- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Petition of QWEST CORPORATION for Arbitration of an Interconnection Agreement with UNION TELEPHONE COMPANY d/b/a UNION CELLULAR under Section 252 of the Federal Telecommunications Act	)	DOCKET NO. 04-049-145 REPORT AND ORDER

ISSUED: April 3, 2008

SYNOPSIS

Having reviewed the evidence presented, as well as the arguments of the parties, the Commission adopts the proposed language of Qwest Corporation ("Qwest") with respect to the issues of asymmetrical rates, locations of points of interconnection, and non-local traffic. The Commission adopts the proposed language of Union Cellular ("Union") regarding type of interconnection and access tandem definition. Qwest and Union are directed to submit an interconnection agreement that includes the terms and conditions reflecting their mutual agreement and the Commission's resolution of the disputed issues discussed and resolved herein.

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By The Commission:

I. PROCEDURAL HISTORY

On September 30, 2004, Qwest Corporation ("Qwest") filed a Petition for Arbitration of an Interconnection Agreement ("Petition") seeking Public Service Commission of Utah ("Commission") arbitration pursuant to 47 U.S.C. § 151 *et seq*. of an interconnection agreement ("ICA") with Union Telephone Company, d/b/a Union Cellular ("Union").[1] The Petition stated Union had failed to respond to Qwest's request to negotiate, or raise any issue with respect to the terms and conditions of a wireless ICA governing the exchange of traffic with Union for its wireless customers. Qwest therefore requested the Commission order Union to execute the proposed wireless ICA attached to the Petition.

On October 19, 2004, the Division of Public Utilities ("Division") filed a memorandum recommending the Commission schedule a hearing to determine whether an ICA is needed.

On October 25, 2004, Union filed its Response of Union Telephone Company to the Petition for Arbitration of Qwest Corporation ("Response") in which Union argued alternatively that the Commission lacks jurisdiction over this matter and that the Commission should conduct any arbitration in concert with other states in which Qwest had filed petitions similar to that filed in this docket.

[1]This arbitration does not involve interconnection between Qwest and Union Telephone Company ("Union Telephone"), the incumbent local exchange carrier, but between Qwest and Union, a wireless service provider.

On November 4, 2004, Qwest filed a Motion to Strike Union's Response to Petition for Arbitration and Motion for Judgment on the Pleadings arguing this Commission should do as the Public Service Commission of Wyoming had done and, in the absence of any meaningful response by Union, approve Qwest's proposed wireless interconnection agreement.

Following a duly-noticed Scheduling Conference held before the Administrative Law Judge ("ALJ") on November 18, 2004, the Commission issued a procedural schedule to govern further proceedings in this docket. However, on November 23, 2004, Qwest and Union (hereinafter jointly referred to as the "Parties") filed a Joint Motion to Vacate Procedural Schedule, Waive Statutory Deadline and Set Procedural Conference ("Joint Motion") stating the Parties had begun negotiations over the terms and conditions of an ICA governing their relationship in Utah and requesting the Commission vacate the current procedural schedule to permit additional time to negotiate. The Parties stated their agreement to extend by 90 days, or until April 23, 2005, the 47 U.S.C. § 252 deadline for completion of these arbitration proceedings. In addition, the Parties requested the Commission set a status conference for 60 days from the date of filing of the Joint Motion for the purpose of reporting on the status of said negotiations.

In the course of the proceeding months, the Parties continued to negotiate, to extend the statutory deadline to permit further negotiation, and to request the Commission set various status conferences in this matter.

On July 12, 2005, Union filed a Motion to Consolidate Hearing ("Motion to Consolidate") requesting, in the interest of administrative efficiency and cost savings, that the

Commission consolidate its evidentiary hearing in this docket with a similar hearing anticipated to be held by the Colorado Public Utilities Commission ("Colorado Commission").

Also on July 12, 2005, following a duly-noticed scheduling conference, the Commission issued its Second Scheduling Order scheduling hearing to convene in this matter on December 6, 2005, and noting Parties' agreement to indefinitely extend as necessary the statutory deadline to permit the Commission the time reasonably required to issue its decision at the conclusion of scheduled proceedings in this matter.

On October 19, 2005, Union filed a Motion for Protective Order. The Commission thereafter issued a Protective Order on October 24, 2005.

On November 18, 2005, the Commission, in response to a joint request of the Parties, issued a Third Scheduling Order postponing to March 22, 2006, commencement of hearing in this matter to permit resolution of a similar, concurrent arbitration proceeding before the Colorado Commission.

On February 23, 2006, the Parties filed a Joint Motion to Continue Schedule stating neither party's witnesses would be available for hearing on March 22, 2006, and requesting the Commission vacate the current procedural schedule.

On March 1, 2006, the Commission issued its Order Vacating Schedule and Notice of Scheduling Conference. By Fourth Scheduling Order issued on March 13, 2006, the Commission set hearing to commence on June 28, 2006. At the request of the Parties, the Commission thereafter, on March 27, 2006, issued a Fifth Scheduling Order setting hearing for August 2, 2006.

On July 14, 2006, Qwest filed a Motion for Protective Order and Motion for Expedited Ruling ("Qwest Motion") seeking Commission order prohibiting Union from taking the deposition of a Qwest witness pursuant to a Notice of Deposition Duces Tecum served on Qwest by Union on July 5, 2006. On July 17, 2006, pursuant to deadline set by the ALJ, Union filed its Response to Motion for Protective Order stating Union and Qwest had agreed to cancel the subject deposition and to proceed informally. Therefore, on July 17, 2006, the Commission issued its Order Denying Motion for Protective Order and Motion for Expedited Ruling.

Also on July 14, 2006, the Parties filed a Joint Motion to Approve Revised Procedural Schedule seeking Commission approval of a revised procedural schedule, including rescheduling the evidentiary hearing to September 19, 2006. On July 31, 2006, the Commission issued a Notice of Postponed Hearing postponing hearing in this matter until further notice and noting the Parties would confer on a revised schedule and inform the ALJ when they had reached agreement on said schedule.

On October 26, 2006, Union filed a Motion for Telephonic Scheduling Conference indicating the Parties had not been able to agree to a further procedural schedule in this docket.

On November 1, 2006, Qwest filed a Motion to Compel and for Confirmation of Oral Representations Regarding Discovery Matters ("Qwest's Motion to Compel") seeking Commission order compelling Union, among other things, to respond to various Qwest data requests.

Following a duly-noticed scheduling conference on November 8, 2006, the Commission issued its Seventh Scheduling Order setting oral argument on Qwest's Motion to Compel for November 30, 2006, and evidentiary hearing on the arbitration to commence on January 24, 2007.

On November 17, 2006, Union filed its Response to Qwest Corporation's Motion to Compel requesting the Commission deny the Motion to Compel.

On November 21, 2006, Union filed its own Motion to Compel ("Union Motion to Compel") seeking an order compelling Qwest to fully and completely respond to several discovery requests propounded by Union.

On November 30, 2006, the Commission issued a Notice of Postponed Oral Argument on Motions to Compel indicating that on November 29, 2006, counsel for the Parties had informed the Commission that they had resolved some or all of their outstanding discovery disputes and had requested said postponement.

On December 29, 2006, Qwest filed a Motion for Modification of Schedule seeking commission order extending the deadline for Qwest to file supplemental surrebuttal testimony on the Union third revised cost study from January 5, 2007, to a date 21 days from the date on which Union provides complete answers and confirmations as agreed by the Parties in resolution of Qwest's Motion to Compel. On January 3, 2007, Union filed its Opposition and, also on that date, Qwest filed its Reply. On January 4, 2007, the Commission issued an Order Granting Qwest's Motion for Modification of Schedule vacating the procedural schedule

established by the Seventh Scheduling Order and noting a new procedural schedule would be set at such time as the Parties informed the ALJ that they were prepared to discuss said schedule.

