Stephen F. Mecham (Bar No. 4089)
Callister, Nebeker & McCullogh
10 E. South Temple, Suite 900
Salt Lake City, UT 84133-1101
Telephone: (801) 530-7300

Bruce S. Asay
Associated Legal Group, LLC
1807 Capitol Avenue, Suite 203
Cheyenne WY 82001
Telephone: (307) 632-2888

Attorneys for Union Telephone Company

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF UTAH

IN THE MATTER OF THE COMPLAINT OF UNION TELEPHONE COMPANY, a Wyoming Corporation, Against QWEST CORPORATION, fka U S WEST COMMUNICATIONS, INC., a Colorado Corporation.	Docket No. 05-054-01 **UNION TELEPHONE COMPANY'S RESPONSE AND OPPOSITION TO QWEST CORPORATION'S PARTIAL MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Union Telephone Company ("Union"), by and through its counsel, hereby files its Response and Opposition To Qwest Corporation's ("Qwest") Partial Motion To Dismiss Second Complaint.

In its third Motion to Dismiss, Qwest alleges that Union merely "recycles" previous filings in its Second Amended Complaint and requests that the Utah Public Service Commission ("Commission") dismiss the Complaint with respect to compensating Union for terminating wireless calls. Union is simply requesting that the Commission recognize a time-honored tenet of utility regulation that a service provider should be compensated for the services it provides, Qwest's Motion, therefore, should be denied.

Procedural Background

On March 4, 2005, Union filed a Complaint against Qwest with this Commission for failure to pay originating and terminating access charges to Union for the use of Union's wireless network. In response, Qwest filed its first Motion to Dismiss or in the Alternative, for a More Definite Statement, seeking dismissal of the Complaint or an order requiring Union to provide a more definite statement regarding Qwest's payment obligations, the time periods covered, and the amounts at issue. On May 4, 2005, the Commission granted Qwest's Motion for a More Definite Statement and ordered that Union file an amended complaint within fifteen days with the following information:

1) The tariff(s), price list or interconnection agreement(s) Union relies upon as the basis for its complaint;
2) The time periods and amount Union contends it has not been paid;
3) Whether the changes in question are for originating or terminating access;
4) Whether the traffic is wire-line or wireless;
5) Whether Qwest is the originating carrier for the traffic at issue or a transiting carrier;
6) Whether the traffic is local or toll traffic; and
7) Whether the entity that claims it was not compensated is Union the ILEC, or Union the wireless provider.

Pursuant to Commission Order, Union filed its First Amended Complaint on May 23, 2005. In response, Qwest filed a Partial Motion to Dismiss First Amended Complaint and Motion for a More Definite Statement seeking a more definite statement setting forth the amounts Union is due for each of its wireline claims. On July 6, 2005, the Commission granted the Motion for More Definite Statement and ordered Union to file a second amended complaint within fifteen days that identified "the amount of compensation Union seeks for termination of Qwest traffic and whether that traffic is transit or Qwest-originated, wireline or wireless, toll or local". Order, p.2.

Union filed its Second Amended Complaint on July 21, 2005. On August 10, 2005, in response to the Second Amended Complaint, Qwest filed a Partial Motion to

Dismiss Union's Second Complaint to the extent that Union is seeking compensation for termination of wireless traffic.

Discussion

Qwest argues that that Union's claims relating to wireless traffic should be dismissed. Qwest misinterprets the Telecommunications Act of 1996 (the "1996 Act"), the Federal Communications Commission's ("FCC") recent *T-Mobile* decision, and the Wyoming Federal Court decision to support its Motion.

The Telecommunications Act of 1996

Qwest argues that under the 1996 Act, Union may not assess Qwest access charges for the termination of IntraMTA wireless traffic. According to Qwest, therefore, since the vast majority of the wireless traffic delivered by Qwest to Union in Utah is intraMTA traffic, Union is not entitled to recover access charges for this traffic. Such an interpretation is contrary to the Act. While the 1996 Act recognized other compensatory schemes, such as reciprocal compensation, it did not eliminate the use of access charges as an alternative form of intercarrier compensation. Instead, the 1996 Act specifically recognized the requirement for compensation for the exchange of traffic between carriers.

