

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

Stephen F. Mecham (4089)  
Callister, Nebeker & McCullough  
10 E. South Temple, Suite 900  
Salt Lake City, UT 84133  
(801) 530-7316

Attorneys for Union Telephone Company

**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, FKA US WEST COMMUNICATIONS, INC., A COLORADO CORPORATION	Docket No. 05-054-01  UNION TELEPHONE COMPANY'S OPPOSITION TO QWEST CORPORATION'S PARTIAL MOTION TO DISMISS FIRST AMENDED COMPLAINT AND FOR MORE DEFINITE STATEMENT. REQUEST FOR SCHEDULING CONFERENCE
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Union Telephone Company (“Union”) by and through its undersigned counsel hereby moves the Utah Public Service Commission (“Commission”) to deny Qwest Corporation’s Partial Motion to Dismiss First Amended Complaint and for More Definite Statement and further petitions the Commission for a scheduling conference in the above-captioned matter. In support of its Opposition to Qwest’s Motion, Union states as follows:

**Introduction**

1. Qwest, in its Motion, argues that Union is attempting to re-litigate claims previously asserted and rejected in litigation before the U.S. District Court for the District of Wyoming. As is evident from the allegations contained in Union’s First Amended

Complaint, as well as from the determination of the Court,<sup>1</sup> Union is attempting to obtain compensation for telecommunications services that it provides to Qwest. Qwest's Motion does nothing more than restate its position which is before the Commission. It is Union's position that a scheduling conference should be held by the Commission to set a schedule for hearing Union's Complaint.

### **Union's Claim for Compensation**

2. In its First Amended Complaint, Union requests that this Commission recognize Union's right to compensation for providing telecommunications services. Union's claim is very simple: if it provides terminating access to Qwest, it is entitled to compensation for providing such service. While Qwest argues that intrastate access charges may not be assessed for certain types of traffic, specifically intra-Major Trading Area ("intraMTA") wireless traffic, Qwest ignores Union's overall right to compensation for services rendered.

3. In a recent decision by the Federal Communications Commission ("FCC") (the "T-Mobile" decision),<sup>2</sup> the FCC noted that its Local Competition First Report and Order determined that §251 (b)(5) obligates local exchange carriers ("LEC") to establish reciprocal compensation arrangements for the exchange of intraMTA traffic between LECs

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<sup>1</sup> The decisions of the U.S. District Court for the District of Wyoming as issued on May 11, 2004 and September 3, 2004 are before the Commission as attachments to Qwest's referenced motion.

<sup>2</sup> See *T-Mobile et al* Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, In The Matter Of Developing A Unified Intercarrier Compensation Regime, FCC, CC Docket No. 01-92, released February 24, 2005. In this decision, T-Mobile and other CMRS providers requested that the FCC hold that wireless termination tariffs are not proper mechanisms for establishing reciprocal compensation arrangements for the transport and termination of traffic. *T-Mobile* at ¶ 1. The FCC held that they were appropriate up to that point in time. A copy of the *T-Mobile* order without the appendices is attached for convenience.

and CMRS (wireless) providers. If an agreement is in place, intraMTA traffic is subject to reciprocal compensation arrangements. See *T-Mobile* at ¶ 3.<sup>3</sup>

4. The FCC further noted that although §251 (b)(5) and the FCC's Rules reference an "arrangement" between LECs and other telecommunications carriers, including CMRS providers, these provisions do not specifically address the type of arrangement necessary to trigger payment of reciprocal compensation or the applicable compensation regime. See *T-Mobile* at ¶ 4. The purpose of the *T-Mobile* proceeding was to address carrier disputes regarding payment obligations in the absence of an interconnection agreement or other arrangement between originating and terminating carriers. *T-Mobile* at ¶ 4.

5. In *T-Mobile* the FCC acknowledged that in the absence of an interconnection agreement or other compensation arrangement, there have been numerous disputes between LECs and CMRS providers with respect to appropriate compensation. The FCC noted, for instance, that intraMTA traffic routed from a CMRS provider through a BOC tandem to another LEC is subject to a reciprocal compensation regime because it originates and terminates in the same MTA. Certain LECs, however, contended that this same traffic is subject to access charges, not reciprocal compensation, because the traffic originates outside the local calling area of the LEC and is being carried by the toll provider. The FCC stated:

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

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<sup>3</sup> The *T-Mobile* decision quotes from the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98 and 95-185, First Report and Order, 11 FCC, RCD 15499, 16016.

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.

*T-Mobile* at ¶ 6.

6. In response to these disputes, certain state commissions have used wireless termination tariffs. In the *T-Mobile* proceeding the FCC determined that these wireless termination tariffs were valid, at least up to the date of the opinion.

