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IDAHO PUBLIC UTILITIES COMMISSION

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

JOSEPH B. MCNEAL, D/B/A PAGEDATA,

Petitioner-Appellant,

v.

IDAHO PUBLIC UTILITIES COMMISSION
And QWEST CORPORATION,

Respondents.

Supreme Court Docket No. 31844

IPUC Docket No. QWE-T-03-25

REPLY BRIEF OF RESPONDENT QWEST CORPORATION

APPEAL FROM THE IDAHO PUBLIC UTILITIES COMMISSION

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This Appeal arises from two final Orders of the Idaho Public Utilities Commission (the Commission) in which it declined to exercise its jurisdiction over PageData's Complaint regarding a contract dispute between Qwest and PageData. The Commission dismissed PageData's Complaint against Qwest without prejudice.¹ R. at 218. *See also* R. at 331-337, 345-350.

II. COURSE OF PROCEEDINGS

On October 31, 2003, PageData filed a "formal" Complaint alleging Qwest was not in compliance with the terms of an interconnection agreement between PageData and Qwest (the Agreement). R. at 218-227. On November 26, 2005 Qwest filed a Limited Response asserting that the Commission should decline to exercise jurisdiction over the Complaint because it concerned a contract billing dispute covered by the Agreement's arbitration clause. *See* Agreement, Section 13.14, "Dispute Resolution;" R. at 230-41. PageData filed a Reply to Qwest's Limited Response and a Request for Summary Judgment in response. R. at 242-80. During the next several months the Commission put this case on hold as the parties unsuccessfully attempted to settle issues in other cases PageData had filed against Qwest before the Commission, the Federal Communications Commission (the FCC), and in federal district court.² R. at 292-94, 302-03. On January 19, 2005, the Commission issued Order No. 29687,

¹ An interconnection agreement is an agreement between telecommunications carriers that in general allows their subscribers to dial each other and may also cover issues such as the sharing of revenues and the provisioning of equipment and services. *See generally Newton's Telecom Dictionary*, at p. 380 (18th Ed. 2002).

² PageData's first litigation against Qwest was filed with the Commission in 1999. That case is now on appeal before this Court. *See 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. PageData has filed Petitions for Arbitration against Qwest in Case Nos. GNR-T-04-5 and GNR-T-05-6 and challenged matters decided in Case Nos. QWE-T-03-6 and QWE-T-03-7. *In the Matter of PageData's Petitions for Arbitration*, GNR-T-04-5, GNR-T-04-6, 2004 Ida. PUC LEXIS 66 (2004). *In the matter of the Applications of*

declining to exercise its jurisdiction and dismissing the Complaint without prejudice. The Commission found the Agreement contained a dispute resolution provision which was the “first and foremost” method for resolving disputes. R. at 331, 336 & 345. On February 9, 2005, PageData filed a Petition for Reconsideration. R. at 338-345. The Commission denied PageData’s Petition, R. at 345-350, and on April 19, 2005, PageData filed a Notice of Appeal. R. at 351-355.

III. STATEMENT OF FACTS

A. The Opt-in Agreement

Under the Telecommunications Act of 1996, 47 U.S.C. § 151 *et. seq.* (the Act) state commissions are tasked with approval or rejection of interconnection agreements. *See* 47 U.S.C. § 252(e). In 2000, the Commission approved an interconnection agreement that is the “underlying agreement” for the PageData-Qwest agreement from which the dispute in this matter arose. The underlying agreement was negotiated between Qwest and Arch Paging, Inc. and Mobile Communications Corporation of America (Qwest-Arch Interconnection Agreement). R. at 53-55. Under the Act, Qwest, as an incumbent local exchange carrier must “make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.” 47 U.S.C. § 252(i); *See also* 47 C.F.R. § 51.809. Competitive carriers such as PageData use these provisions to “opt-in” to the existing, approved interconnection agreements (so-called “underlying agreements”) between incumbent local exchange carriers (such as Qwest) and other competitive carriers. That is

