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IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO PUBLIC
UTILITIES COMMISSION

JOSEPH B. McNEAL DBA PAGEDATA

Petitioner-Appellant,

v.

**IDAHO PUBLIC UTILITIES COMMISSION
AND QWEST CORPORATION,**

Respondents.

)
) **SUPREME COURT**
) **DOCKET NO. 31844**
)
)
)
)
) **BRIEF OF RESPONDENT**
) **IDAHO PUBLIC UTILITIES**
) **COMMISSION**
)

APPEAL FROM THE IDAHO PUBLIC UTILITIES COMMISSION

Commissioner Paul Kjellander, Presiding

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

 A. Nature of the Case..... 1

 B. Course of Proceedings 1

 C. Statement of Facts..... 2

II. ADDITIONAL ISSUES PRESENTED ON APPEAL 7

III. ARGUMENT 8

 A. Summary of Argument 8

 B. Standard of Review 9

 C. The Commission Did Not Err When It Declined Jurisdiction and Dismissed PageData’s Complaint Without Prejudice Because the Parties Were Required to Utilize the Arbitration Provisions of Their Interconnection Agreement..... 11

 D. The Commission Did Not Err When It Found that the Issue of Unconscionability and Contract Interpretation is Best Left for the Courts. 14

 E. The Idaho Rules of Civil Procedure Do Not Apply to the Commission..... 17

 1. PageData May Not Raise Arguments for the First Time on Appeal..... 18

 2. The Idaho Rules of Civil Procedure Do Not Apply to the Commission..... 18

 F. PageData Has Misinterpreted Section 252 of the Federal Telecommunications Act. 19

 1. Noting in 47 U.S.C. § 252 Gives the Commission “Exclusive Rights” to ResolveDisputes Under Approved Interconnection Agreements..... 19

 2. There is No Statutory Impediment to Filing an Arbitration Decision with the Commission..... 20

IV. CONCLUSION..... 21

APPENDIX A – IPUC Order No. 29687, R. Vol. I p. 210-16 Tab A

APPENDIX B – IPUC Order No. 29726, R. Vol. I p. 224-29 Tab B

TABLE OF AUTHORITIES

Cases

<i>A.W. Brown Company v. Idaho Power Co.</i> , 121 Idaho 812, 828 P.2d 841 (1992).....	9, 10, 15
<i>Afton Energy v. Idaho Power Co.</i> , 111 Idaho 925, 729 P.2d 400 (1986)	13
<i>Application of Boise Water Corp.</i> , 82 Idaho 81, 349 P.2d 711 (1960).....	10
<i>Bellsouth Telecommunications, Inc. v. MCIMetro Access Transmission Svs., Inc.</i> , 317 F.3d 1270 (11th Cir. 2003)	20
<i>Boise Water Company v. Idaho PUC</i> , 128 Idaho 534, 916 P.2d 1259 (1996)	10
<i>Eagle Water Company v. Idaho PUC</i> , 130 Idaho 314, 940 P.2d 1133 (1997).....	10, 18
<i>Green Tree Financial Corp. v. Bazzle</i> , 539 U.S. 444, 123 S.Ct. 2402 (2003)	16
<i>Hulet v. Idaho PUC</i> , 138 Idaho 476, 65 P.3d 498 (2003).....	9, 10
<i>Idaho Power Co. v. Cogeneration, Inc.</i> , 134 Idaho 738, 9 P.3d 1204 (2000)	13, 16
<i>Industrial Customers of Idaho Power v. Idaho PUC</i> , 134 Idaho 285, 1 P.3d 786 (2000).....	9, 16
<i>International Assoc. of Firefighters v. City of Boise</i> , 136 Idaho 162, 30 P.3d 940 (2001).....	11
<i>Key Transp., Inc. v. Trans Magic Airlines Corp.</i> , 96 Idaho 110, 524 P.2d 1338 (1974).....	10, 18
<i>Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co.</i> , 98 Idaho 692, 571 P.2d 753 (1977).....	13, 16, 20
<i>Lovey v. Regence Blueshield of Idaho</i> , 139 Idaho 37, 72 P.3d 877 (2003)	14
<i>McKay v. Boise Project Board of Control</i> , 141 Idaho 463, 111 P.3d 148 (2005)	12
<i>Murphy v. Mid-West National Life Ins. Co.</i> , 139 Idaho 330, 78 P.3d 766 (2003).....	15, 16, 17
<i>Natatorium Company v. Erb</i> , 34 Idaho 209, 200 P. 348 (1921)	16, 18
<i>Rosebud Enterprises v. Idaho PUC</i> , 128 Idaho 609, 917 P.2d 766 (1996)	10, 14, 17
<i>Shawver v. Huckleberry Estates, L.L.C.</i> , 140 Idaho 354, 93 P.3d 685 (2004)	12

