BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
David C. Boyd	Commissioner
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
Betsy Wergin	Commissioner

In the Matter of Digital Telecommunications, Inc.'s Complaint Against Qwest Corporation

ISSUE DATE: September 10, 2014

DOCKET NO. P-5681, 421/C-09-302

ORDER DENYING RELIEF

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PROCEDURAL HISTORY

On March 27, 2009, Digital Telecommunications Inc. (DTI), a competitive local exchange carrier (competitive LEC, or CLEC), filed a complaint against Qwest Corporation (Qwest), an incumbent local exchange carrier (incumbent LEC, or ILEC). DTI alleged that Qwest had, among other things, charged unjust, unreasonable, unlawful, and discriminatory prices, breached its duty to negotiate in good faith, and engaged in fraudulent misrepresentation.

On August 16, 2010, DTI filed for protection from creditors under federal bankruptcy laws.[1] DTI would eventually discontinue operations, but its claim would continue.[2]

The Commission referred the docket to the Office of Administrative Hearings to conduct contested case proceedings to develop the record, and to prepare a report and recommendation. The Minnesota Department of Commerce (the Department) intervened as a party to these proceedings.[3] Administrative Law Judge (ALJ) Manuel J. Cervantes presided over the hearings.

On April 15, 2013, the ALJ issued his Findings of Fact, Conclusions and Recommendation (ALJ's Report), generally affirming DTI's claims.

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[1] Tr. Vol. 1 (Siewert), p. 26, ll. 12-14.

[2] During the contested case proceedings, CenturyTel, Inc. became Qwest's successor in interest; see *In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to CenturyLink*, Docket No. P-421/PA-10-456, Order Accepting Settlement Agreements and Approving Transfer of Control Subject To Conditions (March 31, 2011). Similarly, SAWT, Inc. became DTI's successor in interest; see Order Approving Substitution of Party (January 23, 2012). For ease of exposition, this order continues to identify these parties as Qwest and DTI, respectively.

[3] Minn. R. 7829.0800, subp. 3.

On May 6, 2013, Qwest filed exceptions to the ALJ's Report. The Department then requested additional time in which to reply on the grounds that Qwest's exceptions were unusually extensive. The Commission granted the request.

DTI and the Department filed replies to these exceptions.

On October 1, 2013, the Commission issued a list of 24 questions for parties to address during oral argument to bring greater clarity to the issues. The Commission also noted that it might pursue "further procedural matters" after oral argument.

On October 3, 2013, the Commission heard roughly six hours of oral arguments from the parties.

On December 9, 2013, following review of the record, the Commission's staff filed a Supplemental Record Analysis for the Commissioners. This analysis generally supported conclusions contrary to DTI's claims. The Commission solicited comments from the parties on this analysis.

In response to DTI's request, the Commission extended the comment period and established a period for reply comments. In response to Qwest's request, the Commission extended the period for reply comments.

DTI, Qwest, and the Department variously filed comments, reply comments, or both.

On May 19, 2014, the Commission again heard oral arguments from all parties.

The case returned to the Commission on May 22, 2014, and DTI filed additional comments.

FINDINGS AND CONCLUSIONS

I. Summary

In this order the Commission finds as follows:

- The Commission has jurisdiction over the subject matter of DTI's complaint.
- DTI and Qwest had the duty to negotiate the rates, terms, and conditions governing their interconnection agreement (ICA), including the amendment to that agreement.
- DTI's and Qwest's interconnection agreement is a valid and enforceable contract. In reaching this conclusion, the Commission rejects the argument that Qwest procured the agreement through bad faith negotiations.
- Qwest did not breach its duty to negotiate in good faith, or the terms of the interconnection agreement amendment.

Consequently the Commission will deny DTI's prayer for relief.

II. Legal Background

A. Telecommunications Act of 1996

The federal Telecommunications Act of 1996 (the 1996 Act) was designed to promote competition in the market for local telecommunications services by, among other things, imposing certain obligations on carriers -- particularly ILECs and Regional Bell Operating Companies (RBOCs).[4]

In general, the 1996 Act as implemented through FCC rules requires ILECs to (1) interconnect their networks with requesting carriers' networks; (2) make their finished services available at a discount for resale by competing carriers; and (3) allow competing carriers to lease certain network elements on an unbundled basis at cost-based rates. Specifically, in addition to complying with the interconnection obligation, an ILEC must do the following:

- Under § 251, an ILEC must allow competing carriers to purchase its tariffed services at wholesale prices -- which the Commission has set at 17.66 precent off the ILEC's retail price, based on the avoided cost methodology established by the FCC.[5]

- Under § 251, the ILEC must allow competing carriers to lease certain network elements unbundled from other elements (unbundled network elements, or UNEs) at rates that the Commission has approved based on the Total Element Long Run Incremental Cost (TELRIC) methodology established by the FCC.[6]

- Under § 271, if the ILEC is also a RBOC such as Qwest, it must make network elements available to competing carriers at just, reasonable, and non-discriminatory terms, although not necessarily at TELRIC rates.

The terms under which competing carriers obtain interconnection, resale or UNEs from an ILEC are established and memorialized in interconnection agreements negotiated or arbitrated under § 252 of the 1996 Act. Both the ILEC and CLEC parties to an interconnection agreement negotiation are required by § 252(b)(5) to negotiate in good faith and either party can petition the state commission for arbitration during the period from the 135th to the 160th day after the date on which the ILEC received the request to negotiate. The 1996 Act also requires that all interconnection agreements, whether negotiated or arbitrated, be subject to approval by the state commission under § 252(e). Amendments to existing interconnection agreements are similarly subject to the negotiation, arbitration and Commission approval provisions of the 1996 Act.[7]

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[4] See Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code; 104 S. Rpt. 230 (Senate conference report); 104 H Rpt. 230 (House conference report).

[5] *In the Matter of a Further Commission Investigation of Avoided Cost Discount of U S WEST Communications (now Qwest)*, Docket No. P-999/CI-99-776, Order Accepting the Proposed Resolution (December 11, 2001).

[6] 47 C.F.R. § 51.317(b).

