

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.*).