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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF UTAH

IN THE MATTER OF THE COMPLAINT OF UNION TELEPHONE COMPANY, a Wyoming Corporation, Against QWEST Corporation, f/k/a U S WEST COMMUNICATIONS, INC., a Colorado Corporation	)))))	Docket No. 05-054-01

QWEST CORPORATION'S RESPONSE TO UNION TELEPHONE COMPANY'S PETITION FOR REVIEW OR REHEARING

Qwest Corporation ("Qwest"), by its attorneys, submits the following response to the Petition for Review or Rehearing of Order Granting Partial Motion to Dismiss and Petition for Hearing filed by Union Telephone Company ("Union").

Background

In its Second Amended Complaint, Union asserted claims for compensation under its Access Service Tariff for termination of both wireline and wireless calls. Qwest moved to dismiss all of the claims relating to wireless calls and presented three reasons for dismissal. First, under the Telecommunications Act of 1996 (the "1996 Act"), as interpreted by the FCC, intrastate access charges may not be assessed for the termination

of intraMTA wireless traffic. Second, the FCC's *T-Mobile*[1] decision did not change the law's prohibition against the collection of access charges for the termination of intraMTA wireless traffic. Finally, the Wyoming Federal Court had already rejected Union's claims based on its Access Service Tariff for both intraMTA and interMTA wireless traffic.

In its order dated September 28, 2005, the Public Service Commission (the "Commission") granted Qwest's motion to dismiss Union's wireless claims and relied on the third of Qwest's three reasons for dismissal as the basis for its order. Union now seeks reconsideration of that order. However, Union has still not refuted either of the first two grounds for dismissal. In particular, Union has not cited a single authority supporting Union's reliance upon its Access Service Tariff to obtain compensation for the termination of either intraMTA or interMTA wireless calls. In fact, there is no such authority. Thus, for the reasons that follow, Union's Petition for Rehearing should be denied.

Argument

In its Petition for Rehearing, Union makes three arguments. First, Union asserts generally that it is entitled to recover compensation from Qwest. Second, Union claims that prior to *T-Mobile*, it was entitled to compensation pursuant to its Access Service Tariff. Third, Union asserts that since the Wyoming Federal Court's decision[2] is not technically final, Union should be allowed to assert the very same claims before the

[1] *In the Matter of Developing a Unified Intercarrier Compensation Regime and T-Mobile et al Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92 (February 24, 2005)("*T-Mobile Decision*").

[2] Copies of the Court's May 11, 2004 and September 3, 2004 orders are attached as exhibits to Qwest's partial motion to dismiss.

Commission that it asserted before the Wyoming Federal Court. Union is simply wrong on each of these points.

Union's argument that it is entitled to compensation from Qwest is wrong for at least two reasons. First, if Union is entitled to compensation, it is from the originating carrier, not a transiting carrier such as Qwest. As the FCC has explained:

> Existing access charge rules, and the majority of existing reciprocal compensation arrangements require the calling party's carrier, whether LEC, IXC or CMRS, to compensate the called party's carrier for terminating the call. Hence, these regimes may be referred to as "calling party's network pays" or ("CPNP"). Such CPNP arrangements, where the calling party's network pays to terminate a call, are clearly the dominant form of interconnection regulation in the United States and abroad.[3]

Second, Union did not follow the procedures prescribed by Sections 251 and 252 of the 1996 Act in order to obtain compensation. The 1996 Act establishes a system of negotiations and arbitrations to establish the terms of reciprocal compensation. As has been held by several courts, the "comprehensive" process set out in Sections 251 and 252 of the Act are the "exclusive" means for establishing the arrangements contemplated by the Act.[4] Union may not circumvent this process of negotiating and, if necessary, arbitrating an interconnection agreement by unilaterally filing a tariff.[5]

Union's second argument that it was entitled to compensation under its Access Service Tariff prior to *T-Mobile* is also erroneous. In *T-Mobile,* the FCC prohibited local exchange carriers "from imposing compensation obligations for non-access traffic pursuant to tariff."[6] The FCC also determined in *T-Mobile* that the imposition of cost-based reciprocal compensation rates through a state-approved tariff applicable only in the

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[3] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610, 2001 WL 455872 (Notice of Proposed Rulemaking, 2001), ¶9.
[4] *Verizon North, Inc. v. Strand*, 309 F.3d 935, 939 (6th Cir. 2002).
[5] *Verizon North Inc. v. Strand*, 367 F.3d 577, 584-85 (7th Cir. 2004).
[6] *T-Mobile*, ¶14.

absence of an interconnection agreement was not previously *per se* unlawful.[7] The FCC did not, however, legitimize attempts by carriers such as Union to collect access charges for termination of local traffic pursuant to a tariff that had never been approved for the purpose of establishing terms of reciprocal compensation.