[7] *Id.*

B. Regulatory Change and UNE Conversion

The Federal Communications Commission (FCC) issued a series of orders interpreting the 1996 Act's §§ 251 and 252, including 2003's *Triennial Review Order* (*TRO*)[8] and 2005's *Triennial Review Remand Order* (*TRRO*).[9] Through these orders the FCC defined § 251 UNEs ever more restrictively.[10] In particular, the FCC concluded in its TRO that § 251 no longer required ILECs to lease their switching elements to competitors for service to enterprise customers – that is, medium and large business customers using DS1 capacity service (having the capacity of 24 standard voice lines) or larger.[11] The TRRO extended this policy to switching elements used to serve mass market customers – that is, residential and small business customers using a standard phone line (DSO).[12]

Prior to these FCC decisions related to the availability of ILEC switching as a UNE, a number of CLECs had been leasing what was referred to as UNE-P at the TELRIC rates set by the Commission. UNE-P consisted of the ILEC's local loop, transport and switching facilities as a single package of network elements. Given the FCC's conclusion that § 251 no longer required ILECs to provide switching to CLECs, ILECs were no longer required to offer UNE-P at cost-based rates.

When a given element no longer qualifies as a § 251 UNE, the FCC directed the incumbent and the competitor to negotiate how to convert the UNE to some other arrangement. To convert its elements a competitor may change the physical equipment employed to serve its customers, or may continue to use the existing equipment but at a higher price, or both.

The FCC established a one-year transition period -- from March 11, 2005 to March 11, 2006 -- for competitors to convert their § 251 UNEs to "alternative facilities or arrangements, including self-provided facilities, alternative facilities offered by other carriers, or tariffed services offered by the incumbent…."[13] The FCC specified that "[a]t the end of the twelve-month period, requesting carriers must transition all of their affected high-capacity loops to alternative facilities or arrangements."[14]

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[8] Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003), vacated in part, remanded in part, *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[9] *Id.,* Order on Remand, 20 FCC Red. 2533 (2005), aff'd, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[10] *TRRO* ¶¶ 78-110, 149-166.

[11] TRO ¶ 419: "Based on evidence of competing carriers' widespread switch deployment to provide DS1 and above capacity service, we find on a national level that requesting carriers are not impaired without access to unbundled local circuit switching when serving DS1 enterprise customers."

[12] TRRO ¶ 199: "We reexamine incumbent LECs' obligations to unbundle mass market local circuit switching in light of the D.C. Circuit's vacatur of our previous rules…. Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide."

[13] *TRRO* ¶ 195.

[14] *Id.* at ¶ 196.

III. Relationship of Qwest and DTI

A. Interconnection Agreement and Negotiation of Amendment

DTI and Qwest entered into an interconnection agreement in 2002, and the Commission approved it.[15] The agreement provided for Qwest to lease § 251 UNEs to DTI at cost-based rates. Over time DTI would lease a variety of elements from Qwest. Like most competitors, DTI leased elements designed to serve mass market (residential) customers. But unlike most other competitors, DTI also leased from Qwest UNE-P with Digital Subscriber Services (DSS) and Primary Rate Interface (PRI) switch functionality, designed to serve enterprise customers -- such as hospitals, counties, and school districts -- through the use of DS1 lines or larger.[16]

The interconnection agreement contained a Change of Law provision stating that, "[t]o the extent that the Existing Rules are vacated, dismissed, stayed or materially changed or modified, then this Agreement shall be amended to reflect such legally binding modification or change of the Existing Rules."

On August 21, 2003, the FCC's TRO declared that incumbent telephone companies would no longer have the duty to provide UNE-P for enterprise customers at cost-based rates. By letter dated June 16, 2004, Qwest asked DTI to negotiate changes to their interconnection agreement to reflect these and other legal developments. DTI and Qwest began negotiations by June 23, 2004, but then postponed them to allow Qwest to pursue agreements with larger competitors that could serve as a model for smaller competitors such as DTI.[17]

On February 4, 2005, the FCC released its TRRO finding that ILECs would no longer be required, to offer UNE-P at cost-based rates for any customers. By letter dated March 4, Qwest notified all its CLECs of its intention to negotiate amendments to all interconnection agreements to reflect the changes required by the FCC's TRO and TRRO. And Qwest offered a uniform draft amendment (the TRO/TRRO Amendment) designed to reflect these changes.

B. The TRO/TRRO Amendment

In this amendment, Qwest adopted different policies regarding mass market customers and enterprise customers. For competitors that signed the TRO/TRRO amendment, Qwest offered to convert mass market UNE-P into a non-§ 251 equivalent at terms that DTI found attractive; Qwest called this offering its Qwest Performance Platform (QPP). It was essentially the same combined loop, transport, and switching platform as UNE-P, but at a higher rate than the TELRIC-based rates set by the Commission under § 251.

But Qwest offered no comparable proposal for elements serving enterprise customers. Instead, as early as January 2006 Qwest stated its intent to make its enterprise services such as switching with PRI and DSS available to DTI for resale, applying the Commission-established resale discount to various retail rates. The discount would even apply to rates associated with contracts specifying a minimum amount

[15] E x. 52 (Albersheim Direct), pp. 4-5; Ex. 26 (Albersheim RA-1).

[16] DSS include the digital trunk such as a DS1 and ports. PRI includes a digital trunk, a service arrangement, and trunk connections. See Ex. 27 (Albersheim RA-4).

[17] Ex. 76 (December 7, 2004 Sonneman letter to Dillard).

DTI would commit to buying – that is, *individual case based (ICB) pricing.* In response to DTI's request for different terms, Qwest stated that the duty to charge non-discriminatory rates precluded Qwest from offering special terms solely to DTI.[18] Qwest also told DTI that it had no duty to offer "wholesale prices" for DSS or PRI switching, and that Qwest would not renegotiate the retail rate for DSS or PRI switching posted in Qwest's price catalog or the resale discount ordered by the Commission.[19]

DTI claims that it told Qwest that DTI's business model could not accept the DSS and PRI arrangements Qwest was offering, and requested other terms. In response, DTI alleges that Qwest offered the possibility of negotiating prices after DTI signed the TRO/TRRO Amendment, but Qwest never offered more specific terms.

Qwest claims that it repeatedly encouraged DTI to sign the draft amendment, or propose different terms, or petition for Commission intervention (via compulsory arbitration or otherwise).