Constitutional Provisions

Idaho Const., Art. 5, § 9.....	9
--------------------------------	---

Statutes

9 U.S.C. § 1-16 4, 11, 14
47 U.S.C. § 251..... 11
47 U.S.C. § 251(b) 2, 3
47 U.S.C. § 251(c) 2, 3
47 U.S.C. § 252..... 7, 12, 19, 20, 21
47 U.S.C. § 252(a) 2, 3, 19
47 U.S.C. § 252(b) 19
47 U.S.C. § 252(e) 3, 19, 20, 21
47 U.S.C. § 252(h) 3
47 U.S.C. § 252(i) 3, 6, 21
Idaho Code § 7-901 11, 14
Idaho Code § 28-2-302 6, 9, 15, 16
Idaho Code § 61-601 18
Idaho Code § 61-629 9
Idaho Code § 62-615(1) 3

Other Authorities

In re Robert Ryder, et al., PUC Order No. 28427, 2000 WL 1055299 (Idaho PUC)..... 3
In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corp. Commission, 15 F.C.C.R. 11 (2000), 2000 WL 767701 (FCC)..... 11, 19

Rules

47 C.F.R. § 51.3 3
I.A.R. 35(b)(3) 1
I.R.C.P. 1(a) 18
I.R.C.P. 12(b)(6) and 56..... 17
IDAPA 31.01.01 18

I. STATEMENT OF THE CASE

Respondent on appeal, the Idaho Public Utilities Commission (Commission or PUC), believes the Statement of the Case set forth in PageData's Brief is incomplete. Consequently, pursuant to I.A.R. 35(b)(3), the Commission offers its own Statement of the Case.

A. Nature of the Case

This is an appeal from final Orders of the Commission. In the underlying administrative proceeding the Petitioner, Joseph B. McNeal dba PageData (PageData), filed a Complaint against Qwest Corporation. R. at p. 97.¹ The Commission declined to resolve the dispute and dismissed PageData's Complaint without prejudice finding that the parties must first abide by the arbitration provision of their approved Interconnection Agreement. R. at p. 215; PUC Order No. 29687. PageData's Petition for Reconsideration, alleging that the arbitration clause was unconscionable, was denied. R. at p. 219-20; Order No. 29726.

B. Course of Proceedings

On October 31, 2003, PageData filed a Complaint with the Commission alleging that Qwest Corporation (Qwest) was not in compliance with the reciprocal compensation provisions of their Interconnection Agreement. R. at p. 97-106. On November 26, 2003, Qwest filed a Limited Response to PageData's Complaint arguing that the Complaint should be dismissed because the parties' Interconnection Agreement contains an arbitration clause. R. at p. 108-20. PageData filed a Reply to Qwest's Limited Response. R. at p. 121-42. PageData also filed a Request for Summary Judgment with the Commission on January 29, 2004. R. at p. 143-59. Neither party requested oral argument or a hearing date. *See* R. at p. 173.

¹Because the Record in this matter consists of only one volume, citation to the Record in the PUC's Brief has been abbreviated to omit the continued repetition of "Vol. I."

The parties then undertook a lengthy period of settlement negotiations regarding this and other pending matters. The settlement negotiations were ultimately unsuccessful. *See* R. at p. 181.

On January 19, 2005, the Commission issued Order No. 29687 declining to resolve the dispute and dismissing the Complaint without prejudice. R. at p. 210-16 (Appendix A).² The Commission found that it was appropriate to dismiss the Complaint without prejudice given the presence of a detailed arbitration clause in the parties' Interconnection Agreement. R. at p. 214-15 (Appendix A). PageData filed a Petition for Reconsideration, R. at p. 217, which was denied in Order No. 29726 issued March 9, 2005. R. at p. 224-29 (Appendix B).

