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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 **QWEST CORPORATION'S RESPONSE TO UNION CELLULAR'S PETITION FOR RECONSIDERATION, REVIEW AND REHEARING**

Qwest Corporation ("Qwest"), pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §54-7-15, and Utah Admin. Code R746-100-11.F, hereby submits its response to the Petition for Reconsideration, Review, and Rehearing ("Petition") filed by Union Telephone Company d/b/a Union Cellular ("Union").

I. INTRODUCTION

On April 3, 2008, the Commission issued its Report and Order ("Order") resolving the issues in dispute in this interconnection arbitration between Qwest and

Union. The primary dispute between the parties concerned whether Union was entitled to an asymmetrical reciprocal compensation rate for transporting and terminating local calls placed by Qwest's customers to Union's wireless subscribers. Union requested that it be allowed to charge an asymmetrical reciprocal compensation rate to Qwest that is nearly 14 times the rate that Qwest would be permitted to charge Union for a comparable call in the opposite direction.

In the Order, the Commission concluded that Union had failed in four material respects to meet its burden of proving entitlement to an asymmetrical rate. Union has moved for reconsideration on this issue and two other issues resolved against Union in the Order. For the reasons that follow, the Commission should deny Union's Petition.

II. ARGUMENT

A. THE COMMISSION PROPERLY REJECTED UNION'S REQUEST FOR AN ASYMMETRICAL RECIPROCAL COMPENSATION RATE.

1. Union Had the Burden to Prove Entitlement to an Asymmetrical Reciprocal Compensation Rate.

In its Petition, Union does not dispute that it had the burden to prove that it was entitled to an asymmetrical reciprocal compensation rate, if any, and the amount of that rate. Federal Communications Commission ("FCC") Rule 51.711(a) establishes a presumption that the reciprocal compensation rates that two carriers may charge each other are to be symmetrical.[1] FCC Rule 51.711(b) allows a variance from this rule only under limited circumstances:

> A state commission may establish asymmetrical rates for transport and termination of telecommunications traffic only if the carrier other than the incumbent LEC … proves to the state commission[,] on the basis of a cost study using the forward-

[1] 47 CFR § 51.711(a).

> looking economic cost based pricing methodology described in [47 CFR] §§ 51.505 through 51.511, that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC … exceed the costs incurred by the incumbent LEC … and, consequently, that such a higher rate is justified.[2]

To meet its burden of proof, Union was required to prove that "particular wireless network components are cost sensitive to increasing call traffic."[3] Union was also required to prove the amount of any alleged additional cost and to demonstrate that its analysis complied with all applicable FCC rules.[4] The FCC has stated that "[i]n the absence of such a cost study justifying a departure from the presumption of symmetrical compensation, reciprocal compensation … shall be based on the incumbent local exchange carrier's cost studies."[5]

2. The Commission Correctly Found That Union Had Failed to Meet Its Burden of Proof.

The Commission held that Union failed to meet its burden of proof in four material respects.

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[2] 47 CFR § 51.711(b).

[3] Order, *In the Matter of Cost-Based Terminating Compensation for CMRS Providers; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd 18441, ¶ 4 (rel. Sep. 3, 2003) ("*Wireless Additional Cost Order*"), adopting Letter from the Wireless Telecommunications Bureau and Common Carrier Bureau dated May 9, 2001, 16 FCC Rcd 9597 ("*Wireless Additional Cost Letter*") at 2. The *Wireless Additional Cost Order* is also in the record as Union 2SR.2.

[4] *Wireless Additional Cost Order* at ¶ 9.

[5] First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 1089 (rel. Aug. 1, 1996) ("*Local Competition Order*") (subsequent history omitted).

a. Union did not meet its burden to show that its network is 100% traffic sensitive.

First, the Commission found that "Union's cost study is not TELRIC-compliant because it assumes Union's entire network is traffic sensitive." In its *Wireless Additional Cost Order*, the FCC ruled that "a determination of compensable wireless network components should be based on whether the *particular* wireless network components are cost-sensitive to increasing call traffic."[6] A wireless network includes a large number of different components. Mr. Jacobsen, for example, testified for Union that "[t]he connection from the subscriber to the switch includes antennas, coaxial cable, radios, duplexers, combiners, splitters, amplifiers, radio transceivers, controllers, compression equipment and long back-haul facilities in the form of microwave, fiber optics or leased facilities." (Union 4R, lines 91-94).