PageData and Wavesent LLC, for Approval of Amendments to Interconnection Agreements, QWE-T-03-6, QWE-T-03-7, 2004 Ida. PUC LEXIS 244 (2004). PageData has also pursued a complaint procedure involving some of the same issues involved in this case at the FCC. On Halloween, 2003 PageData also filed an action against Qwest in the United States District Court for the District of Idaho which was dismissed without prejudice. *Joseph B. McNeal d/b/a PageData, et al v. Qwest Corporation, et al*, Case No. CIV03-473-S-MHW.

exactly what PageData did in this case, and in so doing, it bound itself to the provisions of that contract, including the arbitration clause.

In 2002, PageData informed Qwest it wished to opt into all of the terms of the Qwest Arch-Interconnection Agreement.³ R. at 73-74. Subsequently, Qwest and PageData filed a joint Application with the Commission requesting approval of PageData's adoption of the entire Qwest-Arch Interconnection Agreement (as amended). R. at 70-72. The parties' Application, signed by PageData, stated that PageData's adoption of the Qwest-Arch Agreement "was reached through voluntary negotiations." R. at 70 (emphasis added). The parties also represented that approval of the Agreement was in the public interest. R. at 71.

In approving this Agreement the Commission found it "was consistent with the public interest, convenience and necessity and [did] not unfairly discriminate." R. at 75-80.

B. PageData's Complaint

PageData's Complaint alleged that Qwest had not complied with the reciprocal compensation provisions of the Agreement. R. at 218. PageData sought an Order from the Commission requiring Qwest to remit cash payments for reciprocal compensation or, at a minimum, to issue credits for the same. R. at 219.

C. Qwest's Limited Response

Qwest asserted that the Commission should not exercise its jurisdiction over PageData's Complaint and should dismiss it because: 1) the parties' voluntary negotiated interconnection agreement set out detailed procedures for resolving disputes through arbitration, R. at 230; *See also* R. at 34; and, 2) resolution of this contract dispute depended on one narrow factual issue –

³ It is important to note that when PageData made its opt-in request 47 C.F.R. § 51.809 allowed a carrier two options, either to opt-into all of the terms of an existing agreement or only certain provisions of it. PageData chose the later course. Today parties can only opt-into entire agreements. *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).

the intent of the contracting parties. R. at 230. Qwest also stated that resolution of this contract dispute was not important to questions of telecommunications law, nor would it affect other Idaho telecommunications carriers or the telecommunications industry as a whole. *Id.*

Qwest also stated that the FCC had stated a state commission may not have responsibility to decide a dispute under an interconnection agreement if the parties had contractually agreed to a dispute resolution clause.⁴

Qwest also asserted that as a general matter, the construction and enforcement of contract rights in Idaho lies in the jurisdiction of the courts and not the Commission. R. at 236. Qwest argued that where the courts and Commission have concurrent jurisdiction over a contract dispute, the Commission must exercise restraint and should determine whether assertion of its jurisdiction is in the public interest. R. at 236-37.

Qwest requested the Commission deny the relief requested by PageData and dismiss the Complaint.

D. PageData's Reply

PageData urged the Commission to reject Qwest's Limited Response and its assertions insisting the Commission had jurisdiction to resolve disputes concerning interconnection agreements pursuant to *Idaho Code* §§ 62-614 and 62-615(1). R. at 246-49. PageData argued

⁴ *In the Matter of Starpower Communications, LLC*, the FCC stated:

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 expressly specify how the disputes shall be resolved.

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 (rel. June 14, 2000).

that Section 13.14 of the Interconnection Agreement provided three methods of dispute resolution and Qwest was bound by PageData's selected method. R. at 250.

