IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNION TELEPHONE COMPANY, a Wyoming Corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 02-CV-209-D
QWEST CORPORATION, f/k/a/ US WEST COMMUNICATIONS, INC., a Colorado Corporation,	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant's Motion for Summary Judgment. The Court, having reviewed the materials submitted in opposition and support, having heard oral argument on the matter, and being otherwise fully advised, hereby FINDS and ORDERS as follows:

BACKGROUND

The parties in the above-captioned matter share a litigious history spanning more than a decade. Union Telephone Company ("Union") is a telecommunications carrier and an incumbent local exchange carrier (ILEC) as defined in the federal Telecommunications Act of 1996 (1996

Act).[1] Union provides local exchange service, intraLATA toll service, interLATA toll service, and wireless (CMRS) service.[2] Although Union started as a wireline ILEC, its business today is overwhelmingly wireless. Union provides wireless service to approximately 40,000 subscribers, 30,000 of whom are located in western and southern Wyoming, and the remainder in parts of Utah and Colorado. Union provides wireline services to approximately 7,000 customers, 6,300 of whom are located in Wyoming, with the remaining customers located in Utah and Colorado. Qwest is a telecommunications carrier that provides local exchange and intraLATA toll telephone service in 14 western states, including Wyoming, Colorado, and Utah.[3] As a Regional Bell Operating Company (RBOC), Qwest is barred from providing interLATA long distance service.[4] Like Union, Qwest is an ILEC.

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[1] An ILEC is defined generally as the company that was providing local exchange service in a particular geographic area on the date the 1996 Act became effective. 47 U.S.C. § 251(h). The 1996 Act imposes specific duties on ILECs with exemptions for certain rural ILECs. Telecommunications carriers that enter a local exchange market after the effective date of the 1996 Act are generally referred to as competitive local exchange carriers (CLECs).

[2] A Local Access and Transport Area (LATA) "means geographic regions created as part of the divestiture of AT&T which defined the areas where regional Bell operating companies were permitted to provide telecommunications services." WYO. STAT. ANN. § 37-15-103(a)(vi) (LexisNexis 2003). For instance, Wyoming is comprised of a single LATA; Colorado is divided into two LATAs.

[3] Pursuant to a merger closed on June 30, 2000, Qwest became the successor in interest to both Mountain States Telephone and Telegraph Company and U S West Communications, Inc.

[4] For most of the 20th Century, telecommunications were provided in the United States by AT&T (the Bell System). Divestiture was imposed upon the Bell System in 1982 pursuant to the Consent Decree issued in the federal anti-trust case. Following the divestiture, US West was

"Local" or "local exchange" telecommunications service allows subscribers to place or "originate" calls to other subscribers located within the same local calling area. Local calling areas for calls placed and received by wireline telephones are often referred to as an "exchange", but may sometimes be comprised of contiguous exchanges.

Wireline local service is provided by local exchange carriers (LECs), usually on a "flat-rated basis" (*i.e.*, unlimited local calls for a fixed monthly fee). Each wireline local calling area is served by one ILEC offering local service to subscribers. Other local carriers (*i.e.*, CLECs) may and often do offer local service in the same area. Wireline local service is provided by carriers subject to the regulations of state public utility commissions. For example, wireline local calling areas are established by or subject to the approval of state commissions. In addition, wireline local service is offered and provided pursuant to tariffs, setting forth rates, terms and conditions, that are filed with and subject to the approval of the state public utilities commissions. The applicability of a state tariff to particular services or calls is usually determined by the commission for the state in which the tariff has been filed. According to the "filed rate doctrine," if a tariff applies to a particular telecommunications service, then the rates,

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one of seven regional Bell operating companies which were allowed to provide long distance service. RBOCs were allowed to provide intraLATA toll service, but not interLATA toll service. AT&T, as the interexchange carrier, would provide interLATA services. Just over a year ago, however, the FCC authorized Qwest to provide interLATA services in Wyoming through a separate affiliate. *See Application of Qwest Communications Int'l, Inc. for Authorization to Provide In-Region, InterLATA, Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket no. 02-314, Memorandum Opinion and Order (FCC) released December 23, 2002.

terms, and conditions set forth in the tariff must be enforced. *US West Communications, Inc. v. Wyoming Pub. Serv. Comm'n*, 907 P.2d 343, 348 (Wyo. 1995); *Montana-Dakota Utils. Co. v. Public Serv. Comm'n of Wyoming*, 847 P.2d 978, 988 (Wyo. 1993).

In contrast to wireline local service, most aspects of wireless service have either been deregulated or are subject to regulation by the Federal Communications Commission (FCC). Local calling areas for calls placed or received by wireless devices are referred to as Major Trading Areas (MTAs), and are established by the FCC.

"Long distance" (also known as "toll" or "interexchange") service refers to service offered to subscribers that permits them to place (or originate) calls that terminate outside of their local calling area. An "intrastate" long distance call is one that originates and terminates in different local service areas, but within the borders of a single state. Intrastate long distance service provided by wireline service is subject to the jurisdiction of and regulations by state public utility commissions, and is generally offered to subscribers pursuant to tariffs filed with and approved by the state commissions. An interstate long distance call is one that originates and terminates in different states. Interstate long distance service is subject to the jurisdiction of and regulation by the FCC under the Communications Act of 1934. *See* 47 U.S.C. §§ 151 *et seq.* None of the long distance traffic at issue in this lawsuit is interstate.

LECs, including ILECs such as Union and Qwest, use the same network facilities to originate and terminate both local and long distance calls. LECs are compensated for the use of

their networks to terminate long distance calls placed to their local service customers by the subscribers of long distance carriers (such as AT&T, MCI, and Sprint) through tariffed "access charges," usually assessed on a per minute, per call, and/or per line basis, payable by the originating caller's long distance carrier. The long distance carrier, in turn, recovers these access charges through the long distance charges assessed on their subscribers.

Access charges have no application to local calls. Since 1996, compensation for the termination of local calls placed by the subscriber of one LEC to the subscriber of another LEC has been determined under the Telecommunications Act. *See* 47 U.S.C. §§ 251(b)(5) and 252(d)(3). Although the same facilities and equipment are used to transport and terminate local and long distance calls to the same customer, tariffed access charges for the termination of long distance calls substantially exceed the "cost-based" charges for the transport and termination of local calls.

Through the Telecommunications Act of 1996, Congress sought "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). To achieve these objectives, the Act imposes on telecommunications carriers a number of duties, including several relevant to this case, and prescribes a detailed process for the implementation and enforcement of these duties. Section 251(a)(1) requires all carriers to "interconnect, directly

or indirectly," with other carriers. In addition, section 251(b)(5) imposes a duty on all local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Reciprocal compensation simply means that "when a customer of one local exchange carrier calls a 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." *Pacific Bell v. Pac-West Telecomms., Inc.*, 325 F.2d 1114, 1119 (9th Cir. 2003).