Union's cost study did not contain the component-by-component analysis required by the FCC's rules, and Union does not argue otherwise. Instead, Union asserts that its cost study had two adjustable factors (one for its switch and one for all other network components) that could be adjusted if the Commission determined that something less than Union's entire network is traffic sensitive. (Petition at 6). However, Union's cost study does not provide a mechanism or data for determining what the two aggregate traffic-sensitivity factors should be. Union's cost study does not break down the costs for each wireless component in its network, nor does it make a case as to whether or not each of these components is traffic-sensitive. Accordingly, there is no way to split the costs up for each component, much less determine whether or not each is

[6] *Wireless Additional Cost Order* at ¶ 4 (emphasis added); Tr. 38:20-39:19.

traffic-sensitive. Therefore it is impossible to arrive at two traffic-sensitive factors by aggregating the costs of the traffic-sensitive components. The Order is correct.

b. Union's cost study does not exclude the costs of data services.

Second, the Commission found that Union's cost study was not TELRIC-compliant because it "does not separate the costs of data and voice traffic." FCC Rule 51.505(d)(2) provides that costs associated with offering retail telecommunications services shall not be considered in calculating a TELRIC cost. Union never disputed that it failed to remove investments and expenses incurred to provide data services from its cost study. Costs to provide data services are incurred throughout Union's wireless network and are lumped together with other costs in Union's cost study such that they cannot be removed just by changing certain inputs to the cost study. For example, there are data service components in Union's GSM switch and Base Transceiver Stations ("BTSs").[7]

In its Petition, Union reiterates its erroneous argument that costs of data services were not material because data service revenues were less than one percent of Union's total revenue. However, it does not matter how much revenue is generated by data services. The issue is what portion of the costs included in Union's cost study were incurred to provide data services. Mr. Woody conceded that the reason data revenues were small was because only a small number of Union's subscribers purchased data services. (Tr. 120:5-13). Mr. Woody further acknowledged that Union incurred the costs to make data services available to all of its wireless subscribers regardless of how many actually purchased data services. (Tr. 119:8-12). Thus, it is impossible to determine

[7] Qwest 3SR, lines 143-156; Qwest 3PSR, lines 217-230; Tr. 152:22-24, 266:17-267:8, 270:12-25, 279:3-12.

from Union's cost study what the effect of removing costs for data services would have been on the reciprocal compensation rate Union is seeking to charge.

In order to comply with the FCC's TELRIC rules, Union had the burden of removing the costs of providing data services from its cost study. The costs of providing data services are not additional costs of terminating voice traffic delivered by Qwest to Union. Because Union failed to remove investment and expenses incurred to provide data services from its cost study, the Order is correct in concluding that Union failed to meet its burden of showing that it complied with the FCC's TELRIC rules.

c. Union's cost study does not represent a hypothetical most-efficient, least-cost network.

Third, the Commission found that Union's cost study is not TELRIC-compliant because it "does not allow for network infrastructure optimization." Union asserts incorrectly that there is no such requirement in the FCC's rules. However, FCC Rule 51.505 very clearly requires that Union's cost study be "based on the most efficient telecommunications technology currently available and the lowest cost network configuration" given the location of its existing wire centers/switches.[8] The FCC's rules also require the support for any contentions that these requirements are met be included in a record sufficient for review.[9]

Union's cost study did not allow for network infrastructure optimization as FCC Rule 51.505 requires. For example, Union's cost study did not allow for cost adjustments to reflect sharing efficiencies. In an efficient, lowest-cost network configuration, poles or towers would be shared with other carriers. In the UNE Cost Docket, Docket No. 01-

[8] 47 CFR § 51.505(b) and (b)(1).

[9] *Local Competition Order* at ¶ 1089.

049-85, the Commission found that a hypothetical efficient provider would have significant sharing opportunities. For example, the Commission set the sharing of poles supporting aerial cable at 50 percent, meaning that on average each pole is shared by one other provider so that no more than 50 percent of the cost of the poles could be included in the cost study. (Tr. 208:10-210:10). Union included no sharing assumption in its cost study or any mechanism to adjust the model for sharing efficiencies. (Tr. 89:2-5).