On May 15, 2006, DTI signed the TRO/TRRO amendment, and the Commission approved it the following month. The amendment did not establish the new prices for switching with DSS and PRI, but rather established a 90-day transition period for resolving these issues:

> 5.1.2.1. Qwest account representatives will work with CLEC on a plan to convert any existing Unbundled Local Switching at the DS1 or above capacity to other available Qwest products or services, if CLEC so desires. CLEC will submit complete, error-free LSRs [Local Service Requests] to convert or disconnect any existing Unbundled Local Switching at the DS1 or above capacity with Due Dates within ninety (90) Days of the Execution Date of this Amendment.

The amendment identified the consequence if, 90 days after the amendment is executed, a competitor has not converted all of its expiring § 251 services to other arrangements. In this circumstance the following language would apply by default:

> 5.1.2.2.1. [A]bsent CLEC transition by the ninety-first day or by March 10, 2006, whichever is earlier, Qwest will disconnect any remaining services on or after this date.
>
> 5.1.2.2.2. Absent CLEC Transition pursuant to the timeline … Qwest will convert services to the equivalent month to month Resale arrangements. CLEC is subject to back billing for the difference between the rates for the UNEs and rates for the Resale arrangement to the ninety-first (91st) day. CLEC is also responsible for all non-recurring charges associated with such conversions.

Qwest states that DTI was motivated to sign the amendment by Qwest's threat to petition for arbitration. DTI states that it was motivated by a desire to secure the favorable pricing for mass market elements, Qwest's claim that the amendment did not establish the new prices for DSS and PRI, and the prospect of working out an agreeable arrangement regarding enterprise elements within the amendment's 90-day transition period.

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[18] 47 U.S.C. §§ 202, 251(c)(3).

[19] Qwest answer to complaint (July 2, 2009) at ¶ 4.

C. Implementation of the TRO/TRRO Amendment

By the end of the 90-day transition period, DTI was still receiving service in reliance on § 251 switching with DSS and PRI. DTI asked for a delay in Qwest's proposed price increase. Qwest declined the request.

Instead, when the 90-day transition period ended Qwest unilaterally began billing DTI for switching with DSS and PRI calculated on the basis of Qwest's month-to-month retail rates, minus the Commission-approved wholesale discount.

DTI fell behind on paying for these wholesale services. When Qwest petitioned for permission to disconnect service to DTI,[20] DTI filed the current complaint.

IV. Positions of the Parties

A. DTI

DTI seeks damages from Qwest due to Qwest's alleged breach of their interconnection agreement, failure to bargain in good faith, and imposition of rates that were unlawful, unreasonable, and discriminatory. DTI argues that Qwest's wrongful conduct harmed DTI's interests in each of three successive periods:

- Following the FCC's TRO and TRRO, Qwest drafted an ambiguous TRO/TRRO Amendment, misrepresented its meaning to DTI, and coerced DTI into accepting it.

  During the 90-day transition period provided by the amendment, Qwest failed to bargain in good faith as manifested in various actions Qwest could have taken, but didn't. Contrary to DTI's expectations, DTI states that the alternatives Qwest offered as substitutes for UNE-P to serve enterprise customers were merely the same alternatives Qwest had offered before DTI signed the TRO/TRRO Amendment.[21] DTI argues that the duty to bargain in good faith entailed a duty to offer terms that recognize the market pressures DTI confronted.[22] In particular, DTI objects to Qwest's failure to offer a package of substitute enterprise services comparable to the QPP that Qwest offered for mass market services.[23] And DTI objects to Qwest's failure to offer the equivalent finished services for resale with the resale discount applied to unit prices comparable to the prices available on three- or five-year bulk service contracts, but without the obligation to commit to receiving service for three or five years.[24] DTI argues that, at a minimum, the duty to bargain in good faith required

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[20] See *In the Matter of the Application of Qwest Corporation for Expedited Approval to Discontinue Physical Connection with Digital Telecommunications Inc.,* Docket No. P-5681, 421/M-08-1443.

[21] DTI Brief at 26.

[22] *Id.* at 40, 48-49.

[23] *Id.* at 11-12, *Id.* at 40, 48-49.

[24] *Id.* at 41.

Qwest to grant DTI's request to maintain the status quo beyond the transition period to permit negotiations to continue.[25]

- Thereafter, Qwest unilaterally converted DTI's UNE switching with DSS and PRI to resold services, and arbitrarily chose to impose the highest possible price for those services.

B. The Department

The Department argues that Qwest failed to bargain in good faith when negotiating the TRO/TRRO Amendment. In particular, the Department claims that Qwest refused to negotiate over the terms of existing offers set forth in tariffs, price lists, and the Commission-approved wholesale discount for resale. The Department claims that Qwest adopted a bridge agreement for Eschelon Telecom (Eschelon), a different competitor, which had the effect of extending the period during which the parties could negotiate replacement terms for the expiring § 251 elements.[26] Yet Qwest refused DTI's request to extend the period for negotiations.

In addition, the Department argues that the term "equivalent month to month Resale arrangements" as found in the TRO/TRRO Amendment, is ambiguous. Consequently, the Department argues that the amendment's default provision – imposing these resale arrangements if there are no other arrangements to replace DTI's expiring § 251 elements by the end of the 90-day transition period – is void due to the lack of a necessary price term. In the alternative, if the Commission finds the term sufficiently clear to establish new prices then the Department would argue that the default provision is void because it was obtained through misrepresentation. Specifically, the Department argues that Qwest induced DTI to sign the amendment by claiming that the amendment did not establish the new prices for switching with DSS and PRI.

In either event, the Department disputed Qwest's argument that the TRO/TRRO Amendment authorized Qwest to impose its highest rates on DTI. To the contrary, the Department concludes that a nondiscriminatory wholesale service provider in Qwest's circumstances would have extended to DTI the opportunity to receive DSS and PRI switching at rates available to wholesale customers that have signed three- to five-year contracts, but without requiring DTI to commit to buying Qwest's switching for an additional three to five years. Requiring DTI to enter into a long-term contract – while ignoring the fact that DTI had already been Qwest's customer for years -- would be the equivalent of requiring DTI to bear unwarranted transition costs in violation of the TRO.

Regarding the substance of the TRO/TRRO Amendment, the Department reasoned that a wholesale service provider acting in good faith would have offered terms to its wholesale customers (such as DTI) that would have permitted the customers to stay in business.

C. Qwest

As a procedural matter, Qwest acknowledges that the Commission has jurisdiction over the negotiation of interconnection agreements and the price of § 251 elements. But Qwest argues that

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[25] *Id.* at 12, 23, 46.