The 1996 Act also establishes a system of negotiations and arbitrations between carriers to implement its substantive requirements. For example, all local exchange carriers are required to establish reciprocal compensation arrangements in their interconnection agreements. If the parties fail to reach an agreement through voluntary negotiations, either party may petition the relevant state public utility commission to arbitrate and resolve any open issue. The final agreement, whether negotiated or arbitrated, must be approved by the state commission.[5] In addition to the FCC, several courts have held that the comprehensive process set out in sections 251 and 252 is the exclusive means for establishing arrangements contemplated by the 1996 Act's substantive provisions. *See, e.g., Pacific Bell v. Pac-West Telecomms., Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003) ("[T]he point of § 252 is to replace the comprehensive state and

[5] If the terminating and originating carriers are unable to agree in negotiations upon the amount or form of compensation owed the former, the Act provides that such compensation shall be limited to a "reasonable proximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A)(ii).

federal regulatory scheme with a more market-driven system that is self-regulated through negotiated interconnection agreements."); *Verizon North, Inc. v. Strand*, 309 F.3d 935, 941 (6th Cir. 2002) (stating that neither carriers nor regulatory agencies may through a tariff filing bypass and ignore the "detailed process for interconnection set out by Congress" in the 1996 Act).

Pursuant to its rulemaking authority, the FCC in 1996 released its *Local Competition Order*. Among the issues addressed by the FCC were the applicability to particular types of calls, including wireless calls, of the Act's provisions regarding reciprocal compensation and the formation of interconnection agreements. To resolve these issues, the FCC first addressed the applicability of sections 251 and 252 to the regulation of local exchange carrier-wireless (LEC-CMRS) interconnection, and concluded that they provide an alternative basis for jurisdiction to 47 U.S.C. §§ 201 and 332. 11 FCC Rcd. at 16006 ¶¶ 1022-1023. Qwest Ex. 13. Observing that "all four sections are designed to achieve the common goal of establishing interconnection and ensuring interconnection on terms and conditions that are just, reasonable and fair," the FCC "opt[ed] to proceed under sections 251 and 252." Id. at 16006 ¶ 1023.

Next, the FCC had to determine which calls are subject to reciprocal compensation for the transport and termination thereof under section 251(b)(5). In this regard, the FCC distinguished between local calls and long distance calls. Id. at 16013 ¶ 1033. The FCC determined that local calls would be subject to section 251(b)(5) reciprocal compensation, while long distance traffic would be subject to interstate and intrastate access charges. Finally, the

FCC defined the local service area for calls to or from a wireless (CMRS) network for the purposes of applying sections 251 and 252, including the reciprocal compensation provisions of section 251(b)(5), as the Major Trading Area (MTA). Id. at 16014 ¶ 1036. "Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges." Id. The FCC also directed carriers and state commissions to use the negotiation and arbitration process set forth in section 252 to ensure that interconnection agreements will be reached between incumbent LECs and telecommunications carriers, including CMRS providers. Id. at 16005 ¶ 1024.

On July 21, 2000, Union filed with the Wyoming Public Services Commission (Commission or WPSC) a formal Complaint against Qwest's predecessor, US West Communications. Union's WPSC Complaint alleged that despite clear tariff provisions, US West had wrongfully withheld a portion of the terminating access charges invoiced to it for long distance traffic sent to Union's local networks. Qwest Ex. 14 at ¶¶ 7, 10. In its Claim for Relief, Union sought an order directing US West to compensate Union for all such terminating access charges US West had wrongfully withheld. Id. at ¶ 2. Qwest denied liability on the ground that it had paid access charges on all long distance calls placed by its customers to Union's customers, and that it was not responsible for the payment of access charges on other calls, including calls placed by customers of third-party carriers that transited Qwest's network. *See,*

e.g., Qwest Ex. 5 at ¶ 7. Qwest further argued that it had provided Union with sufficient information to identify and bill the originating carrier for the traffic transiting its network. Qwest Ex. 7 at ¶¶ 24-28, 31.

Following an opportunity for discovery, the parties submitted pre-filed testimony and presented witnesses for live testimony and cross-examination at an evidentiary hearing attended by all three members of the Commission. Union's witness, James Woody, reiterated Union's claim that Qwest, which had since acquired US West, was required by Union's Wyoming tariff to pay access charges on all traffic delivered by Qwest to Union. Qwest Ex. 6 at 50-51; Qwest Ex. 8 at 1. In response to questions by Chairman Ellenbecker regarding paragraph 7 of Union's WPSC Complaint invoking Union's Wyoming tariff, Mr. Woody confirmed that Union was requesting the Commission to direct a full payment by Qwest of the tariffed access charges invoiced it by Union. Ex. 6 at 60-61. Union presented no evidence that any of the calls for which Qwest had paid terminating access charges had been originated by Qwest as opposed to other carriers. Woody testified only that the information provided by Qwest to Union did not prove to its satisfaction otherwise. Id. at 30, 35.

In its post-hearing brief, Union repeated its allegations that Qwest is carrying intraLATA toll traffic to Union and is liable to pay terminating access charges in accordance with Union's access tariffs. Qwest Ex. 9 at 2. According to Union, these tariffs "provide for terms and conditions under which Union will accept and terminate long distance calls directed to them by

interexchange carriers such as Qwest." Id. at 4. Union further claimed that under the filed rate doctrine, Qwest was required to pay the charges set forth in its tariffs. Id. at 4-5, 12-13, 18-23. As a necessary prerequisite to the application of the filed rate doctrine, Union asked the Commission to agree that Union's switched access tariff is applicable to all traffic carried by Qwest and terminated by Union, regardless of the nature of the traffic or the originating carrier. Id. at 30. In the alternative, Union asked the Commission to order Qwest to provide a connection that would allow Union to bill the originating carriers for its services provided. Id. at 12.

By Memorandum Opinion, Findings of Fact, Conclusions of Law and Order, issued January 24, 2001, the Commission rejected Union's claim that it was entitled, pursuant to tariff, to compensation for terminating the traffic. Qwest Ex. 1, Woody Depo. Ex. 8 at 29 ¶ 44. Specifically, the Commission determined that Union failed to carry its burden of proof on that issue. Id. Additionally, the Commission concluded that Union had not met its burden of proof on its allegations that the connection it sought from Qwest would provide the billing information Union seeks; that the desired connection would provide this information any better than the methods Qwest currently used to provide billing information to Union; or that Qwest's current methods are inaccurate. Id. at 28 ¶ 43. Finally, the Commission dismissed all other issues contained in Union's Complaint. Id. at 29 ¶ 1. Although entitled to do so, Union sought neither reconsideration nor clarification by the Commission, nor judicial review, of the WPSC Order. WYO. STAT. ANN. § 37-2-214 (LexisNexis 2003).