E. Commission Order No. 29687

On January 19, 2005, the Commission issued Order No. 29687 declining to exercise its jurisdiction over PageData's Complaint. R. at 331-337. The Commission found Qwest and PageData had voluntarily agreed to adopt the entire Qwest-Arch Paging Interconnection Agreement which included a dispute resolution provision. R. at 335. The Commission found that Section 13.14 of the parties' Agreement, contained detailed procedures for utilizing the AAA arbitration rules to resolve disputes and as such "the parties clearly contemplated utilizing arbitration when they cannot resolve their dispute informally." R. at 336. The Commission stated Idaho case law has recognized there is a strong public policy in favor of arbitration and that arbitration "is a favored remedy" for resolving disputes citing *International Assoc. of Firefighters Local 672 v. City of Boise*, 136 Idaho 162, 168, 30 P.3d 940, 946 (2001) and *Driver v. SI Corporation*, 139 Idaho 423, 426, 80 P.3d 1024, 1027 (2003). *Id.*

Based on the foregoing, the Commission found that although the dispute resolution provision did not limit the parties' right to seek relief from it, the arbitration process was the "first and foremost" method for resolving disputes.⁵ *Id.* In closing the Commission commented:

Even though the Commission declines jurisdiction in this case, PageData is not without a remedy. As PageData recognized, it may submit this dispute to arbitration or the FCC under Section 13.14.

R. at 336.

⁵ The Commission also addressed what it called PageData's misplaced reliance on *Idaho Code* § 62-614 finding it was not applicable to PageData because it was not a Title 61 LEC providing local exchange service but rather a telephone corporation providing radio paging services and thus was "exempt from any requirements of title 61, or chapter 6, title 62, Idaho Code." *Id.*

F. Petition for Reconsideration

On February 9, 2005, PageData filed a Petition for Reconsideration asserting primarily that the Commission had erred in declining to resolve its Complaint because its Order No. 29687 had made the dispute resolution clause in the parties' Agreement unconscionable. R. at 338. PageData requested that the Commission hold a hearing pursuant to *Idaho Code* § 28-2-302 to investigate Section 13.14. R. at 340.

PageData also alleged 47 U.S.C. § 252(i) of the Act requires that "the resolution of a reciprocal compensation dispute be filed . . . and available for adoption by other carriers." R. at 347. Finally, PageData asserted that there was "no mechanism in Idaho statutes" to incorporate a private arbitration decision into an interconnection agreement thus his billing dispute with Qwest should be resolved by the Commission. *Id.*

G. Order on Reconsideration, Order No. 29726

On March 9, 2005, the Commission issued Order No. 29726 denying PageData's Petition for Reconsideration. R. at 345-350. In its findings the Commission addressed two primary issues raised by PageData: (1) whether the dispute resolution clause was unconscionable, and (2) the filing of arbitration decisions.

1. Unconscionability

The Commission noted that *Idaho Code* § 28-2-302, part of the Idaho Uniform Commercial Code, did not confer jurisdiction upon the Commission. R. at 348. Rather, the Commission stated the plain text of the statute provided that arguments and evidence of unconscionability must be presented to a court - not the Commission. *Id.* Accordingly, the Commission found his request for a hearing was without merit.

The Commission also found, as it did in Order No. 29687, there is a strong public policy in favor of arbitration and arbitration clauses. R. at 349. Thus, it was declining to exercise its

jurisdiction when the parties had "voluntarily negotiated" the adoption of an interconnection agreement which included a dispute resolution provision that was clearly the "first and foremost" method selected by the parties to resolve their disputes. *Id.*

The Commission also found the construction and enforcement of contracts is generally "a matter which lies in the jurisdiction of the courts and not with it citing *Lemhi Tel. Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 696, 571 P.2d 753, 757 (1977). R. at 348. The Commission recognized there were exceptions to this general rule but none were applicable. *Id.*

