Office of the Secretary
Service Date
December 6, 2005

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE JOINT PETITION OF ROBERT RYDER DBA RADIO PAGING SERVICE AND JOSEPH McNEAL DBA PAGEDATA FOR A DECLARATORY ORDER TO RECOVER OVERCHARGES FROM QWEST CORPORATION[1]	)	**CASE NO. USW-T-99-24 (ON REMAND)**
	)	**ORDER NO. 29923**

On September 28, 2005, the Idaho Supreme Court issued its Remittitur in *Robert Ryder dba Radio Paging Service, et al. v. Idaho PUC, et al.*, 141 Idaho 918, 120 P.3d 736 (2005). In its Opinion, the Supreme Court affirmed the Commission's decisions[2] regarding the amounts that Qwest Corporation overcharged Radio Paging Service and PageData (collectively referred to as "the Pagers"). However, the Court held that the Commission had used the wrong rate in calculating the interest on the refunds owed the Pagers. More specifically, the Court held that the Commission should have used the 12% interest rate as set out in *Idaho Code* § 28-22-104(1) instead of the interest rate for customer deposits set out in Customer Relations Rule 106, IDAPA 31.41.01.106.01. The Court remanded the case to the Commission for recalculation of the interest. *Ryder*, 141 Idaho at 929, 120 P.3d at 747.

On October 3, 2005, the Pagers filed a "Motion"[3] for the Commission to alter its Order Nos. 28626 and 29603 to reflect the 12% interest rate pursuant to *Idaho Code* §§ 61-629 and 61-624. The Pagers also requested that the Commission order Qwest to pay cash refunds within 14 days from the date the Commission issues its Order. Petition at 1-2. The Pagers maintained that once the Commission simply recalculates the refunds "at 12% interest, then this matter is concluded." Brief at 2. The Pagers assert there is no need for a rehearing or a comment period. *Id.* at 5. Qwest has not filed an answer to the Pagers' Petition.

[1] The caption of this case has been modified to reflect the current parties.

[2] The Pagers appealed from Order Nos. 29064 and 29140. Qwest cross-appealed from Order Nos. 29555 and 29603.

[3] Requests that the Commission modify prior Orders after they have "been set aside or set aside in part on appeal" should be initiated by filing a petition pursuant to the Commission's procedural Rule 326, IDAPA 31.01.01.326.01.a.

BACKGROUND

A. The Underlying PUC Case

The procedural history of this complex and lengthy case is set out in detail in Order Nos. 29064 and 29140 but the pertinent parts are summarized here. This case was initiated when the Pagers complained that U S WEST Communications (the predecessor to Qwest Corporation) had improperly charged the Pagers for facilities and services used to transport telephone calls to the Pagers' customers. In the first part of this three-part case, the Commission found that Qwest had inappropriately billed the Pagers for services and facilities. Order No. 28601.

1. The Credit Phase. Having determined that the Pagers were improperly charged, the Commission instituted the second part of this case (the "Credit Phase") to determine the amount of reimbursements or billing credits due the Pagers. When the parties were unable to reach settlement on the refund amounts, the Commission appointed a Hearing Examiner to conduct an evidentiary hearing and issue a Proposed Order. Order No. 29140 at 3-4. After conducting its own *de novo* review, the Commission issued a lengthy Order affirming and expanding on the Examiner's proposed findings of fact. Order No. 29064. The Commission denied the Pagers' Petition for Reconsideration in Order No. 29140 and the Pagers filed their appeal to the Idaho Supreme Court in December 2002. The Supreme Court then stayed the appeal so the parties could participate in the Court's appellate settlement process. Following unsuccessful negotiations, the Court reinstated the appeal in November 2003 with the Pagers initial brief due in February 2004.

2. Suspending the Appeal. On February 13, 2004, the Pagers, Qwest and the Commission requested that the Court suspend the appeal so that the appellate parties could consider a recent decision of the D.C. Circuit, *Mountain Communications v. FCC*, 355 F.3d 644 (D.C. Cir. 2004). After unfruitful settlement discussions, the Commission ordered Qwest and the Pagers to file briefs on the issues presented in the *Mountain* decision. Relying on *Mountain*, the Commission subsequently found that the Pagers were entitled to additional refunds for wide area calling services and third-party transit traffic. Order No. 29555. Because the Pager refunds were substantially increased from those amounts initially calculated in 2002, the Commission stated that "it is possible that the refund credits might exceed the amounts the Pagers owe Qwest, if any. If the refunds afforded [the Pagers] exceed the amounts they owe Qwest, then Qwest shall

provide them with cash reimbursements. . . ." Order No. 29555 at 21. Qwest filed a Petition for Reconsideration and a Notice of Cross Appeal regarding Order No. 29555.