Union argues that its *actua*l sharing revenues were immaterial and basically offset the operating expense of land leases and the payment of right-of-way fees. (Petition at 7). This misses the point. The issue is not how much sharing Union actually achieves; the point is how much sharing a hypothetical most-efficient provider would optimally achieve. In this proceeding, Union did not take a position as to how much sharing should be imputed to an efficient provider or produce a cost model that could be adjusted to reflect sharing efficiencies. Thus, as the Commission put it, Union's cost study did not "allow for network infrastructure optimization."

Another example is the failure of Union's cost study to allow for network infrastructure optimization with respect to fill factors. In the UNE Cost Docket, the Commission adopted TELRIC switching costs that were based on an assumed 90% utilization. In this case Union presented no quantitative evidence concerning the utilization of its switch or any of the other components of its wireless network. Nor did Union present any testimony to support what the appropriate utilization rate should be for an efficient, least-cost network so that the Commission could make an appropriate adjustment. Thus, it was impossible to determine whether the cost study incorporates efficient utilization or "optimization" levels as required by TELRIC. It was also

impossible to adjust the model to reflect particular utilizations for particular network components. The Order is correct in concluding that Union failed to meet its burden.

d. Union's cost study includes costs of providing other services.

Fourth, the Commission found that Union's cost study was not TELRIC-compliant because it "does not provide enough detail to break out the system that is shared with other services." As discussed above, under the FCC's rules, costs associated with providing retail telecommunications services had to be removed from Union's cost study. In this case, Union did not claim that it removed the costs of providing additional retail call services and features to its wireless subscribers. (Qwest 3RR, 19:20-20:5, 24:10-25:10). Indeed Union did not even contend that the costs of providing these additional calling features were "minimal." Examples of the services and calling features Union offers to its subscribers in its retail wireless plans include operator services, voice messaging, call waiting, call forwarding, caller ID, six-way calling and No Answer/Busy Transfer.[10] (Qwest Cross 8). It was undisputed that none of the costs of providing these retail services was removed in Union's cost study. (Qwest 3RR, 19:20-20:5, 24:10-25:10). Nor is there any mechanism in Union's cost study to do so.

Union also failed to remove the costs of providing retail voice termination to its wireless subscribers. Union charges its wireless customers on a per-minute basis for completing voice calls to them. (Qwest Cross 8). Each Union wireless retail plan allows a Union subscriber to place *or receive* a certain number of minutes per month. (Qwest

[10] In the arbitration between Verizon and Sprint in New York, the evidence showed that for landline switches "approximately 43% of the central processor is utilized by features." *Petition of Sprint Sprectrum L.P. d/b/a Sprint PCS, Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York, Inc.*, Case 01-C-0767, 2002 N.Y. PUC LEXIS 407, *34 (NY PSC Aug. 23, 2002).

3RR, 5:9-6:1) The costs that Union incurs to allow its wireless subscribers to receive calls are largely the same costs Union is attempting to recover through an asymmetric reciprocal compensation rate in this case. The law does not permit such a double recovery. Union was required to remove the costs associated with retail telecommunications services such as retail voice termination from its cost study. Union failed to meet its burden of proof because it failed to remove these costs.

3. The Commission's Conclusion That Union Failed to Meet Its Burden of Proof Does Not Require More Specific Findings of Fact

Union argues that the Commission's findings are vague and unsubstantiated, so the Commission should grant reconsideration. (Petition at 4-6). This argument is incorrect for at least two reasons.

First, the threshold issue in the case was whether Union had provided a TELRIC-compliant cost study that demonstrated that its traffic-sensitive costs exceed those of Qwest. The principal issues involved in determining whether that was the case are legal, not factual. In the Order, the Commission gave four specific reasons for concluding that Union had failed to provide such a study. There was no dispute in the record that Union's cost study did not allow for removal of costs associated with non-traffic-sensitive components of its network on a component-by-component basis, that the study included costs associated with provision of data services, that the study did not contain assumptions consistent with a least-cost, most-efficient provider and that the study was not structured in a sufficiently detailed way to allow the break out of costs incurred to provide retail services.