The Commission also addressed PageData's unconscionability argument substantively. The Commission reasoned that to be voided as unconscionable an arbitration provision had to be both procedurally and substantively unconscionable. R. at 348. The Commission noted that the Idaho Supreme Court has recognized that an arbitration clause "may be unenforceable if large arbitration costs preclude the party from effectively vindicating the party's federal statutory rights in the arbitral forum." *Murphy v. Mid- West National Life Insurance Co.*, 139 Idaho 330, 332, 78 P.3d 766, 768 (2003) quoting *Lovey*, 139 Idaho at 45, 72 P.3d at 885. The Commission stated that in *Murphy*, the arbitration clause required: 1) each party to pay for its own arbitrator; 2) equally share the expenses of a third arbitrator; pay for all other expenses of arbitration; and 4) pay for their attorney fees and expenses for witnesses. R. at 349. The Commission found that the arbitration provision in *Murphy* stood in "stark contrast" to the dispute resolution provision contained in Section 13.14 which provided for a single arbitrator and the prevailing party "shall be entitled to an award of a reasonable attorney's fees and costs." R. at 349. Based on the foregoing, the Commission did not find the terms of Section 13.14 to be unenforceable. *Id.*

2. Filed Arbitration Decisions

The Commission found PageData's argument regarding the filing of arbitration decisions with state commissions unpersuasive because it was unaware of any impediment to either party

filing an arbitration decision with the Commission to amend or clarify their interconnection agreement. R. at 349.

Following the issuance of this Order PageData filed its Notice of Appeal.

ISSUES PRESENTED ON APPEAL

A. The Commission regularly pursued its authority and made sufficient findings when it declined to exercise its jurisdiction and dismissed PageData's Complaint without prejudice.

B. The Commission regularly pursued its authority and made sufficient findings to justify its decision to not hold a hearing on PageData's demand made pursuant to *Idaho Code* § 28-2-302.

C. After affirming the Commission's Orders, the Respondent Qwest Corporation contends that the Court should award Attorney Fees.

ARGUMENT

I. STANDARD OF REVIEW

Article V, Section 9 of the Idaho Constitution provides the Supreme Court shall have jurisdiction to review on appeal any order of the Commission. *Boise Water Corp. v. Idaho Public Utilities Commission*, 128 Idaho 534, 537, 916 P.2d 1259, 1262 (1996). *Idaho Code* § 61-629 defines the scope of the Supreme Court's limited review and states in relevant part:

The review on appeal shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the constitution of the United States or of the state of Idaho.

Idaho Code § 61-629. See also *Industrial Customers of Idaho Power v. Idaho PUC*, 134 Idaho 285, 288, 1 P.3d 786, 789 (2000). In *Industrial Customers*, the Court stated review of

Commission determinations as to “questions of law” is limited to a determination of whether the Commission has regularly pursued its authority and whether the constitutional rights of the appellant have been violated. *Industrial Customer*, 134 Idaho at 288, 1 P.3d at 789. PageData has not alleged its constitutional rights were violated, thus the question is whether the Commission regularly pursued its authority in this matter. Regarding “questions of fact,” the Court stated that where the Commission’s findings are supported by substantial, competent evidence in the record, the Court must affirm those findings and the Commission’s decision. *Id.*⁶

The Commission’s findings of fact are to be sustained unless it appears that the clear weight of the evidence is against its conclusions or that the evidence is strong and persuasive that the Commission abused its discretion. *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789. The Court will not displace the Commission’s findings of fact when faced with conflicting evidence, “even though the Court would have made a different choice had the matter been before it *de novo*.” *Rosebud Enterprises, Inc. v. Idaho PUC*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996). Thus, the Commission’s findings of fact in this case are entitled to a presumption of correctness and the burden is on PageData to show those findings are unsupported by the evidence. *Industrial Customers*, 134 Idaho at 292, 1 P.3d at 793.

