports with Qwest’s concession at the *Mountain* oral argument.

Having reviewed Qwest’s Petition for Reconsideration and the Pagers’ Answer, we correct the calculation error and otherwise affirm our findings and conclusions in Order No. 29555. In addition, we deny Qwest’s request for further hearing for the reasons set out above. We also deny Qwest’s request for oral argument because is not necessary and it would delay resolution of this proceeding.¹⁰ Qwest’s request did not indicate why oral argument was necessary.

CALCULATION OF THE REFUNDS

Having concluded our reconsideration of Remand Order No. 29555, we return to the calculation of the refunds. In Order No. 29555, the Commission recognized that it was possible

¹⁰ Qwest’s entire request for oral argument was a single sentence. Qwest “requests oral argument on Qwest Corporation’s Motion to Stay Order No. 29555 and Qwest Corporation’s Petition for Reconsideration, Alteration or Amendment of Order No. 29555.”

that the refunds due the Pagers “might exceed the amounts the Pagers owe Qwest, if any,” because the refunds have substantially increased from those originally calculated by Qwest in November 2002. The Commission went on to say that if refunds afforded to PageData and Radio Paging exceed the amounts they owe Qwest, then Qwest shall provide them with cash reimbursements no later than August 23, 2004. Order No. 29555 at 21. The Commission also directed Qwest to tender any refund that is due to Tel-Car’s estate to the Bankruptcy Court. *Id.* at 22. Qwest has not provided any cash refunds to the Pagers or the Bankruptcy Court. Instead, the Company filed its Petition to Stay Order No. 29555.

A review of our prior Orders is helpful in examining the issue of billing credits or cash reimbursements. In the first phase (the Liability Phase) of this case, the Commission determined that the Pagers were “entitled to a billing credit or reimbursement for services and facilities. . . .” Order No. 28601 at 12 (emphasis added) (R. at 139). After Order No. 28601 was issued in December 2000, the Pagers filed a Petition to Amend that Order. Among other things, the Pagers requested the Commission strike the words “a billing credit or” from the ordering paragraphs. The Commission rejected this request. Order No. 28626 at 2 (R. at 183).

In the second phase (the Credit Phase) of this case, the Pagers again raised the issue of cash reimbursements. The Commission listed several reasons why cash reimbursements may not be appropriate. In particular, the Commission noted that:

At least two pagers [Radio Paging and PageData] acknowledged they stopped paying their paging bills from Qwest. This fact coupled with the fact that they sought much larger refunds than the Commission eventually ordered, leads us to infer that the credits may not exceed the arrearages. If this is the case, it would be unreasonable to require cash reimbursements.

Order No. 29140 at 47 (emphasis added). In other words, if the refunds were less than the amounts the Pagers owed Qwest, it made little sense to issue cash reimbursements instead of billing credits. Conversely, if the refunds were greater than the amounts owed Qwest, cash reimbursements for the balances would be appropriate. Following Order No. 29140 Qwest advised the Commission in November 2002 that it had issued “billing credits” to the Pagers. R. at 925-26.

As noted above, PageData and Radio Paging again assert that they are entitled to cash reimbursements primarily because their refund amounts exceed the amounts they owed Qwest. A review of Qwest Exhibits 201-203 and its November 2002 calculations appears to support the

Pagers assertions. Qwest Exhibits 201-203 and its November 2002 calculations show: (1) the amounts Qwest billed each Pager during the respective refund periods; (2) the refund credits due each Pager; and (3) the payments that each Pagers made to Qwest. Qwest Recalculation of Credits Due Pursuant to Order No. 29140 (Nov. 2002) (R. at 915-23). As portrayed in the Table on pages 6-7, each Pager owed Qwest (“Balanced Owed Qwest”), but the Commission ordered refunds exceeded the arrearages. The November 2002 calculations indicate that the Pagers refunds exceed the amounts they owed Qwest by: Radio Paging – \$42,105; PageData – \$55,483; and Tel-Car’s estate – \$33,512. Consequently, we believe that Qwest should have issued billing credits to cover the amounts owed and cash reimbursements to the two Pagers and the Bankruptcy Court for the balance of the refunds.