Second, to the limited extent that factual findings may have been necessary to support the Commission's conclusion that Union failed to meet its burden of proof, the

Order reviewed the evidence presented by the Division in some detail and specifically stated that the Commission "concurs with the Division" with respect to the four points on which the Commission found the study deficient. (Order at 29). Thus, the Order "disclose[s] the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, [were] reached."[11] Far from supporting the Petition, *Milne* supports the validity of the Order. In fact, addressing the type of evidence presented by Union in attempting to meet its burden—conclusory testimony that the network was efficient or entirely traffic-sensitive, *Milne* states that a party cannot meet its burden of proof "simply by conclusory statements in oral testimony." *Id.* at 1379.

Union's citation of *MCI Telecommunications Corp. v. Public Service Comm'n*, 840 P.2d 765 (Utah 1992), is also misplaced. In *MCI*, the Court was critical of the Commission for approving stipulated rate reductions without making findings of fact on either subordinate or ultimate factual issues. *Id.* at 773. However, this discussion was just general background in the nature of dicta and did not play any role in the Court's decision to overturn the Commission order because the Commission did not even have an evidentiary hearing in that case, but rather granted a motion to dismiss on legal grounds. *Id.* at 769, 772. Here, the Commission allowed Union an opportunity to present its evidence and found, after hearing the evidence, that Union had failed to meet its burden of proof.

Had Union met its burden of proof, the Commission would then have been required to make specific factual findings on disputed evidence to arrive at the appropriate asymmetrical rate. In this case, Union did not pass the first hurdle of meeting

[11] *Milne Truck Lines v. Public Service Comm'n*, 720 P.2d 1373, 1378 (Utah 1986).

its burden of proof, so findings of fact on how much of the network was non-traffic sensitive, the portion of costs attributable to data services or other products or the appropriate sharing or utilization factors were unnecessary.

4. The Commission's Findings Were Correct and Based on Substantial Evidence.

Union argues in the Petition that the Commission's findings are inaccurate, but fails to review the evidence presented by the Division and the additional evidence provided by Qwest that supports the findings. (Petition at 6-7). Again, because the Commission found that Union had failed to meet its burden of proof, it was only necessary for the Commission to conclude that Union's cost study was deficient. As noted above, it was essentially undisputed that the study included costs as a matter of fact that made it non-TELRIC-compliant as a matter of law.

The Petition also argues that the Division's testimony on traffic-sensitivity is based on a Korean study of the traffic-sensitivity of components of a wireless network that was hearsay and may not be the basis for a finding. (Petition at 8). This argument is incorrect for at least two reasons. First, qualified expert witnesses may rely on studies of other experts in their field in support of their opinions. Utah R. Evid. 703. It was appropriate for Mr. Anderson to rely on Dr. Kim's study. Second, Mr. Anderson did not rely on the Korean study of traffic sensitivity of a wireless network as the sole basis for his conclusion that the network was not 100% traffic-sensitive. Mr. Anderson testified that he did his own analysis of traffic sensitivity as well as reviewing the Korean study. (Tr. 331:25-332:14). In addition, Mr. Copeland provided extensive evidence of the fact that various components of Union's network were not cost sensitive to increasing call

traffic. Much of the basis for that evidence came from Union's data and the data of equipment vendors.

B. THE COMMISSION CORRECTLY RESOLVED THE DISPUTE CONCERNING POINTS OF INTERCONNECTION.

For Issue No. 3, Union proposed to delete language from Section 6.1.1 of the interconnection agreement that would require Union to interconnect with Qwest at a technically feasible point "within its network." Union also proposed to delete language in Section 6.1.2.1 that would require Union to interconnect within each LATA in which Union has end user customers or assigned telephone numbers. The Commission correctly rejected Union's proposed language changes.

Under Section 251(c)(2) of the Act and the FCC's implementing regulations, Qwest is required to provide interconnection to Union only "at any technically feasible point within" Qwest's network.[12] Furthermore, the FCC has determined that a requesting carrier may choose to interconnect at as few as one point per LATA.[13] This minimum obligation strikes a balance between the benefit to CMRS providers of being able to interconnect at as few places as possible and the burden upon ILECs of transporting traffic to point(s) of interconnection. Thus, the Commission correctly held that "Qwest has no obligation to interconnect with a requesting carrier outside its ILEC territory within a LATA." (Order at 40). Union's proposed changes to Sections 6.1.1 and 6.1.2.1 were inappropriate because they would have required Qwest to interconnect at points that were not "within its network" and that were not even in the same LATA in which traffic would be exchanged.

