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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition of QWEST CORPORATION for Arbitration of an Interconnection Agreement with UNION TELEPHONE COMPANY d/b/a UNION CELLULAR under Section 252 of the Federal Telecommunications Act	**DOCKET NO. 04-049-145** Petition for Reconsideration, Review, and Rehearing

Union Telephone Company, d/b/a Union Cellular ("Union"), pursuant to Utah Code Ann. § 63-46b-12, Utah Code Ann. § 54-7-15, and Utah Admin. Code R746-100-11 F hereby petitions the Public Service Commission ("Commission") to reconsider the order the Commission issued April 3, 2008 ("Order") in this matter and review and rehear the issues enumerated below.

I. INTRODUCTION

On November 6th and 7th, 2007 the Commission held hearings on Qwest's Petition for Arbitration of an interconnection agreement with Union under Section 252 of the Federal Telecommunications Act. Virtually the entire hearing addressed the dispute between the parties over asymmetrical rates. Union presented a cost study showing that its costs for transport and termination are higher than Qwest's justifying an asymmetrical compensation rate, but both

Qwest and the Division of Public Utilities challenged Union's cost study. After reciting the parties' positions, the Commission agreed with the Division and summarily concluded that Union failed to meet its burden to prove that its costs exceed Qwest's costs[1], stating:

> The ALJ concurs with the Division and finds Union's cost study is not TELRIC compliant because it assumes Union's entire network is traffic sensitive, does not separate the costs of data and voice traffic, does not allow for network infrastructure optimization, and does not provide enough detail to break out the system that is shared with other services. For these reasons, the ALJ concludes Union has failed to meet its burden of proof to overcome the presumption in favor of symmetric reciprocal rates and to justify its requested asymmetric rate. The ALJ therefore recommends the Commission adopt Qwest's position on this issue.[2]

The Commission also resolved disagreements between the parties involving the Type of Interconnection, the Definition of Access Tandem, the Locations of the Points of Interconnection, and Non-local Traffic. Union requests that the Commission reconsider and reverse its decisions on the asymmetrical rate issue, the Locations of the Points of Interconnection and payment for Non-local Traffic. Support for this Petition for Reconsideration of the Commission's decisions on these three issues is as follows:

II. ARGUMENT

A. Asymmetrical Rate

1. The Commission erroneously interpreted and applied federal law and federal regulations to Union.

The Commission erroneously interpreted and applied federal law and federal regulations to Union in this matter.[3] During the course of this proceeding, the Commission had to interpret and apply federal law, federal regulations, federal case law, and federal agency decisions, including but not limited to 47 USC § § 251 and 252, and 47 CFR § § 51.711, 51.505 and

[1] 47 CFR 51.711(b).
[2] Order p. 29.
[3] Utah Code Ann. § 63-46b-16(4)(d); *Qwest Corporation v. The Public Service Commission of Utah*. WL 842891 (D. Utah 2006).

51.511. In addition, since Union is a wireless service provider, the Commission also had to review the Federal Communications Commission's ("FCC") FCC 03-215 order released September 3, 2003 in which the FCC determined additional considerations for cost studies for reciprocal compensation developed by wireless providers.[4]

In its findings the Commission imposed a requirement that Union's cost study must allow for network infrastructure optimization to be TELRIC compliant, a standard not found anywhere in federal law, the federal regulations, or on this record. The Commission does not define what network infrastructure optimization means. Depending on the meaning, such a requirement for a relatively small wireless provider serving a rural area could be cost prohibitive, and while it is not clear that the Commission relied on the Division's or Qwest's testimony for this requirement, it is reflective of both parties' approaches. Both insisted on treating Union's cost study as though it were developed for a large landline provider, despite their claims to the contrary.[5] Union's cost study properly addresses and applies TELRIC principles contemplated by federal law and regulations for wireless networks. Union therefore requests that the Commission reconsider and reverse this finding that is inconsistent with federal requirements.

To the extent the Commission relied on the Division's testimony to make its findings, Union maintains that by doing so, the Commission has arbitrarily held Union's cost study to an unduly difficult, different standard not sanctioned by federal law or regulation. The HAI 5.2a cost model for landline networks considers assets such as land and buildings that support traffic sensitive equipment to be traffic sensitive also and includes them in the model's cost calculation. The Division rejected the inclusion of support assets in Union's model so if the Commission relied on the Division's position, the Commission's decision is arbitrary and exceeds federal

[4] *In the Matter of Cost-Based Terminating Compensation For CMRS Providers*, CC Docket Nos. 95-185 and 96-98, and WT Docket No. 97-207; Order at p. 41.
[5] See Union Exhibit 4PSR, Post Surrebuttal testimony of Henry Jacobsen.

requirements. As a result, Union requests that the Commission reconsider and reverse its decision in this proceeding.

