

Robert C. Brown
Corporation Counsel
Qwest Services Corporation
1801 California Street, 10th Floor
Denver, CO 80202
(303) 383-6642
(303) 296-3132 (fax)
Robert.Brown@qwest.com

Jeff Nodland
Corporation Counsel
Qwest Services Corporation
1801 California Street, 10th Floor
Denver, CO 80202
(303) 383-6657
(303) 296-3132(fax)
jeff.nodland@qwest.com

Attorneys for Qwest Corporation

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 of 1996

Docket No. 04-049-145

**QWEST CORPORATION'S MOTION
TO STRIKE UNION'S RESPONSE TO
PETITION FOR ARBITRATION AND
MOTION FOR JUDGMENT ON THE
PLEADINGS**

Qwest Corporation ("Qwest"), through its counsel, files this motion to strike Union Telephone Company's ("Union") Response to Qwest's Petition for Arbitration, and requests the Utah Public Service Commission ("Commission") to grant Qwest a judgment on the pleadings.

In support, Qwest states:

I. INTRODUCTION AND SUMMARY

Qwest stands by the representation it made in its petition; namely, that Qwest has tried unsuccessfully to negotiate a wireless interconnection agreement with Union. In fact, despite several negotiation requests, Union has steadfastly refused to enter into any negotiations at all.

In partial response to this assertion, Union states that Qwest filed a petition for arbitration before the Wyoming Commission. Union Response, p. 2. This is indeed correct. Qwest filed an almost identical petition for arbitration before the Wyoming Commission. In that docket, the Wyoming Commission specifically ruled that because of Union's repeated failure to negotiate prior to the filing of the petition for arbitration, and Union's failure to file a response to Qwest's petition for arbitration, Union had failed to negotiate in good faith, as required by 47 U.S.C. § 252 (b)(5). A copy of the Wyoming Commission's decision is attached hereto as Exhibit 1, and incorporated herein by reference. The Wyoming Commission found that it was in the public interest for it to approve the wireless interconnection agreement Qwest submitted as part of its petition for arbitration.¹

Union will undoubtedly argue here that because it submitted a response to Qwest's petition for arbitration in this docket, this Commission should not grant Qwest the same relief that the Wyoming Commission granted to Qwest. As Qwest will demonstrate below, Union's pleading is not a response as that term is used in 47 U.S.C. § 252(b)(3). This Commission should do as the Wyoming Commission did, and enter an order approving the interconnection agreement attached to Qwest's petition for arbitration and labeled Exhibit D.

¹ See, Order Approving Interconnection Agreement, *In the Matter of the Contract Filing of Qwest Corporation For Petition For Arbitration of an Interconnection Agreement with Union Telephone Company D/B/A Union Cellular*, Docket No. 70000-TK-04-967, 70008-TK-04-41 (P.S.C. Wy. June 23, 2004).

II. ARGUMENT

Union's entire position -- including its refusal to negotiate or arbitrate pursuant to sections 251 and 252 of the Telecommunications Act of 1996 (the "Act") -- is premised upon the notion that its access tariffs should govern the termination of local traffic on Union's network, whether that local traffic originates on Qwest's network or merely transits Qwest's network for termination on Union's network.² Union's contention has led it to file its non-responsive response to Qwest's petition for arbitration. Union's failure to negotiate, and its non-responsive response is the basis for Qwest's assertion that Union has failed to negotiate in good faith. As a remedy for Union's failure to negotiate in good faith, Qwest seeks judgment on the pleadings, and asks that this Commission enter an order approving the interconnection agreement attached to Qwest's petition for arbitration and labeled Exhibit D.