On November 26, 2002, Union filed its Complaint with this Court. The Complaint alleges that Qwest provides long distance services that allow its long distance customers to originate calls terminated in Union's local service territory, that Qwest receives revenue from long distance subscribers for these toll calls, that Qwest is required to pay Union terminating access charges pursuant to industry custom and tariffs it has filed with the WPSC and state public utility commissions in Utah and Colorado, and that notwithstanding repeated demands, Qwest has refused to fully pay Union for its intrastate tariffed terminating access services. In summary, Union states the following four causes of action: (1) breach of tariff requirements; (2) discrimination by common carrier; (3) breach of contract; and (4) quantum meruit / unjust enrichment. Without qualification, Union concedes that the request for compensation in the Complaint before this Court is the same request asserted in its WPSC Complaint. Qwest Ex. 1, Woody Depo. Tr. at 115-16. Additionally, the tariff upon which Union relies in both its WPSC Complaint and the Complaint to this Court has not changed in any material respect since the 2000 WPSC proceeding. Qwest Ex. 10. Qwest denies the allegations contained in Union's Complaint and asserts seven affirmative defenses, including failure to comply with the applicable statute of limitations, laches and estoppel, lack of subject matter jurisdiction, and res judicata and collateral estoppel. In the present Motion, Qwest asks this Court to grant summary judgment in Qwest's favor on all claims stated in Union's Complaint.

STANDARD OF REVIEW

"By its very terms, [the F.R.C.P. 56(c)] standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgement; the requirement is that there is no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

> The trial court decides which facts are material as a matter of law.
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> Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgement . . . . [W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.

Id. at 248. *See also Carey v. United States Postal Serv.*, 812 F.2d 621, 623 (10th Cir. 1987). The relevant inquiry is "whether it is so one-sided that one party must prevail as a matter of law." *Carey*, 812 F.2d at 623. In considering the party's motion for summary judgement, the court must examine all evidence in the light most favorable to the non-moving party. *Barber v. General Elec. Co.*, 648 F.2d 1272, 1276 n.1 (10th Cir. 1981). Nevertheless,

> When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine

issue for trial."

FED. R. CIV. P. 56(e).

DISCUSSION

Applicability of the Doctrine of Collateral Estoppel to Union's Claims

Qwest argues that Union's Complaint raises the same request for compensation made to and resolved by the Wyoming Public Service Commission in 2001, and is thus barred by the doctrine of collateral estoppel. A federal court sitting in diversity follows the law of the forum state when considering the applicability of collateral estoppel. *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986). The four factors identified by the Wyoming Supreme Court to consider in applying collateral estoppel are: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Kahrs v. Board of Trustees*, 901 P.2d 404, 406 (Wyo. 1995).

The first factor to consider in determining the applicability of collateral estoppel is whether the issues decided in the 2000 WPSC hearing are identical with the issues presented in the present action. A side-by-side comparison of Union's WPSC Complaint and the Complaint

filed in this Court reveals that the allegations contained in Union's breach of tariff (Complaint at 8-9 ¶¶ 18-20) and breach of contract (Complaint at 10-11 ¶¶ 24-26) claims are substantially the same as the claims found in Union's WPSC Complaint (WPSC Complaint at 3-4 ¶¶ 7-9). Additionally, in his deposition, James Woody, a member of both Union's management team and its board of directors, testified that Union's claim in the present action that Qwest owes it terminating switched access charges pursuant to its Wyoming tariffs is "the same request for compensation" that was presented to the WPSC in 2000. Qwest Ex. 1 Woody Depo. Tr. at 69.

A thorough review of the transcript of the 2000 hearing before the Commission reveals substantial testimony and discussion pertaining to Union's claims that Qwest owed Union payment of access charges under Union's filed tariffs. Intertwined in this allegation seem to be Union's claims that Qwest was providing inadequate information to allow Union to bill the appropriate carriers for traffic Union terminated on its network. Also included were claims that Qwest should pay for transit traffic – calls that do not originate with Qwest customers, but are handed off by the originating carrier for transport by Qwest to Union, where the calls are terminated by Union to a Union customer. While these claims may appear on their face to be distinct, the nature of the examination of witnesses tended to combine the claims into one. Essentially, the argument Union advanced through testimony and discussion was that since Qwest did not provide the type of information needed to permit Union to bill the proper carrier, as between Qwest and Union, Qwest should bear the costs because the traffic comes to Union

over Qwest's network. The Court is satisfied that significant evidence was presented to the Commission in the form of oral testimony, prefiled written testimony, pre- and post-hearing briefs, and exhibits to determine that the issues alleged in Union's breach of tariff and breach of contract claims, as far as they pertain to Wyoming traffic, are the same as those litigated in the 2000 WPSC proceeding. A close reading of the collateral portion of Union's Opposition to Qwest's Motion for Summary Judgment reveals that Union does not take issue with this conclusion.[6]

The second factor to be considered in applying collateral estoppel is whether the prior adjudication resulted in a judgment on the merits. The Wyoming Supreme Court has consistently held that collateral estoppel applies to final adjudicative determinations which have been rendered by administrative tribunals. *Wilkinson v. State*, 991 P.2d 1228, 1233 (Wyo. 1999); *Slavens v. Board of County Comm'rs*, 854 P.2d 683, 685 (Wyo. 1993). Absent actual and adversarial litigation in an administrative hearing, however, principles of collateral estoppel do not hold fast. *Regions Hospital v. Shalala*, 522 U.S. 448, 464 (1998).

The Commission issued an Order on January 24, 2001, *In the Matter of the Complaint of Union Telephone Company vs. Qwest Corp., f/k/a US West Communications, Inc. Regarding*

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[6] With respect to "changed circumstances" since the 2001 WPSC Order, though Union does not make this argument, the Court finds from the record that any changed circumstances, if they exist at all, are not material and, therefore, do not amount to controlling facts sufficient to avoid the application of collateral estoppel to the issues identified above. WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4417. *See also Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 846 (3rd Cir. 1974).

IntraLATA Toll Services. Docket Nos. 70008-TC-00-34 and 70000-TC-00-594, Memorandum Opinion, Findings of Fact, Conclusions of Law and Order (WY PSC January 24, 2001), Qwest Ex. 1, Woody Depo. Ex. 8. In the Order, the Commission characterized Union's relevant allegations as follows:

> (1) that Qwest['s] . . . Feature Group C (FG-C) connection with Union does not allow for the proper identification and billing of telecommunications traffic between Qwest and Union; (2) that Qwest refuses to compensate Union for terminating toll traffic or to cease sending toll traffic to Union's local network for which it refuses to pay terminating access; . . . (4) that Qwest has arbitrarily applied a ten percent (10%) charge or reduction to Union's terminating access billing without any justification or support . . . .