The FCC stated:

In light of existing carrier disputes, we find it necessary to clarify the type of arrangements necessary to trigger payment obligations. Because the existing rules do not explicitly preclude tariffed compensation arrangements, we find that incumbent LECs were not prohibited from filing state termination tariffs and CMRS providers were obligated to accept the terms of applicable state tariffs. Going forward, however, we amend our rules to make clear our preference for contractual arrangements by prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff. In addition, we amend our rules to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in Section 252 of the Act.

Our finding that tariffed arrangements were permitted under the existing rules is based on the fact that neither the Commission's reciprocal compensation rules, nor the section 20.11 mutual compensation rules adopted prior to the 1996 Act, specify the types of arrangements that trigger a compensation obligation. Because the existing compensation rules are silent as to the type of arrangement necessary to trigger payment obligations, we find that it would not have been unlawful for incumbent LECs to assess transport and termination charges based upon a state tariff. Prior to the 1996 Act, the Commission specifically declined to preempt state regulation of LEC intrastate interconnection rates applicable to CMRS providers and it acknowledged that the intrastate portions of interconnection arrangements are sometimes filed in state tariffs.

Thus, it appears that the Commission was aware of these arrangements and explicitly declined to preempt them at that time.<sup>4</sup>

*T-Mobile* at ¶¶ 9, 10.

7. The FCC recognized that a state tariff could be used to determine compensation, but decided that on a going-forward basis it would require an interconnection agreement for purposes of determining compensation. The implications are clear. While Qwest initially demanded that Union enter into an interconnection agreement, Union as a CMRS provider was not required to comply. Before *T-Mobile*, a LEC could not force a CMRS provider to enter into an interconnection agreement. Union relied on an alternative compensation regime, specifically the filed tariffs.

8. At this point, Union and Qwest have entered into an interim interconnection agreement pending resolution of a final agreement which is before this Commission.<sup>5</sup> Nevertheless, for all services Union provided to Qwest before the interconnection agreement became effective, Union is entitled to compensation. While Union argues that the filed tariffs are the mechanism by which it should be compensated, there is no question that compensation is owed and that this Commission can make such a determination.

9. In a recent Tenth Circuit case, *Atlas Co. v. Oklahoma Corporation Commission*, 400 F.3d 1256 (10 CA, 2005), the Tenth Circuit addressed the

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<sup>4</sup> It is noteworthy that in ¶ 12 of the *T-Mobile* decision, the FCC also referenced that in § 20.11 of its rules, it recognized a default right to intercarrier compensation, which right did not preclude alternative compensation arrangements.

<sup>5</sup> In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement, Utah Public Service Commission 04B-0491T.

compensatory scheme for CMRS providers and held that nothing relieves a LEC from its duty to compensate CMRS providers for call termination.

9. Clearly, Union's Complaint is appropriate in that Union has been providing terminating access to Qwest for which it has not received compensation. Union is simply asking this Commission to declare that Union has the right to compensation for telecommunications services that it provided. The position is elementary. Once this determination has been made, it is a simple calculation to arrive at an appropriate amount for compensation. Union specified in its Complaint the time period for which it is requesting compensation and addressed all of the requirements requested by the Commission in its prior order. The Commission recognized this in setting forth a scheduling conference.

WHEREFORE, Union Telephone Company urges this Commission to deny Qwest's Motion and further requests that it establish a scheduling conference to determine an appropriate discovery and hearing schedule for this matter.

DATED this 27th day of June, 2005.

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

Stephen F. Mecham (4089)  
Callister, Nebeker & McCullough  
10 E. South Temple, Suite 900  
Salt Lake City, UT 84133  
(801) 530-7316

Attorneys for Union Telephone Co.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing OPPOSITION TO QWEST CORPORATION'S PARTIAL MOTION TO DISMISS FIRST AMENDED COMPLAINT AND FOR MORE DEFINITE STATEMENT AND REQUEST FOR SCHEDULING CONFERENCE was sent to the following by electronic mail or telefax on the 27th day of June, 2005:

Michael Ginsberg  
Patricia Schmid  
Counsel for Division of Public Utilities  
P.O. Box 140857  
Salt Lake City, UT 84114-0857  
[mginsberg@utah.gov](mailto:mginsberg@utah.gov)  
[pchmid@utah.gov](mailto:pchmid@utah.gov)

Robert Brown  
Jeff Nodland  
Corporate Counsel  
Qwest Service Corporation  
1801 California Street, Suite 1000  
Denver, CO 80202  
[Robert.Brown@Qwest.com](mailto:Robert.Brown@Qwest.com)  
[Jeff.Nodland@Qwest.com](mailto:Jeff.Nodland@Qwest.com)

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