[26] Ex. 72 (Johnson Direct, Attachment BJJ-3); Ex. 73 (Johnson rebuttal, Attachment BJJ-2); *In the Matter of the Interconnection Arbitration of Eschelon and Qwest Corporation*, Docket No. P-5340, 421/IC-06-768.

the Commission lacks jurisdiction over elements no longer subject to § 251 – which includes the elements at issue in this docket.

Qwest denies that it misrepresented the content of the draft TRO/TRRO Amendment, or that Qwest failed to negotiate in good faith. But Qwest asserts that the duty to negotiate in good faith does not require Qwest to offer a package of enterprise services comparable to its package of mass market services, or to make any other specific substantive concession. Qwest argues that DTI's professed concerns with how Qwest negotiated the TRO/TRRO Amendment are belied by the fact that DTI never requested arbitration, and refrained from filing a complaint until years after the amendment had taken effect.

Qwest acknowledges that it entered into a bridge agreement with Eschelon establishing the price Qwest would charge for expiring § 251 elements as these parties finalized an amendment to their interconnection agreement. But Qwest argues that the circumstances of Eschelon's amendment are not analogous or relevant to the circumstances of DTI's amendment.

Finally, Qwest argues that the default terms of the TRO/TRRO Amendment are not unenforceably ambiguous.

V. ALJ's Report

Following hearings and briefings, the ALJ issued his Findings of Fact, Conclusions and Recommendation on April 15, 2013.

Among other things, the ALJ found that both federal and state law grant the Commission jurisdiction over the subject matters of DTI's complaint. The ALJ found that Qwest had a duty to negotiate in good faith over the conversion of § 251 elements to non-§ 251 elements, and that Qwest violated that duty in the manner in which Qwest set the rates for non-§ 251 elements and imposed them on DTI. This breach of duty caused DTI to pay unjust, discriminatory, and excessive rates. The ALJ recommended further proceedings to calculate an appropriate remedy for DTI.

VI. Supplemental Record Analysis

Following issuance of the ALJ's Report, Qwest filed extensive exceptions alleging that the ALJ had failed to address various issues in the docket, and DTI and the Department filed extensive replies. In an effort to clarify key issues, the Commission posed 24 questions for the parties to address during oral arguments, and stated that it might pursue "further procedural matters" thereafter. The parties' oral arguments lasted nearly six hours.

With the benefit of this additional perspective and argumentation, the Commission's staff prepared a Supplemental Record Analysis to aid the Commission's review. In contrast to the ALJ's Report, this analysis generated conclusions that generally supported Qwest's argument. Parties were provided opportunity to comment on the analysis.

According to this analysis, the Commission generally has jurisdiction over DTI's complaint, with some caveats. The analysis states that the Commission lacks some jurisdiction over the terms for § 271 elements, including elements that were formerly § 251 elements. And the analysis states that 47 U.S.C. § 415(b) and (c) establishes a two-year statute of limitations on claims arising solely under the 1996 Act. This would bar remedies for any claim arising after November 21, 2008 regarding, for example, a breach of the 1996 Act's duty to negotiate in good faith. But this statute

of limitations would not apply to claims arising under state law, such as contract law allegations of fraud, misrepresentation, and bad faith negotiations.

While DTI argues that the TRO/TRRO Amendment was secured by fraud, and thus should not be enforceable against DTI, the Supplemental Record Analysis identifies both legal and factual grounds to reject this argument.

The analysis finds support for DTI's argument that Qwest had a duty to negotiate in good faith. But the analysis identifies little factual or legal support for DTI's claim that Qwest wrongfully coerced DTI into signing the TRO/TRRO Amendment or otherwise breached its duty to negotiate in good faith.

VII. Issues

To resolve the issues raised by the parties, the Commission will address four questions:

- Does the Commission have jurisdiction to resolve DTI's complaint?
- Does the record show that Qwest's conduct in negotiating for adoption of its TRO/TRRO Amendment violated Qwest's duty to negotiate in good faith?
- Does the record show that Qwest's conduct during the TRO/TRRO Amendment's 90-day transition period violated Qwest's duty to negotiate in good faith?
- Does the record show that Qwest's conduct in transitioning DTI's services to month-to-month wholesale services following the 90-day transition period violated Qwest's duty to negotiate in good faith, or to charge fair, reasonable, and non-discriminatory rates?

VIII. Commission Jurisdiction

A. In General

The Commission finds that it has jurisdiction over DTI's complaint. Under 47 U.S.C. § 252(e), the Commission has the authority to approve or reject interconnection agreements. This includes the power to interpret and enforce the agreements after their initial approval.[27] As the FCC found, "inherent in state commissions' express authority to mediate, arbitrate, and approve interconnection agreements under § 252 is the authority to interpret and enforce previously approved agreements."[28] Moreover, the Commission has jurisdiction over DTI's complaint under Minn. Stat. §§ 237.02, 237.06 and 237.121, and Minn. R. 7812.1900.

B. Duty to Negotiate in Good Faith Regarding Replacements for § 251 Services

Qwest acknowledges that the Commission has jurisdiction over § 251 elements, including whether Qwest has negotiated with competitors in good faith over the terms for providing such elements. And Qwest denies that it failed to negotiate in good faith. But as a preliminary matter, Qwest denies that the jurisdiction delegated to states by § 251, including over § 251 elements, gives states

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[27] *Sw. Bell Tel. Co. v. Connect Commc'n Corp.*, 225 F.3d 942, 946 (8th Cir. 2000).

[28] *In re Starpower Comm'n, LLC*, 15 F.C.C.R. 11277, 11279-80 (F.C.C. 2000).

jurisdiction over elements offered *to replace* expiring § 251 services and elements.