The Commission granted Qwest reconsideration and adjusted the reimbursement amounts owed to the Pagers. The Commission ordered Qwest to file new calculations showing whether the authorized refunds now exceed the amounts the Pagers owed Qwest. "If the refunds exceed the amounts the Pagers owe Qwest, then Qwest shall issue cash reimbursements for the remaining balance of the refunds. . . ." Order No. 29603 at 20. The Commission ordered Qwest to submit new calculations regarding the refunds owed to the Pagers and any arrearage the Pagers may owe Qwest no later than October 19, 2004.

Rather than submit detailed calculations, Qwest asserted that both PageData and Radio Paging owed Qwest in excess of $200,000 and $20,000, respectively. In Order No. 29666 issued December 21, 2004, the Commission found Qwest's calculations to be "non-responsive" because they did not provide detailed calculations regarding any arrearages that the Pagers may owe Qwest. Order No. 29666 at 3; *Ryder*, 141 Idaho at 923, 120 P.3d at 741. The Commission directed the parties to meet once again to exchange information and attempt to settle their differences. Qwest was ordered to provide detailed calculations pertaining to what services are subject to any claimed arrearages. Order No. 29666 at 4. Settlement negotiations were unsuccessful and oral argument in the appeal was held in March 2005.

B. The Court's Opinion

On September 6, 2005, the Idaho Supreme Court issued its Opinion holding that the Commission properly determined the amount of overcharges owed to the Pagers. The Court also determined that the Commission was neither arbitrary nor capricious in ordering cash refunds in excess of any arrearages the Pagers owed Qwest. *Ryder*, 141 Idaho at 927-30, 120 P.3d at 745-48. The Court agreed with the Commission that if the refunds were less than the amounts the Pagers owed Qwest, "it made little sense to issue cash reimbursements instead of billing credits." *Id.* The Court recognized that "although the Commission did not possess the evidence necessary to make this determination [of whether the arrearages exceeded the refunds], Qwest did, and this is the reason the Commission ordered Qwest to provide data to the Commission[.]" *Id.* at 928-29, 120 P.3d at 746-47. The Court concluded that "[d]epending on the arrearages the Pagers may in fact get all their reimbursements back in cash." *Id.* at 928, 120 P.3d at 746. The Court affirmed the decisions of the Commission except for the interest rate.

THE INTEREST CALCULATIONS

On November 1, 2005, the Pagers filed two documents. First, the Pagers' counsel submitted an affidavit and two sets of interest calculations. Mr. Purdy stated in his affidavit that the interest calculations were true and correct copies of information he received from Qwest's counsel purporting to be the refund interest calculations at 12% up to September 2005. For Radio Paging, the calculations show overcharges of $44,945 and recalculated interest of $41,482, or a total of $86,427. Exh. A. For PageData, Exhibit B shows overcharges of $76,168 and recalculated interest of $63,942, or a total of $140,110.

Second, the Pagers also filed a "Response" to the Qwest interest calculations alleging that Qwest made two "typographical errors" in the computations of interest for the two Pagers. First, when calculating the interest due for transit traffic charges, PageData insisted that Qwest erroneously calculated the interest based on a 90-month recovery period instead of 104 months. This results in a "shortfall of $3,712 in interest." Pagers Response at 4 (Exh. A). Second, the Pagers asserted that the Commission should include the months of October and November 2005 in the interest calculations. *Id.* Adding another two months of interest to Radio Paging's refund would increase the interest by $899, resulting in a total refund of $87,326. Adding the 14 months for transit traffic and the two months of October and November would increase PageData's interest by $5,271. Thus, PageData argued that its interest should be $69,213, resulting in a total refund of $145,386. The table below sets out the interest calculations attributed to Qwest and the corrections asserted by the Pagers.

