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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE COMPLAINT)	DOCKET NO. 05-054-01
OF UNION TELEPHONE COMPANY, a)	
Wyoming Corporation, Against QWEST)	
CORPORATION, fka US WEST)	QWEST CORPORATION'S
COMMUNICATIONS, INC., a Colorado)	PARTIAL MOTION TO
Corporation.)	DISMISS FIRST AMENDED
)	COMPLAINT AND MOTION
)	FOR A MORE DEFINITE
)	STATEMENT

Pursuant to Utah Admin., Rule R746-100-4.D, Qwest Corporation ("Qwest"), hereby moves to dismiss the First Amended Complaint filed by Union Telephone Company ("Union") to the extent that it seeks compensation for termination of wireless traffic. Qwest also moves that Union be required to comply with the Utah Public Service Commission's May 4, 2005 Order and provide a more definite statement setting forth the amount(s) Union claims to be due, if any, for each of its wireline claim(s). In support of these motions, Qwest states the following:

I. INTRODUCTION

This proceeding is an attempt by Union to re-litigate claims previously asserted and rejected in a lawsuit filed against Qwest in the United States District Court for the District of Wyoming. In that proceeding, Union sought to recover access charges for terminating both

wireline and wireless calls in the states of Colorado, Utah and Wyoming. Union sought recovery from Qwest even in circumstances in which Qwest was merely a transiting carrier delivering calls to Union placed by customers of other telecommunications carriers.

Union bases all of its claim(s) in this proceeding upon its Access Service Tariff. (First Amended Complaint, ¶15). Union has not entered into an interconnection agreement with Qwest in Utah and Union has not alleged the existence of any other agreement, price list or tariff as the basis for its claim(s).¹ Thus, Union's claim(s) here are identical to the claims Union asserted before the Wyoming Federal Court for termination of calls in Utah.

In orders dated May 11, 2004 and September 3, 2004, the Wyoming Federal Court granted Qwest summary judgment on several claims that Union is attempting to assert in this proceeding.² In particular, the Court dismissed all of Union's claims for terminating wireless calls in Utah.³ Since the vast majority of Union's customers are wireless customers, the Court's dismissal of the claims for terminating wireless calls disposed of all but a small portion of Union's total claim.

In its May 11, 2004 Order, the Wyoming Federal Court declined to rule on whether Union was entitled to collect access charges for terminating wireline calls in Colorado and Utah that are delivered to Union by Qwest but placed by customers of third party carriers ("wireline transit traffic"). Instead, the Wyoming Federal Court noted that "Qwest disputes the application of Union's tariffs presently on file in Utah and Colorado to intrastate wireline traffic that transits

¹ Qwest initiated Docket No. 04-049-145 requesting that the Commission arbitrate the terms of an interconnection agreement precisely because Union refused to negotiate such an agreement.

² The Court's May 11, 2004 and September 3, 2004 orders are attached as Exhibits A and B, respectively.

³ See May 11, 2004 Order, pp. 25-26 (dismissing claims for termination of intraMTA calls) and September 3, 2004 order, pp. 5-6 (dismissing claims for termination of interMTA calls terminated in Utah).

Qwest's network for termination on Union's network in those states" and stayed these claims "pending the interpretation of those tariffs by the appropriate state agencies."⁴

Had Union followed the Wyoming Federal Court's direction, Union would have limited its claim before the Commission to a determination as to whether Qwest is required to pay access charges under Union's Access Service Tariff for terminating wireline transit traffic. However, in its First Amended Complaint, Union makes it clear that it seeks to re-litigate the wireless claims that have already been rejected by the Wyoming Federal Court. Accordingly, Qwest now moves the Commission for an Order dismissing Union's First Amended Complaint to the extent that it requests compensation from Qwest for terminating wireless calls. Qwest also requests that Union be required to provide a more definite statement setting forth the amount(s), if any, it seeks to recover in each of its remaining wireline claims.

II. MOTION TO DISMISS (Claim(s) Relating to Wireless Traffic)

In its First Amended Complaint, Union requests compensation from Qwest for the termination of wireless calls. Union's claim(s) relating to wireless traffic should be dismissed for two reasons. 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 Wyoming Federal Court has already rejected Union's claims based on its Access Service Tariff for both intraMTA and interMTA wireless traffic.

