Sup-T-05-01

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOSEPH B. MCNEAL, D/B/A PAGEDATA, Petitioner-Appellant, vs. IDAHO PUBLIC UTILITIES COMMISSION and QWEST CORPORATION, Respondents	Supreme Court Docket No. 31844 IPUC Docket No. QWE-T-03-25

REPLY BRIEF OF APPELLANT

APPEAL FROM THE IDAHO PUBLIC UTILITIES COMMISSION
Commissioner Paul Kjellander, Presiding

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TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES ii

I. STATEMENT OF THE CASE 3
A. Course of Proceedings 3
II. ARGUMENT 3
A. Non-Applicable Case Law 3
B. The IPUC Erred by Treating Interconnection Agreements as Any Other Contract 3
C. The State Commission has the Authority to Enforce Interconnection Agreements After the Agreements have been Approved 3
D. The IPUC Misapplied the Starpower Decision 3
E. PageData's Interconnection Agreement Unambiguously Contains the Option of Seeking Relief from the IPUC in the First Instance. 3
F. The IPUC May Not Blue-Pencil An Approved Interconnection Agreement After A Complaint Has Been Filed 3
G. The IPUC Promotes Discrimination by Not Enforcing Approved Interconnection Agreements 3
H. The IPUC Must Provide Enforcement of IPUC-Approved Interconnection Agreements on a Nondisciriminatory Basis Using the Guidelines of Sections 251 and 252 3
I. The IPUC's Blue-Penciling of the Interconnection Agreement Made it Unconscionable; the IPUC is not Afforded State Agency's Deference; and is Subject to *De Novo* Review 3
J. There is a Prohibition for Filing Interconnection Agreement Amendments and Clarifications with the IPUC 3
K. The Dispute Resolution Clause Does Not Have Provisions for Attorney Fees For Proceedings at the IPUC 3
L. Summary Judgment Rules are the Same Whether Under Commission Rules or Idaho Rules of Civil Procedure 3
III. CONCLUSION 3

CERTIFICATE OF SERVICE 26

APPENDIX A – Colorado Unfiled Secret Agreements Matrix

APPPENDIX B – Arch and PageNet Unfiled Secret Agreement

TABLE OF AUTHORITIES

Cases **Page**

Bellsouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., 317 F.3d 1270 ....4, 7, 8

Chevron U.S.A, Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984))....5, 20

Idaho Power Co. v. Cogeneration, Inc., 134 Idaho 738, 9 P.3d 1204 (2000)....6

Illinois Bell Telephone Company v. WorldCom Technologies, Inc., 179 F.3d 566 (7th Cir. (Ill.) Jun 18, 1999) *as amended* (Aug. 19, 1999)....10

In the Matter of Petition of McLeodUSA Telecommunications Services, Inc., for Enforcement of Interconnection Agreement with Qwest Corporation., Qwest's Answer to McLeod Petition, IPUC Docket No. MTI-T-05-01 16

In the Matter of the Application of Qwest Corporation and McLeodUSA for Approval of an Interconnection Agreement, QWE-T-00-7 18

In the Matter of the Application of Qwest Corporation and Teton Communications for Approval of an Interconnection Agreement, Case No. QWE-T-05-16 ....12, 14

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier, CC Docket No. 01-338, 19 FCC Rcd 13494 (rel. July 13, 2004)....2

In the Matter of Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-52, Memorandum Opinion and Order, FCC 00-216 (re. June 14, 2000)....4, 7, 9, 10, 18, 20

Jackson Transit Auth. v. Local Div. 1285, 457 U.S. 15, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982)....6

Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co., 98 Idaho 692, 696, 571 P.2d 753, 757 (1977 6

Machinists v. Central Airlines, Inc., 372 U.S. 682, 692, 83 S.Ct. 956, 962, 10 L.Ed.2d 67 (1963)....6

MCI Telcoms. Corp. v. Illinois Bell Tel. Co., 222 F.3d 323, 344 (7th Cir. 2000) 8

Michigan Bell Telephone Co. v. Climax Telephone Co., 202 F.3d 862, C.A.6 (Mich.), 2000....2, 4, 8, 9

Michigan Bell Tel. Co. v. Strand, 305 F.3d 580 (6th Cir.)(2002). 4, 5, 8

Orthopaedic Hosp. V. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997) 5, 20