Id. at 1-2.

The Order then recounts the highlights of the day-long hearing held on November 28, 2000. Of significance to the present case are portions of paragraphs 15-20, 30, 38-41, 43-44, and paragraph 1 of the Order. Paragraphs 15-20 and 30 are summaries and selected portions of testimony regarding Union's allegation of Qwest's underpayment / responsibility to pay access charges. The remaining paragraphs represent the Commission's decision in the proceeding. Specifically, the Commission found that Union failed to meet its burden of proof regarding its claim that Feature Group D service would provide the information Union seeks to enable it to bill

carriers whose traffic Union terminates. The Commission also concluded that Union failed to meet its burden of proof as to whether Qwest is entitled to take a 10% reduction from Union's access billing. As a result of these failures, the Commission dismissed Union's complaint on those issues. In paragraph 1 on page 29 of the Order, the Commission dismissed all other issues contained in the Complaint.

Based on the Court's painstaking examination of the record, the Court finds that sufficient evidence was presented on this issue to allow the Commission to reach a decision on the merits. Ultimately, after reviewing the evidence, the Commission dismissed Union's claims. Nowhere does the Order say that the Commission dismissed those claims without prejudice. On the contrary, dismissal of claims for failure to carry the burden of persuasion or production after some effort is made to litigate the issue is sufficient to invoke collateral estoppel. *Yates v. United States*, 354 U.S. 298, 336 (1957) (overruled on other grounds). Moreover, that the Commission's decision appears to be broadly-based with respect to its dismissal of Union's claims gives little reason to infer that it was reached with less care than a narrow decision. Finally, because the burden of proof is more relaxed in an agency hearing than in a federal court, it is reasonable to believe that a party who cannot carry its burden of proof under a lower standard could not carry its burden under a higher standard.

The third factor in the application of collateral is whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication. This

factor is met. The fourth factor is whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. This factor also is met. It is clear from the administrative record that both parties fully and vigorously litigated the issues that Qwest now seeks to bar by collateral estoppel.

Union argues that collateral estoppel is inapplicable to the present case. Though this argument is far from clear, the Court nevertheless presents it as argued and addresses each premise appropriately. Union characterizes Qwest's argument as, "in essence, that the [WPSC] has ruled that a utility may take services without paying for [them]." Union Opp'n at 17. Then, in an attempt to disprove this statement, Union delves into a1993 WPSC Order issued *In the Matter of the Application of Union Telephone Company, Inc. for a Certificate of Public Convenience and Necessity to Provide Mobile Cellular Telecommunications Services in Wyoming*, Docket No. 62006-RA-89-1 (WY PSC August 6, 1993), wherein the Commission made several findings with respect to Qwest's obligation to pay terminating access charges for each call made by a Qwest customer within Qwest's certificated local exchange service areas to a Union cellular customer located in Union's certificated wireless area (RSA). Previously, Qwest had agreed to pay access charges for cellular calls terminated within Union's RSA, but outside Union's certificated wireline service area. In the 1993 proceeding, Union sought compensation for calls terminated anywhere in its RSA, regardless of whether the customer was within the certificated wireline service area.

The Commission concluded that there was no difference in the switching costs for terminating access to Union's cellular customers within any part of its RSA, and found that Union was entitled to charge Qwest for terminating access beginning in 1992. Qwest Ex. 1, Woody Depo. Ex. 4 at 11. The Commission determined that terminating access payments for cellular calls should be equal to that charged for terminating access in Union's landline service areas. Id.

The Court finds that Union mischaracterizes the argument advanced by Qwest in its Motion for Summary Judgment. From the information presented to the Court in Qwest's Memorandum and oral argument in support of its motion, the Court understands that Qwest is willing to pay to Union any sum owed, as determined by proper calculation under applicable tariffs, state and federal regulations, and state and federal laws. The Court also finds Union's reliance on the 1993 WPSC Order to be misplaced. In 1995, the Wyoming Supreme Court reversed the 1993 decision of the Commission. In *US West Communications, Inc. v. The Wyoming Public Service Commission*, 907 P.2d 343 (Wyo. 1995), the Wyoming Supreme Court determined that Union had not filed the proper tariffs to entitle it to receive access payments for terminating cellular calls within Union's RSA. The court noted:

> Union's cellular operations are distinct and separate from its landline operations. Under the law [WYO. STAT. ANN. § 37-3-110 (LexisNexis 2003)], Union is required to file rates for its cellular operations. There is no evidence in the record that Union

has ever filed the appropriate rates. This is contrary to law and, accordingly, the PSC's decision must be reversed.

Id. at 348. Accordingly, the Court disregards the language of the 1993 WPSC Order, as well as any relevant propositions for which Union believes it stands.

Union refers the Court to *Airtouch Communications, Inc. et al. v. State Dept. of Revenue*, 76 P.3d 342 (Wyo. 2003), for the proposition that the Wyoming Supreme Court no longer distinguishes between wireline and wireless traffic. This case, however, is readily distinguishable. In *Airtouch*, four cellular service providers argued that they were not telephone companies for purposes of reduced taxation levels. The Wyoming Supreme Court disagreed, finding that cellular companies are telephone companies for tax purposes. In no way does this opinion indicate that wireline and wireless traffic are the same for the purposes for which that distinction would be relevant to the present case.

In a further attempt to bolster its argument that collateral estoppel is inapplicable to the present case, Union refers the Court to an unpublished opinion of the United States Court of Appeals for the Ninth Circuit in an apparent attempt to offset the effect of the 2001 WPSC Order. Union cites *3 Rivers Telephone Cooperative, Inc. v. U.S. West Communications, Inc.*, 2002 WL 1986469 (9th Cir. 2002)(unpublished), for the proposition that "at least one appellate court has found that terminating access charges may require payment if controlled by an applicable tariff." Union Opp'n at 21-22. Five months prior to the issuance of the 2001 WPSC Order, a United

States District Court in Montana refused to require Qwest to compensate independent telephone companies for providing terminating access services to Qwest. This decision was reversed and remanded by the Ninth Circuit in *3 Rivers*. Union suggests that perhaps the Commission might have incorrectly relied on the initial decision of the United States District Court for the District of Montana in reaching its decision in the 2001 Order. On remand, however, the trial court agreed with the FCC and found that tariffs do not apply to local wireless (intraMTA) traffic. The court concluded that IntraMTA traffic is governed by provisions of the Telecommunications Act of 1996 (*i.e.*, 47 U.S.C. § 251(b)(5)) and FCC regulations promulgated thereunder. Qwest Ex. 12 at 44-49.