The tariffs at issue in *T-Mobile* were not access service tariffs. They were tariffs submitted to a state commission that applied "only in the situation where there is no interconnection agreement or reciprocal compensation agreement between the parties."[8] Moreover, the FCC explicitly reaffirmed that tariffs could not be used to circumvent the Act's prescribed procedures for creating an interconnection agreement to set forth the reciprocal compensation obligations of the parties.[9] Thus, if it was possible for the party seeking compensation to enter into an interconnection agreement, a tariff could not be used to set forth terms and conditions for reciprocal compensation.

What must be emphasized in this case is that Union (acting as a wireless carrier) has always had the right to request that Qwest negotiate an interconnection agreement setting forth the terms and conditions for the exchange of traffic.[10] Thus, *T-Mobile* does not under any circumstances support Union's use of its Access Service Tariff to recover compensation from Qwest for the delivery of intraMTA wireless traffic to Union. The 1996 Act has always required that the terms and conditions for the exchange of this traffic be set forth in an interconnection agreement.

Union's last contention is that the Wyoming Federal Court's decision is not technically final. This is a new argument by Union. In its response to Qwest's motion to

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[7] *T-Mobile*, ¶13.
[8] *T-Mobile*, ¶7, footnotes 33 and 49.
[9] *T-Mobile*, ¶13.
[10] *Local Competition Order*, ¶1015.

dismiss, Union initially asserted that the Wyoming Federal Court had not decided the claims that Union was asserting in this proceeding. However, that argument was simply wrong. In its May 11, 2004 order, the Wyoming Federal Court expressly stated "the Court has determined that Union's tariffs are inapplicable to intraMTA wireless traffic that terminate 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."[11] In its September 3, 2004 order, the Wyoming Federal Court ruled that "Union's claims regarding the applicability of its Utah and Colorado tariffs to interMTA traffic are dismissed with prejudice."[12]

The Wyoming Federal Court gave Union very specific directions as to how Union should proceed before the Commission. The Court directed Union to seek a determination by the Commission as to the applicability of its Access Service Tariff to intrastate wireline traffic that transits Qwest's network in Utah. In its May 11, 2004 Order, the Court stated:

> 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 those states to intrastate wireline traffic that originates on Qwest's network and terminates on Union's network. Yet, Qwest disputes the application of Unions 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. (emphasis added).

The Court clearly did not direct Union to reassert its claims relating to wireless traffic. However, rather than abiding by the Court's directions, Union instead attempted to assert all of its claims, even those that were rejected by the Wyoming Federal Court.

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[11] May 11, 2004 Order, p. 34.
[12] September 3, 2004 order, p. 6.

In its Petition for Review or Rehearing, Union argues that the Wyoming Federal Court's decision is not technically final. Union misses the point. The Wyoming Federal Court has already decided Union's wireless claims. Thus, there is no principled reason for the Commission to redo the work already performed by the Wyoming Federal Court. That is a complete duplication of effort and it is not what the Wyoming Federal Court intended when it directed Union to seek a determination from the Commission concerning Union's *wireline transit traffic* claims. The Commission should not give Union a second opportunity to assert its claims for termination of intraMTA and interMTA wireless traffic. Instead, it should dismiss the claims for the reasons given by the Wyoming Federal Court.

Conclusion

For the foregoing reasons, Union's Petition for Review or Rehearing should be denied.

Dated this 24th day of October, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **QWEST CORPORATION'S RESPONSE TO UNION TELEPHONE COMPANY'S PETITION FOR REVIEW OR REHEARING** to be served by electronic mail and/or by U.S. Mail, postage prepaid, to the following on this 24th day of October, 2005:

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