A. Under the 1996 Act, Union May Not Assess Qwest Access Charges For the Termination of IntraMTA Wireless Traffic

The 1996 Act imposes on telecommunications carriers a number of duties and prescribes a detailed process for their implementation and enforcement. For example, Section 251(b)(5)

⁴ May 11, 2004 Order, p. 34.

imposes a duty on all local exchange carriers to “establish reciprocal compensation arrangements for the transport and termination of telecommunications.”⁵ Pursuant to its rulemaking authority, the FCC in 1996 determined in its *Local Competition Order* that “section 251(b)(5) reciprocal compensation,” and not “access charges,” would apply “to traffic that originates and terminates within a local calling area.”⁶

In its *Local Competition Order*, the FCC defined the local calling area for a wireless call to be the Major Trading Area (“MTA”).⁷ A call that originates and terminates within the same MTA is treated as a local call regardless of whether it crosses exchange boundaries defined by a state commission.⁸ Thus, Union is not entitled to charge Qwest access charges for termination of intraMTA wireless calls.

The 1996 Act also establishes a system of negotiations and arbitrations in order to facilitate voluntary agreements between competing carriers to implement its substantive provisions. As held by several courts, the “comprehensive” process set out in Section 251 and 252 is the “exclusive” means for establishing arrangements contemplated by the Act’s substantive provisions.⁹ Neither carriers nor regulatory agencies may through a tariff filing “bypass” and “ignore” the “detailed process for interconnection set out by Congress” in the Act.¹⁰

In this case, Union improperly seeks to recover access charges for the termination of wireless traffic pursuant to its Access Service Tariff. (First Amended Complaint, ¶15). The vast

⁵ 47 U.S.C. §251(b)(5).

⁶ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, ¶¶1034, 1036, 1043, 11 FCC Rec. 15499 (August 8, 1996), *aff’d in part and rev’d in part*, *Iowa Utils. Bd. v. FCC*, 525 U.S. 1133 (1999)(the “*Local Competition Order*”).

⁷ See *Local Competition Order*, ¶¶1036, 1043.

⁸ *Id.*

⁹ *Verizon North, Inc. v. Strand*, 309 F.3d 935, 939 (6th Cir. 2002)

¹⁰ *Verizon North Inc. v. Strand*, 367 F.3d 577, 584-85 (7th Cir. 2004)(“unilateral” tariff filing is “a fist slamming down on the [negotiating] scales”).

majority of the wireless traffic delivered by Qwest to Union in Utah is intraMTA traffic. This is so because Union's operations in Utah are for the most part encompassed in the northeast corner of the state¹¹ and are contained in MTA No. 22.¹² Union's Colorado and Wyoming operations are also largely contained in MTA No. 22. Thus, while it is possible that Qwest delivers interMTA traffic to Union in Utah, the volume of such traffic is likely to be very small or nonexistent.

In its recent *T-Mobile* decision, the FCC prohibited local exchange carriers altogether "from imposing compensation obligations for non-access traffic pursuant to tariff."¹³ 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 absence of an interconnection agreement was not previously *per se* unlawful.¹⁴ 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 that would apply in the absence of an interconnection agreement.

The real significance of *T-Mobile* is that it clarifies that an incumbent local exchange carrier can request a wireless carrier to negotiate an interconnection agreement containing the terms and conditions for the exchange of local traffic. What must be emphasized, however, 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.¹⁵ Thus, *T-Mobile* does not under any circumstances support Union's use of its Access Service

¹¹ Attached as Exhibit C is an exchange map for the state of Utah.

¹² Attached as Exhibit D is the MTA map for the United States. The MTA map can be found at the FCC's website at <http://wireless.fcc.gov/auctions/data/maps/mta.pdf>.

¹³ *T-Mobile*, ¶14.

¹⁴ *T-Mobile*, ¶13.

¹⁵ *Local Competition Order*, ¶1015.

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.