The Court is unpersuaded by Union's use of the Ninth Circuit opinion in *3 Rivers* and its accompanying effort to encourage the Court to place less weight on the 2001 WPSC Order. The Court notes that in a situation similar to this case, the United States District Court for the Southern District of Iowa applied principles of collateral estoppel to bar the claims of independent carriers who, following a state agency adjudication unfavorable to them, filed an independent claim in federal court rather than seek judicial review of the agency decision. *Iowa Network Servs., Inc. v. Qwest Corp.*, 2002 WL 31296324 (S.D. Iowa 2002) (unpublished) (appeal pending). INS argued that collateral estoppel should not bar their claims in federal court because the agency proceeding was not a final judgment on the merits. *Id.* at *13. The court disagreed. The court had "little doubt that during the [agency] proceeding, INS had a chance to, and did in

fact, fully and fairly litigate the ultimate issue at the heart of this case, that issue being whether or not access charges apply to the traffic at issue." *Id.* Following the close of the hearing, the agency determined that access charges do not apply to the traffic at issue. *Id.* Having decided the issue, the parties were bound by the agency's conclusions. Thus, INS was collaterally estopped from bringing the same claims in federal court.

Based on the foregoing analysis, the Court holds that Union's breach of tariff and breach of contract claims are barred by the doctrine of collateral estoppel only as pertaining to intrastate wireline traffic originating on or transiting Qwest's network and terminated by Union in Wyoming.

Applicability of Union's Filed Tariffs to the Traffic at Issue

Filed Rate Doctrine

Before discussing the applicability of Union's tariffs to traffic originating on or transiting Qwest's network for termination on Union's network, it is important to discuss the filed rate doctrine. The filed rate doctrine was developed by courts to prohibit a regulated service provider and its customers from charging rates for its services other than those specified in its duly filed tariff. *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998). Under this doctrine, duly filed rates bound both carriers and customers with the force of law. *Lowden v. Simonds-Shields Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939). The rights and liabilities defined by the tariff could not be "varied or enlarged by either contract or tort of the carrier." *Cent. Office Tel.*, 524

U.S. at 227 (quoting *Keogh v. Chicago & Nw. Ry.*, 260 U.S. 156, 163 (1922). According to the filed rate doctrine, if a tariff applies to a particular telecommunications service, then the rates, terms, and conditions set forth in the tariff must be enforced. *US West Communications, Inc. v. Wyoming Pub. Serv. Comm'n*, 907 P.2d 343, 348 (Wyo. 1995); *Montana-Dakota Utils. Co. v. Public Serv. Comm'n of Wyoming*, 847 P.2d 978, 988 (Wyo. 1993).

The filed rate doctrine applies to bar all claims for services for which a filing is required. *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998). Similar principles apply to traffic that is subject to interconnection agreements. *Verizon Delaware v. Covad Communications Co.*, 232 F. Supp. 2d 1066, 1070-72 (N.D. Cal. 2002). Courts universally refuse to invoke equitable remedies to avoid the filed rate doctrine. *Ting v. AT&T*, 319 F.3d 1126, 1131 (9th Cir. 2003). *See also AT&T v. Cent. Office Tel.*, 524 U.S. at 222; *Illinois Cent. Gulf R.R. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978). Moreover, claims under state law for equitable relief that would permit carriers to bypass and ignore federal regulatory requirements are preempted. *Verizon North, Inc. v. Strand*, 309 F.3d 935, 944 (6th Cir. 2002). *See also Bastien v. AT&T Wireless*, 205 F.3d 983, 987 (7th Cir. 2000) (stating that state law claims raising "regulatory issues preempted by Congress" fail as a matter of law).

Wireline Traffic

The Wyoming Supreme Court in *US West Communications, Inc. v. The Wyoming Public Service Commission* found that Union's filed switched access tariff is applicable to all long

distance wireline traffic. Because the Commission refused in its 2001 Order to enlarge the applicability of Union's filed tariff, the Court likewise finds that Union's filed switched access tariff applies only to long distance wireline traffic. It is for this reason that the Court limited the application of the doctrine of collateral estoppel to wireline traffic terminated in Wyoming.

Wireless Traffic

The majority of the calls for which Qwest has not paid access charges invoiced to it under Union's state access tariffs are wireless calls. According to Mr. Woody, 60-70% of the charges alleged to be due and unpaid are for termination of wireless calls. Union concedes that it has no interconnection agreement with Qwest. Qwest Ex. 6 at 49; Qwest Ex. 1, Woody Depo. Tr. at 79, 116. Other than the tariffs at issue, Union has identified no other agreement pursuant to which Qwest is required to pay access charges for Union's termination of wireless traffic.

As explained above, the Wyoming Supreme Court held that in an attempt to collect access charges for terminating wireless traffic, Union cannot "simply adopt the landline terminating access charges without a filing under the cellular service." *US West Communications*, 907 P.2d at 348. As the Court explained:

> [A] rate for each and every service must be filed. The cellular operations are distinct from the landline, both in terms of technology and geographic scope. By law, rates for those services in the cellular RSA must be filed once the PSC has established the appropriate rate.

* * * *

> No tariff was filed [by Union] establishing any rate [for] terminating access charges for cellular calls. . . . Union is, therefore, precluded from receiving access charges for cellular calls until such tariffs are properly filed.

Id. Union concedes that the tariffs upon which Union's Complaint relies are landline tariffs, and that Union has not subsequent to the Supreme Court's decision made "any tariff filings for the wireless operations of Union." Qwest Ex. 1, Woody Depo. Tr. at 119-120. More importantly, since the Court's opinion in *US West*, Wyoming enacted legislation deregulating all aspects of cellular and wireless telecommunications services, with three exceptions not important to the resolution of this case. WYO. STAT. ANN. § 37-15-104(a)(vi) (LexisNexis 2003). Thus, Wyoming has left regulation of wireless traffic in the state to the federal government.

Having concluded that Union's tariffs are inapplicable to wireless traffic, the Court next examines Union's ability under federal law to charge Qwest for terminating wireless traffic. Pursuant to the Telecommunications Act of 1996 and the FCC's implementing regulations, the termination of wireless calls that originate and terminate within the same local service area (MTA) are subject to reciprocal compensation set forth in interconnection agreements, not access charges set forth in tariffs. *See* Local Competition Order, 11 FCC Rcd. at 16014 ¶ 1036. Section 251(b)(5) of the Act imposes a duty on all local exchange carriers, including Union, to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."

47 U.S.C. § 251(b)(5). As a matter of federal law, telecommunications carriers cannot impose access charges pursuant to filed tariffs for terminating intraMTA traffic.