	PageData		Radio Paging	
Refund Category	Qwest	Pager	Qwest	Pager
Local Facilities	$45,062	$45,067*	$33,655	
Transit Traffic	26,767	26,767	11,290	
Wide Area Calling	4,339	4,339	N/A	
Total Overcharge	$76,168	$76,173	$44,945	
Interest at 12%	$63,942	$69,213	$41,482	$42,381
Total as of 11/05	$140,110	$145,386	$86,427	$87,326

*The supporting workpapers show a local facilities credit of $45,067 but the "Credit Summary" reflects a credit of $45,062. Order No. 29603 (affirmed on appeal) found that the local facilities credit was $45,062.

With the adjustments noted above, the Pagers assert "the matter is fully submitted and that there is no reason for this Commission to not rule upon the Petition immediately, subject to . . . Qwest's right to review the correction of the computational errors and respond within no more than seven (7) business days." Pagers Response at 2. Again, Qwest did not file any response to Counsel's affidavit or to the alleged typographical errors.

DISCUSSION AND FINDINGS

A. Calculating the Interest

On remand from the Court, the Commission's task is to recalculate the interest on the Pagers' refund using a 12% rate. The Pagers assert that the calculations submitted with Mr. Purdy's affidavit (with adjustments discussed below) accurately reflect the calculation of the 12% interest rate. After examining these calculations, we find these calculations do reflect the Commission-determined overcharges attributable to local facilities, transit traffic, and wide area calling ($44,945 for Radio Paging and $76,168 for PageData). Based upon our review of these calculations and the lack of any objection from Qwest, we find these calculations (with the adjustments noted below) accurately reflect the calculation of interest at 12%.

Turning now to the "corrections" proposed by the Pagers in their November 1 filing, we find that the adjustments to the interest calculations are appropriate. In particular, we find it reasonable to add two months of interest for October and November 2005. Given the lack of any objection, we further find that PageData should receive an additional 14 months of interest for transit traffic. Consequently, we find that Radio Paging is due a refund of $87,326 and PageData is due a refund of $145,381.

B. Ordering Refunds

The Commission's procedural Rule 57 requires that answers to petitions "must be filed with the Commission and served on all parties of record within twenty-one (21) days after service of the complaint or petition[.]" IDAPA 31.01.01.057.02. As noted above, Qwest has not filed an Answer to the Pagers' Petition or responded to the two pleadings filed November 1, 2005. Rule 57.02(b) sets out the consequences for a party failing to answer a petition.

> A party that fails to answer a complaint or petition within the prescribed time will be treated as generally denying the allegations of the complaint or petition <u>and will be precluded, except for good cause shown, from setting up any affirmative defense in the proceeding</u>. In these cases, the Commission may proceed with the matter solely upon the issues set forth in the complaint or petition. The complainant or petitioner must offer evidence of its

> allegations regardless of whether the complaint or petition is answered or denied.

Rule 57.02(b), IDAPA 31.01.01.057.02(b) (emphasis added).

Despite Qwest's affirmative claim that the Pagers owe Qwest for arrearages, Qwest has not presented detailed evidence of such set off. Qwest has been directed several times to submit calculations showing the amount of refunds minus arrearages. Order Nos. 29555 at 21; 29603 at 19; 29666 at 4. On remand, Qwest has not filed an answer to the Pagers' Petition seeking cash reimbursements or responded to the Pagers' November 1 filing addressing the refund calculations. Consequently, we are unable to address the issue of arrearages, if any, because such information is not in the record. Accordingly, we find that Qwest has not met its burden of proof regarding any arrearages. *Pace v. Hymas*, 111 Idaho 581, 585, 726 P.2d 693, 697 (1986).

In summary, the Commission finds that Radio Paging is due interest of $42,381 for a total refund of $87,326. The Commission further finds that PageData is due interest in the amount of $69,213 for a total refund of $145,381. Qwest shall issue cash reimbursements in the amounts specified above.

ORDER

IT IS THEREFORE ORDERED that the Pagers' Petition for recalculation of the interest due pursuant to the Supreme Court's Opinion is granted.

IT IS FURTHER ORDERED that Qwest issue a check in the amount of $87,326 to Radio Paging Service.

IT IS FURTHER ORDERED that Qwest issue a check in the amount of $145,381 to PageData.

IT IS FURTHER ORDERED that Qwest issue the checks to Radio Paging Service and PageData within 14 days from the service date of this Order.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order on Remand) may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order on Remand. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 6th day of December 2005.

PAUL KJELLANDER, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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