Whatever the merits of this interpretation of § 251, it is rendered moot by the myriad other sources of the duty to negotiate in good faith. First, the duty to negotiate in good faith appears throughout DTI's interconnection agreement with Qwest. For example, the agreement states that, "[i]n the event that any one or more of the provisions contained herein shall for any reason be held to be unenforceable or invalid in any respect under law or regulation, the Parties will *negotiate in good faith* for replacement language as set forth herein."[29]

Second, both the TRO and TRRO established a duty to negotiate in good faith the conversion of § 251 elements to alternative services, be they § 271 elements or any other replacement elements.[30] For example, the FCC declined to adopt rules governing how an incumbent would convert § 251 elements into replacement elements and services, reasoning as follows:

> We decline the suggestions of several parties to adopt rules establishing specific procedures and processes that incumbent LECs and competitive LECs must follow to convert wholesale services (e.g., special access services offered pursuant to interstate tariff) to UNEs or UNE combinations, and the reverse, i.e., converting UNEs or UNE combinations to wholesale services. Because both the incumbent LEC and requesting carriers have an incentive to ensure correct payment for services rendered, and because both parties are bound by *duties to negotiate in good faith*, we conclude that these carriers can establish any necessary procedures to perform conversions with minimal guidance on our part.[31]

Further, the Commission has jurisdiction under § 251 over the resale of Qwest's telecommunications services. Much of this dispute relates to DTI's effort to negotiate an arrangement to resell certain Qwest services that were equivalent to the UNE-P DTI had been leasing from Qwest.

Consequently the Commission rejects the argument that it lacks jurisdiction over the disputes in this matter.

C. Filed Rate Doctrine

Qwest argues that DTI's claims, to the extent that DTI asks the Commission to prescribe different rates than those prescribed by the default provision of the TRO/TRRO Amendment, would violate the filed rate doctrine. This doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate … regulatory authority."[32] The filed rate doctrine applies to rates contained in a state-approved interconnection agreement.[33]

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[29] Interconnection agreement § 5.15 (emphasis added).

[30] TRO ¶¶ 585, 703, 704, 706, & 2087; TRRO ¶ 233.

[31] TRO ¶ 585 (emphasis added, internal citations omitted).

[32] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

[33] *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 680-81 (8th Cir. 2009).

DTI and the Department note that Qwest offers DSS and PRI switching under a variety of terms. These parties allege, among other things, that Qwest applied the wrong terms when it imposed "equivalent month to month Resale arrangements." These parties do not ask the Commission to retroactively impose a new rate, but rather to determine which of Qwest's rates Qwest should have been charging for DSS and PRI switching since the end of the 90-day transition period. Thus the Commission concludes that the parties' requests do not conflict with the filed rate doctrine.

D. Statute of Limitations

The Supplemental Record Analysis notes that 47 U.S.C. § 415(b) and (c) establish a two-year statute of limitations on claims for damages if the claims arise under the 1996 Act. Because Qwest began charging for DSS and PRI switching at its higher rate around November 20, 2006, these statutes could be read to preclude claims arising from that fact if the claim was filed after November 21, 2008, and was based solely on federal law.

As an initial matter, a statute of limitations must be raised as an affirmative defense or it is waived.[34] In this docket, no party raised the statute of limitations defense in pre-hearing pleadings, during the evidentiary hearing, or in any of the three rounds of briefing after the evidentiary hearing. Thus the matter is waived.

Moreover, Qwest had an ongoing duty to negotiate in good faith, and Qwest issued bills allegedly calculated on the basis of terms derived from a breach of good faith. Consequently, while Qwest began charging for DSS and PRI at higher rates beginning around November 20, 2006, the conduct that forms the basis of DTI's complaint extended well past this date, arguably constituting a continuing violation.[35] Where a carrier is alleged to have engaged in a continuing violation, a statute of limitations does not preclude relief.[36]

Finally, even if the statute of limitations did bar DTI from pursuing its claims under federal law, interconnection agreements are contracts subject to state contract law. DTI's allegations of fraud and misrepresentation arise under state law. Consequently 47 U.S.C. § 415(b) and (c) do not preclude Commission jurisdiction over DTI's complaint.

For the foregoing reasons, the Commission finds that it has jurisdiction over DTI's complaint.

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[34] A defense based on a statute of limitations is subject to waiver. *Reed v. State*, 793 N.W.2d 725 (Minn. 2010) citing *Carlson v. Indep. Sch. Dist. No. 623*, 392 N.W.2d 216, 220-21 (Minn. 1986) and *Day v. McDonough*, 547 U.S. 198, 205 (2006) (a statute-of-limitations defense "is not jurisdictional.")

[35] See *MCI Telecom. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1096-1101 (3d Cir. 1995) (comparing tariff payments to installment payments, finding that "additional causes of action accrued 30 days after the date of each of MCI's subsequent bills"); *MFS Intern., Inc., v. Int'l Telcom Ltd*, 50 F.Supp. 2d 517, 523-26 (E.D. Va. 1999) ("the cause of action on each invoice accrued when that invoice became due and payable…").

[36] *Capital Telephone Co., Inc. v. F.C.C.,* 777 F.2d 868 (2d. Cir. 1985).

IX. Negotiating for the TRO/TRRO Amendment: Inflexibility and Good Faith

A. Allegation

The TRO and TRRO eliminated incumbents' duty to provide switching at cost-based rates, including both mass market switching and enterprise service switching for DSS and PRI. And the TRRO declared that --

> carriers have [until March 11, 2006,] to modify their interconnection agreements, including completing any change of law processes. At the end of the twelve month period, requesting carriers must transition the affected … UNEs to alternative facilities or arrangements.[37]

Qwest elected to offer QPP, an attractive package of substitute mass market services, but only to carriers that signed the TRO/TRRO Amendment.

DTI and the Department variously object to Qwest's choice to refrain from offering an attractive package of enterprise market services comparable to its QPP, to Qwest's practice of making the QPP offer contingent upon signing the TRO/TRRO Amendment, and to Qwest's resistance to changes in the amendment generally. These parties argue that Qwest's conduct was coercive and a violation of the duty to negotiate in good faith. Qwest argues that it had the discretion to act as it did.

The ALJ accepted the arguments of DTI and the Department. In support of a finding that Qwest had failed to negotiate in good faith, the ALJ noted that "Qwest expressly conditioned execution of the QPP agreement regarding switching on DTI's execution of the amended ICA, without any change in the terms of the latter document, or any negotiation over those terms."[38]

B. Commission Analysis

The Commission finds that DTI and the Department have not demonstrated that Qwest violated its duty to negotiate in good faith under the 1996 Act.

Qwest had the right to convert customers from UNE-P to an alternative product or service at non-TELRIC rates. Qwest could pursue this conversion by negotiating with competitors to amend their interconnection agreements or, failing that, by arbitrating the changes. Qwest had no obligation to offer its QPP, but did so as part of its negotiation to encourage competitors to approve the draft TRO/TRRO Amendment.

