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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

Qwest Corporation, ("Qwest") submits the following reply memorandum in support of Qwest's motion to dismiss the complaint filed by Union Telephone Company ("Union") and Qwest's motion in the alternative to require Union to file a more definite statement of its claim(s) against Qwest.

I. BACKGROUND

Qwest moved to dismiss Union's complaint because it lacks allegations that are sufficient to state a claim. Union's complaint does not identify the tariff, price list or

interconnection agreement upon which Union bases its claim. Nor does the complaint identify the traffic type(s) for which Union is seeking compensation, including whether Union is seeking compensation for traffic exchanged with its wireline Independent Local Exchange Carrier (“ILEC”) business or its wireless business (aka Union Cellular) . Indeed, as matters stand now, the Commission cannot even determine whether it has jurisdiction. If, for example, Union is asserting its claim based on an interstate tariff, this Commission would not have jurisdiction. Jurisdiction would rest with the Federal Communications Commission (“FCC”).

In its response to Qwest’s motions, Union merely repeats the general assertion made in its complaint that compensation should be paid when services are provided. Union does not dispute that its complaint fails to identify the document(s) that set forth the compensation terms and conditions that it alleges have been violated or identify the traffic types for which it seeks compensation. Instead, Union makes oblique reference to three legal proceedings: (1) the lawsuit that Union filed against Qwest in the United States District Court for the District of Wyoming (Docket No. 02-CV-209D); (2) the arbitration that Qwest filed against Union that is pending before the Commission in Docket No. 04-049-145; and (3) the FCC’s recent *T-Mobile Decision*.¹

Of the three proceedings referenced by Union, the proceeding before the Wyoming Federal Court is noteworthy for two reasons. First, the Court in that proceeding has already ruled that Union is not entitled to compensation from Qwest

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*”).

under its access tariffs for either intraMTA² or interMTA wireless traffic delivered by Qwest to Union in Utah.³ Second, after ruling on all of Union's Wyoming state law claims and all claims relating to wireless traffic, the Court stayed its proceedings to permit this Commission to determine whether Union's Utah intrastate access tariff requires Qwest to compensate Union for terminating wireline-originated traffic that merely transits Qwest's network to terminate to Union, the ILEC.⁴ Qwest disputes that it is required to pay access charges on traffic that it does not originate.

Had Union followed the Wyoming Federal Court's direction, Union would have requested only that the Commission determine whether Qwest is required to pay intrastate access charges to Union on wireline traffic that originates on one carrier's network, transits Qwest's network, and is then terminated by Union, the ILEC. Instead, Union filed a nebulous complaint without any detail as to the terms and conditions under which it claims it should be compensated or description of the traffic at issue. Union's complaint is so lacking in detail that it should be dismissed, or in the alternative, Union should be required to file a more definite statement. This is precisely what happened to the identical complaint Union filed against Qwest in Colorado.⁵

II. ARGUMENT

To state a cause of action against Qwest, Union is required to identify the legal document(s) upon which it bases its claim and to identify the traffic type(s) for which it seeks compensation. These details are necessary because Union's entitlement to

² An MTA is a "Major Trading Area," a designation commonly used under the Act to regulate relationships between carriers related to wireless traffic.

³ Copies of the Court's May 11, 2004 and September 3, 2004 orders are attached as Exhibits A and B, respectively.

⁴ May 11, 2004 Order, at 34 (Exhibit A).

⁵ Interim Order of Administrative Law Judge Ken F. Kirkpatrick Granting Motion for More Definite Statement and Vacating Hearing, *Union Telephone Company v. Qwest Corporation*, Docket No. 05F-083T (Colorado PUC, April 11, 2005).

compensation, if any, is limited in at least three material respects. 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 local traffic. Second, under the FCC’s *T-Mobile* decision, Union may not rely upon a tariff to set forth the terms and conditions for reciprocal compensation applicable to local traffic. Finally, the Wyoming Federal Court has already ruled that Qwest is not required to compensate Union for wireless traffic delivered to Union in Utah.

A. Under the 1996 Act, Union May Not Assess Qwest Access Charges For the Termination of Local 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) imposes a duty on all local exchange carriers to “establish reciprocal compensation arrangements for the transport and termination of telecommunications.”⁶ 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.”⁷

Under the FCC’s reciprocal compensation rules, it is the carrier whose customer places the call who has the responsibility to pay reciprocal compensation to the carrier who terminates the call. In this respect, these rules follow the custom in the industry that the calling party’s carrier has the obligation to compensate the carrier who terminates the call. As the FCC has explained:

⁶ 47 U.S.C. §251(b)(5).