[12] 47 USC § 251(c)(2); 47 CFR § 51.305(a).

[13] Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, ¶ 112 (rel. April 27, 2001).

C. THE COMMISSION CORRECTLY RULED CONCERNING NON-LOCAL TRAFFIC

Issue No. 5 concerned the treatment of non-local traffic. Union proposed modifications to Section 6.3.8.14 and 6.3.9.1 that would make Union Telephone's wireline switched access tariffs apply to non-local wireless traffic. On this issue, the Commission held that Union's proposed changes to Section 6.3.8.14 were inappropriate because that provision addressed only land-to mobile traffic and could not be made reciprocal as Union proposed. (Order at 42). The Commission also held that Union's changes to Section 6.3.9.1 were unlawful because the FCC does not allow wireless carriers to collect access charges pursuant to tariff. (*Id.* at 42-43).

The Commission correctly decided Issue No. 5. In 1994, the FCC held that CMRS carriers could not collect access charges pursuant to tariff as Union is proposing.[14] The FCC's decision was cited in *Sprint Spectrum, LP v. AT&T Corporation*, 168 F.Supp. 2d 1095, 1100-01 (W.D. Mo. 2001). *Sprint Spectrum* involved an attempt by Sprint PCS to collect access charges from an interexchange carrier, specifically AT&T. In that case, the Court made a primary jurisdiction referral to the FCC to obtain a ruling as to whether and under what circumstances a wireless carrier could collect access charges from an interexchange carrier. On referral, the FCC confirmed its prohibition on the use of switched access tariffs by CMRS providers. The FCC stated, "CMRS access services are subject to mandatory detariffing, and it is therefore undisputed that Sprint PCS could not have imposed access charges on AT&T pursuant to any tariff."[15]

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[14] Second Report and Order, *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Service*, 9 FCC Rcd 1411, ¶ 179 (rel. Mar. 7, 1994)

[15] Declaratory Ruling, *In the Matter of Petitions of Sprint PCS and AT&T Corp., for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, ¶ 8 (rel. Jul. 3, 2002)

Union relies erroneously upon quotes from the FCC's referral decision for the proposition that it is permissible for a CMRS provider to collect access charges from an interexchange carrier by agreement—that is, if the interexchange carrier agrees to pay such charges. This is not such a case. First, Union's proposed language unlawfully seeks to have its wireline switched access tariffs apply. Second, Union is seeking to collect pursuant to its tariffs from Qwest rather than the interexchange carrier that serves the calling party. Third, it is undisputed that Qwest has not agreed to pay access charges to Union for interMTA traffic. Thus, none of the circumstances in which CMRS providers can collect access charges are present in this case.

Union incorrectly claims that if it is not allowed to collect tariffed access charges from Qwest, it will go uncompensated. In fact, Union is already compensated for terminating interMTA traffic because it charges its customers for receiving calls. Indeed, Mr. Hendricks testified that Union effectively charges its wireless subscribers $0.17 per minute for receiving calls. (Union 2SSR, lines 85-86). The FCC has recognized that this is the customary way in which CMRS providers are compensated for terminating long distance calls:

> [S]ince the advent of commercial wireless service, and continuing today, CMRS carriers have charged their end users both to make and to receive calls. Until 1998, when Sprint PCS first approached AT&T and other IXCs about payment for terminating access service, all CMRS providers recovered the cost of terminating long distance calls from their end users, and not from interexchange carriers.[16]

("*FCC Declaratory Ruling*"), *appeal dismissed, AT&T Corporation v. FCC,* 349 F.3d 692 (D.C. Cir. 2003).

[16] *FCC Declaratory Ruling*, ¶ 14.

Thus, Union's proposed changes to Sections 6.3.8.14 and 6.3.9.1 are inappropriate because they would allow Union to double recover by charging both its customers and Qwest for terminating interMTA calls. The Commission correctly denied Union's attempt to obtain a double recovery.

III. CONCLUSION

For the foregoing reasons, the Commission should deny Union's Petition.

RESPECTFULLY SUBMITTED: May 20, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **QWEST CORPORATION'S RESPONSE TO UNION CELLULAR'S PETITION FOR RECONSIDERATION, REVIEW AND REHEARING** was served upon the following by electronic mail on May 20, 2008:

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