On March 6, 2007, pursuant to information provided by the parties on March 5, 2006, the Commission issued its Eighth Scheduling Order setting hearing to commence in this docket on April 24, 2007.

On March 19, 2007, Union filed a Motion to Accept Post-Rebuttal Testimony of Henry D. Jacobsen ("Motion to Accept Post-Rebuttal Testimony") seeking leave to file testimony responsive to certain rebuttal testimony filed by Qwest on March 5, 2007.

On March 22, 2007, the Division filed a Response to the Motion to Accept Post-Rebuttal Testimony suggesting a new schedule be adopted to permit all parties the opportunity to file responsive testimony as desired.

On March 30, 2007, Qwest filed its Opposition to Union's Motion to Accept Post-Rebuttal Testimony of Henry D. Jacobsen or, in the Alternative, Motion to Vacate Schedule and Motion for Sanctions.

On April 10, 2007, the Commission issued an Order Granting Motion to Accept Post-Rebuttal Testimony and Granting Motion to Vacate Schedule, along with a Notice of Scheduling Conference, pursuant to which the schedule established by the Eighth Scheduling Order was vacated.

On September 11, 2007, following a duly-noticed scheduling conference, the Commission issued its Ninth Scheduling Order setting hearing in this matter to convene on November 6, 2007. Pursuant to said Scheduling Order, on September 28, 2007, the Parties filed

a Joint Disputed Issues List ("Issues List") detailing six issues remaining for resolution via arbitration.

Hearing convened on November 6, 2007, before the ALJ. Union was represented by Bruce S. Asay of Associated Legal Group, LLC, and Stephen F. Mecham of Callister, Nebeker & McCullough. Qwest was represented by Gregory B. Monson of Stoel Rives and Thomas Dethlefs, in-house counsel for Qwest. Patricia E. Schmid, Assistant Attorney General, appeared on behalf of the Division. Each party filed evidence and offered testimony on its behalf.[2]

On December 18, 2007, Qwest and Union filed post-hearing briefs. That same day the Division filed a Position Statement.

II. ISSUES DISCUSSION, FINDINGS, AND CONCLUSIONS

Subsequent to hearing, the Parties informed the ALJ they had agreed to language resolving their differences with respect to Issue 4–Transit Traffic.[3] Therefore, five issues remain

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[2]Although participants pre-filed and offered into evidence confidential testimony and exhibits, including Union's revised cost study, the evidentiary hearing remained open at all times. This Order discloses no confidential information; no confidential order has been prepared or issued in this docket.

[3]The Parties' dispute regarding Transit Traffic involved ICA sections 6.2.1.1, 6.2.4.3.1, and 6.2.4.3.3. By the time of hearing in this matter, Qwest and Union had agreed to language for sections 6.2.4.3.1 and 6.2.4.3.3, as reflected in the Issues List. On January 28, 2008, counsel for Qwest notified the ALJ via email that Parties have agreed to the following language for section 6.2.1.1:

> Reciprocal traffic exchange addresses the exchange of traffic between Union's network and Qwest's network. Reciprocal traffic exchange covered by this Agreement is for Wireless Interconnection for CMRS Carriers only in association with CMRS two way services over either one-way or two-way facilities. Other Interconnections are covered by a separate agreement or Tariff. Wireless two-way or one-way Interconnection is intended for Wireless to Wireline or Wireline to Wireless, but not Wireline to Wireline communications. For purposes of this Agreement, Fixed Wireless is considered a Wireline architecture. The Parties each shall be responsible for the traffic that originates on their own networks and

for Commission decision. Of these, Issue 6, the question of whether Union should be permitted to charge Qwest an asymmetrical rate for transport and termination of local calls placed by Qwest's customers to Union's wireless subscribers, represents the primary dispute between the Parties in this arbitration. Indeed, Issue 6 is the only issue on which the Division took a position in this arbitration. This Report and Order therefore addresses this issue first below, with the remaining issues thereafter addressed in numerical order.

Issue 6. Asymmetrical Rates

Section 251(b)(5) of the Telecommunications Act of 1996 (the "Act") imposes a duty upon all local exchange carriers ("LECs") "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[4] Reciprocal compensation simply means that "when a customer of one local exchange carrier calls the customer of a different local exchange carrier who is within the same local calling area, the first carrier pays the second carrier for completing, or 'terminating,' the call."[5] The Federal Communications Commission ("FCC") has defined the local calling area for wireless calls to be

> terminates on the other parties network. Where either Party interconnects and delivers traffic to the other from third parties, each Party shall bill such third parties the appropriate charges pursuant to its respective Tariffs or contractual offerings for such third party terminations. Should a Party wish to exchange traffic with the other Party through use of a third party transit provider, the Parties will negotiate the terms and conditions of that exchange and amend the Agreement accordingly. The party delivering transiting traffic will provide sufficient information to allow for the appropriate billing of the transiting traffic.

[4] 47 USC § 251(b)(5).

[5] *Pacific Bell v. Pac-West Telecom., Inc*., 325 F.3d 1114, 1119 (9th Cir. 2003).

the major trading area ("MTA").[6] Calls exchanged between Qwest and Union within the same MTA are subject to reciprocal compensation.[7] Calls between different MTAs are not.

In this docket, Union has requested that it be permitted to charge an asymmetric reciprocal compensation rate to Qwest for transport and termination of local traffic that is nearly 14 times the rate that Qwest would be permitted to charge to Union. When a Qwest customer calls a Union wireless subscriber located within the same MTA, Union proposes to charge Qwest $0.036533 per minute of use ("MOU"). However, when the call flow is reversed and a Union subscriber calls a Qwest customer, Qwest would only be entitled to charge Union $.002659 per MOU. Qwest challenges Union's claim to an asymmetrical rate, arguing instead that the Parties' local transport and termination compensation rates should be the same.

Qwest Position

Qwest begins by noting FCC Rule 51.711(a) establishes a presumption that the reciprocal compensation rates that two carriers may charge each other are to be symmetrical.[8] Under Rule 51.711(a)(1), the presumed rate is the rate set by the Commission for the incumbent LEC, or the larger of the LECs, in this case Qwest. Only under the limited circumstances prescribed in Rule 51.711(b) may a state commission authorize an asymmetrical rate:

> A state commission may establish asymmetrical rates for transport and termination of telecommunications traffic only if the carrier other

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[6] First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 1036 (rel. Aug. 1, 1996)("*Local Competition Order*")(subsequent history omitted).

[7] *Id.*

[8] 47 CFR § 51.711(a).

> than the incumbent LEC … proves to the state commission[,] on the basis of a cost study using the forward-looking economic cost based pricing methodology described in [47 CFR] §§ 51.505 through 51.511, that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC … exceed the costs incurred by the incumbent LEC … and, consequently, that such a higher rate is justified.[9]

Qwest also points out that Section 252(d)(2) of the Act states reciprocal compensation rates for transport and termination of calls shall be based on "a reasonable approximation of the additional costs of terminating such calls."[10] In its *Wireless Additional Cost Order*, dated September 3, 2003, the FCC provided certain clarifications as to how Rule 51.711(b) should be applied to cellular mobile radio service ("CMRS") providers.[11] Specifically, the FCC confirmed its statements in its *Intercarrier Compensation NPRM* that the determination of compensable wireless network components "should be based on whether the particular wireless network components are cost sensitive to increasing call traffic."[12] The FCC further stated that "the CMRS carrier bears the burden of justifying its additional costs, and demonstrating that its analysis complies with all applicable Commission rules."[13]

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[9] 47 CFR § 51.711(b).

[10] 47 USC § 252(d)(2)*; Local Competition Order* at ¶ 1054.

[11] Order, *In the Matter of Cost-Based Terminating Compensation for CMRS Providers; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd 18441, ¶ 1 (rel. Sep. 3, 2003), adopting *Letter from the Wireless Telecommunications Bureau and Common Carrier Bureau* dated May 9, 2001, 16 FCC Rcd 9597, p. 2 ("*Wireless Additional Cost Letter*").