B. The Wyoming Federal Court Has Already Rejected Union's Claims for the Termination of IntraMTA and InterMTA Wireless Traffic

In its May 11, 2004 and September 3, 2004 Orders, the Wyoming Federal Court rejected Union's claims for access charges for both intraMTA and interMTA traffic delivered by Qwest to Union in Utah. The Court rejected Union's claim for access charges on intraMTA traffic because federal law prohibits the collection of access charges as discussed above.¹⁶ The Court rejected Union's claim for access charges on interMTA traffic because Union had not entered into an agreement with Qwest for the payment of access charges for terminating interMTA wireless traffic and because Union had otherwise failed to follow FCC-prescribed procedures.¹⁷

In dismissing Union's claim for access charges for interMTA wireless traffic, the Court also concluded that Union's Access Service Tariff was not applicable to interMTA traffic originating on or transiting Qwest's network for termination by Union in Utah.¹⁸ In addition, the Court questioned whether the Commission regulates "telecommunications services using cellular or other wireless technology in any way relevant to" Union's claims. The Court gave Union ten days to provide evidence to the Court that the Commission did regulate telecommunications services using cellular or other wireless technology in a way relevant to

¹⁶ May 11, 2004 Order, pp. 25-26.

¹⁷ Id at pp. 26 -27.

¹⁸ Id at pp. 34-35.

Union's claim(s).¹⁹ When Union failed to present such evidence, the Court granted Qwest summary judgment on Union's claim with respect to interMTA wireless traffic.²⁰

The Commission should not give Union a second opportunity to assert its claims for termination of intraMTA and interMTA wireless traffic. Those claims have already been rejected by the Wyoming Federal Court and there is no legitimate reason for the Commission to reconsider the conclusions reached by the Wyoming Federal Court.

III. MOTION FOR A MORE DEFINITE STATEMENT (Union's Remaining Claims)

The Interim Order entered in this matter on May 4, 2005 required Union to file a more definite statement containing details as to the types of traffic Union seeks compensation for and the amounts for which Union contends it has not been paid. Qwest had moved for a more definite statement because Union's entitlement to compensation, if any, varies by traffic type. In its First Amended Complaint, Union provided some but not all of the information required by the Interim Order.

In this case, Union has now alleged that it is seeking compensation from Qwest for the termination of wireless traffic. (First Amended Complaint, ¶¶12-14). In fact, the claim(s) relating to wireless traffic must make up the largest portion of Union's claim. As the Wyoming Federal Court noted in its May 11, 2004 order, Union at the time had approximately 40,000 wireless subscribers compared to only 7,000 wireline customers.²¹ Moreover, in the states of Colorado and Utah, Union had approximately 10,000 wireless customers compared to only 700 wireline customers. Based on this data, over ninety percent of Union's customers in Colorado and Utah are wireless customers. Union has at most a few hundred wireline customers in Utah.

¹⁹ Id at p. 35.

²⁰ September 3, 2004 Order, pp. 5-6.

²¹ May 11, 2004 Order, p. 2.

If the Commission dismisses Union's wireless claims, the Commission should also require Union to file a more definite statement as to its wireline claims so that the Commission and Qwest can determine what is left to be resolved. The Interim Order required Union to provide the amounts for which Union contends it has not been paid and this detail should be required for wireline transit traffic, Qwest-originated wireline toll traffic and Qwest-originated wireline local traffic that makes up Union's claim. Union did not provide any information as to the amount of its claim(s) in its First Amended Complaint.

WHEREFORE, Qwest Corporation respectfully requests (1) that the Commission dismiss the Complaint filed by Union Telephone Company to the extent that it seeks recovery from Qwest for the termination of wireless traffic and (2) that the Commission require Union to file a more definite statement of the amounts, if any, that Union claim(s) are due from Qwest for the termination of wireline transit traffic, Qwest-originated wireline toll traffic and Qwest-originated wireline local traffic.

Dated this 26th day of May, 2005

Respectfully submitted,

/s/ Robert C. Brown, Esq.

Robert C. Brown, Esq.
Qwest Services Corporation

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **PARTIAL MOTION TO DISMISS FIRST AMENDED COMPLAINT AND MOTION FOR A MORE DEFINITE STATEMENT** to be served by electronic mail and/or by U.S. Mail, postage prepaid, to the following on this 26th day of May, 2005:

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