This Court must view the facts and inferences of the Commission in the light most favorable to the party who prevailed before the Commission. *Lethrud v. State of Idaho*,

⁶ The Court has set the test for substantial and competent evidence as follows:

The “substantial evidence rule” is said to be a “middle position” which precludes a *de novo* hearing but nonetheless requires a serious review which goes beyond the mere ascertainment of procedural regularity. Such a review requires more than a mere “scintilla” of evidence in support of the agency’s determination, though “something less than the weight of the evidence.” “Put simply”, we wrote, “the substantial evidence rule requires a court to determine ‘whether [the agency’s] findings of fact are reasonable.’”

Industrial Customers, 134 Idaho at 293, 1 P.3d at 794 quoting *Idaho State Insurance Fund v. Hunnicutt*, 110 Idaho 257, 260, 715 P.2d 927, 930 (1985 (citations omitted)).

Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995). Simply put, findings of the Commission must be reasonable “when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [Commission’s] view.” *Hayden Pines*, 111 Idaho at 336, 723 P.2d at 880, quoting *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 261, 715 P.2d 927, 931 (1985).

The Commission’s findings need not take any particular form so long as they fairly disclose the basic facts upon which the Commission relies and support the ultimate conclusions. What is essential are sufficient findings to permit the reviewing Court to determine that the Commission has not acted arbitrarily. *Rosebud*, 128 Idaho at 624, 917 P.2d at 781.

If the Court finds that the Commission has not “regularly pursued its authority,” then it shall set aside the Commission’s Orders in whole or in part and remand it to the Commission for its consideration. *Idaho Code* § 61-629.

A. The Commission regularly pursued its authority and made sufficient findings when it declined to exercise its jurisdiction and dismissed PageData’s Complaint without prejudice.

Although PageData raises multiple issues, the primary issue on appeal is whether the Commission erred in declining to exercise its jurisdiction over PageData’s Complaint and dismissing it without prejudice.⁷ In both final Orders, the Commission focused on the dispute resolution provision contained in Section 13.14 of the parties’ Agreement. The Commission noted that the parties had voluntarily negotiated and adopted the terms of the Qwest-Arch Interconnection Agreement in their entirety. The record also shows that at the start of the negotiations, PageData specifically requested that Qwest allow it to opt-into this agreement, R. at 73, which included a dispute resolution provision stating in pertinent part:

⁷ For instance, PageData argues that the Commission erred by granting Qwest’s motion to dismiss. Qwest filed no such pleading and even if its Limited Response were considered in that vein the Commission in its discretion was justified in dismissing the Complaint without prejudice in the absence of Qwest’s pleading.

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”). The arbitration shall be conducted by a single neutral arbitrator familiar with the telecommunications industry and engaged in the practice of law. . . . The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. . . . All expedited procedures prescribed by the AAA rules shall apply and the rules used shall be those for the telecommunications industry. The arbitrator’s award shall be final and binding and may be entered in any court having jurisdiction thereof. The prevailing Party, as determined by the arbitrator, shall be entitled to an award of reasonable attorneys’ fees and costs. The arbitration shall occur at a mutually agreed upon location. 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. The Commission found that Section 13.14 had detailed procedures for utilizing the AAA arbitration rules to resolve disputes. As such the Commission decided that “the parties clearly contemplated utilizing arbitration when they cannot resolve their dispute informally.” R. at 336. The Commission found that the intent of this provision was consistent with Idaho case law that recognizes there is a strong public policy in favor of arbitration and that arbitration is “a favored remedy” for resolving disputes. *International Assoc. of Firefighters, Local 672 v. City of Boise*, 136 Idaho 162, 168, 30 P.3d 940, 946 (2001). Lastly, the Commission found that although Section 13.14 did not limit the parties’ right to seek relief from the Commission, the arbitration process was still the “first and foremost” method for resolving disputes under the ICA.⁸ R. at 336. Accordingly, it seems clear that the Commission found that the terms of the dispute resolution provision were unambiguous.

⁸ Although the FCC has held that state commissions can interpret and enforce previously approved interconnection agreements it also held 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 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