Compensation for the transport and termination of intraMTA and other local wireline calls is to be determined by following the process established in the 1996 Act for negotiation and (if necessary) state commission arbitration of bilateral interconnection agreements. If the parties are unable to agree during negotiations on compensation to be included in their agreement, the Act requires that it be established by the relevant state commission based on "a reasonable approximation of the additional" (*i.e.*, incremental) costs caused by the call, *see* 47 U.S.C. § 252(d)(2)(A)(ii), thereby excluding the subsidies and embedded costs reflected in access charges. Union has never entered into nor requested an interconnection agreement with Qwest. Therefore, under federal law Union cannot demand compensation from Qwest for intraMTA traffic originating on or transiting Qwest's network and terminated on Union's network until it complies with the mandatory process prescribed by Congress.

To the extent that Union's Complaint seeks compensation for long distance (interMTA) wireless traffic terminated on Union's network, the Court determines that no agreement exists between Union and Qwest for the payment of access charges to Union for terminating interMTA wireless traffic. In the absence of an agreement, section 332(c)(1)(B) of the Communications Act, which incorporates by reference section 201 of that Act, governs. Pursuant to section 332(c)(1)(B), Union may request of the FCC an order directing Qwest to establish physical

connections with Union's wireless service pursuant to the provisions of 47 U.S.C. § 201. Section 201 requires Qwest, upon such an order, to establish just and reasonable access charges, as well as the divisions of such charges. 47 U.S.C. § 201(a) and (b). Compliance with these procedures is a mandatory precondition to requiring the payment of access charges. *See* 47 U.S.C. § 332(c)(1)(B); *AT&T Corp. v. FCC*, 292 F.3d 808, 812-13 (D.C. Cir. 2002) (rejecting efforts to enforce FCC tariff imposing access charges absent compliance with the procedures specified in 47 U.S.C. § 201(a), which is incorporated by reference in section 332(c)(1)(B)). The parties point to nothing in the record indicating that Union has attempted to comply with this procedure. Therefore, until such time as Union either enters into an agreement with Qwest, or obtains an order from the FCC requiring Qwest to pay access charges to Union for terminating interMTA wireless traffic, Union is prevented from collecting such charges from Qwest.[7]

Applicability of the Statute of Limitations to the Traffic at Issue

As an alternative ground for narrowing Union's claims, Qwest asserts that the statute of limitations bars Union's claims for calls terminated by Union more than two years prior to the filing of its Complaint. The Court notes that the statute of limitations applicable to this case is

[7] While the obligation to jump through these regulatory hoops falls upon Union, nothing bars Qwest from informally working with Union to establish interconnection agreements regarding reciprocal compensation for intraMTA traffic and access charges for interMTA traffic. This Court encourages the parties to do so. It is high-time this 12-plus years of litigation ended.

47 U.S.C. § 415(a).[8] Section 415(a) applies to all actions at law to recover lawful charges. The Court finds the statute of limitations inapplicable to this situation simply because Union has no lawful charges. The Court does not decide whether Qwest owes Union money. The Court simply notes that Union has done nothing to be entitled to lawful charges. The Court recognizes that entitlement to lawful charges requires a carrier such as Union to jump through many administrative hoops. Nevertheless, this is the law. Union is not entitled to recover charges from Qwest for intraMTA wireless traffic because it has failed to follow the procedure established in 47 U.S.C. §§ 251-252 and applicable regulations promulgated thereunder. Union is not entitled to recover charges from Qwest for interMTA wireless traffic because it has failed to follow the procedure established in 47 U.S.C. §§ 332 and 201 and applicable regulations promulgated thereunder. In short, in spite of the claims in Union's Complaint, Union has no contract or tariff applicable to the termination of wireless traffic upon the breach of which it could bring an action at law. Thus, the statute of limitations is inapplicable.[9]

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[8] In its Memorandum in support of its Motion for Summary Judgment, Qwest asserts the applicable statute of limitations is 47 U.S.C. § 415(b). *See* Qwest Mem. at 23 n.66. Section 415(b), however, governs complaints filed with the FCC seeking the recovery of damages not based on overcharges. The statute of limitations applicable to this type of proceeding is section 415(a), which states, "All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after." 47 U.S.C. § 415(a).

[9] If the statute of limitations were applicable, however, Union would have been barred from asserting a cause of action for the recovery of any charges more than two years after their accrual. 47 U.S.C. § 415(a). *See also Ward v. Northern Ohio Tel. Co.*, 251 F. Supp. 606, 611 (N.D. Ohio 1966) (stating that the statute of limitations bars claims against any common carrier

The Applicability of Union's Filed Tariffs to Transiting Traffic

In addition to Union's claims for access charges on calls originated on Qwest's network and terminated on Union's network, Union seeks payment of access charges on calls originated by customers of third-party carriers that transit Qwest's network for termination by Union.[10] Union claims that its filed tariffs impose access charges on Qwest for terminating both wireline and wireless transiting traffic. Because the Court has found both that Union's filed tariffs are inapplicable to wireless traffic and that Union has failed to follow procedures applicable to establishing agreements and rates under which Union can charge Qwest for terminating wireless traffic, the Court concludes as a matter of course that Union's filed tariffs are inapplicable to transiting wireless traffic.

Insofar as Union's claims pertain to Wyoming intrastate transiting wireline traffic, those claims are barred by the doctrine of collateral estoppel. As stated above, the Court finds that collateral estoppel acts as a bar to Union's breach of contract and breach of tariff claims as they

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for damages when filed in the district court more than one year (now two years) after their accrual). Union's cause of action against Qwest accrued for purposes of the statute of limitations on the date the bills became due, rather than on the date the services were rendered. *See Central Scott Tel. Co. v. Teleconnect Long Distance Servs. & Sys. Co.*, 832 F. Supp. 1317, 1320 (S.D. Iowa 1993) (stating that LEC's cause of action against long distance carrier for recovery of charges for access services accrued for statute of limitations purposes on date that bills became due, rather than on date access services were rendered).

[10] As stated in the Complaint, Union's breach of contract and breach of tariff claims seek payment for terminating Qwest's intrastate traffic. Implicit in these claims is the issue of intrastate transiting traffic which does not originate on Qwest's network, but is delivered to Union for termination by Qwest. Transiting intrastate traffic may be either wireline or wireless.

pertain to the recovery of access charges for Wyoming intrastate wireline traffic. This includes traffic transiting Qwest's network for termination in Union's network in Wyoming.

Union's Claim of Discrimination by Common Carrier

Contrary to Qwest's assertion, the Court finds that Union has stated a claim for discrimination by common carrier. At this stage of the proceedings, however, one must do more than merely state a claim. To put it idiomatically, one must "put up or shut up." Both parties agree that telecommunications carriers are prohibited from unjustly or unreasonably discriminating in the provision of rates, charges, classifications or services. *See, e.g.*, 47 U.S.C. § 202(a); WYO. STAT. ANN. § 37-15-404(a) (LexisNexis 2003). In essence, similarly situated customers must be treated alike. To prove discrimination under 47 U.S.C. § 202(a), Union must show that like services are being provided, that these services are provided under different terms and conditions, and that any differences are unreasonable. *National Communications Ass'n v. AT&T Corp.*, 238 F.3d 124, 127 (2d Cir. 2001). Union alleges that while Qwest has refused to accommodate Union's attempts to obtain appropriate compensation for terminating Qwest traffic, in other jurisdictions, Qwest has allowed for differing methodologies which more accurately allow for the payment of access services.