[12] See *Wireless Additional Cost Order* at ¶ 4, *citing* Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, ¶ 104 (rel. Apr. 27, 2001)("*Intercarrier Compensation NPRM"*).

[13] *Wireless Additional Cost Order* at ¶ 9. See also *Intercarrier Compensation NPRM* at ¶ 104.

According to Qwest, the FCC has subsequently confirmed that the evidence of "cost sensitivity to increasing call traffic" should be both qualitative and quantitative. In its *Further Notice of Proposed Rulemaking on Intercarrier Compensation*, the FCC directed "parties taking the position that digital switching costs do vary with minutes of use" to "identify the specific portions of the switch for which costs increase when minutes of use increase."[14] It also directed those parties to "explain how costs decrease as minutes on the switch decrease" and "to provide objective evidence demonstrating that their switching costs have increased or decreased with MOU."[15] Qwest argues the FCC would only be seeking this type of detailed information in the "reciprocal compensation" section of the *FNPRM* if it deemed this information critical to its analysis of traffic sensitivity.

According to Qwest, a CMRS provider that fails to produce a cost study that complies with the FCC's rules and that meets its burden of proof is not entitled to try again over and over until it finally gets it right. The FCC has stated that "[i]n the absence of such a cost study justifying a departure from the presumption of symmetrical compensation, reciprocal compensation for the transport and termination of traffic shall be based on the incumbent local exchange carrier's cost studies."[16]

Qwest then argues Union has failed to meet its burden of proof to justify an asymmetric reciprocal compensation rate. According to Qwest, Union's cost study in this

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[14] Further Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, ¶ 68 (rel. Feb. 10, 2005) ("*FNPRM*").

[15] *Id.*

[16] *Local Competition Order* at ¶ 1089. *See also* 47 CFR § 51.711(b).

proceeding does not comply with the total element long run incremental cost ("TELRIC") requirements that costs associated with retail services be excluded and that prohibit use of embedded costs. Furthermore, Union did not demonstrate that the costs in its cost study were forward looking and based on the most efficient telecommunications technology currently available and the lowest cost network configuration. Finally, when network components are analyzed separately, the available evidence does not indicate that the costs of specific components increase with increasing call traffic.

Union Position

Union argues its cost study complies with TELRIC principles, and that the cost estimates its model produces support its proposed asymmetrical rate. Union notes the Act at Section 252(d)(2)(A)(ii) explains the requirement for compensation by providing that compensation is just and reasonable if the cost forms a reasonable approximation of the additional costs of terminating such calls. These additional costs were defined in the *Local Competition Order*, at ¶1057, wherein the FCC stated:

> We find that, once a call has been delivered to the incumbent LEC end office serving the called party, the "additional costs" to the LEC of terminating the call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching. The network elements involved with the termination of traffic include the end office switch and local loop.... for purposes of setting rates under Section 252(d)(2), only that portion of the forward looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an "additional cost" to be recovered through termination charges.

Union notes various state commissions, including this Commission,[17] have allowed asymmetrical rates. Union also argues that it is a small company providing service to a very large rural area and that its costs are higher than the incumbent LEC such that it is entitled to an asymmetrical rate.

Union explains its costs were developed assuming the most efficient technology currently available and the lowest cost network configuration given the existing location of Union's wireless switches and cell sites. For instance, Union is currently converting its wireless network from TDMA to GSM which is the most efficient network currently available. Given this conversion, and since Union has already purchased a new GSM switch, the actual cost of this switch was used in developing the asymmetric rate. In the same manner, as Union installed GSM cell sites as part of this new network, the costs for these GSM sites were used in developing the average cell site cost for the system. These costs are known to the company from actual purchases; the costs can not be more accurate than those based on actual purchases. Correspondingly, the transport component of the asymmetric rate was developed assuming that calls were transported via microwave transmission as it is the most efficient methodology for transmission over distance. Importantly, Union factored in costs using the most efficient technology currently available to produce an initial cost/rate per minute of use of $0.036626.

Union argues against Qwest's attempt to eliminate cell site investment and switch cost, totaling $38 million in investment, from the cost study. Union believes if cell site

[17] *Citing* Public Service Commission of Utah Docket No. 04-049-09.

investment is traffic sensitive, then inclusion of these costs is warranted. Union cites the FCC's *Wireless Additional Cost Order* in support of this assertion:

> [B]ased on the language of Section 252(d)(2)(A) of the Communications Act, CMRS carriers are entitled to the opportunity to demonstrate that their termination costs exceed those of ILECs.
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> [T]he "equivalent facility" language of Sections 51.701(c) and (d) of the Commission's rules does not require that wireless network components be reviewed on the basis of their relationship to wireline network components; nor does it bar a CMRS carrier from receiving compensation for the additional costs that it incurs in terminating traffic on its network if those costs exceed the ILEC's costs. Rather, the determination of compensable wireless network components should be based on whether the particular wireless network components are cost sensitive to increasing call traffic.
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> [I]f a CMRS carrier can demonstrate that the costs associated with spectrum, cell sites, backhaul links, base station controllers and mobile switching centers vary, to some degree, with the level of traffic that is carried on the wireless network, a CMRS carrier can submit a cost study to justify its claim to asymmetric reciprocal compensation that includes additional traffic sensitive costs associated with those network elements.[18]

The FCC went on to state

> We reaffirm that the term "equivalent facility" was not intended to preclude the recovery by CMRS carriers of the "additional costs" of wireless components that might be regarded as functionally equivalent to wireline elements whose costs are non-recoverable, such as a wireline LEC's local loop. Rather, the language "switch or equivalent facility" was used to "contemplate that a carrier may employ a switching mechanism other than a traditional LEC switch to terminate calls," and more generally to ensure that the costs of non-LEC facilities would be included in transport and termination rates even if such facilities did not precisely track the network facilities architecture of a LEC. Thus, while equivalence does, in part, define what facilities are involved in the function of

[18] *Wireless Additional Cost Order* at ¶4.

> "termination," it is simply not relevant to determining which of those terminating facilities imposes costs that can be recovered through reciprocal compensation charges.[19]

Thus, Union believes the FCC has already considered and rejected the arguments espoused by Qwest that cell site costs are not "additional costs" since cell sites are equivalent to incumbent LEC ("ILEC") loop facilities and the FCC has ruled that loop costs are not "additional costs." Furthermore, Union argues Qwest is incorrect in relying on FCC rules and orders to claim that cell site costs are not traffic sensitive, noting the FCC left such a determination to the appropriate state commissions:

> [w]e make no determination here as to whether any particular element of a CMRS network is actually traffic-sensitive. Rather, as the Joint Letter noted, a CMRS carrier that believes it is entitled to asymmetrical compensation must still submit a cost study to the appropriate State commission justifying its claim to asymmetrical compensation for additional traffic-sensitive costs associated with its network elements.[20]

Finally, Union points out its own expert's testimony that the network associated with a wireless system is totally different from the local loop of an ILEC as the wireless network which includes base station controllers and base transceiver stations functions in many respects like ILEC switches.

Union argues all of the cell site facilities included in its cost study are traffic sensitive. Union points to its testimony and data request responses showing the costs for the facilities included in its study vary "to some degree" with the level of traffic that is carried on its

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[19] *Id*. at ¶11.

[20] *Id*. at ¶15.

network. Responding to Qwest's claim that portions of Union's network are underutilized, Union points out that if traffic increases beyond a certain threshold the facilities will need to be upgraded or replaced. While Union agrees the FCC has required CMRS carriers to demonstrate that each component included in an asymmetric cost study is traffic sensitive, the FCC has not required the study itself to contain that analysis. Qwest, Union argues, is simply wrong in its position that the FCC's asymmetric compensation decision imposed a higher standard on CMRS carriers than it imposed on wireline carriers. Thus, Union believes it has appropriately included those costs in its cost study in compliance with the FCC's asymmetric compensation requirements.