2. The Commission's findings of fact on the issue of an asymmetrical rate are vague, inaccurate, not material and are not supported by substantial evidence viewed in light of the whole record.

The Commission's findings that Union's cost study "…is not TELRIC compliant because it assumes Union's entire network is traffic sensitive, does not separate the costs of data and voice traffic, does not allow for network infrastructure optimization, and does not provide enough detail to break out the system that is shared with other services" [6] are vague, inaccurate, not material and are not supported by substantial evidence viewed in light of the whole record.[7]

a. The findings are impermissibly vague and unsubstantiated.

After reciting all of the parties' positions in the Order and stating that it had reviewed the cost study, the evidence, and parties' positions, the Commission made the four summary findings noted above. The only hint given as to how the Commission developed its findings is the statement that it concurs with the Division that the Union cost study is deficient for the four stated reasons in the Order.[8] There is no support or explanation indicating on what the Commission relied to make the findings, which renders the findings arbitrary and capricious.

In *Milne Truck Lines, Inc. v. Public Service Commission*, 720 P.2d 1373, 1378 (Utah 1986), the Utah Supreme Court said that with respect to Commission findings:

> The Commission cannot discharge its statutory responsibilities without making findings of fact on all necessary ultimate issues under the governing statutory standards. It is also essential that the Commission make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions. The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency.

[6] Order at p. 29.
[7] Utah Code Ann. §63-46b-16(4)(g).
[8] Order at p. 29.

> To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached. *See generally, Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979).* Without such findings, this Court cannot perform its duty of reviewing the Commission's order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action.

The Court criticized the Commission's findings again in *MCI v. Public Service Commission,* 840 P.2d 765 (Utah 1992) emphasizing that every rate adjustment must be predicated on a finding that the adjustment is just and reasonable, and "[i]n turn, this finding must be supported by substantial evidence concerning every significant element in rate making components (expense or investment) which is claimed by the applicant as the basis to justify a rate adjustment." *Id.* at 773. Of significance is that in *MCI*, the Court cited *Milne* approvingly and reiterated that if the Commission did not make findings on every ultimate and subordinate issue of fact, they were inadequate for an appellate Court to do a proper review the decision. *Id.* at 774. Apart from the significance of the requirement for clear findings itself, the Court decided *MCI* after Utah Code Ann. § 63-46b-16(4)(g) was in effect which established the standard of review when an agency makes determinations of fact.

The Commission's findings are simply too general and vague to be sustained. It did not explain how it reached its decisions. In addition, it is not clear whether the Commission concurred with the Division's conclusions "…that cellular radios, backhaul termination equipment, transport termination equipment and switch ports are traffic sensitive."[9] Nor is it clear if the Commission agrees "…that switch processors, cell towers, radio antennas and cables, land and buildings at the cell sites and the power equipment including emergency back up generators are all non-traffic sensitive components?"[10] Though Union strongly disagrees with

[9] *Id*. at p. 27.
[10] *Id.*

the Division's conclusions on the components it deems to be non-traffic sensitive and believes they are not supported by evidence, Union's model could be altered to reflect different assumptions if the Commission's findings were clear. During the course of the proceeding, Union requested guidance on this issue, asking that the Commission make an alternative allocation if it did not agree with Union's position, but the Commission did not respond. The effect of the Commission's decision is to frustrate the FCC's and Congress's intent to allow for an asymmetrical rate in cases like this one and to leave Union guessing.

b. The findings are inaccurate.

The Commission found that Union's cost study assumes that Union's entire network is traffic sensitive, but that is not accurate. While Union does advocate a 100 percent traffic sensitivity factor, the model can be changed to reflect a factor less than 100 percent, a fact the Commission recognized in its recitation of the Division's position.[11] The model is an Excel spreadsheet that calculates transport and termination costs on a per minute of use basis that can be changed relatively easily; it is not hardwired or restricted to 100 percent traffic sensitivity. In spite of its opposition to the model, the Division acknowledged that the model could be used to develop TELRIC pricing for a wireless network assuming inputs the Division accepted and appropriate principles were used.[12] The Commission's findings on this point are not consistent with the evidence and should be reconsidered and reversed.

c. The findings are not material.