For their part, competitors did not have to accept the TRO/TRRO Amendment. Following implementation of the TRO and TRRO, competitors retained the discretion to purchase Qwest's finished services under § 251 at the Commission-set wholesale discount and resell those services. Competitors could also seek to lease elements at market rates from incumbents or other competitors if available, or could use their own facilities if they had such facilities.[39] And

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[37] TRRO ¶ 143.

[38] ALJ's Report, Finding 13.

[39] TRRO ¶¶ 163, 180, 195.

procedurally, competitors had the discretion to negotiate terms governing the transition, and to compel incumbents to arbitrate any disputes. However, competitors no longer had the right to lease the UNE-P platform at TELRIC rates to which they had previously been entitled under § 251.

Qwest had the option, but not the obligation, to offer a package of enterprise services comparable to the QPP, and to accept changes to its draft amendment. The fact that Qwest did not do these things might be evidence that Qwest refused to negotiate about such matters; alternatively, it might be evidence that no party offered terms that would make such proposals worthwhile to Qwest. But the fact that Qwest offered DTI an option, and DTI found the option less attractive than DTI would have liked --- yet still sufficiently attractive to accept -- is not evidence of bad faith negotiations or coercion.

X. Negotiating for the TRO/TRRO Amendment: Ambiguity.

A. Allegation

DTI and the Department argue that the Commission should not enforce the TRO/TRRO Amendment in the manner Qwest has. They argue that the language of the amendment is unenforceably vague or, at a minimum, susceptible to enough interpretation as to entitle DTI to the benefit of a doubt.

As previously noted, the TRO/TRRO Amendment states at section 5.1.2.2.2, "Absent CLEC Transition pursuant to the timeline ... Qwest will convert services to the equivalent month to month Resale arrangements." DTI and the Department argue that this language is so ambiguous as to render the amendment void for lack of a price term – or, at a minimum, so as to entitle DTI to a remedy to correct for Qwest's choice to assess the highest possible rates.

DTI and the Department argue that this provision is sufficiently ambiguous that DTI was justified in relying on Qwest's statement that the amendment's language did not establish the future price of DSS and PRI switching. Qwest argues that it merely summarized the text: signing the amendment would not lock DTI into any specific arrangement regarding DSS and PRI because DTI would retain the option to negotiate for various pricing alternatives or to replace Qwest's DSS and PRI switching with switching provided by DTI itself. Nevertheless, DTI argues that the ambiguity led DTI to rely on a false impression to its detriment.

In addition, the Department observes that DSS and PRI switching involves a variety of components, not all of which are listed explicitly in Qwest's tariffs. Thus, the Department argues, the price of DSS and PRI switching is necessarily ambiguous.

Finally, the Department questions the meaning of the terms "equivalent ... arrangement" within the context of the transitions created by the TRO and TRRO. The Department challenges the conclusion that Qwest's highest rate for DSS and PRI switching reflects its most *equivalent arrangement*. As a factual matter, DTI was a long-standing customer of Qwest, not a new customer. And as a matter of policy, Qwest has a duty to charge non-discriminatory rates – that is, according to the Department, the rates most similar to the cost at which Qwest provides DSS and PRI switching to its own retail operation. Given these considerations, the Department reasons that Qwest had a duty to charge DTI in a manner that reflected the volume and duration of the wholesale business DTI had conducted with Qwest in the past. Charging DTI as if it were a brand new customer would not be "equivalent."

B. Commission Analysis

The Commission finds the default language of the TRO/TRRO Amendment clearly indicates the consequences of failing to convert expiring § 251 elements to some substitute element.

1. Plain Language

The concept of month-to-month is not ambiguous. In a variety of familiar commercial contexts, including utility services, *month-to-month* is understood to refer to an arrangement by which a customer chooses to purchase a service one month at a time without incurring an obligation to purchase the service for a longer period.[40]

A party's subjective confusion about the meaning of a text does not render the text ambiguous from a legal perspective, and a party that neglects to take appropriate steps to clarify the meaning of contract language cannot expect to be relieved of the consequences. DTI had 14 months, from March 2005 to May 2006, in which to review the proposed amendment – sufficient time to review its implications with its own counsel prior to executing the agreement. Even a party's misrepresentation as to the nature of a proposed contract does not amount to fraud in the execution if the other party had a reasonable opportunity to acquaint himself with the contract and failed to do so.[41]

2. Party Conduct Communicating and Acknowledging Meaning

Looking beyond the four corners of the TRO/TRRO Amendment itself, the record contains multiple examples of Qwest stating the consequences that would result if DTI failed to convert its DSS and PRI switching to some other arrangement, and of DTI explicitly or implicitly acknowledging the same.

For example, Qwest told DTI the consequences of not fully transitioning within the 90-day transition period, and the effect of month-to-month rates. A Qwest representative stated that month-to-month rates "would use standard rates" or "monthly, resale measured service," and admonished DTI: "In other words, you really want to do the conversion yourself."[42]

The record also shows that DTI understood the distinction between month-to-month rates and rates that require a long term commitment but which bill on a monthly basis. DTI acknowledged that the TRO/TRRO Amendment "calls for month-to-month … resale pricing … which is obviously the highest price that we know of that Qwest could have charged for these products."[43] DTI

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[40] *Newton's Telecom Dictionary*, 27th ed., 2013 (defining month to month as "[t]he standard way of paying for telephone service. Some services now come in 'rate stability packages' which means if you commit to taking services for a while-typically three or five years-it's cheaper each month"); *Black's Law Dictionary* (9th ed. 2009) (defining 'month to month lease' as one where rent is paid monthly and only one month's notice is required to terminate the tenancy).

[41] *BankCherokee v. Insignia Development, LLC,* 779 N.W.2d 896, 900 (Minn. Ct. App. 2010).

[42] Exhibit RA-5 (Qwest e-mail from March 24, 2006).