Union argues its costs are not embedded costs but instead reflect current actual prices Union pays for a forward-looking efficient network consistent with TELRIC rules. Union operates in a competitive wireless industry and has every incentive to operate in an efficient manner. Accordingly, the costs that Union incurs are the costs of an efficient, facilities-based entrant as envisioned by the FCC at the time it established its TELRIC rules. Union's cost study is completely compliant with the TELRIC pricing methodology because it uses the costs Union would incur today if it built a network that could provide all of the services its current network provides, to meet reasonably foreseeable demand, using the least-cost, most efficient technology currently available. Union developed its cost study using the current prices it paid for recently completed GSM cell sites as a basis for the projection of building and conversion costs for additional GSM cell sites. Union has specifically complied with each of the primary

requirements in the TELRIC rules – 1) current costs; 2) reasonably foreseeable demand; and 3) least-cost, most efficient technology currently available.

According to Union, neither Qwest nor the Division has presented any evidence to show that Union's network is inefficiently designed or that the technology used in the network is inefficient or outdated. Indeed, the Division concedes Union's switch is a modern efficient switch technology that is forward-looking. Qwest and the Division have instead taken the position that the costs in Union's model are embedded costs simply because Union has recorded those costs in its books of accounts. But that is clearly not the definition of embedded costs that the FCC had in mind when it established the TELRIC rules. At the time it established the TELRIC rules, the FCC was addressing the proper pricing mechanism for ILECs whose markets were just recently opened up as a result of the passage of the Act. The common perception at that time among regulators and competitive carriers was that ILECs had been operating for years without competition and that their booked costs were probably higher than what a competitive carrier would incur given that the ILECs had little competitive incentive to be efficient and, according to this logic, had received a guaranteed return on their investments. As a result, the FCC established TELRIC pricing rules so that competitive LECs ("CLECs") would not have to pay a higher rate for unbundled network elements and service than what an efficient facilities-based carrier would incur. The rules were designed to make the ILEC operate efficiently and allow the CLEC to make decisions on how to deploy services based on such theoretical efficiency considerations. Moreover, the types of embedded costs that the ILECs were seeking to recover were costs that they felt they incurred as a result of regulatory requirements in place

prior to the Act and that they believed they were precluded from recovering with the change in regulatory requirements resulting from the Act.

Union's costs can not be considered inefficient embedded costs because: 1) Union does not need a separate regulatory incentive to operate efficiently since the market in which it operates is vastly more competitive than the market in which ILECs operated in 1996; 2) Union has not had a set regulated return on its wireless networks like the ILECs did on their networks prior to the passage of the Act; and 3) Union is not seeking recovery of costs under some previous regulatory regime as were the ILECs in 1996. Simply stated, the costs that Union incurred, slightly before and early in this proceeding, do not include the types of inefficiencies that may have been present in the ILECs' booked costs in 1996. Some of the costs are simply a few years old because this proceeding is a few years old.

In short, Qwest's and the Division's positions on embedded costs are not consistent with the FCC's rulings on embedded costs, nor are their positions–i.e., that the costs included in Union's study are too high relative to what Union would pay today, or that the technology and network design in Union's study is inefficient or non-forward-looking–supported by the evidence. Accordingly, the Commission should reject any suggestion that Union's model contains embedded costs. Qwest and the Division reject Union's use of its costs to establish the most efficient forward-looking costs for its network. The Division takes the position that any cost already in the network, no matter how recently incurred, is an embedded cost. However, according to Union, agencies and courts have recognized that Union's method regarding embedded costs is appropriate. For instance, the Seventh Circuit has held that a TELRIC study

does not demand that every ingredient be hypothetical. In fact, how could one know the long-run costs of the most efficient technology without understanding the costs of today's most efficient producers? *AT&T Communications of Illinois, Inc. v. Illinois Bell Telephone Co.* 349 F.3d 402, 411 (C.A.7, 2003). The Eighth Circuit has likewise stated that TELRIC rates are calculated according to what it would cost today to build and operate an efficient network that can provide the same services as the ILEC's existing network. *Qwest Corporation, v. Leroy Koppendrayer*, 436 F.3d 859 (CA 8, 2006). In other words, actual costs can play a role in establishing appropriate rates. *Re Verizon New England Inc., dba Verizon Vermont*, 2005 WL 2778033 (Vt.P.S.B., Doc. No. 6882) p. 6.

Union argues its cost study should not be held to a higher standard than the studies used in the development of Qwest's reciprocal compensation rate and that non-traffic sensitive costs should be included in the development of the traffic sensitive rate. Union notes the FCC has required that CMRS asymmetric compensation studies comply with the same TELRIC principles with which incumbent LECs, such as Qwest, have been required to comply. Thus, the Commission should find that certain primary assumptions and inputs that the Commission found to be appropriate for the development of Qwest's reciprocal compensation rate are also appropriate in Union's asymmetric compensation study. The Division has taken the position that costs for towers, buildings, power equipment, cables, and fiber/conduit should be excluded from Union's cost study.[21] However, these facilities are support assets to traffic-

[21] Union urges the Commission to give no weight to this testimony on grounds that it is based on hearsay evidence. Tr. pgs. 295-296, 332-333.

sensitive facilities and the HAI 5.2a model[22] includes non-traffic-sensitive support assets in the development of per-minute transport and termination rates. For example, HAI 5.2a includes land, buildings, and power investment in the development of per-minute switching rates for reciprocal compensation. Each of these facilities, in isolation, could not be considered traffic-sensitive, but they are included in the per-minute switching rates because they support the traffic-sensitive switch. Similarly, HAI 5.2a includes pole, conduit, and manhole investment in the development of per-minute transport rates for reciprocal compensation. Again, each of these facilities, in isolation, could not be considered traffic-sensitive, but they are included in the per-minute transport rates because they support the traffic-sensitive transport equipment. Union's switch and cell sites perform comparable switching and transport functionality to the switches and transport facilities in Qwest's network. Since Qwest's reciprocal compensation rates, which are based partially on HAI results, contain those kinds of costs, Union's asymmetric compensation study should as well.

Union protests Qwest's attempt to explain why those kinds of costs were appropriate to include in Qwest's study but not in Union's asymmetric study. For example, Qwest claimed that cell towers should not be included in the cost study because it is a direct cost, yet Qwest admits that conduit is a direct cost and is included Qwest's reciprocal compensation rate. Qwest also admits that poles are a direct cost while also stating that it is included in Qwest's reciprocal compensation rate. Since neither Qwest nor the Division has provided any

[22]In Docket No. 01-049-85, the Commission adopted the HAI model to develop TELRIC rates and adopted Qwest's current terminating and transport rates which are the basis of the Parties' current reciprocal compensation arrangement.

evidence or policy rationale to justify a different treatment of non-traffic sensitive support assets (or non-traffic sensitive direct costs, as Qwest defines them), the Commission should allow those costs to be included in Union's asymmetric compensation study.

Union concludes by arguing that if the Commission were to determine that a specific assumption made within the study is inappropriate, it should allow Union to correct the problem and submit a revised study rather than simply rejecting the study in its entirety. Union believes any changes that need to be made in Union's asymmetric rates can be made within the existing cost study structure, whether they be explicit input changes or changes in the formulas used within the model. Union disagrees with Qwest's and the Division's position that the record does not contain the data necessary to permit the Commission to make any desired changes. However, even if certain data is missing from the record, the Commission could issue a decision noting what needs to be changed and allow Union to file a compliance study.

Division Position

The Division puts the question before the Commission as follows: Has Union met its burden of proof to demonstrate that Qwest should be required to pay asymmetric transport and termination rates to Union for carrying Qwest's originating local traffic that is terminated on Union's local cellular network? The Division concludes Union has failed to show that the cost model developed by Union is transparent and verifiable, that the cost model is TELRIC compliant, and that the additional costs to transport and terminate Qwest traffic are traffic sensitive. Therefore, the Division concludes Union has failed to demonstrate through its cost

model that a deviation from reciprocal compensation is justified and recommends the ICA contain reciprocal compensation terms rather than asymmetric pricing terms.