In *Atlas Telephone Co. v. Oklahoma Corporation Commission*, 400 F.3d 1256, C.A. 10 (Okla.) 2005, the Tenth Circuit Court of Appeals addressed interconnection between wireless carriers and incumbents. The Court recognized the statutory scheme established by the 1996 Act. The Court noted an incumbent's obligation to interconnect and establish reciprocal compensation arrangements, stating that ILECs are required to provide interconnection to CMRS providers that request it. Since *Atlas* and *T-Mobile* were decided virtually simultaneously, the Court did not address *T-Mobile* and the reciprocal obligation did not yet exist. Nevertheless, the Court recognized that an ILEC

has a duty to compensate CMRS providers for call termination. Indeed, the Court would not relieve the originating carrier (ILEC) of its obligation to compensate the terminating carrier even in a reciprocal compensation regime. The Court addressed with approval the responsibility of a carrier to deliver traffic to the other and bearing the costs of that delivery. The Court noted:

> Under a typical reciprocal compensation agreement between two carriers, the carriers on whose network the call originates bears the cost of transporting the telecommunication traffic to the point of interconnection with the carrier on whose network the call terminates… Having been compensated by its customer, the originating network in turn compensates the terminating carrier for completing the call. *Id. at 1.*

In the instant case, Qwest exacts compensation from its customers for telecommunications traffic, yet it refuses to compensate Union for the services Union provides. Qwest's position is unjust and cannot be sustained. This was recognized in the case of *Iowa Network Services, Inc. v. Qwest Corporation*, 363 F.3d 683, 694 (8th Cir. 2004) where the court found Qwest's position may violate the doctrine of unjust enrichment. The Court noted:

> Unjust enrichment is an equitable doctrine of restitution, wherein a plaintiff must prove the defendant received a benefit that in equity belongs to the plaintiff. *Slade v. M.L.E. Inv. Co.*, 566 N.W. 2d 503, 506 (Iowa 1997). The doctrine is based on the concept of an implied contract, however, "[a]n express contract and an implied contract cannot coexist with respect to the same subject matter," and Iowa courts refuse to imply a contract where an express contract exists. *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777, 791 (Iowa 1985)(rejecting claim for unjust enrichment where the controversy was covered by an express contract). Thus, to the extent that the basis for INS's claim of unjust enrichment is covered by an express contract, wither in the form of a tariff or a reciprocal compensation arrangement, INS cannot state a claim for unjust enrichment under Iowa law. *Id. at* 10.

Utah recognizes claims for constructive trust and unjust enrichment, *see e.g.*, *Lakeside Lumber Products v. Evans*, 110 P.3d 154, 157 (Utah 2005); *SLW/Utah, Jeffs v.*

Stubbs 970 P.2d 1234, 1244 (Utah 1998), and the Commission can find in this case that services were provided without compensation. This is particularly egregious because Qwest's customers paid Qwest for Union's termination charges, but Qwest did not pay them to Union. Irrespective of the compensation scheme, paying nothing for services rendered is unjust, unreasonable, and wrong.

The FCC's T-Mobile Decision

Although Qwest argues to the contrary, the recent FCC decision in *T-Mobile et al. Petition for Declaratory Ruling Regarding ILEC Wireless Termination Tariffs,* CC Docket No. 01-92, FCC 05-42, FCC February 24, 2005 not only supports but mandates the outcome Union seeks. In *T-Mobile* the FCC held that an ILEC like Qwest could not force an interconnection agreement on a wireless carrier and, at least to the date of the order, wireless tariffs were appropriate.

In the order, the FCC referenced the very type of dispute that Union has with Qwest.

> 6. The practice of exchanging traffic in the absence of an interconnection agreement or other compensation arrangement has led to numerous disputes between LECs and CMRS providers as to the applicable intercarrier compensation regime. For instance, many CMRS providers argue that intraMTA traffic routed from a CMRS provider through a BOC tandem to another LEC is subject to the reciprocal compensation regime because it originates and terminates in the same MTA. Some LECs, however, contend that this traffic is more properly subject to access charges because it originates outside the local calling area of the LEC, is being carried by a toll provider, *i.e*. the BOC, and is routed to the LEC via access facilities. When a LEC seeks payment of access charges from a BOC in these circumstances, the BOC often refuses to pay such charges on the basis that (1) it is merely transiting traffic subject to reciprocal compensation, and (2) the originating carrier is responsible for the reciprocal compensation due.
>
> 7. As a result of these disputes, the LECs have sought assistance from

> state commissions, requesting that they be compensated for terminating this traffic. FCC Order at p.4.

The FCC addresses the concern that Union has been raising. Qwest has continuously forced traffic on Union's system without providing compensation. Qwest argues that in the absence of an interconnection agreement it need not compensate Union for terminating the traffic. Union, to the contrary, has argued that there are regulations, guidelines, tariffs and price lists in place that control and demand compensation for traffic which is forced by Qwest onto Union's system for termination. It is patently unfair that Qwest receives compensation from its customers or initiating carriers under the premise that it is paying for the termination of calls when in actuality, it refuses to compensate the terminating carrier.

In response, the FCC noted that its existing rules do not preclude tariff compensation arrangements or LECs from filing termination tariffs.[1] Most importantly, the FCC noted in its Order that it was allowing tariff arrangements because existing law did not specify the types of arrangements that trigger compensation obligations. It is not unlawful, therefore, to utilize tariffs to assess transport and termination charges. FCC Order, p. 6 ¶ 10.