Robert Ryder dba Radio Paging Service, Joseph B. McNeal dba PageData and InterPage of Idaho, Inc., and Tel-Car, Inc. v. Idaho Public Utilities Commission and Qwest Corporation, Supreme Court Docket No. 29175 2

Southwestern Bell Telephone Co., v. Public Utility Commission of Texas, 208 F.3d 475 (5th Cir. 2000)....10

Statutes **Page**

47 U.S.C. § 251 8
47 U.S.C. § 251(b) and (c)....1, 19
47 U.S.C. § 251(b)(5) 7
47 U.S.C. § 252....4, 8, 18
47 U.S.C. § 252(c) 8, 9
47 U.S.C. § 252(d)....1, 19
47 U.S.C. § 252(e) 1, 8, 9
47 U.S.C. § 252(i)....1

Idaho Code § 62-602(5)....4, 6
Idaho Code § 62-615(1)....4, 6
Idaho Code § 62-615(3)....4, 6

Regulations **Page**

IDAPA 31.01.01.00 et seq. 22

Miscellaneous

Merriam-Webster's Dictionary....12
Black's Law Dictionary, Eighth Edition....12

I. STATEMENT OF THE CASE

A. Course of Proceedings

PageData would like to clarify certain matters regarding the course of proceedings as portrayed by the Idaho Public Utility Commission ("IPUC") and Qwest Corporation ("Qwest") in their respective briefs.

Congress had envisioned that section 252(i) would give smaller carriers the ability to adopt interconnection agreements with terms and conditions negotiated by larger carriers (with more financial resources and quality legal representation) that the smaller carriers would not otherwise have been able to negotiate.

On-going litigation between Qwest and PageData is facilitated and kindled by the IPUC's defiance of its responsibility to enforce the federal Telecommunications Act of 1996 ("Act") (and specifically Sections 251(b) and (c), and 252(d) and (e)) including requiring Qwest to file all interconnection agreements entered into by Qwest with other carriers who operate within the state of Idaho. The litigation between PageData and Qwest could have been avoided by the IPUC simply having Qwest file previously unfiled interconnection agreements that have been identified by the IPUC counterparts in the states of Iowa, Minnesota, Colorado, New Mexico and Arizona and enforcing those terms and conditions included in commission-approved interconnection agreements.

Specifically affecting PageData are two interconnection agreements identified in Exhibit A). All five state commissions that investigated Qwest for unfiled agreements, identified the Arch and PageNet secret, unfiled agreements as interconnection agreements that were required to be filed with the state commissions. These agreements provided

interconnection facilities (telephone lines), reciprocal compensation (money paid by ILECs such as Qwest to carriers such as PageData for terminating Qwest-originated traffic), and dispute resolutions not available to small Idaho carriers because the IPUC is in continuous violation of federal law for not enforcing federally mandated filing requirements.[1] Exhibit B shows that these unfiled and secret interconnection agreements were effective in the state of Idaho.

Because of the IPUC's lack of enforcement of the Act and the IPUC's failure to act on credible evidence presented by PageData and public utility commissions in five states, PageData has had to litigate for over six years for terms and conditions that it could have simply adopted under section 252(i).[2] Another case that PageData has before the Supreme Court falls in this same category because PageData could have adopted the unfiled dispute resolution terms and conditions, which included refunds for overcharges and reciprocal compensation on a going forward basis.[3]

PageData had to bring complaints before the IPUC, Federal Communications Commission ("FCC"), and federal court in order to receive the same terms and conditions that Arch received from voluntary negotiations with Qwest. The terms that should have been available per the Act but were not received by PageData until various complaints

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[1] "It is the [Commission's] duty, if it chooses to regulate, not the other party's, to ensure that the agreement meets the requirements of the Act both at the time of arbitration, 47 U.S.C. § 252(c), and at time of approval, 47 U.S.C. § 252(e)(2)(B). Furthermore, it is the [Commission's] function, not the other party's, to enforce the agreement." Michigan Bell Telephone Co. v. Climax Telephone Co., 202 F.3d 862, C.A.6 (Mich.) 2000.

[2] As of July 13, 2004, individual terms and conditions are no longer available for adoption under section 252(i) using "pick and choose". In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier, CC Docket No. 01-338, 19 FCC Rcd 13494 (rel. July 13, 2004)(FCC adoption of "all or nothing" rule). At the time of the various state commission investigations into Qwest's unfiled interconnection agreements, the option of adopting individual terms and conditions from approved interconnection agreements was still available.