[43] Tr. Vol. 1 p. 21 ll. 12-16.

understood that discounts for term purchases are common and that month to month rates are higher than rates under long-term contracts.[44] And the record contains an example of DTI asking Qwest for information on month-to-month rates to serve a customer temporarily: DTI acknowledged that it would not get the benefit of a term discount, but valued the flexibility to discontinue the service as soon as DTI could get its own facilities installed to serve the customer.[45]

Similarly, DTI stated "[f]rom our previous correspondence, DTI believes that it understands the pricing proposals…. Enterprise rates are based upon rates found in the Qwest Retail tariff less either a discount based on the terms of the CLECs ICA or an 18% discount."[46]

The record shows that by the time DTI signed the TRO/TRRO Amendment, DTI understood that it had to convert its switching-related services to alternative services within 90 days or Qwest would convert the services to resale month-to-month rates.[47] DTI understood that the PRI and DSS elements would no longer be available at cost-based prices after the 90 day transition period.[48] On at least four occasions prior to signing the TRO/TRRO Amendment, DTI stated its plans to convert its enterprise customers to DTI facilities within 90 days, but acknowledged the alternative arrangements were to sign a one-, three-, or five-year contract "or go on month to month pricing."[49]

Finally, DTI's ongoing performance under the month-to-month provision and long delay in contesting Qwest's rates further evidence DTI's understanding and acceptance of the month-to-month provision. Qwest began billing DTI at the higher month-to-month rate in October 2006. DTI made payments to Qwest under this arrangement until November 2008, and did not file any complaint before the Commission until March 2009.

DTI claims that it deferred filing a complaint with the Commission because it was seeking to resolve the dispute informally with Qwest. But when DTI first discussed its higher bills with Qwest by letter dated October 4, 2006, DTI did not contest the *amount* of the bills; rather, DTI merely requested a delay in the bill increase to provide additional time in which to install its own

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[44] Ex. 14 (Siewert rebuttal) at 250-253.

[45] Ex. 45 (March 24, 2006 e-mail exchange between Terek, Rixe).

[46] Ex. 78 (November 22, 2005 e-mail from Sonneman to Dinwiddie). The precise wholesale discount rate is 17.66 percent, not 18 percent; see Ex. 56 (Easton direct), p. 22, ll. 1-4, p. 25, ll. 20-21.

[47] Tr. Vol. 1, p. 60, ll. 13-15, and p. 69 ll. 11-12; Ex. 77 (January 19, 2005 Terek e-mail to Sonneman) (acknowledging that upon signing the QPP, all of DTI's DSS and PRI switching customers would immediately convert to resale agreement prices).

[48] Tr. Vol. 1 p. 87, ll. 19-22.

[49] Ex. 32, 36, 45, & 46 (stating that DTI expected to move 70-80 percent of its enterprise customers to DTI facilities).

facilities to serve its customers.[50] This behavior is inconsistent with the claim that DTI was either unaware of the higher bills it was incurring, or regarded the bills as erroneous or otherwise unjustified.

From either an objective or subjective standard, DTI fails to demonstrate that the terms of the TRO/TRRO Amendment were unenforcebly vague.

3. Prices for Each Component of DSS and PRI Switching

The Department argues that Qwest's price list fails to state a price for each component of DSS and PRI switching, and thus fails to provide an obvious equivalent arrangement for the DSS and PRI switching DTI purchased under § 251.

Qwest acknowledges that the price of one component is missing from Qwest's Exchange and Network Services Non-Price Regulated Price List No. 2 – but notes that it is included in Qwest's Exchange and Network Services Tariff, as stated in Qwest's testimony.[51] While DSS and PRI switching involves a variety of components, Qwest lists prices for each of them. The fact that some components appear on Qwest's price list while others appear on Qwest's tariff does not render the prices ambiguous.

4. "Equivalent … Arrangement"

Finally, the Department questions the meaning of the terms "equivalent ... arrangement" within the context of the transitions created by the TRO and TRRO. The Department challenges the conclusion that Qwest's highest rate for DSS and PRI switching reflects the most *equivalent arrangement*.

Factually, the Department notes that DTI was a long-standing, continuing customer of Qwest, not a new customer. And as a matter of policy, Qwest has a duty to charge non-discriminatory rates – that is, according to the Department, the rates most similar to the cost at which Qwest provides DSS and PRI switching to its own retail operation. According to the Department, charging DTI as if it were a brand new customer would not be "equivalent." Rather, the Department reasons, Qwest had a duty to charge DTI in a manner reflecting the volume and duration of the wholesale business DTI has conducted with Qwest in the past. For these reasons the Department argues that a more equivalent arrangement would permit DTI to receive services at prices available under long-term contracts – but without requiring DTI to make any prospective long-term purchase commitments.

The Department acknowledges that Qwest's current long-term contracts would require DTI to make a long-term purchase commitment. But the Department argues that asking DTI to incur the burden of a long-term purchase commitment simply to comply with the TRO and TRRO would act

[50] Ex. 65. See also Ex. 68 (DTI protesting the amount of DTI's past due balances based on factors entirely unrelated to the amount billed per month); Ex. 84 (DTI protesting Qwest's refusal to grant 90-day extension, but not contesting calculation of bills).

[51] Ex. 52 (Albersheim Direct); attachment RA-4, p. 35, n.4.

as a needless impediment to DTI's transition to a post-TRRO regulatory environment, in contravention of the TRO, which prohibits wasteful and unnecessary conversion charges:[52]

> 587. …We recognize … that once a competitive LEC starts serving a customer, *there exists a risk of wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time.* We agree that such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an incumbent LEC as a result of converting a UNE or UNE combination to a wholesale service. Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are inconsistent with an incumbent LEC's duty [under § 251(c)(3)] to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions. Moreover, we conclude that such charges are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any person or class of persons (*e.g*., competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or disadvantage.[53]

The Department's argument misconstrues the TRO, and thus the TRO/TRRO Amendment.

First, in the TRO the FCC found that competing carriers had widely deployed switches capable of providing service at DS1 and above, and consequently eliminated the incumbents' duty to provide access to services such as enterprise UNE-P (including the DSS and PRI functionalities) at cost-based rates.[54] As a result, Qwest no longer had an obligation to offer enterprise switching to DTI. Qwest was not imposing discriminatory charges by insisting on applying the resale discount to its tariffed rates based on the terms of those tariffs, including term or volume purchase commitments.

Second, the TRO's prohibition on wasteful conversion charges pertains to one-time charges, not ongoing charges. Qwest has not sought to impose any one-time charges.[55] Moreover, any suggestion that the FCC opposes bulk purchase commitments is dispelled in the TRO paragraph immediately preceding the one cited by the Department:

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[52] See, for example, Department Response (February 10, 2014); see also ALJ's Report, ¶ 28.

[53] TRO ¶ 587 (emphasis added).