A. UNION'S ACCESS TARIFFS DO NOT GOVERN THE TERMINATION OF LOCAL TRAFFIC ON UNION'S NETWORK

The cornerstone of Union's position, as well as its persistent refusal to negotiate an interconnection agreement with Qwest, is that its access tariffs govern the termination of local traffic on its network. Union's position is simply contrary to law. As the Wyoming District Court has held, "Union's filed switched access tariff applies only to long distance wireline

² Union is purposely vague as to the "tariffs" it is referring to in its purported response. See *e.g.* Union's Response, p. 3, ¶ 4 ("...Union would represent that it has continually taken the position with Qwest that the tariffs on file with the respective state commissions, including the Utah Public Service Commission, remain yet applicable to the interconnection of traffic."). However, it is clear from Qwest's prior dealings with Union that Union is referring to its access tariffs. See *e.g. Union Telephone Company v. Qwest Corporation, Slip Op.*, p. 22 (D.C. Wy. May 11, 2004)("Union District Court Decision")("Union['s] ... Complaint with this Court .. alleges ... 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.") A copy of the Wyoming District Court's decision is attached to this motion and labeled Exhibit 2.

traffic.”³ The traffic at issue in this arbitration proceeding is decidedly local; therefore, consistent with the *Wyoming District Court Decision*, Union’s tariffs do not apply to the traffic that is at issue in the arbitration proceeding.⁴

B. QWEST HAS AN ABSOLUTE RIGHT TO SEEK AN INTERCONNECTION AGREEMENT WITH UNION

Union’s position is that its tariff essentially trumps the negotiation and arbitration process set forth in 47 U.S.C. § 252.⁵ Union is wrong. Even if Union were found to have a tariff in place that governed the traffic that is at issue in this arbitration, Qwest would have an absolute right to seek an interconnection agreement with Union.

The Federal Communications Commission (“FCC”) has determined that compensation for transport and termination of local traffic between an incumbent local exchange carrier and a wireless carrier should be addressed under Sections 251 and 252 of the Telecommunications Act of 1996 (“Federal Act”).⁶ In Sections 251 and 252, “Congress designed a comprehensive system” under which carriers “enter into interconnection agreements setting forth the terms and

³ *Union District Court Decision*, p. 24

⁴ *Id.*, Accord *VERIZON NORTH, INC v. JOHN G. STRAND, Chairman; JOHN C. SHEA, Commissioner; and DAVID A. SVANDA, Commissioner*, 309 F.3d 935, (C.A. 6th Cir. 2002)(“*Verizon v. Strand*”)(“[T]he M[ichigan] P[ublic]S[ervice] C[ommission] order [requiring GTE to publish tariffs offering to sell elements of its network at rates predetermined by the Commission] completely bypasses and ignores the detailed process for interconnection set out by Congress in the FTA, under which competing telecommunications providers can gain access to incumbents' services and network elements by entering into private negotiation and arbitration aimed at creating interconnection agreements that are then subject to state commission approval, FCC oversight, and federal judicial review. This is "inconsistent with the provisions of [the Federal Telecommunications Act]," and therefore preempted.”).

⁵ Union Response, p. 6, ¶ 13.

⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. at 16005 ¶ 1023.(“*First Report and Order*”)

conditions of their business relationship.”⁷ A tariff that purports to be the exclusive means of dictating the terms of local interconnection “evades the *exclusive* process required by the 1996 Act, and effectively eliminates any incentive to engage in private negotiation, which is the centerpiece of the Act.”⁸ A carrier that seeks compensation for terminating traffic cannot ignore or bypass the “detailed process for interconnection,” including review of agreements by the relevant state commission, set out by Congress in the Act.⁹ By pointing to its tariff in answer to Qwest’s petition for arbitration, Union is attempting to avoid its obligations under Sections 251 and 252 of the Act as well as specific FCC rules that command companies like Union to negotiate agreements for the exchange of traffic. Union’s position must be rejected.

C. UNION HAS CONSISTENTLY FAILED TO NEGOTIATE IN GOOD FAITH

Both Union and Qwest have an obligation to negotiate in good faith with respect to the terms and conditions of agreements to fulfill the duties described in sections 251(b) and (c) of the Federal Act.¹⁰ When a party fails to negotiate in good faith, penalties may be imposed against that party, and a state commission has authority, under section 252(b)(5) to consider such allegations.¹¹

⁷ *Verizon North v. Strand*, 309 F. 3d 935, 939 (2002).