On April 19, 2005, PageData filed a Notice of Appeal from Commission Order Nos. 29687 and 29726. R. at p. 230. Following a dispute about the contents of the appellate Record, the Commission issued Order No. 29800 settling the Record on June 14, 2005. R. at p. 239.

C. Statement of Facts

1. Interconnection Agreements. In an effort to promote competition in the telecommunications industry, the federal Telecommunications Act of 1996 (the Act) requires incumbent local exchange carriers (ILECs) such as Qwest to interconnect their facilities with other telecommunications carriers requesting access to markets, such as PageData. 47 U.S.C. § 251(c)(2). The carriers may negotiate and enter into binding interconnection agreements that specify the details and charges for the interconnection of their systems. 47 U.S.C. § 252(a)(1). Among other things, the Act mandates that when carriers interconnect their networks, they have a "duty to establish reciprocal compensation arrangements" for transporting and terminating the calls of each other's customers. 47 U.S.C. § 251(b)(5). A local exchange carrier must make

² For the convenience of the Court, the PUC's final Order No. 29687 is included in Appendix A and the PUC's reconsideration Order No. 29726 is contained in Appendix B.

available any approved interconnection agreement to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided for in the approved agreement. 47 U.S.C. § 252(i).

All interconnection agreements must be submitted to the state regulatory commission (i.e., the Idaho PUC) for approval. 47 U.S.C. § 252(a)(1); § 252(e)(1); *Idaho Code* § 62-615(1). However, the Commission's review of an interconnection agreement is severely limited. The Commission may reject an agreement adopted by negotiation only if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement is not consistent with the public interest, convenience and necessity. 47 U.S.C. § 252(e)(2)(A). Additionally, the Idaho PUC, as well as the Federal Communications Commission (FCC), has acknowledged that carriers voluntarily entering into interconnection agreements "may negotiate terms, prices and conditions that do not comply with either the FCC rules or with the provision of Section 251(b) or (c)." *In re Robert Ryder, et al.*, PUC Order No. 28427 at 11 (emphasis in original), 2000 WL 1055299 (Idaho PUC); 47 C.F.R. § 51.3 ("a state commission shall have authority to approve an interconnection agreement adopted by negotiation even if the terms of the agreement do not comply with the requirements of this part"). Once approved, all interconnection agreements are posted by the Commission. 47 U.S.C. § 252(h).

The underlying Interconnection Agreement in this proceeding was adopted by Qwest and PageData through voluntary negotiations. R. at p. 70. They agreed to adopt a previously approved and amended Qwest/Arch Paging Interconnection Agreement pursuant to 47 U.S.C. § 252(i). R. at p. 73. Mr. McNeal signed the Agreement to adopt the Qwest/Arch Interconnection Agreement on December 22, 2002. R. at p. 74. The Qwest/PageData Interconnection

Agreement was approved by the Commission on February 25, 2003. R. at p. 75, 77. The parties subsequently submitted an amendment to this agreement (R. at p. 81-89), which was approved by the Commission on July 15, 2003. R. at p. 91-96. Mr. McNeal signed and accepted the amendment on May 19, 2003. R. at p. 86. Neither of the approved amendments to the Interconnection Agreement affected the arbitration clause at issue here. The subject Interconnection Agreement was first approved in Case No. USW-T-00-20. R. at p. 6-52.

The parties' Interconnection Agreement contains a mandatory arbitration provision in Section 13.14. This section states in pertinent part:

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. The Arbitrator shall not have authority to award punitive damages. 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 [Idaho] Commission or the FCC as provided by state or federal law.