[3] Robert Ryder dba Radio Paging Service, Joseph B. McNeal dba PageData and InterPage of Idaho, Inc., and Tel-Car, Inc. v. Idaho Public Utilities Commission and Qwest Corporation, Supreme Court Docket No. 29175.

were filed include 1) the adoption of the Arch interconnection agreement in the first instance; 2) adoption of the Arch amendment for a single point of presence/interconnection; and 3) digital interconnection facilities themselves. This instant complaint was filed because Arch is receiving its flat rate reciprocal compensation per telephone line on its interconnection agreement approved by the IPUC, but Qwest has refused to pay PageData its flat rate reciprocal compensation per the same interconnection agreement approved by the IPUC. The Idaho Supreme Court has a long-standing position that an aggrieved party has the right to his day in court.

The IPUC would have PageData believe that PageData's federally granted statutory rights have not been denied by the IPUC, the old Qwest monopoly is broken, that political donations to IPUC employees, Qwest's indirect hiring of IPUC employees[4], and extravagant lunches have no influence on the IPUC's enforcement decisions.

There is no denying that as well as being a quasi-legislative body, the IPUC is a political body. It is not politically convenient for the IPUC to enforce the Act on interconnection agreements that it has approved. These unfiled interconnection agreements and the lack of enforcement of approved interconnection agreements by the IPUC has decreased competition and caused Idaho consumers to pay more for telecommunications services than they otherwise would have had to pay.

[4] Mr. John R. Hammond, Jr., is currently employed by Qwest's Counsel of Record (Batt & Fisher LLP), and signed Qwest's Reply Brief in this case (p. 17), but was previously the IPUC's legal staff member assigned PageData's initial complaint against Qwest, which is currently before the Court (Supreme Court Docket No. 29175). Mr. Hammond was also part of the IPUC's decision-making process for the decision not to require Qwest to file all unfiled interconnection agreements identified by counterpart state commissions from their investigations of Qwest.

II. ARGUMENT

A. Non-Applicable Case Law

The IPUC cited numerous cases that are not applicable to telecommunications carriers with an interconnection agreement approved by the IPUC according to 47 U.S.C. § 252 because the cases have been superseded, vacated, or overridden by federal law.

The following cases quoted by the IPUC are not applicable:

Case Law Cited by IPUC	IPUC Stance	Not-Applicable or Overridden By
Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co., 98 Idaho 692, 696, 571 P.2d 753, 757 (1977)	Enforcement of contracts is matter of courts and not public utilities commission (IPUC Brief, p. 13, 16, 20)	• 47 U.S.C. § 252 • I.C. §§ 62-602(5) and 62-615(1) and (3) • *In the Matter of Starpower Commun. LLC, Petition for Preemption of Jurisdiction of the Virginia State Corp. Commission Pursuant to Section 252(e)(5) of the Tel. Act of 1996.* CC Docket No. 00-52, Memorandum Opinion and Order, FCC 00-216 (re. June 14, 2000) • *Bellsouth Tel., Inc. v. MCIMetro Access Trans. Svcs., Inc.* 317 F.3d 1270 • *Michigan Bell Tel. Co., v. Strand*, 305 F.3d 580 (6th Cir.)(2002) • *Michigan Bell Tel. Co., v. Climax Tel. Co.*, 202 F.3d 862, C.A.6 (Mich.), 2000
Idaho Power Co. v. Cogeneration, Inc., 134 Idaho 738, 9 P.3d 1204 (2000)	Enforcement of contracts is matter of courts and not public utilities commission	
Afton Energy v. Idaho Power Co., 111 Idaho 925, 929, 729 P.2d 400, 404 (1986)	Both parties must agree to let the IPUC settle the contractual dispute	
International Assoc. of Firefighters, Local 672 v. City of Boise, 136 Idaho 162, 168, 30 P.3d 940, 946 (2001)	Arbitration is favored remedy.	
Driver v. SI Corporation, 139 Idaho 423, 426, 80 P.3d 1024, 1027 (2003)	Both parties consented to substitute arbitration for judgment of the court	
Hecla Mining Co. v. Bunker Hill Co., 101 Idaho 557, 562, 617 P.2d 861, 866 (1980)	Both parties consented to substitute arbitration for judgment of the court	