Currently, Union and Qwest are negotiating an interconnection agreement as part of Qwest's Petition in Docket No. 04-049-145. Union acknowledges the FCC's *T-Mobile* decision now allows Qwest to require interconnection agreements even of a CMRS provider. Union anticipates that it will have an interim agreement with Qwest shortly,

1 The FCC did note that on a prospective basis, it was amending its rules to make clear its preference for contractual arrangements by prohibiting LECs from imposing compensation obligations via tariff arrangements. FCC Order at p.6, ¶ 9. Further, the FCC noted that it was amending its regulations to allow incumbent LECs to request interconnection with CMRS providers. FCC Order, p. 6 ¶9.

and by judicial order or mutual agreement, the parties will have a permanent interconnection agreement in place. As stated before, prior to the FCC's *T-Mobile* decision, an ILEC could not force a CMRS provider to enter into an interconnection agreement, but in the absence of an interconnection agreement, tariffs, even state tariffs, were applicable, appropriate, and lawful.

When the interconnection agreement between the parties is in place, the agreement will control compensation prospectively for the exchange of traffic between them. The agreement, however, will not control compensation for traffic exchanged before the date of the agreement and, consequently, Qwest owes Union compensation for this period of time.

Wyoming Federal Court Decision

In a Complaint filed in the United States District Court for the District of Wyoming (Docket No. 02-CV-209D), Union complained that it was not receiving appropriate access charges billed to Qwest for its operations in Wyoming, Colorado, and Utah. Union indicated that it provided local and long distance services to its customers who were connected through the public switched network to facilities beyond its system. Union noted that the system's purpose was to seamlessly transfer telecommunications traffic between different companies, regions and countries. For this system to work there must be a compensation scheme in place to ensure that all carriers involved in the origination or termination of traffic are compensated. Union further argued that whether a call is between states, LATAs or MTAs, the traffic moving from one carrier to another carries with it payment responsibility. In any jurisdiction, when a message or call is originated, carried or terminated, compensation is owed for the service rendered.

Union told the Court that as an integrated carrier providing wireless and wireline local and long distance services, Union connects with Qwest primarily in originating and terminating traffic. When Qwest delivers traffic to Union for termination to complete a message, Qwest owes Union for this service. Qwest disagreed and has refused to compensate Union. Whether Qwest compensates Union for these services pursuant to tariff, price list, or interconnection agreement is not as important as the recognition that some form of compensation is due. Qwest's position of no payment is simply wrong. The federal district court rejected Union's complaint concerning Wyoming intrastate traffic and deferred ruling on the implications for the states of Utah and Colorado. The court allowed Union to pursue its claims in these states while its appeal on Wyoming intrastate traffic was stayed.

Union Complaint at the Commission

On September 30, 2004, Qwest filed a Petition for Arbitration with the Commission in Docket No. 04-049-145 demanding that the Commission arbitrate an interconnection agreement between Qwest and Union as a wireless carrier. Union had rejected Qwest's demand because prior to *T-Mobile* Union had no obligation to do so and instead relied on tariffs, price sheets and regulations filed at the federal and state levels to establish a compensation scheme between the parties.

In order to resolve the issue of the appropriate compensation scheme in Utah, Union filed its Second Amended Complaint July 21, 2005 with the Commission reiterating its position that intercarrier compensation is required. Specifically Union stated:

> "18. If Union does not complete the Qwest traffic, the messages cannot be transmitted and completed. As Union terminates these

> calls for the benefit of Qwest, Qwest must compensate Union for the services provided in completing these calls. Accordingly, as telephone and communications traffic carried by Qwest is transferred to Union for completion in Union's service area. Pursuant to federal and state law, Union is to be compensated for such services." Union Second Amended Complaint, p. 7.

WHEREFORE, as courts and the FCC in *T-Mobile* have recognized alternative compensatory schemes, Union petitions the Commission to recognize Union's request for compensation and order Qwest to pay Union appropriate compensation for services rendered. In addition, Union strongly urges the Commission to deny Qwest's Partial Motion to Dismiss Second Amended Complaint.

DATED this 2nd day of September, 2005.

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Bruce S. Asay
Associated Legal Group, LLC
1807 Capitol Avenue, Suite 203
Cheyenne, Wyoming 82001
Telephone: (307) 632-2888

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing RESPONSE AND OPPOSITION TO PARTIAL MOTION TO DISMISS SECOND AMENDED COMPLAINT to be served by electronic mail and/or by U.S. Mail, postage prepaid to the following named parties on this 2nd day of September 2005, and addressed as follows:

Michael Ginsberg
Patricia Schmid
Assistant Attorneys General
Counsel for Division of Public Utilities
P.O. Box 140857
Salt Lake City, UT 84114-0857
mginsberg@utah.gov
pschmid@utah.gov

Robert Brown, Esq.
Qwest Service Corporation
1801 California Street, 10th Floor
Denver, CO 80202
Telephone: (303) 383-6642
robert.brown@qwest.com

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