In rejecting Union's cost model the Commission also found that the model does not separate the costs of data and voice traffic and does not provide enough detail to break out

[11] Order at p. 23.
[12] DPU Exhibit 1, Lines 176 - 179 Rebuttal Testimony of Paul Anderson.

the system that is shared with other services.[13] Union testified that data traffic accounts for less than one percent of Union's revenue.[14] Removing data from the cost study would have little to no effect on the result of the study. Additionally, at hearing Union testified that the network was designed for voice traffic, not data traffic, and voice receives priority over data.[15] By making its finding on data traffic, the Commission has in essence prioritized data traffic over voice even though the network was not designed for data and has almost no impact on the outcome of the study.

With respect to the Commission's finding on shared services not being broken out, Union testified that the small amount of sharing revenues it receives basically offsets the operating expense of land leases and the payment of right-of-way fees and does not offset capital investment.[16] Like revenues from data traffic, removing the revenues from sharing would have virtually no impact on the result of the cost study. They do not rise to the level to justify the Commission's rejections of the cost study and Union requests that the Commission reconsider and reverse these findings.

d. The findings are not supported by substantial evidence.

As stated in section 2.a. above, the basis for the Commission's findings is unclear. There is no explanation for how the Commission made its findings or on what evidence the Commission relied. The Commission stated that it concurred with the Division to support the four claimed deficiencies in Union's cost study, but that does not establish substantial evidence on the record for the findings. In fact, if the Commission's concurrence means that it based any findings on the Division's testimony on traffic sensitivity of the network, those findings must be

[13] Order at p. 29.
[14] Union Exhibit 4PSR, Lines 367 - 369, Post Surrebuttal testimony of Henry Jacobsen.
[15] Transcript at p. 132. Hearing testimony of James Woody.
[16] Union Exhibit 4PSR, Lines 221 - 223, Post Surrebuttal testimony of Henry Jacobsen.

reversed. The Division's position on traffic sensitivity relied on hearsay, and while not inadmissible,[17] hearsay may not be the basis for a finding.[18]

With the exception of one narrow deviation,[19] the Division's testimony on traffic sensitivity relied on an article entitled "The Criteria, Procedure, and Classification of Traffic-Sensitive and Non-Traffic-Sensitive Components: A Case of CDMA Mobile System" by someone named Moon-Soo Kim.[20] The article is highly suspect as it was simply a response to an Internet search and is not trustworthy. It constitutes classic hearsay evidence and to the extent that it formed the basis for the Commission's findings, they should be reconsidered and reversed.

B. Locations of the Points of Interconnection

In addition to misinterpreting and misapplying the federal law on the issue of asymmetrical rates, the Commission has also misinterpreted the law in its decision requiring that Union establish a point of interconnection in each LATA where Union has local end user customers. There is nothing in either federal law or in the federal regulations requiring interconnection in the LATA. The only requirement is that interconnection occur at any technically feasible point within a carrier's network and that is all that Union has requested.[21] Having exceeded the federal requirements, Union petitions the Commission to reconsider and reverse its decision adopting Qwest's language and instead adopt Union's language allowing Union to interconnect at any feasible point within Qwest's network.

[17] Utah Code Ann. § 63-46b-8(c).
[18] Utah Admin. Code § R746-100-10 F. 1.
[19] Transcript at p. 333, Lines 14 - 21. Hearing testimony of Paul Anderson.
[20] *Id*. at Lines 6 - 10. *See also*, DPU Exhibit 1, Lines 442 - 444 Rebuttal Testimony of Paul Anderson where the article was cited as authority to justify the determination that the base station controller has mixed traffic sensitivity.
[21] 47 USC § 251(c)(2); 47 CFR § 51.305(a).

C. Non-Local Traffic

The effect of the Commission's decision on the issue of Non-Local Traffic is that Union must transport and terminate Qwest's non-local InterMTA traffic without compensation. No rationale can justify that outcome and the Commission's decision should be reversed. The decision is unjust and unreasonable in violation of 47 USC § 201 and it also violates 47 USC § 251(b)(5) and 47 CFR 20.11(b).