⁸ *Id.* at 940. (*Emphasis added*); see also *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1178 (D. Or. 1999); *Iowa Utilities Board v. FCC*, 120 F. 3d 753, 801 (8th cir. 1997)(noting the “Act’s design to promote negotiated binding agreements”).

⁹ *Verizon v. Strand*, 309 F.2d at 944; see also *TSR Wireless v. US West Communications*, 15 FCC Rcd. 11166 at ¶ 29 (2000)(FCC’s reciprocal compensation rules apply “regardless of ... charges ... contained in a federal or state tariff.)

¹⁰ See, 47 U.S.C. § 251(c) (1) and 47 U.S.C. § 252(b)(5).

¹¹ See *First Report and Order*, ¶ 143.

The terms and conditions of the agreement that must be negotiated in good faith by the parties include, *inter alia*, reciprocal compensation, interconnection, transmission and routing.¹² Any party who refuses to negotiate these terms and conditions shall be considered to have failed to negotiate in good faith.¹³ In its *First Report & Order*, the FCC stated:

. . . We conclude that intentionally obstructing negotiations also would constitute a failure to negotiate in good faith, because it reflects a party's unwillingness to reach agreement.

* * *

We agree with parties contending that actions that are intended to delay negotiations or resolution of disputes are inconsistent with the statutory duty to negotiate in good faith. (citations omitted) . . . *For example, a party may not refuse to negotiate with a requesting telecommunications carrier . . .* If a party refuses throughout the negotiation process to designate a representative with authority to make binding representations on behalf of the party, and thereby significantly delays resolution of issues, such action would constitute failure to negotiate in good faith.¹⁴

In this docket, Union failed to negotiate in good faith. On multiple occasions, and over the course of several months, Qwest sent letters to Union's President, Howard Woody, requesting that Union enter into negotiations with Qwest for a wireless interconnection agreement. Not once did Union respond to these requests. Nor did Union designate a representative with authority to make binding representations on its behalf. Moreover, despite receiving a copy of Qwest's template Wireless Interconnection Agreement, Union never identified any provisions in the agreement with which it disagreed, and it never proposed any alternative language. By failing to respond to Qwest's letters, Union effectively refused to

¹² 47 U.S.C. at §§ 251 (b)(5), 251(c)(2) and 251(c)(2)(A).

¹³ See, 47 U.S.C. § 252 (b)(5).

¹⁴ *First Report and Order*, ¶¶ 148 and 154 (emphasis added).

negotiate with Qwest despite the clear mandate contained within the Federal Act that it engage in good faith negotiations, and despite the FCC's clear guidance that a party may not refuse to negotiate with a requesting carrier.

In its response to Qwest's petition for arbitration Union continued its failure to negotiate in good faith. In its response, Union does not dispute the critical facts concerning its failure to negotiate as outlined above. Instead, Union merely parrots its position from the Wyoming arbitration, suggesting that its access tariffs control the terms and conditions relating to the relationship between itself and Qwest. Union then goes on to challenge this Commission's jurisdiction to conduct the arbitration;¹⁵ Union contends that its access tariffs control the terms and conditions relating to the relationship between itself and Qwest knowing full well that it lost these identical arguments in Wyoming.

Incredibly, Union then attempts for the very first time to raise "initial issues" by "suggest[ing] that there are a number of issues that would need to be resolved if this proceeding continues."¹⁶ Union's actions in attempting to raise "initial issues" during the course of this arbitration is simply too little, and too late. Union's consistent bad faith refusal to negotiate with