Union's evidence of discrimination consists of the deposition testimony of three Qwest witnesses. According to Union, these witnesses testified that Qwest uses a "clearinghouse" method in New Mexico and Oregon to more accurately measure, record and bill for access

services, Qwest Ex. 4 at 57-68, and that Qwest uses the "residual billing" method in North Dakota, Minnesota and Iowa to pay for terminating access services. Qwest Ex. 4 at 64-66. Residual billing, Union explains, allows the provisioning provider to measure the traffic transiting the local switch and to bill Qwest for all traffic that is not identified. Union concludes by arguing that in refusing to utilize a more accurate method of billing in its dealings with Union, Qwest continues to underpay Union for the services it uses. These practices, Union contends, are discriminatory.

Because Union relies exclusively upon the deposition testimony of Qwest witnesses in support of its discrimination claim, it is beneficial to the discussion to clarify that deposition testimony. The most significant deposition of the three Qwest witnesses is that of Mr. Staebell. He testified that Qwest uses the clearinghouse method in New Mexico and Oregon. Staebell also testified that since at least three years ago, Qwest has not allowed use of the residual billing method. It is still used in North Dakota because it was part of a 1995 settlement agreement. As of the date of his deposition, however, Staebell indicated that the method was being reexamined in North Dakota. Qwest Ex. 4 at 66-69.

In response to Union's argument, Qwest directs the Court's attention to Qwest's Interrogatory No. 9 propounded to Union during discovery. Union was asked to "identify every carrier that Union asserts was situated similarly to Union and was treated more favorably than Union by Qwest with respect to compensation for origination, transport or termination of traffic."

In its response, Union indicated that it presently was not sufficiently familiar with the factual situations surrounding other carriers to respond, but that it would discuss the matter with other carriers and update its response. To date, Union has never updated its response to Interrogatory No. 9. Qwest also points to the expert witness designation of Woody and Larson. Union's designation makes no mention of discrimination and contains no suggestion that the testimony of either witness will establish facts that would support a discrimination claim. Moreover, Mr. Larson testified at his deposition that he had no knowledge that Qwest was treating any other Wyoming local exchange or wireless carrier differently from Union.

In short, the Court determines that Union is unable to "put up" any evidence showing that Qwest's use of other billing methodologies in other jurisdictions amounts to "unjust or unreasonable discrimination" as explained in 47 U.S.C. § 202(a). To the extent that this discrimination claim represents a disguised attempt to force Qwest to provide Union with a Feature Group D connection, the Court finds that this issue was fully litigated and conclusively decided by the WPSC in its 2001 Order. Specifically, Union did not meet its burden of proof sufficient to enable the Commission to determine that Feature Group D will provide the information Union seeks to enhance its billing capabilities, or that Feature Group D would provide that information better than the methods Qwest currently employs. 2001 WPSC Order at 28 ¶ 43. Accordingly, the Commission dismissed Union's Complaint with regard to those issues. Therefore, in light of the obvious lack of evidence on this issue, the Court determines that

Union's claim of discrimination by common carrier should be dismissed.

Quantum Meruit / Unjust Enrichment Claim

In its Complaint, Union requests "that it be compensated for carrier access services as Qwest has been unjustly enriched in that it charges its own customers for the services provided by Union but refuses to remit payment to Union." Union Opp'n at 16. This argument appears to the Court to be an alternative argument. Union spends much of its brief attempting to persuade the Court that its tariffs (*i.e.*, "contracts" as described in paragraph 25 of the Complaint) should be applied to all traffic originating on or transiting Qwest's network for termination by Union. Should the Court not be convinced by this argument (and it is not), Union argues alternatively that in the absence of applicable contract or tariff provisions, Union should be permitted to recover its access charges under a equitable theory of unjust enrichment.

The Court finds that Union has very ably stated a claim for unjust enrichment. Yet, the Court finds that Union's claim is barred by the filed rate doctrine. The Court has already determined that Union's filed tariffs apply only to intrastate wireline traffic. Moreover, with respect to the Wyoming tariffs, the Court finds them to be inapplicable to transiting traffic. The Court does not decide that Union is not entitled to compensation from Qwest for terminating wireless traffic. The Court merely points out that Union has failed to comply with applicable statutes and regulations to acquire the tariffs, agreements, and orders necessary to recover access charges for wireless traffic. Based on these facts, as applied to the filed rate doctrine, Union's

unjust enrichment claim necessarily fails. Equitable doctrines cannot apply to relieve Union of its obligation to comply with state and federal statutory and regulatory requirements. Positing arguments that compensation may be appropriately based on equitable doctrines in the face of such overwhelming failure to comply with applicable requirements is unavailing.

Utah and Colorado Tariffs

The Court notes that throughout its Order any discussion of intrastate wireline traffic has been limited to that which originates on or transits Qwest's network for termination by Union in Wyoming. The Court has expressed no opinion on the applicability of tariffs filed by Union in Colorado and Utah to intrastate wireline traffic terminated by Union in those states. Based on the record before this Court, Qwest does not seem to dispute the application of filed tariffs in these states to intrastate wireline traffic that originates on Qwest's network and terminates on Union's network. Yet, Qwest disputes the application of Union tariffs presently on file in Utah and Colorado to intrastate wireline traffic that transits Qwest's network for termination on Union's network in those states. Thus, this issue remains to be determined. The Court will stay this claim pending the interpretation of those tariffs by the appropriate state agencies.

Unlike the Court's ruling on wireline traffic, the Court has determined that Union's tariffs are inapplicable to intraMTA wireless traffic that terminates on Union's network, regardless of whether the traffic originates on or transits Qwest's network and irrespective of whether that traffic terminates in Wyoming, Utah, or Colorado. With respect to interMTA wireless traffic, the

Court has ruled that Union's Wyoming tariffs are inapplicable to such traffic, regardless of whether that traffic originates on or transits Qwest's network. Moreover, it is the Court's belief that, like Wyoming, neither Utah nor Colorado regulates telecommunications services using cellular or other wireless technology in any way relevant to the claims in this lawsuit. Thus, it is the Court's belief that, following the passage of the Telecommunications Act of 1996, neither the Utah Public Service Commission nor the Colorado Public Utilities Commission would find the Union tariffs filed in those states applicable to interMTA traffic originating on or transiting Qwest's network for termination by Union in those states.