The Division notes this Commission observed the following in its 2002 decision in the Qwest TELRIC cost docket, Docket No. 01-049-85:

> We view the TELRIC methodology as providing a proxy cost estimate for elements of a forward-looking monopoly provider's theoretical lease-cost, most-efficient, forward-looking network designed to provide for current demand. The model is not a representation, nor a blueprint, of an actual network. Rather, it is an estimate of what minimum costs any single efficient forward-looking provider would incur to serve current demand. A TELRIC model is not a substitute for an engineer. It is an estimated cost-proxy model. The question is whether the cost estimate is sufficient to compensate a least-cost, most-efficient, forward-looking provider of network elements.
>
> TELRIC asks what is the lowest cost estimate for a declining cost provider to self-provision a given element, assuming optimal size and design. That amount will be the minimum forward-looking, least-cost, most-efficient long-run average cost. Then the TELRIC methodology requires that the Commission set the price for the element at that level in recognition that if competitive markets were present, prices in the marketplace would be driven to this amount.

The Division further points out that the Public Utilities Commission of Colorado ("Colorado Commission") recently rejected Union's request for asymmetric pricing because it had concluded that Union failed to meet its burden of proof with respect to the asymmetric rates. Specifically, the Colorado Commission determined Union's cost study did not distinguish between voice and data services; assumed, without analysis, that Union's entire wireless network is traffic-sensitive; and neither the cost study nor Union had provided the critical detail and analysis required by law.

The Division believes, despite Union's assertion that its Utah cost study provides more data and detail than the cost study presented in Colorado, the Utah cost study is still not TELRIC compliant, still assumes Union's entire network is traffic sensitive, still does not separate the costs of data and voice traffic, and still does not provide enough detail to break out the system that is shared with other services.

According to the Division, the most significant shortcoming of Union's proposed model is its lack of granularity with regard to the break down of costs into component parts. For the model to be transparent and verifiable, it must be arranged in such a way that the Commission and other interested parties can look at each category of incremental investment to determine if the hypothetical costs are appropriately calculated with algorithms that are agreed upon by all parties concerned. Many of the flaws in Union's model cannot be corrected by adjusting input parameters and the only way to correct Union's result would be to restructure the model and develop a new record.

The economic algorithms contained in Union's proposed model can be reviewed, but the way the model uses embedded costs does not calculate an efficient, forward looking hypothetical network. The model has been developed in such a way that all cell site equipment is lumped together so that a separate analysis or separation by traffic sensitive component is not possible. Union's assumption that the whole network is traffic sensitive is still embedded in the model. Even with the introduction of two user adjustable traffic sensitive input factors for switch and cell sites, the proposed model still cannot separate traffic sensitive investments from those that are non-traffic sensitive. Without knowledge of what investment is traffic sensitive,

how, asks the Division, can one determine what percentage to apply in the user adjustable inputs for traffic sensitivity?

The switch components are presented the same way; they are not broken down by component but are presented instead as one lump sum. The appropriate way to model the network is to break down the costs by component so that non-traffic sensitive equipment can be separated from traffic sensitive equipment. Furthermore, the model applies present worth factors inappropriately to minutes of use. Minutes do not decrease in value over time. In Union's proposed model, one minute now would shrink to fifteen seconds over 14.5 years. The time value of money only applies to money, not to minutes of use. Finally, Union's proposed model also fails to separate equipment and facilities by economic life. A correct model would handle the network components separately in computing depreciation before combining and applying present worth factors.

Likewise, Union's model is non-compliant with TELRIC principles since it uses embedded costs that exist on its books of accounts to estimate pricing for all the components of the cellular network. The use of embedded costs is a direct violation of TELRIC principles[23] and the use of embedded costs was confirmed in Union's testimony at hearing. Union believes the FCC in its *Local Competition Order* does not interpret embedded costs to be current expenditures that it defines as forward-looking. The Division grants Union's point that the GSM switch is a forward-looking technology, but it is still embedded and on Union's books of accounts. The price of the embedded switch is not current since it was purchased in 2003.

[23] 47 CFR § 51.505 (d)(1).

Similarly, the 68 embedded cell sites used to determine the cost of all cell sites in the study were built between 2003 and 2005. In a true TELRIC hypothetical model, other than central offices,[24] the number and placement of facilities are not pre-determined, thus all of the proposed locations and costs are subject to change.

Furthermore, Union's proposed model does not present demand as traditionally required by TELRIC principles in land line studies. It uses what appears to be current demand and two years growth to determine network costs rather than using current demand as prescribed by the Commission[25] with a percentage growth determined through the use of a fill factor as required in TELRIC pricing to achieve reasonably foreseeable demand.[26]

In addition, Union did not account for structure and facilities sharing with other companies in its pricing. Union shares structure space and facilities at its cell sites with 28 other companies.[27] Although Union claims it receives relatively little revenue from other carriers for access to Union's network, it is the prorated cost of tower or equipment space that would otherwise be available to Union that is relevant in a TELRIC cost study. This cost should be eliminated to modify the study costs.

Union also has not shown that the switch and transport costs contained in its proposed cost model do not include equipment that is also specifically used for the provisioning of other tariff and retail offerings that are unrelated to interconnection. Revenues from data

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[24] 47 CFR § 51.505 (b)(1).
[25] Report and Order, *In the Matter of the Determination of the Cost of the Unbundled Loop of Qwest Corporation*, Docket No. 01-049-85, Utah PSC (May 5, 2003), p. 3.
[26] See, *Local Competition Order*.
[27] Post Surrebuttal Testimony of Jason P. Hendricks, October 26, 2007, Exhibit 18.

services that Union provides in its wireless network can be significant but are not relevant in the cost study. It is the cost of the equipment required to provide these services that should be eliminated from the cost study. Union has not allocated costs for equipment used for data services and removed them from the cost study. This must be done for the cost study to be considered TELRIC compliant.

Union has also modeled its proposed transport rate separately from its proposed termination rates. The overlying problem with the proposed transport rate is that it appears Union has modeled its transport microwave radio costs based on what seems to be the retail prices of equivalent T-1s, as opposed to using local or tandem switch cost data, signaling data or network data. Union argues that the cost per T-1 is conservative, but that is not the point. Similar to termination rates, TELRIC transport rates must be developed using a hypothetical network cost study taking into account what an efficient network configuration would look like utilizing the most efficient telecommunications technology currently available[28] rather than applying embedded T-1 costs.

All of the above TELRIC issues are covered in the Code of Federal Regulations and Union has admitted in part to its deviation from those regulations, attempting to excuse said deviation by stating Union receives relatively very little revenue from sharing, by considering data related costs minimal or by considering the preferred approach to developing transport costs time-consuming and costly to develop. Union's statement ignores the fact that embedded costs are defined as being on a company's books of accounts, a direct violation of TELRIC rules.

[28] 47 CFR 51.505 (b)(1).

Based on its investigation, the Division also believes that Union inappropriately included costs for equipment and facilities that are clearly non-traffic sensitive. Specifically, Union included costs for towers and antennas, buildings and power equipment and processor components in the GSM switch, base station controllers and data base registers that are non-traffic sensitive.

Union claims its GSM cellular switch and all of its cell sites are traffic sensitive so Union fails to break down its switching or cell site equipment into traffic sensitive and non-traffic sensitive components. The Division analyzed the components of a cellular network to determine what components are sensitive to additional traffic. From its detailed analysis, the Division concludes that cellular radios, backhaul termination equipment, transport termination equipment and switch ports are traffic sensitive. The Division conversely determined that switch processors, cell towers, radio antennas and cables, land and buildings at the cell sites and the power equipment including emergency back up generators are all non-traffic sensitive components.

