

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Complaint of Union)
Telephone Company, a Wyoming) DOCKET NO. 05-054-01
Corporation, Against Qwest Corporation,)
fka US West Communications Inc., a) ORDER GRANTING PARTIAL MOTION
Colorado Corporation) TO DISMISS

ISSUED: September 28, 2005

By The Commission:

PROCEDURAL HISTORY

On July 22, 2005, Union Telephone Company (“Union”) filed its Second Amended Complaint seeking compensation from Qwest Corporation (“Qwest”) for termination of wireless and wireline calls originated or transported by Qwest.

On August 10, 2005, Qwest filed its Answer to Second Amended Complaint with Respect to Wireline Claims and contemporaneously filed a Partial Motion to Dismiss Second Amended Complaint (“Motion”) seeking dismissal to the extent Union’s Complaint seeks compensation for termination of wireless traffic.

Union filed its Response and Opposition to Qwest Corporation’s Partial Motion to Dismiss Second Amended Complaint (“Response”) on September 2, 2005. By agreement of the parties, Qwest filed its Reply Memorandum in Support of Qwest Corporation’s Partial Motion to Dismiss (“Reply”) on September 19, 2005.

DISCUSSION

In its Motion, Qwest lists three reasons Union's claims relating to wireless traffic should be dismissed: (1) under the Telecommunication's Act of 1996 (the "Act"), as interpreted by the Federal Communications Commission ("FCC"), intrastate access charges may not be assessed for the termination of intraMTA wireless traffic; (2) the FCC's recent *T-Mobile*¹ decision did not change the law's prohibition against the collection of access charges for the termination of intraMTA wireless traffic; and (3) the Wyoming Federal Court has already rejected Union's claims for both intraMTA and interMTA wireless traffic.²

In its Response, Union argues it is entitled to reciprocal compensation under the Tenth Circuit Court of Appeals decision in *Atlas Telephone Co. v. Oklahoma Corporation Commission*, 400 F.3d 1256, C.A. 10 (Okla.) 2005 ("*Atlas*"), which recognized that an incumbent local exchange carrier ("ILEC" or "incumbent LEC") has a duty to compensate wireless providers for call termination. Union also claims compensation under the doctrine of unjust enrichment. Union disputes Qwest's reading of *T-Mobile*, arguing the FCC recognized its existing rules did not preclude tariff compensation arrangements or termination tariffs. Furthermore, Union argues the Wyoming Federal Court only rejected Union's complaint concerning Wyoming's intrastate traffic and deferred ruling on the implications for the states of Utah and Colorado.

¹*In the Matter of Developing a Unified Intercarrier Compensation Regime; T-Mobile Petition et al. for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92 (FCC, February 17, 2005 ("*T-Mobile*").

²Citing *Union Telephone Company v. Qwest Corporation*, Case No. 02-CV-209-D, Order on Defendant's Motion for Summary Judgment (May 11, 2004) ("*May 2004 Order*"), and Order on Motion to Amend Judgment (September 3, 2004).

CONCLUSIONS

We begin our analysis with the recognition that this Commission does not possess equitable powers. We therefore will not further entertain Union's claim that it is entitled to compensation under the equitable doctrine of unjust enrichment.

Furthermore, we find no support in *Atlas* or *T-Mobile* for Union's position. In *Atlas*, the Tenth Circuit merely affirmed that CMRS providers are entitled to reciprocal compensation from originating LECs for terminating traffic transported over an interexchange carrier network when that traffic originates and terminates in the same MTA. In the instant case, as distinguished from *Atlas*, Union seeks tariffed access charges in lieu of reciprocal compensation because it did not have an interconnection agreement in place with Qwest during the relevant period.

Likewise, in *T-Mobile*, the FCC concluded that, because its existing rules did not permit LECs to force CMRS providers to negotiate interconnection agreements, LECs could employ access tariffs to impose compensation obligations on CMRS carriers for termination of those carriers' wireless traffic. Conversely, in the present docket, Union seeks to impose tariffed access charges on a LEC (i.e., Qwest) for termination of calls to Union's own wireless customers in the absence of an interconnection agreement the negotiation of which Union could have requested. We find nothing in *T-Mobile* to indicate the FCC intended its decision to apply to this situation and we decline to do so herein.

Qwest argues that the Wyoming Federal District Court has already considered Union's wireless claims and granted summary judgment for Qwest such that this Commission need not adjudicate these claims further. We agree. The parties to both the Wyoming case and

this docket are identical. The District Court rejected Union's claims regarding both intra- and interMTA wireless traffic which are the subject of the wireless component of Union's complaint before this Commission. Judgment on those issues is final and neither party indicates that it has appealed that judgment. Because the federal court has entered a judgment on the merits between identical parties on issues identical to the ones now before us, we consider the matter to be *res judicata* under the principle of claims preclusion³ and dismiss that portion of Union's complaint seeking compensation for the termination of wireless traffic.

Therefore, based on the foregoing information and for good cause appearing, the Administrative Law Judge enters the following proposed

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

Qwest's Partial Motion to Dismiss Second Amended Complaint is granted. All Union Telephone claims seeking compensation for termination of wireless calls are dismissed.

Further proceedings will be scheduled as appropriate.

DATED at Salt Lake City, Utah, this 28th day of September , 2005.

/s/ Steven F. Goodwill
Administrative Law Judge

³See *Massey v. Bd. of Trustees of the Ogden Area Community Action Committee, Inc.*, 86 P.3d 120, 122 (2004 UT App)(citing *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 (10th Cir. 1999)).

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Approved and Confirmed this 28th day of September, 2005, as the Order of the
Public Service Commission of Utah.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#45903