⁷ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rec. 15499 ¶¶ 1034, 1036, 1043(August 8, 1996), *aff’d in part and rev’d in part*, *Iowa Utils. Bd. v. FCC*, 525 U.S. 1133 (1999) (“*Local Competition Order*”).

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.⁸

Union must identify both the document(s) upon which it bases its claim and the type(s) of traffic for which it seeks compensation because these details determine whether Union is entitled to compensation and from whom. Union may not, for example, attempt to collect tariffed access charges for the termination of local traffic. Moreover, whether the traffic is toll traffic or local traffic, it is the carrier whose customer places the call who is responsible for compensating Union. Significantly, Union has not alleged the existence of any tariff, price list or interconnection agreement that imposes an obligation upon Qwest to compensate Union for traffic that merely transits Qwest's network.

B. Under the FCC's *T-Mobile Decision*, Union May Not Use a Tariff To Set Forth the Terms and Conditions for Reciprocal Compensation

The 1996 Act 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 Sections 251 and 252 is the "exclusive" means for establishing arrangement 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

⁸ Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, 16 FCC Red. 9610, 2001 WL 455872, ¶ 9 (2001).

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").

Union relies upon the FCC's *T-Mobile* decision to support an argument that the prohibition against the use of tariffs to collect reciprocal compensation is only a recent event. In *T-Mobile*, the FCC prohibited local exchange carriers "from imposing compensation obligations for non-access traffic pursuant to tariff."¹¹ 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.¹²

In this case, Union has not alleged that it is seeking compensation pursuant to a particular tariff. Furthermore, Union has certainly not alleged that it is seeking compensation for non-access traffic, that the tariff rates meet the pricing standards under Section 252 of the Act, that the tariff was commission-approved as a reciprocal compensation tariff or that the tariff is applicable only in the absence of an interconnection agreement. Indeed, Union has not specified if it is seeking compensation for traffic exchanged with its ILEC or wireless carrier. (Traffic exchanged between LECs is not the subject of the *T-Mobile* decision.) Thus, *T-Mobile* does not in any way fill in or otherwise cure the deficiencies in Union's complaint.

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. Thus, *T-Mobile* does not under any circumstances

¹¹ *T-Mobile*, ¶ 14.

¹² *Id.* ¶ 13.

or for any time period support Union's use of an access tariff to recover compensation from Qwest for the delivery of local traffic to Union.

C. The Wyoming Federal Court Has Determined that Qwest is Not Required to Compensate Union for Wireless Traffic Delivered to Union in Utah

A final reason for requiring Union to identify more precisely the basis for its claim is to honor the decision of the Wyoming Federal Court. The Wyoming Federal Court has already determined that Union may not recover access charges for the termination of wireless traffic that is originated by, or transits, Qwest's network in Utah.

The vast majority of the wireless traffic at issue is intraMTA traffic – that is, traffic that originates and terminates in the same Major Trading Area. In its *Local Competition Order*, the FCC defined the local calling area for a wireless call to be the MTA.¹³ 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.¹⁴ Thus, Union is not entitled to charge access charges for intraMTA wireless calls.

Since Union has not specified the type(s) of traffic for which it seeks compensation, it is impossible to determine whether Union is making a backdoor attempt to circumvent the decision of the Wyoming Federal Court. Thus, in order to ensure that the Wyoming Federal Court's decision is respected, the Commission should require Union to identify the type(s) of traffic for which it is seeking compensation.

¹³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, ¶¶ 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).

¹⁴ *Id.*

III. CONCLUSION

For the foregoing reasons, the complaint filed by Union Telephone Company should be dismissed, or in the alternative, Union Telephone Company should be required to file a more definite statement.

Dated this 25th day of April, 2005

Respectfully submitted,

Robert C. Brown
Jeff Nodland
Thomas Dethlefs

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF QWEST CORPORATION'S MOTION TO DISMISSOR IN THE ALTERNATIVE FOR A MORE DEFINITE STATEMENT** to be served by electronic mail and/or by U.S. Mail, postage prepaid, to the following on this 25th day of April, 2005:

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