Union argues that some of the non-traffic sensitive components, such as cell towers, land and building space, and power, are support assets that should be considered as traffic sensitive as the components they support. Union states that the HAI 5.2a model includes land, buildings, and power investment in the development of per-minute switching rates for reciprocal compensation. In verifying Union's claim that non-traffic sensitive support assets are used to determine traffic sensitive interconnection rates the Division looked at a current version of the HAI 5.2a that is prescribed by the Commission. During a sensitivity analysis of this

model, the Division removed the land and building investments from the End Office Switching tab. When the spreadsheet was recalculated it showed no effect on the local interconnection rates found in the Cost detail tab. The Division is aware that the HAI 5.2a model does use land and building investments to determine unbundled network element costs and it may be a factor in the minutes of use interconnection rates. However, it could not be demonstrated in the development of interconnection rates with the current HAI 5.2a model used by the Commission. The Division, therefore, stands by its conclusion that Union's proposed model does not meet the traffic sensitive additional costs requirement. Even if one accepts that support facilities for the traffic sensitive portion of the network can be included, it does not follow that 100% of the network becomes traffic sensitive. For these several reasons, the Division recommends the ICA contain reciprocal compensation terms rather than the asymmetric pricing sought by Union.

Decision

While telecommunications companies must make reciprocal compensation arrangements for the transport and termination of local calls, asymmetrical rates are allowed as an exception to the general rule. Thus, 47 CFR § 51.711 requires that reciprocal compensation be symmetrical, unless the state commission establishes asymmetrical rates. Union can establish asymmetrical rates if it proves its traffic sensitive costs exceed the costs of the incumbent carrier Qwest. To do so, Union must prove "on the basis of a cost study using the [TELRIC] pricing methodology . . . that the forward looking costs for a network efficiently configured and operated

by [Union] . . . exceed the costs incurred by [Qwest] . . . and, consequently, that such a higher rate is justified."[29]

Having reviewed the cost study, supporting evidence, and positions of the parties, the ALJ concludes Union has failed to meet its burden. The ALJ concurs with the Division and finds Union's cost study is not TELRIC compliant because it assumes Union's entire network is traffic sensitive, does not separate the costs of data and voice traffic, does not allow for network infrastructure optimization, and does not provide enough detail to break out the system that is shared with other services. For these reasons, the ALJ concludes Union has failed to meet its burden of proof to overcome the presumption in favor of symmetric reciprocal rates and to justify its requested asymmetric rate. The ALJ therefore recommends the Commission adopt Qwest's position on this issue.

Issue 1. Type of Interconnection

This issue concerns the use of the term "Type2" throughout the proposed ICA. Qwest argues use of this term is appropriate because the parties seek a direct interconnection through an industry standard Type 2 interconnection.[30] Union, on the other hand, argues the current Union-Qwest interconnection is a tandem-to-tandem connection, not a typical Type 2 interconnection such that the Parties' ICA should not use the term "Type 2". This issue necessarily impacts numerous sections of the proposed ICA, as detailed in the Issues List.

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[29] 47 CFR § 51.711(b).

[30] Qwest describes a Type 2 (or "Type II") connection as the industry standard interconnection between wireline and wireless carriers who own their own switches and are assigned numbers by the national numbering administrator. Qwest argues it and a wireless service provider ("WSP") must create trunking between the WSP's Mobile Switching Center ("MSC") and Qwest's switching office to enable Qwest to identify, route and rate the traffic the WSP delivers to Qwest. A Type 2 wireless interconnection is used to create this direct trunking. Qwest testified it has eighteen Type 2 ICAs in place with wireless carriers in Utah.

Qwest Position

Qwest notes the FCC's Rule 20.11(e) expressly provides that "[a]n incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in Section 252"[31] such that Qwest is entitled to request interconnection with Union. Qwest argues a Type 2 interconnection between Qwest and Union's wireless switch is necessary so that Qwest can properly rate and bill wireless traffic that Union delivers to Qwest. Qwest also notes it has established provisioning, recording and billing processes specifically associated with Type 2 trunks in order to properly rate mobile-to-land traffic. If Union combines its wireless traffic with Union Telephone's wireline traffic, Qwest will not be able to distinguish the wireless traffic from the wireline traffic and rate and bill the wireless traffic correctly. In addition, Qwest will be unable to prepare transit records for third parties who terminate Union's traffic that transits Qwest's network.

Qwest argues Union has offered no alternative to direct trunking that would allow Qwest to prepare its own bills and to provide records for third party terminating carriers. In particular, Union has not offered to provide these records itself so that Qwest and other carriers would have the information they need to bill Union appropriately for Union's wireless traffic. Thus, argues Qwest, the Commission should require Union to establish Type 2 interconnection trunks from its wireless switch to Qwest tandems and/or end offices. Qwest also argues that by requiring Union to establish Type 2 interconnection trunks, the Commission will not be forcing

[31] 47 CFR § 20.11(e).

Union or Union Telephone to make any significant investments to reconfigure their networks since Union has interim Type 2 interconnection trunks in place.

Finally, Qwest acknowledges that in the Colorado arbitration, the Colorado Commission did not require Union to establish Type 2 interconnection trunks to separate its wireless traffic from its wireline traffic but argues the Colorado Commission based its decision on three assumptions that are not present in the Utah arbitration. First, the Colorado Commission assumed that Union would be supplying records that Qwest and other carriers could use to bill for wireless traffic delivered by Union. In this case, Union has not offered to produce such records and has not proposed an alternative to Type 2 interconnection trunks that will allow Qwest to separate Union's wireless traffic from Union Telephone's wireline traffic. Second, the Colorado Commission ordered Union to use Feature Group D ("FGD") trunks instead of Type 2 interconnection trunks based on the incorrect assumption that FGD trunks would address Qwest's billing concern.[32] In this case, Union presented no evidence demonstrating that FGD trunks will work as an alternative to Type 2 interconnection trunks to address Qwest's billing concern. Finally, the Colorado Commission may have assumed that it would be costly for Union to establish Type 2 interconnection trunks. According to Qwest, the evidence before the Commission in this case demonstrates such an assumption is not accurate.

Thus, Qwest argues, to ensure that Qwest can properly rate and bill Union's wireless traffic, the Commission should adopt Qwest's proposed language for Issue No. 1.

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[32] Qwest notes that had Union proposed FGD trunks for intraMTA wireless traffic, Qwest would have presented evidence that the billing systems associated with FGD trunks cannot separate wireless traffic from wireline traffic or appropriately bill intraMTA wireless traffic.

Specifically, references to "Type II" should not be removed from the ICA. The Commission should not adopt Union's proposed Section 6.2.4.1.1 which would require Qwest to establish one-way trunk groups from its network to Union Telephone's "access tandem or end-office switch(es)" rather than to Union's wireless switch. Finally, the Commission should not adopt Union's proposed Section 6.2.4.2.1 requiring non-local traffic be routed over Union Telephone's tandem FGD facilities.

Union Position

Union argues that Qwest's proposed architecture, whereby the Type 2 interconnection would provide direct trunking between Union's MSC and Qwest's access tandems/local tandems/end offices in each LATA where Union originates or terminates traffic, would increase revenues for Qwest, and produce correspondingly higher costs for Union, by requiring additional trunking while providing no benefit to Union. Union argues that in any calling scenario its wireline tandem is an integral part of the transmission path in Union's architecture such that the interconnection between Qwest and Union is most properly viewed as a tandem-to-tandem connection.

The Act at Section 251 requires all telecommunications carriers, including both CMRS and LECs, "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers". In like manner, FCC Rule 20.11(a) provides that "a local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after their request, unless such interconnection is not technically feasible or economically reasonable." According to Union,

Qwest's demand that Union establish a direct trunk between each of its MSCs and each of Qwest's tandems violates this provision and is contrary to Union's request. Union further notes that because it operates a GSM network and a TDMA network in addition to its wireline tandem a direct connection to any of Qwest's tandems would require a direct connection to all three of Union's networks through either the TDMA MSC, GSM MSC, or the Union tandem for wireline customers. In effect, Qwest's proposal would require three times the trunking as required by Union's architecture.