R. at p. 34, 225 (Appendix A)(emphasis added).

2. PageData's Complaint and the PUC Orders. On October 31, 2003, PageData filed a Complaint with the Commission alleging that Qwest was not in compliance with the reciprocal compensation provisions of their Interconnection Agreement. R. at p. 97-106. Qwest filed a Limited Response asking that the Complaint be dismissed because Section 13.14 of the parties' Interconnection Agreement contains detailed procedures for resolving disputes, including an

arbitration clause. R. at p. 108-20. Qwest argued that the Commission should not exert jurisdiction over this private contract dispute, citing authority that the Commission is not the proper forum for arbitration or mediation of disputed contracts. R. at p. 115. Qwest also maintained there is no federal or state law that clearly grants the Commission jurisdiction over disputes arising from a previously approved interconnection agreement. R. at p. 116. Qwest next argued that the FCC has recognized that a state commission may have no responsibility to hear and decide an interconnection agreement dispute where the agreement contains a dispute resolution mechanism. R. at p. 117. Finally, Qwest asserted that dismissal of PageData's filing is supported by the strong public policy favoring arbitration and alternative dispute resolution. R. at p. 117-18. Qwest did not address the substantive allegations of the Complaint, but argued the dispute should be resolved through arbitration. R. at p. 108-18.

On January 19, 2005, the Commission issued Order No. 29687 declining to accept jurisdiction to hear the Complaint regarding reciprocal compensation and dismissing PageData's Complaint without prejudice. R. at p. 214-15 (Appendix A). After reviewing Section 13.14 of the Interconnection Agreement, the Commission found that: "the parties clearly contemplated utilizing arbitration when they cannot resolve their dispute informally." R. at p. 215. The Commission observed that the Idaho Supreme Court "has recognized that there is a strong public policy in favor of arbitration and that arbitration is a favored remedy for resolving disputes." *Id.* The Commission concluded that although the arbitration clause "does not limit the parties right to seek relief from this Commission, the arbitration process is the first and foremost method for resolving disputes under the Interconnection Agreement." *Id.*

On February 9, 2005, PageData filed a Petition for Reconsideration asserting for the first time that the arbitration clause was unconscionable. R. at p. 217. PageData requested the

Commission schedule a hearing pursuant to *Idaho Code* § 28-2-302 so PageData could present additional evidence regarding unconscionability.³ R. at p. 219. PageData also argued there is no mechanism allowing an arbitrator's decision to be incorporated into an interconnection agreement and made available to other carriers under 47 U.S.C. § 252(i). R. at p. 218.

On March 9, 2005, the Commission issued Order No. 29726 denying PageData's Petition for Reconsideration and affirming its decision to dismiss without prejudice for several reasons. R. at p. 229 (Appendix B). First, the Commission found that *Idaho Code* § 28-2-302 confers jurisdiction upon the court, not the Commission. R. at p. 226-27 (Appendix B). Thus, the Commission was not the appropriate forum to decide whether the arbitration clause was unconscionable. *Id.* Second, under the controlling opinions of this Court, the Commission observed that the construction and enforcement of contracts is generally a matter which lies in the jurisdiction of the courts and not the Public Utilities Commission. R. at p. 227 (Appendix B). Third, the Commission observed that "for an arbitration provision to be voided as unconscionable, it must be both procedurally and substantively unconscionable." *Id.* The Commission ultimately found that, although there is no dispute concerning the Commission's authority to approve interconnection agreements under the Act, it would decline to subsequently engage in interpretation and enforcement of this particular agreement that contains an arbitration clause. R. at p. 228-29 (Appendix B).

The Commission also found PageData's argument, that there is no mechanism in Idaho statute to file a private AAA arbitration decision with the Commission and make it publicly available to other carriers for adoption under 47 U.S.C. § 252(i), was not persuasive. R. at p. 228 (Appendix B). The Commission stated it was not aware of any impediment that would

³ *Idaho Code* § 28-2-302(1) provides in pertinent part that "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract . . ." (emphasis added).

prevent either party to the arbitration from filing an arbitration decision as an amendment or clarification to their interconnection agreement, and that other jurisdictions have found that both parties to the agreement bear responsibility for filing it with the state commissions. *Id.* Lastly, the Commission pointed out that, as referenced in its initial Order No. 29687, there is a strong public policy in favor of arbitration and arbitration clauses, and the parties here had voluntarily negotiated the adoption of the Arch Interconnection Agreement in its entirety which includes the provision for arbitration. *Id.*

On April 19, 2005, PageData filed a Notice of Appeal from the Commission's Order No. 29687 and No. 29726. R. at p. 230. The Commission subsequently issued Order No. 29800 settling the Record on Appeal, resolving the parties' dispute concerning the Record. R. at p. 239.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

While the Commission does not have any additional issues to present on appeal, the five issues cited by PageData can be more succinctly stated as follows:

1. The Commission did not err when it declined jurisdiction and dismissed PageData's Complaint without prejudice because the parties were required to utilize the arbitration provision of their Interconnection Agreement.
2. The Commission did not err when it found that the issue of unconscionability and contract interpretation is best left for the courts.
3. The Idaho Rules of Civil Procedure do not apply to the Commission.
 - a. PageData is not permitted to raise issues for the first time on appeal.
 - b. The Rules of Civil Procedure do not apply to the Commission.
4. PageData has misinterpreted Section 252 of the federal Telecom Act.
 - a. Nothing in Section 252 gives the Commission "exclusive rights" to resolve disputes under approved interconnection agreements.
 - b. There is no statutory impediment to filing an arbitration decision with the Commission.

The Commission does not seek attorney fees on appeal.

III. ARGUMENT

A. Summary of Argument

This appeal presents the straightforward issue of whether the Commission properly exercised its discretion by declining jurisdiction and dismissing PageData's Complaint without prejudice. It did. According to the plain language of the parties' voluntarily negotiated and approved Interconnection Agreement, they are required to arbitrate disputes that they cannot resolve informally. While the dispute resolution clause states that it does not limit the parties' right to seek relief from the Commission, the Commission found that "arbitration remains the first and foremost method of resolving disputes under the interconnection agreement." R. at p. 215 (Appendix A).

This Court recognizes a strong public policy in favor of arbitration, and has held that arbitration is a favored remedy for resolving disputes. The Telecommunications Act and FCC decisions acknowledge that parties may be bound by dispute resolution clauses in their interconnection agreements to seek relief in a particular fashion, such as arbitration. Consequently, a state commission may have no responsibility in the first instance to interpret and enforce provisions of approved interconnection agreements.

The Commission also relied on opinions of this Court that limit the Commission's authority to interpret and enforce contracts. Typically "the construction and enforcement of contracts is generally a matter which lies in the jurisdiction of the courts and not the public utilities commission." R. at p. 227 (Appendix B) (citing cases).

PageData has not demonstrated that the arbitration clause is procedurally or substantively unconscionable, or that it is unenforceable. Additionally, PageData has not alleged

a valid contractual defense to the underlying Interconnection Agreement that would allow it to avoid arbitration by litigating the validity of the entire Agreement itself. The unconscionability of a contract is a matter beyond the Commission's authority. *Idaho Code* § 28-2-302; R. at p. 227 (Appendix B).

The Commission's findings are supported by substantial and competent evidence in the Record. The Commission did not act contrary to law, nor abuse its discretion. The dismissal of the Complaint without prejudice was a regular pursuit of the Commission's authority. The Commission's Orders should be affirmed.

B. Standard of Review

The standards of review for Orders of the Public Utilities Commission are well settled. Under the Idaho Constitution, this Court has only limited jurisdiction to review decisions of the Commission. Idaho Const., Art. 5, § 9; *A.W. Brown Company v. Idaho Power Company*, 121 Idaho 812, 815, 828 P.2d 841, 844 (1992). "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 the state of Idaho." *Idaho Code* § 61-629.

With regard to findings of fact, if the Commission's findings are supported by substantial, competent evidence this Court must affirm those findings, *Industrial Customers of Idaho Power v. Idaho PUC*, 134 Idaho 285, 288, 1 P.3d 786, 789 (2000), even if the Court would have made a different choice had the matter been before it *de novo*. *Hulet v. Idaho PUC*, 138 Idaho 476, 478, 65 P.3d 498, 500 (2003). Substantial, competent evidence is defined as more than a mere scintilla, but something less than the weight of the evidence. *Industrial Customers*, 134 Idaho at 292-93, 1 P.3d at 793-94.

On questions of law, review is limited to the determination of whether the Commission has regularly pursued its authority. *A.W. Brown*, 121 Idaho at 815, 828 P.2d at 844; *Hulet*, 138 Idaho at 478, 65 P.3d at 500. The Commission's Order or ruling will not be set aside unless it has failed to follow the law or has abused its discretion. *Application of Boise Water Corp.*, 82 Idaho 81, 86, 349 P.2d 711, 713 (1960)(citing cases).