Accordingly, while it is the Court's intent to dismiss Union's claims pertaining to the applicability of its Utah and Colorado tariffs to originating and transiting interMTA traffic, it will withhold judgment on this issue for 10 days following the filing of this Order. The Court grants the parties 10 days to provide evidence to the Court that one or both of these state commissions regulates interMTA traffic to the extent necessary to resolve the claims before this Court – *i.e.*, the applicability of Union's filed tariffs to interMTA traffic. Provided that such evidence is received, then the Court will stay Union's claims as they pertain to interMTA traffic terminated in such state(s) pending the outcome of the state agency proceedings. If no such evidence is received, then the Court will issue an Order granting summary judgment in Qwest's favor as to these claims.

Though jurisdiction of this claim in this Court is proper, the Court finds it prudent to stay

the above-described claims pending the interpretation of the Utah and Colorado tariffs by the appropriate state agencies. A reading of the statutes applicable to both the Utah Public Service Commission and the Colorado Public Utilities Commission leaves little doubt that those commissions also have jurisdiction to interpret the applicability of a filed tariff. *See, e.g.*, UTAH CODE ANN. § 54-4-1 (1953); COLO. REV. STAT. ANN. §§ 40-6-111 and 119 (West 2003). Thus, the Court invokes its primary jurisdiction over the issues remaining in this lawsuit. The United States Court of Appeals for the Tenth Circuit explains that "[p]rimary jurisdiction is invoked in situations where the courts have jurisdiction over the claim from the very outset but it is likely that the case will require resolution of issues which, under a regulatory scheme, have been placed in the hands of an administrative body." *Marshall v. El Paso Natural Gas* Co., 874 F.2d 1373, 1376 (10th Cir. 1989). Under this doctrine, the judicial process is suspended pending referral of the issues to the administrative body for its views. Several factor relevant to the application of primary jurisdiction are "whether the issues of fact raised in the case are not within the conventional experience of judges; or whether the issues of fact require the exercise of administrative discretion, or require uniformity and consistency in the regulation of the business entrusted to a particular agency." *Id.* at 1377.

Instructive in the Court's determination to permit the parties to refer the above-described claims to the state commissions for interpretation of the filed tariffs is the opinion of the United States Court of Appeals for the Ninth Circuit in *3 Rivers Telephone Cooperative Inc. v. U.S. West*

Communications, Inc., 2002 WL1986469 (9th Cir. 2002) (unpublished). As explained previously, in that case, independent telecommunications carriers brought a breach of tariff action against Qwest alleging that Qwest breached their filed tariffs by refusing to pay terminating access charges. *Id.* at *1. The district court granted summary judgment for Qwest without interpreting and applying the Independents' tariffs. The Ninth Circuit found the trial court's failure to interpret the tariffs to be reversible error. *Id.* On remand, the Ninth Circuit instructed:

> [G]iven the complexity of the issues raised in this case, the district court may deem it necessary to stay proceedings so that the parties may commence declaratory proceedings before the Montana Public Services Commission ("PSC"). . . . It does . . . appear to be within the PSC's authority and expertise to issue a declaratory ruling with regard to (1) whether the calls for which the Independents seek payment are covered by the Independents' tariffs, and (2) whether a tariff, interpreted to require payment for such calls, is just and reasonable in light of the FCC's interpretation of federal law. . . .

Id. See also Mical Communications, Inc. v. Sprint Telemedia, Inc., 1 F.3d 1031, 1038 (10th Cir. 1993) (deciding that under doctrine of primary jurisdiction, district court should have stayed lawsuit pending FCC's action on a petition currently before FCC dealing with same issue).

The interpretation of a tariff to determine its applicability to particular types of

telecommunications traffic for purposes of recovering access charges involves expertise beyond the conventional experience of this Court. This being said, the Court fears that plowing ahead and deciding the issues likely could result in an interpretation that is inconsistent with interpretations of these and similar tariffs by the state commissions charged with regulating the telecommunications industry. Accordingly, the Court will stay these proceedings with respect to the above-described claims to permit the parties to obtain the appropriate relief before the appropriate state agencies.

Union's Motion for Partial Summary Judgment

Union argues that pursuant to the filed rate doctrine, Union asks this Court to enter partial summary judgment in Union's favor on the issue of whether Qwest must pay access charges for intrastate wireline calls. Based upon the record before this Court, Qwest does not dispute the applicability of Union's filed tariffs in Wyoming, Utah, or Colorado to intrastate long distance traffic originating on Qwest's network and terminated by Union. Though at this point the Court finds Union's motion to be more of a housekeeping matter, pursuant to *Yu v. Peterson*, 13 F.3d 1413, 1415 n.3 (10th Cir. 1993), the Court grants summary judgment in favor of Union only with respect to the applicability of Union's filed tariffs to intrastate long distance traffic that originates on Qwest's network and terminates on Union's network.

Therefore, it is hereby

ORDERED that Qwest's Motion for Summary Judgment is **GRANTED** in part and

DENIED in part. Specifically, Qwest's Motion for Summary Judgment on Union's discrimination by common carrier and unjust enrichment claims is **GRANTED**. In addition, Qwest's Motion for Summary Judgment on Union's breach of tariff and breach of contract claims is **GRANTED** with respect to all intrastate wireline and wireless traffic originating on or transiting Qwest's network for termination by Union in Wyoming. Moreover, Qwest's Motion for Summary Judgment on Union's breach of tariff and breach of contract claims is **GRANTED** with respect to all intraMTA traffic originating on or transiting Qwest's network and terminated on Union's network in Utah and Colorado.

It is further **ORDERED** that Qwest's Motion for Summary Judgment on Union's breach of tariff and breach of contract claims pertaining to the applicability of Union's Utah and Colorado tariffs to intrastate wireline traffic transiting Qwest's network for termination by Union in those states is **DENIED** subject to renewal.

It is further **ORDERED** that Union's breach of contract and breach of tariff claims pertaining to the applicability of Union's Utah and Colorado tariffs to intrastate wireline traffic transiting Qwest's network for termination by Union in those states is **STAYED** pending the interpretation of those tariffs by the appropriate state agencies. With respect to Union's breach of tariff and breach of contract claims pertaining to the applicability of Union's Utah and Colorado tariffs to interMTA traffic originating on or transiting Qwest's network for termination by Union in those states, the Court will withhold judgment for 10 days following the filing of this Order.

Following this time period, the Court will determine whether these claims should be stayed pending the interpretation of such tariffs by the appropriate state agencies or dismissed with prejudice.

In conjunction with the foregoing, it is further **ORDERED** that Union's Motion for Partial Summary Judgment is **GRANTED** only with respect to the applicability of Union's filed tariffs in Wyoming, Utah, and Colorado to intrastate long distance wireline traffic originating on Qwest's network and terminated by Union.

It is further **ORDERED** that all other claims in Union's Complaint are **DISMISSED** with prejudice.

DATED this 11 day of May, 2004.

Chief United States District Judge