Decision

The FCC defines the three types of LEC-to-wireless carrier interconnection as follows:

> Type 1 service involves interconnection to a telephone company end office similar to that provided by a local exchange carrier to a private branch exchange (PBX). Type 1 interconnection involves an end office connection that combines features of line-side and trunk-side connections and uses trunk-side signaling protocols. Type 1 interconnections enable the CMRS provider to access any working telephone number, including all NXX codes within the LATA of the LEC providing the interconnection. The Type 1 connection also permits access to Directory Assistance, N11 codes, and service area codes. Type 2A connections give the CMRS carrier the ability to connect to the Public Switched Network in the same manner as any wireline carrier. The connections, which may be either solely to access tandems or to a combination of tandems and other central offices, are true trunk-side connections using trunk-side signaling protocols. Type 2A connections do not permit access to LEC operator services or N11 codes. Type 2B connections are trunk-side connections to an end office that operate in the same manner as high-usage trunks. Under Type 2B interconnection, the CMRS provider's primary traffic route is the Type 2B connection, with any overflow traffic routed through a Type 2A connection. Type 2B interconnection permits access to valid NXX codes, but cannot access operator services or N11 codes.

In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Serv ice, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, RM-8012, FCC 94-145, 9 FCC Rcd. 5408, 1994 FCC LEXIS 3181 (rel. July 1, 1994), at ¶ 105. The FCC has stated the "system design is up to the cellular carrier, which may choose to design for either form of interconnection."[33] Neither party points to any FCC pronouncement or other authority, nor is the Commission aware of any such authority, requiring the Parties to interconnect in a particular manner or requiring the Parties' ICA to specify a particular form of interconnection.

Given the FCC's pronouncements and the Parties' arguments, the ALJ finds and concludes the ICA need not identify the type of interconnection as Type 1 or Type 2. However, the ALJ shares Qwest's concern that any form of interconnection must provide the information necessary to allow Qwest to properly rate and bill wireless traffic that Union delivers to Qwest so that Qwest can prepare its own bills and provide records for third party terminating carriers. Qwest notes Union has not offered in this proceeding to provide such information; implicit in this statement is the assumption that Union is able to provide such information if required to do so. Therefore, while the ALJ recommends the Commission adopt Union's proposed language on this Issue, Union must, as a consequence, provide Qwest the information it requires to properly rate and bill the wireless traffic Union delivers to Qwest. If Union is not able to provide this information under its current network configuration, it must change said configuration so that it

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[33] *In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order, FCC 86-85, 1986 FCC LEXIS 3878, 59 Rad. Reg. 2d (P&F) 1275 (rel. March 5, 1986) at Appendix B ¶ 3.

is able to gather and provide the information to Qwest, or so that Qwest is able to gather said information for itself at minimal cost.

Issue 2. Access Tandem Definition

> The Parties' proposed ICA Section 4.3 provides:
>
> "Access Tandem Switch" is a switch used to connect End Office Switches to Interexchange Carrier switches. Qwest's Access Tandem Switches are also used to connect and switch traffice between and among Central Office Switches within the same LATA and may be used for the exchange of Local Traffic. **Union's access tandem switches are also used to connect and switch traffic between and among central office switches and may be used for the exchange of local traffic.**[34]

Qwest Position

Qwest argues Union's proposed inclusion of Union Telephone's incumbent LEC wireline access tandem within the Access Tandem Switch definition in Section 4.3 should be rejected because it serves no purpose in the ICA. Qwest's incumbent LEC tandems are referenced in the agreement only because Union has a right to interconnect at any technically feasible point within Qwest's network, including at Qwest's access tandems. Thus, Qwest's tandems must be referenced because they are possible points of interconnection. The same is not true of Union Telephone's incumbent LEC wireline tandem. The Parties will not interconnect at Union Telephone's incumbent LEC wireline tandem because it is not a point within Qwest's network in Utah and Qwest is not seeking to interconnect with Union Telephone, the incumbent LEC. Qwest is seeking interconnection with Union, the CMRS provider.

[34]Throughout this Report and Order, Qwest's proposed ICA language is presented in plain text. Union's proposed additions are presented in bold, underlined text while its proposed deletion of Qwest language is indicated by bold, strikethrough font.

In addition, according to Qwest, Union has not established that its tandem serves a comparable geographic area as Qwest's Utah tandems. Under the FCC's rules, Union is not entitled to have its switch treated as a tandem absent such proof.[35]

Union Position

Union argues the Union Telephone tandem should be recognized in the ICA because it is used to aggregate calls just as Qwest's tandem is used. Rather than using a generic definition of access tandem as it has in other wireless interconnection agreements, Qwest demands that the "access tandem" be defined only as a Qwest switch. The Qwest proposal ignores Union Telephone's access tandem which performs an identical function.

Union further argues that if Qwest's proposed language is to be used, then an addition needs to be made which recognizes Union Telephone's tandem. Union's proposed language is nothing more than a clear statement of fact supported by uncontroverted testimony that Qwest's tandem connects directly to Union Telephone's tandem which performs the concentration and distribution functions for originating and terminating traffic between and among central office switches and, in fact, that it may be used for the exchange of local traffic. Union's proposed definition of "access tandem switch" merely recognizes that all Union traffic is routed through Union Telephone's tandem. Union believes the ICA should recognize this routing.

Decision

Union and Qwest currently interconnect via Union Telephone's wireline access

[35] 47 CFR § 51.711(a)(3).

tandem. The ALJ's recommended decision above with respect to Issue 1 recognized Union's right to elect to continue this form of interconnection under the ICA so long as Union is able to provide Qwest the billing information Qwest requires for Union's wireless calls delivered to Qwest. The ALJ therefore concludes it is reasonable to adopt Union's proposed language recognizing Union Telephone's tandem, except that the language must be changed to make explicit the fact that it is a wireline access tandem of the incumbent LEC Union Telephone.

Issue 3. Locations of the Point of Interconnection ("POI")

This issue concerns the location of the point of interconnection ("POI") between Qwest and Union. The Parties' proposed ICA Section 4.68 provides:

> "Point of Interface", "Point of Interconnection" or "POI" is a physical demarcation between the networks of two LECs (including a LEC and Union). The POI is that point where the exchange of traffic takes place. This point establishes the technical interface, the test point(s), and the point(s) for operational division of responsibility. The POI must be established at any technically feasible location selected by Union in Qwest territory in the LATA. **The Parties may agree to a POI other than in Qwest territory that is technically feasible.**

Proposed language for ICA Section 6.1.1. is as follows:

> This Section describes the Interconnection of Qwest's network and Union's network for the purpose of exchanging Local, Non-Local and Transit traffic. Qwest will provide Interconnection at any technically feasible point requested by Union ~~**within its network**~~. Qwest's Wireless Interconnection Service is provided for the purpose of connecting End Office Switches to End Office Switches or End Office Switches to Local or Access Tandem Switches for the exchange of Local Traffic; or End Office Switches to Access Tandem Switches for the exchange of Local, Non-Local or Jointly Provided switched Access Traffic. Qwest Tandem to Union Tandem switch connections will be provided where technically feasible. New or continued Qwest Local Tandem to Qwest Access Tandem and Qwest

> Access Tandem to Qwest Access Tandem Switch connections are not required where Qwest can demonstrate that such connections present a risk of switch exhaust and that Qwest does not make similar use of its network to transport the local calls of its own or any Affiliate's End User Customers.