Order No. 29140 issued in November 2002 directed Qwest to recalculate and issue refund “credits” to the Pagers. Order No. 29140 at 50. Qwest did not appeal from that Order. Thus, it appears that Qwest does not contest that the Pagers are due these refunds—over and above what they owed Qwest.

On remand, the Commission found in Order No. 29555 that additional refunds were due the Pagers for transit traffic and wide area calling (minus the 800-service for PageData). *See supra* pp. 6-7. Although Qwest has filed a Cross Appeal, most if not all of the issues identified in its Cross Appeal relate to the remand issues of wide area calling and transit traffic. Consequently, we direct Qwest to provide up-to-date calculations to confirm that the refunds apportioned to each Pager: (1) as of November 2002; and (2) for the additional refunds for wide area calling and transit traffic (with the “800” adjustment), exceed the amounts the Pagers owed Qwest. We order Qwest to provide this data to the Commission within ten (10) days of the service date of this Order. We encourage the Parties to meet informally to review the data/calculations before it is filed with the Commission. If the Pagers’ refunds exceed the amounts they owed Qwest, then Qwest shall issue cash reimbursements for the balances to PageData, Radio Paging and Tel-Car’s estate within fourteen (14) days of the service date of this Order.

STAY ON APPEAL

Having concluded our reconsideration of the issues raised by Qwest, we turn to its request for a stay pending appeal. After reviewing Qwest’s Motion for Stay and the Pagers’ Answer, we decline to stay our Order No. 29555 and this Order pending appeal. While we

recognize that the Pagers as well as Qwest may contest these Orders, we do not find it reasonable to further stay these Orders pending appeal. This is especially true if the refunds exceed the amounts that the Pagers owed Qwest. Consequently, we shall lift our stay fourteen (14) days from the date of this Order.

ORDER

IT IS HEREBY ORDERED that Qwest Corporation's Motion to Stay is granted in part and denied in part. The Commission stays Order No. 29555 to allow sufficient time for us to consider and review Qwest's Petition for Reconsideration. The Commission's limited stay on reconsideration will expire fourteen (14) days from the date of this Order. Qwest's request for a stay pending appeal is denied.

IT IS FURTHER ORDERED that Qwest's Petition for Reconsideration, Alteration or Amendment of Order No. 29555 is granted. Having completed our reconsideration of the issues raised in Qwest's Petition, the Commission issues this Remand Order on Reconsideration. As set out in the body of this Order, the Commission amends its prior Order No. 29555 to decrease PageData's refund in the amount of \$5,007 for 800 Pageline service. *Idaho Code* §§ 61-624 and 62-619.

IT IS FURTHER ORDERED that Qwest's Request for Oral Argument is denied.

IT IS FURTHER ORDERED that Qwest file a confirmation with calculations showing whether the refunds authorized in Order No. 29140 and this Order exceed the amounts the Pagers owed Qwest. Qwest shall make this filing within ten (10) days of the service date of this Order. If the refunds exceed the amounts the Pagers owed Qwest, then Qwest shall issue cash reimbursements for the remaining balance of the refunds to the two Pagers and to Tel-Car's bankruptcy estate within fourteen (14) days of the service date of this Order. *Idaho Code* §§ 61-624 and 62-619.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order may appeal to the Supreme Court of Idaho as provided by the Public Utilities Law and the Idaho Appellate Rules.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 5th
day of October 2004.


PAUL KJELLANDER, PRESIDENT


MARSHA H. SMITH, COMMISSIONER


DENNIS S. HANSEN, COMMISSIONER

ATTEST:


Jean D. Jewell
Commission Secretary

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