Case Law Cited by IPUC	IPUC Stance	Not-Applicable or Overridden By
A.W. Brown Company v. Idaho Power Company, 121 Idaho 812, 815, 828 P.2d 841, 844 (1992)	Supreme Court has limited jurisdiction to review decisions of the Commission (IPUC Brief, p. 9) Questions of law review limited to determination if Commission pursued its authority. (IPUC Brief, p. 10)	"State agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes under *Chevron*." *Michigan Bell Telephone Co. v. Strand*, 305 F.3d 580 (quoting *Orthopaedic Hosp. V. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) (referring to *Chevron U.S.A, Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).
Industrial Customers of Idaho Power v. Idaho PUC, 134 Idaho 285, 288, 1 P.3d 786, 789 (2000)	If the Commission's findings are supported by substantial, competent evidence this Court must affirm those findings (IPUC Brief, p. 9)	
Hulet v. Idaho PUC, 138 Idaho 476, 478, 65 P.3d 498, 500 (2003)	If the Commission's findings are supported by substantial, competent evidence this Court must affirm those findings even if the Court would have made a different choice. (IPUC Brief, p. 9) Questions of law review limited to determination if Commission pursued its authority. (IPUC Brief, p. 10)	"Nothing in this Section [13.14] shall be construed to waive or limit either Party's right to seek relief from the Commission or the FCC as provided by state or federal law." IPUC-Approved Interconnection Agreement between PageData and Qwest, *R., at 34*
Application of Boise Water Corp., 82 Idaho 81, 86, 349 P.2d 711, 713 (1960)	Commission's ruling not set aside unless failed to follow the law or abused its discretion. (IPUC Brief, p. 10)	
Rosebud Enterprises v. Idaho PUC, 128 Idaho 609, 618, 917 P.2d 766 (1996)	Sufficient findings to permit reviewing court to determine the PUC has not acted arbitrarily. (IPUC Brief, p. 10)	

B. The IPUC Erred by Treating Interconnection Agreements as Any Other Contract

Qwest has asserted and the IPUC erred by agreeing with Qwest that interconnection agreements should be treated as contracts and thereby not in the jurisdiction of the IPUC. Qwest and the IPUC cited cases (Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co., 98 Idaho 692, 696, 571 P.2d 753, 757 (1977) and Idaho Power Co. v. Cogeneration, Inc., 134 Idaho 738, 9 P.3d 1204 (2000) in which the Idaho Supreme Court ruled the IPUC did not have authority to enforce contracts. Since the implementation of the Act the rulings cited by the IPUC only apply to non-telecommunications utility monopolies under the jurisdiction of the IPUC. As far as telecommunications companies, these rulings are superseded by the Act itself, I.C. §§ 62-602(5) and 62-615(1)[5] and (3), and U.S. Court of Appeals rulings that specifically state that interconnection agreements are not regular contracts and are enforced by the state commissions unless that federally granted statutory right is specifically waived in the interconnection agreement.

In Jackson Transit Auth. v. Local Div. 1285, 457 U.S. 15, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982), the Supreme Court held that a contract enforcement action stated a federal claim, "if Congress intended that [the contracts] . . . be 'creations of federal law,' . . . and that the rights and duties contained in those contracts be federal in nature." *Id.* At 23, 102 S.Ct. at 2207 (quoting Machinists v. Central Airlines, Inc., 372 U.S. 682, 692, 83 S.Ct. 956, 962, 10 L.Ed.2d 67 (1963)). The interconnection agreement signed by PageData and Qwest is indeed a creation of federal law—namely, the Act—and does

[5] "The commission shall have full power and authority to implement the federal telecommunications act of 1996..." I.C. § 62-615(1)

contain federal rights and duties—specifically, those enumerated in section 251 of that Act. It is the responsibility of the IPUC to enforce the provisions on an interconnection agreement approved by the IPUC in the first instance.[6]

The U.S. Court of Appeals, Eleventh Circuit ruled that:

> It would be illogical to say that the [IPUC's] interest in an interconnection agreement is extinguished as soon as the agreement is approved, and that the agreement should thereafter be treated as any other contract.

Bellsouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc. 317 F.3d 1270

C. The State Commission has the Authority to Enforce Interconnection Agreements After the Agreements have been Approved

To address the natural monopoly in place in the telecommunications industry and promote competition in local telephone service, Congress passed the Act in 1996. Its regulatory scheme was designed to counteract the deterrence of competition inherent in the high, fixed initial cost of telephone service and the need for all telecommunications companies to interconnect with one another. Thus, in order to open telephone markets to competition, it required incumbent Local Exchange Carriers, such as Qwest, to share access with companies like PageData. The Act established the duty for local exchange carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5)

As a result the state commissions have the duty to ensure compliance with the approved interconnection agreement, including the enforcement of reciprocal

[6] In the Matter of Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-52, Memorandum Opinion and Order, FCC 00-216 (re. June 14, 2000)

compensation payment, and ensure the regulatory scheme envisioned by Congress to promote competition in an area that was once a monopoly.

The U.S. Court of Appeals, Eleventh Circuit ruled that:

> Footnote 9: A state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved. . . . To deprive the state commission of authority to interpret the agreement that it has approved would thus subvert the role that Congress prescribed for state commissions.

Bellsouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc. 317 F.3d 1270

To promote competition, the state commission's interpretation must be in accordance with sections 251 and 252 of the Act.

> At least one circuit has described state commissions as "deputized federal regulator[s]" authorized to exercise regulatory power and ensure compliance with federal law as set out in the [Act]. MCI Telcoms. Corp. v. Illinois Bell Tel. Co., 222 F.3d 323, 344 (7th Cir. 2000). Interconnection agreements are tools through which the [Act] is enforced.

Id.

In Michigan Bell Telephone Co. v. Strand the U.S. Sixth Circuit Court of Appeals ruled:

> Access to an ILEC's network facilities comes only through specified procedures for forming "interconnection agreements," the Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth in the Act. The Act requires ILECs to enter into these agreements ... requires submission of the final agreement to the appropriate state commission for approval; gives the state commission authority to interpret and enforce agreements when post-approval disputes arise, *see* 47 U.S.C. § 252(c), (e)(1) and (2), and *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 868 (6th Cir.)

Michigan Bell Tel. Co. v. Strand, 305 F.3d 580 (6th Cir.)(2002).

In Michigan Bell Telephone Co. v. Climax Telephone Co. the U.S. Sixth Circuit Court of Appeals ruled:

> It is the [Commission's] duty, if it chooses to regulate, not the other party's, to ensure that the agreement meets the requirements of the Act both at the time of arbitration, 47 U.S.C. § 252(c), and at time of approval, 47 U.S.C. § 252(e)(2)(B). Furthermore, it is the [Commission's] function, not the other party's, to enforce the agreement.

Michigan Bell Telephone Co. v. Climax Telephone Co., 202 F.3d 862, C.A.6 (Mich.), 2000.

D. The IPUC Misapplied the Starpower Decision

Both Qwest and the IPUC refer to the FCC's Starpower Memorandum and Order footnote number 14, which is a circumstance in which a carrier waives its federal statutory right to seek dispute resolution from the state commission or the FCC in favor of arbitration only. A more detailed look at the FCC's Starpower decision is in order.

In the FCC's Starpower Memorandum and Order[7], the FCC stated:

> In applying Section 252(e)(5), we must first determine whether a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' "responsibility" under section 252. We conclude that it is. In reaching this conclusion, we find federal court precedent to be instructive. Specifically, at least two federal courts of appeal have held that inherent in state commissions' express authority to mediate, arbitrate, and approve interconnection agreements under section 252 is the authority to interpret and enforce previously approved agreements.[FN13] These court opinions implicitly recognize that, due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements. Thus, we conclude that a state commission's failure to "act to carry out its responsibility" under section 252 can in some circumstances include that failure to interpret and enforce existing interconnection agreements. [FN14]

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[7] In the Matter of Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-52, Memorandum Opinion and Order, FCC 00-216 (re. June 14, 2000) *emphasis added*

FN13. *Southwestern Bell Telephone Co., v. Public Utility Commission of Texas*, 208 F.3d 475 (5th Cir. 2000)("[T]he Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved."); *Illinois Bell Telephone Company v. WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir. (Ill.) Jun 18, 1999) *as amended* (Aug. 19, 1999)(holding that the Act "specifically provides state commissions with an important role to play" in interpreting and enforcing interconnection agreements).