In its recitation of Qwest's position on this issue, the Commission referred to *Sprint Spectrum, LP v AT&T Corporation*, 168 F. Supp. 2d 1095, 1100-01 (2001) for the proposition that a wireless carrier could not impose tariffed access charges. This overstates the holding in the opinion. The FCC had ruled in Sprint's favor finding that a wireless carrier was entitled to compensation and that access charges were not proscribed. The parties appealed to the appellate court and the court dismissed the case. The appellate court referred to some of the findings in the FCC's declaratory ruling and noted:

> In its petition, Sprint PCS asks the Commission to find that there is no federal law or Commission policy that bars Sprint PCS from recovering its call termination costs from AT&T. Sprint PCS also asks [the Commission] to find that AT&T's refusal to pay access charges to Sprint PCS is unreasonably discriminatory under section 202(a) of the Communications Act of 1934, as amended (the Act), and unjust and unreasonable under section 201(b) of the Act…. If CMRS carriers are permitted to impose access charges, AT&T asks that those charges be capped at the reciprocal compensation rate for local traffic and assessed only prospectively.*Declaratory Ruling*, 17 F.C.C.R. at 13,193-94. . . .Cut to its core, however, the FCC *Declaratory Ruling* is fairly precise in responding to the referral order. The principal terms of the *Declaratory Ruling* are as follows:
>
> 7. Sprint PCS is correct that neither the Communications Act nor any Commission rule prohibits a CMRS carrier from attempting to collect access charges from an interexchange carrier.
> *Id*. at 13,195.
>
> 8. That Sprint PCS may seek to collect access charges from AT&T does not, however, resolve the question whether Sprint PCS may unilaterally impose such charges on AT&T.

Id. at 13,196.

> 9. We find that there is no Commission rule that enables Sprint PCS unilaterally to impose access charges on AT&T.
> *Id.* at 13,196.

> 12. There being no authority under the Commission's rules or a tariff for Sprint PCS unilaterally to impose access charges on AT&T, Sprint PCS is entitled to collect access charges in this case only to the extent that a contract imposes a payment obligation on AT&T. While it is preferable for carriers to memorialize such contracts in a written agreement, the parties here agree that there is no written agreement or any express contract between AT&T and Sprint PCS. Nevertheless, the law recognizes - as has the Commission - that an agreement may exist even absent an express contract.

> *AT&T Corp. v. F.C.C.* 349 F.3d 692, 696-697, 358 U.S. App. D.C. 369, 373 - 374 (C.A.D.C.,2003)

The Commission could approve a contract allowing Union to be compensated through an access charge as the Commission's ruling is contrary to law, Union requests that the Commission reconsider and reverse its decision.

D. Abuse of Discretion Delegated to the Commission

The Telecommunications Act, 47 USC § 252, delegates the arbitration and approval of interconnection agreements to the Commission. As part of its duty to arbitrate agreements, the Commission is to ensure that the requirements it imposes on parties meet the provisions of 47 USC § 251.[22] For all the reasons stated in the sections above, Union does not believe the Commission's resolutions for which Union seeks reconsideration in this proceeding meet the requirements of § 251 or § 252 and as a result, the Commission's action constitutes an abuse of discretion.[23] It is an abuse of discretion to base a decision on a flawed interpretation of caselaw and a statute and case law. It is an abuse of discretion to impose a higher or different standard on Union in this proceeding than has been required before of other parties. It is an abuse of

[22] 47 USC § 252(c)(1).
[23] Utah Code Ann. § 63-46b-16(4)(h)(i).

discretion to base a finding on hearsay evidence. Union therefore urges the Commission to reconsider and reverse its decision and to make findings that align with the evidence in the case.

III. CONCLUSION

Based on the foregoing, the Commission has misinterpreted and misapplied federal law, has acted arbitrarily and capriciously and has abused its discretion in making its findings in this proceeding and rejecting Union's cost study, all of which has substantially prejudiced Union.[24] Union therefore petitions the Commission to reconsider and reverse its decision.

Respectfully submitted this 5th day of May, 2008.

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[24] Utah Code Ann. § 63-46b-16(4).

Certificate of Service

I hereby certify that on this 5th day of May, 2008, I caused to be emailed a true and correct copy of the foregoing Petition for Reconsideration, Review, and Rehearing of Union Telephone Company d/b/a Union Cellular filed in Docket No. 04-049-145 to the following:

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