The Commission's Orders must contain the reasoning behind its conclusions to sufficiently allow the reviewing court to determine that the Commission did not act arbitrarily. *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996). "What is essential are sufficient findings to permit the reviewing court to determine that the IPUC has not acted arbitrarily." *Id.* at 624, 617 P.2d at 781 (citations omitted).

Contrary to PageData's assertions (Brief at p. 6-7), the Orders of the Commission are not subject to *de novo* review. PageData does not offer any authority for its position. *Id.* Indeed, this Court will not displace the Commission's choice between two fairly conflicting views, "even if the Court would have made a different choice had the matter been before it *de novo*." *Boise Water Company v. Idaho PUC*, 128 Idaho 534, 537, 916 P.2d 1259, 1262 (1996).

Matters may not be raised for the first time on appeal. *Eagle Water Company v. Idaho PUC*, 130 Idaho 314, 316-17, 940 P.2d 1133, 1135-36 (1997). "It is a well settled rule that in an appeal from the commission matters may not be raised for the first time on appeal and that where the objections were not raised in the petition for rehearing, they will not be considered by this court." *Id.* (quoting *Key Transp., Inc. v. Trans Magic Airlines Corp.*, 96 Idaho 110, 112-113, 524 P.2d 1338, 1340-41 (1974)).

C. The Commission Did Not Err When It Declined Jurisdiction and Dismissed PageData's Complaint Without Prejudice Because the Parties Were Required to Utilize the Arbitration Provisions of Their Interconnection Agreement.

In its Order No. 29687, the Commission found that the parties' Interconnection Agreement contains an arbitration clause. R. at p. 214 (Appendix A). PageData acknowledges that an arbitration provision is contained in Section 13.14 of the Agreement. R. at p. 97; PageData's Brief at p. 10. The Commission also noted that this Court recognizes a strong public policy in favor of arbitration, and has held that arbitration is a favored remedy for resolving disputes. *International Assoc. of Firefighters v. City of Boise*, 136 Idaho 162, 168, 30 P.3d 940, 946 (2001). R. at p. 215 (Appendix A).

Both the Idaho State Legislature as well as the U.S. Congress in their enactment of the Uniform Arbitration Act and the Federal Arbitration Act, respectively, have embraced arbitration as a favored remedy. Under both federal and state law, arbitration agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. *Idaho Code* § 7-901; 9 U.S.C. § 2. Here, Section 13.14 states that the "Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes." R. at p. 34, 211 (Appendix A)(emphasis added).

Additionally, the FCC has specifically recognized the validity of dispute resolution provisions contained in interconnection agreements entered into pursuant to the federal Telecommunications Act of 1996, 47 U.S.C. § 251 *et seq.* *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corp. Commission*, CC Docket No. 00-52, FCC 00-52, 15 F.C.C.R. 11,277 at n.14 (2000), 2000 WL 767701 (FCC). The FCC noted, "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.” *Id.* This is the situation in this case, as Section 13.14 of the parties’ Agreement contains a mandatory arbitration clause. R. at p. 34.

The plain language of the arbitration clause in the parties’ Interconnection Agreement requires them to arbitrate any dispute that cannot be resolved through negotiations. Section 13.14 states any dispute that “If any claim cannot be settled through negotiations, it shall be resolved by arbitration.” R. at p. 34, 211 (Appendix A)(emphasis added). When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004); *McKay v. Boise Project Board of Control*, 141 Idaho 463, 111 P.3d 148, 156 (2005). An unambiguous contract will be given its plain meaning. *Id.* A contract is ambiguous if the Court determines that it is “reasonably subject to conflicting interpretation.” *McKay*, 141 Idaho at 463, 111 P.3d at 156.

PageData asserts that the last sentence in Section 13.14 allows it to choose arbitration, the Commission, or the FCC in lieu of federal or state court, and that “Qwest is contractually bound to accept PageData’s selected method of relief without recourse.” PageData’s Brief at 13. The last sentence reads: “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 p. 34. However, the Commission found “the parties clearly contemplated utilizing arbitration when they cannot resolve their dispute informally,” and that the plain language, “shall arbitrate,” requires them to first utilize the arbitration process detailed in their agreement. R. at p. 214-15 (Appendix A). The Commission stated, “Although Section 13.14 does not limit the parties right to seek relief from this Commission, the arbitration process