FN14. *See* Petition at 7; Comments of MCI at 4-5. We note that, in other circumstances, parties may be bound by dispute resolution clauses in their interconnection agreement to seek relief in a particular fashion, and, therefore, the state commission would have no responsibility under section 252 to interpret and enforce an existing agreement. In this case, however, the relevant interconnection agreements do not express specify how the disputes shall be resolved. *See* Interconnection Agreement between Starpower LLC and Bell Atlantic-Virginia, Inc., dated March 9, 1998, para. 2.3, and October 19, 1999, § 24; and Interconnection Agreement between Starpower, LLC and GTE South, Inc., effective March 11, 1998, § XVIII.

In footnote 14 of the Starpower Memorandum and Order, the FCC conditions the only exception in which a state commission would have no responsibility under section 252 to enforce an existing agreement is if the parties are bound by a dispute resolution clause in their interconnection agreement to seek relief in a particular fashion. Therefore, the federally granted statutory right for a telecommunications carrier to have complaints resolved by a state commission can only be denied if it is specifically written in the interconnection agreement as such. Any doubt in the language must favor Commission-handled enforcement.

There is no language in Section 13.14 of the interconnection agreement waiving PageData's right to seek relief from the Commission. *R. at 34.* In fact, Section 13.14 specifically retains the right of PageData to seek relief from the Commission or the FCC by stating:

> **Nothing in this Section [13.14]** shall be construed to waive or limit either Party's right to seek relief from the Commission or the FCC as provided by state or federal law.

R. at 34 (emphasis added)

This sentence negates any previous requirements that could or would limit PageData's right to seek relief from the Commission in the first instance. Therefore the IPUC erred by not enforcing PageData's federally granted statutory right to have the IPUC enforce the terms and conditions of the interconnection agreement.

E. PageData's Interconnection Agreement Unambiguously Contains the Option of Seeking Relief from the IPUC in the First Instance.

The IPUC erred by accepting the false assertion by Qwest that PageData's interconnection agreement with Qwest contains an exclusive dispute resolution condition for arbitration in the first instance. Qwest and the IPUC continue to put a spin on the dispute resolution clause. A look at the statements themselves in the interconnection agreement is appropriate.

> If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents ("Dispute") cannot be settled through negotiation, it shall be resolved by arbitration under the then current rules of the American Arbitration Association ("AAA"). . . . **Nothing in this Section shall be construed to waive or limit** either Party's right to seek relief from the Commission or the FCC as provided by state or federal law.

R. at 34 (emphasis added)

The phrase, "Nothing in this Section shall be construed to waive or limit either Party's right to seek relief from the Commission," nullifies any previous requirements that may be construed for arbitration as the first instance of dispute resolution.

At this point a look at the definitions will shed some light on the plain meaning of the words "nothing, " "limit," and "construe."

Nothing:

1) Not any thing: no thing <leaves *nothing* to the imagination>
2) No part

3) One of no interest, value, or consequence <they mean *nothing* to me>

Merriam-Webster's Dictionary

Limit:

1) to assign certain limits to: PRESCRIBE <reserved the right to *limit* use of the land>
2a) to restrict the bounds or limits of <the specialist can no longer *limit* himself to his specialty> b) to curtail or reduce in quantity or extent <we must *limit* the power of aggressors>

Merriam-Webster's Dictionary

Construe:

To analyze and explain the meaning of (a sentence or passage), <the court construed the language of the statute>.

Black's Law Dictionary, Eight Edition, p. 333

Therefore, through adoption of the interconnection agreement PageData has not waived or limited its right to seek relief from the IPUC in the first instance. It is unambiguous that the interconnection agreement emphatically retains PageData's federally granted statutory right to seek relief from the IPUC in the first instance. The IPUC erred by construing the language any other way.

In contrast to PageData's interconnection agreement with Qwest, the recently approved interconnection agreement between Qwest and Teton Communications in Idaho[8] does **not** include provisions for seeking enforcement relief from the IPUC or the FCC. Therefore, in that agreement Teton and Qwest mutually agreed to limit their outside dispute resolution to arbitration in Denver, Colorado according to the American Arbitration Association rules and the Federal Arbitration Act, not state law.

[8] Interconnection Agreement Between Qwest Corporation and Teton Communications, Case No. QWE-T-05-16, Approved by IPUC Order No. 29858, dated August 29, 2005.