ICA Section 6.1.2.1 proposed language is as follows:

> The Parties will negotiate the facilities arrangement used to interconnect their respective networks. **~~Union shall establish at least one Physical Point of Interconnection in Qwest territory in each LATA where Union has local End User Customers and/or has a NPA/NXX rated to a Rate Center within the LATA~~**. The Parties shall establish, through negotiations, one of the following Interconnection Agreements (1) a DS1 or DS3 Qwest Provided Entrance Facility; (2) Collocation; (3) negotiated Mid-Span Meet POI facilities; or (4) Other technically feasible methods of Interconnection.

Finally, Union also proposes changes to ICA Sections 6.3.1.4.1 and 6.3.1.4.2 dealing with Direct Trunked Transport to include references to both Parties' tandems rather than only to Qwest's.

Qwest Position

Qwest's proposed language requires that the POI be located within Qwest's network. According to Qwest, this is consistent with the Act and the FCC's rules. Qwest notes the issue in this proceeding is interconnection under Section 251(c)(2) of the Act which provides for interconnection with the incumbent LEC's network "at any technically feasible point within the carrier's network."[36]

Qwest argues Union's proposed changes would require interconnection anywhere Union proposes and that this goes beyond what is required of Qwest by the Act or the FCC's

[36] 47 USC § 251(c)(2); s*ee also* 47 CFR § 51.305(a).

regulations. Interconnection under the Act is limited to interconnection with the incumbent LEC's existing network. Qwest is not required to extend its network to accommodate interconnection with Union. Further, Qwest has a right to insist on at least one interconnection point within each LATA.[37] Accordingly, Union's proposed changes should be rejected.

Union Position

Union argues there is nothing in the Act to support Qwest's requirement that the POI be established in Qwest's service territory in the LATA. Accordingly, Union requests that the POI be established at any technically feasible location selected by Union within Qwest's network. According to Union, 47 U.S.C. §251(a)(1) indicates that it is the general duty of every telecommunications carrier to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Furthermore, 47 U.S.C. §251(c)(2) provides that it is the duty of an ILEC:

> To provide for the facilities and equipment of any requesting telecommunications carrier, interconnecting with the local exchange carrier's network:
>
> 1. for the transmission and routing of telephone exchange service and exchange access;
> 2. at any technically feasible point within the carrier's network;
> 3. that is at least equal in quality to that provided by the local exchange carrier to itself or any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
> 4. at rates, terms and conditions that are just, reasonable, and non-discriminatory.

While "network" is not specifically defined in the Act, 47 C.F.R. §51.5 defines "network

[37] *Intercarrier Compensation NPRM* at ¶112.

element" as "any facility or equipment used in the provision of telecommunication service". Hence, according to Union, the use of the word "network" by the drafters was to recognize that the interconnection point can be anywhere on the local exchange carrier's network. Union argues an appropriate reading of the Act and FCC rules indicates that the interconnection point can be at any technically feasible point within Qwest's network.

Decision

The ALJ concludes Qwest has no obligation to interconnect with a requesting carrier outside its ILEC territory within a LATA. Concluding otherwise would conflict with the many statutory and FCC references evincing an intent that interconnection occur within an ILEC's local calling area. The ALJ therefore recommends the Commission adopt Qwest's proposed ICA language.

Issue 5. Non-local Traffic

The language at issue in ICA Section 6.3.8.14 is as follows:

> If ~~**Union**~~ **a party** is direct Billing ~~**Qwest**~~ **the other** the L-M InterMTA factor will be applied to the billed land to mobile minutes of use originated from ~~**Qwest's**~~ **the billed party's** network and terminated to ~~**Union**~~ **the billing party** and deducted from Qwest total L-M MOU. No reciprocal Compensation will be paid ~~**by Qwest to Union**~~ for such traffic. ~~**Qwest**~~ **Each party** may bill ~~**Union**~~ **the other** interstate switched Access Tariffed rates for this traffic.

Likewise, Section 6.3.9.1 is proposed as follows:

> Applicable ~~**Qwest**~~ switched Access Tariff rates apply to Non-Local Traffic routed to a Toll/Access Tandem, Local Tandem, or directly to an End Office. Applicable ~~**Qwest**~~ switched Access Tariff rates also apply to InterMTA and Roaming traffic originated by, or terminating to **the other party.** ~~**Qwest.**~~ Relevant rate elements could include Direct Trunked Transport, Tandem switching, Tandem

Transmission, and Local switching, as appropriate.

Qwest Position

According to Qwest, Union is seeking to have Union Telephone's wireline access tariffs apply to Union's wireless operations. Union attempts to justify its changes by arguing that Qwest and Union should be treated reciprocally. Qwest argues the Commission should reject Union's proposed changes because they are not lawful. First, while wireline carriers are permitted to file access tariffs, wireless carriers such as Union are not.[38] Second, even if Union could assess access charges, the party that would be responsible for paying the access charges would be the customer's presubscribed interexchange carrier. Third, wireless carriers charge their wireless subscribers for receiving interMTA calls in lieu of charging switched access, a fact that distinguishes Union from Qwest. Union would therefore be receiving a double recovery if it charged both its subscribers and Qwest for terminating calls. Thus, the symmetry Union seeks to create does not exist under the law.

Union's proposed changes to Section 6.3.8.14 should also be rejected because, by its terms, Section 6.3.8.14 cannot be symmetrical. Section 6.3.8.14 concerns only land-to-mobile calls, but Union cannot by definition deliver a land-to-mobile call to Qwest because Union customers will make only mobile-to-land calls. Qwest therefore argues this section simply provides the formula for how interMTA traffic is deducted from the bill for local land-to-

[38] In 1994, the FCC temporarily prohibited CMRS carriers from filing tariffs for interstate access service. Second Report and Order, *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, ¶ 179 (rel. Mar. 7, 1994). The FCC has taken notice and comment concerning the appropriate intercarrier compensation for wireless traffic, but has not lifted this temporary prohibition. See *Sprint Spectrum, L.P. v. AT&T Corporation*, 168 F. Supp.2d 1095, 1100-01 (2001).

mobile minutes to arrive at the proper charge for reciprocal compensation; it does not and can not apply to calls delivered by Union.

Union Position

Union notes Qwest proposed that its switched access tariff rates be applied to such traffic as routed to a toll access tandem on the local tandem or directly to an end office. Applicable Qwest switched access tariffs would also apply to interMTA and roaming traffic originating or terminating to Qwest. Union agrees with Qwest that reciprocal compensation is not applicable to such traffic and argues its proposal is simply intended to make such language reciprocal.

Furthermore, if reciprocal language is not applicable, Union argues it must still be compensated. Union should not be required to pay Qwest at tariffed rates for non-local interMTA traffic but denied any compensation for providing the same service. Requiring service without compensation is unjust and unreasonable in violation of 47 U.S.C. § 201. It is also a violation of the reciprocal compensation requirements of 47 U.S.C. §251(b)(5). Furthermore, 47 C.F.R. §20.11(b)(1) requires a LEC to pay reasonable compensation to a CMRS provider. No compensation for a service rendered is not "mutual compensation" as required by 47 C.F.R. § 20.11(b).

Decision

Union's proposed language would make sections 6.3.8.14 and 6.3.9.1 reciprocal in all respects. However, as Qwest correctly argues, § 6.3.8.14 cannot apply reciprocally because Union is a wireless carrier and by definition will have no land-to-mobile minutes of use originating from its network. Likewise, Union seeks by its proposed changes to § 6.3.9.1 to be

paid by tariff for non-local InterMTA traffic. However, wireless carriers such as Union cannot file access tariffs so Union cannot bill Qwest interstate switched access tariffed rates for InterMTA traffic. The ALJ therefore agrees with Qwest and adopts the language proposed by Qwest.

Wherefore, the Parties are directed to submit an interconnection agreement that includes the terms and conditions reflecting their mutual agreement and the resolution of the disputed issues discussed herein.

DATED at Salt Lake City, Utah, this 3rd day of April, 2008.

/s/ Steven F. Goodwill
Administrative Law Judge

Approved and Confirmed this 3rd day of April, 2008, as the Arbitration Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#56717