¹⁵ In its Response, Union admits that Qwest requested negotiations for the terms of a wireless interconnection agreement between the parties on September 23, 2003. Response at ¶ 4. Without any supporting authority, however, Union suggests that this Commission may not have jurisdiction to consider Qwest's petition for arbitration because more than nine (9) months have passed since Qwest sent this initial request. Union's argument is without merit, and is additional evidence of its bad faith. As Union's President, and its lawyers know, and as they failed to note in their response, by letter dated April 23, 2004, Qwest renewed its request for negotiations with Union. This renewed request for negotiations restarted the nine month clock set forth in 47 U.S.C. § 252 (b)(4)(C). More specifically, Qwest stated that "[s]hould negotiations not be concluded within the timeframe set forth in the Telecommunications Act of 1996, Qwest may file for arbitration with the applicable state commission between . . . September 5, 2004 and September 30, 2004 respectively." See, Ex. C to Qwest Corporation's Petition For Arbitration of an Interconnection Agreement. Union's unsupported assertion that this Commission may not have jurisdiction because the nine month time period has expired is, therefore, unfounded.

Qwest forecloses this thinly veiled attempt to circumvent the requirements of the Federal Act. Just as in the Wyoming arbitration between Union and Qwest, Union should now be ordered to sign and implement the terms of Qwest's template Wireless Interconnection Agreement.

D. UNION HAS FAILED TO IDENTIFY ANY OPEN ISSUES FOR THE COMMISSION TO RESOLVE

When a party files a petition for arbitration pursuant to Section 252 of the Act, a state commission has authority “to arbitrate any open issues” that the parties failed to resolve during their negotiations.¹⁷ In order to help facilitate the state commission's resolution of the “open issues” that were not resolved during the negotiations, the petitioner must identify for the commission “(i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issues discussed and resolved by the parties.”¹⁸ “A non-petitioning party *to a negotiation* under this section may respond to the other party's petition and provide such additional information as it wishes . . .”¹⁹ “The state commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).”²⁰

In this docket there are no “open issues” that remain unresolved by the parties because Union has consistently refused to negotiate with Qwest. Despite having had a copy of Qwest's template Wireless Interconnection Agreement since at least September 23, 2003, Union has

¹⁶ Response at ¶ 16.

¹⁷ See, 47 U.S.C. § 252 (b)(1).

¹⁸ *Id.*, at § 252 (b)(2)(A).

¹⁹ *Id.*, at § 252 (b)(3) (emphasis added).

never disputed ANY provision contained in the agreement, and has never provided Qwest, or any state commission, with ANY alternative language to the terms and conditions found in the template agreement. Consistent with this approach, or lack thereof, Union's response in this docket fails to identify a single provision in Qwest's agreement with which it disagrees, and it fails to provide any alternative language to that which is contained in Qwest's template agreement. Though Union has attempted to identify "initial issues" in its response, the list of "initial issues" is merely a generic list of legal issues upon which Union desires to have the Commission opine. Union's list of "initial issues" does not meet the requirements of the Act, and is merely a failed attempt to obfuscate its prior and consistent refusal to negotiate. Union's response should be stricken, and a judgment for Qwest should be rendered by this Commission on the pleadings submitted by the parties.

III. CONCLUSION

WHEREFORE, Qwest respectfully requests that the Commission enter an order striking the Response of Union Telephone because it is not in accord with the requirements of the Federal Act, and enter judgment on the pleadings on behalf of Qwest thereby requiring Union Telephone to sign and implement the template Wireless Interconnection Agreement proposed by Qwest.

DATED: November 4, 2004.

Respectfully submitted,

Robert C. Brown, Esq.
Jeff Nodland, Esq.

Attorneys for Qwest Corporation

²⁰ *Id.*, at § 252(b)(4).

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Qwest Corporation's Motion to Strike Union's Response to Petition for Arbitration and Motion for Judgment on the Pleadings** to be served by electronic mail and/or by U.S. Mail, postage prepaid, to the following on November 4, 2004:

James Woody
Executive Vice President
Union Telephone Company d/b/a Union Cellular
850 N. Hwy 414,
P.O. Box 160
Mountain View Wyoming 82939
jwoody@union-tel.com

Bruce Asay, Esq.
Counsel for Union Telephone
1807 Capitol Ave.
Suite 203
Cheyenne, WY 82001
basay@associatedlegal.com