[54] TRO ¶ 419.

[55] See Ex. 14 (Siewert Rebuttal) at 1. 210-214:

> Q: Did Qwest bill DTI for non-recurring charges associated with conversion of the PRI and DSS services?
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> A: No, not that I am aware. Billing for non-recurring charges would not be logical because there were no facilities changed with the conversion. It was only a rate change that arose because of FCC mandate.

> 586. We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, *so long as the competitive LEC meets the eligibility criteria that may be applicable.* (Emphasis added).

More generally, the TRO emphasizes the principle that competitors should receive all the benefits *and burdens* of their business arrangements with incumbents. When addressing the mirror image of DTI's case – a competitor that signed a long-term contract for UNEs, but now seeks to buy elements or services under some other terms – the FCC held that the competitor should be bound by its earlier choice. The FCC held to this position notwithstanding arguments that –

- The competitor sought to change its arrangements with the incumbent simply "because the law requires such a result."[56]
- § 251 bars the imposition of impediments to or restrictions on access to UNEs.[57]
- "[I]ncumbent LECs exercise market power to force competitive LECs to buy special access facilities which were only affordable with long-term discounts…."[58]
- The resulting transition costs "would be a windfall to incumbent LECs…."[59]

Ultimately the FCC found that permitting competitors to derive the benefits of wholesale arrangements they had not bargained for would create an inequitable situation between competitors:

> Competitive LECs that entered into long-term special access contracts benefited from term discount arrangements which allowed for lower costs. It may be unfair for these carriers to completely avoid [contract termination] costs they knowingly agreed to shoulder. Indeed, it would put them in a far better position than those competitive LECs that chose to avoid early termination provisions, and to select shorter contract periods with higher prices.[60]

In this case, DTI is the competitive LEC that chose to *avoid* the burdens of long-term contracts by opting for shorter contract periods and higher prices. But the FCC's principle -- that a competitor should get both the costs and the benefit of its choices – applies nonetheless.

Finally, the Department's proposed interpretation of the TRO/TRRO Amendment would not eliminate a discriminatory pricing practice; it would create one. As the ALJ found, the record shows that Qwest offers uniform terms to qualified customers, wholesale or retail. Even a long-term wholesale customer buying DSS and PRI switching under an individual case based contract will be billed at month-to-month resale rates once the contract expires – unless the

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[56] TRO ¶ 693.

[57] *Id.* at ¶ 697.

[58] *Id.* at ¶ 693.

[59] *Id.*

[60] *Id.* at ¶ 699.

customer signs a new contract.[61] In contrast, the Department's proposal would put DTI in a permanently superior position to other competitors that were bound to long-term purchase commitments. Discrimination does not consist merely of treating similarly situated entities dissimilarly; it also consists of treating dissimilarly situated entities similarly.[62]

For these reasons, the Commission is not persuaded that DTI's circumstances warrant access to long-term rates without a long-term purchase commitment.

XI. Negotiating the TRO/TRRO Amendment: Failure to Negotiate

A. Allegation

DTI and the Department argue that, in pursuing approval of the TRO/TRRO Amendment, Qwest engaged in coercive practices by failing to provide DTI with information about alternative arrangements for acquiring DSS and PRI switching. As a consequence, when the FCC-prescribed deadline for finding new sources for DSS and PRI switching was at hand, these parties argue that DTI felt it had no alternative than to accept Qwest's proposed amendment. The ALJ concurred, finding that "Refusal by DTI to execute [the amendment] would have resulted in DTI being unable to offer telecommunications services to retail customers."[63]

Qwest denies the allegation.

B. Commission Analysis

While DTI and the Department allege that Qwest acted coercively, the record supplies ample evidence to support the contrary conclusion. Arguably the chief obstacle DTI faced in negotiating terms for acquiring DSS and PRI switching from Qwest was DTI's long-standing plan to discontinue buying switching from Qwest and to start providing this service itself.

As early as January 19, 2005, it appears that DTI had opted to address the changes required by the TRO/TRRO Amendment by "continu[ing] with our conversion process so we can get as many customers onto our own facilities as quickly as possible as to maintain our bottom line."[64] DTI proposed to explore Qwest's promotional pricing merely as a contingency in the event DTI would not be able to convert all its customers to DTI's own facilities soon enough.[65]

Qwest "contacted DTI numerous times attempting to discuss this [TRO/TRRO] amendment," but repeatedly found that DTI was not prepared to negotiate."[66]

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[61] Ex. 55 (Albersheim supplemental surrebuttal) at 10-11.

[62] See *In the Matter of the Minnesota Independent Equal Access Corp.'s Application for a Certificate of Public Convenience and Necessity*, 477 N.W.2d 516, 522 (Minn. App. 1991), rev. denied (Jan. 30, 1992). ("[T]here is no greater inequality than the equal treatment of unequals.")

[63] ALJ's Report, Finding 12.

[64] Ex. 77 (January 19, 2005 Terek e-mail to Sonneman); Tr. Vol. 1 at 53-54.

[65] Tr. Vol. 1 at 54 and at 127, ll. 5-6.

[66] Ex. 54 (Albersheim surrebuttal), Attachment RA-42.

By January 25, 2005, Qwest provided DTI with Qwest's "Enterprise Switching rate sheet" governing PRI and DSS switching.[67] Qwest also provided DTI with an outline of the alternatives available for enterprise services including resale and individual case based options for customers willing to commit to long-term purchases.[68]

From February 21-23, 2006, Qwest responded to DTI's queries by providing information on wholesale rates for DSS and PRI switching, including rates that decreased in relation to the increasing number of years the customer committed to the rates; Qwest also provided DTI with information on promotional rates for PRI switching.[69]

On March 24, 2006, Qwest provided DTI with rates based on a three-year individual case based contract for DSS and PRI circuits, reflecting the volume and term information provided by DTI.[70] The individual case based contract offered even lower rates than those contained in the tariffs based on both time and volume commitments.[71] In an internal email, DTI acknowledged that these rates were "reasonable" but, given DTI's preferred strategy of converting its customers to DTI's own facilities promptly, DTI did not want to commit to a three-year contact.[72]

On April 3 and 4, 2006, Qwest asked DTI if DTI needed additional information addressing conversions or the individual case based contract. DTI declined assistance, saying that it was still in the process of choosing the customers to convert to DTI's facilities, and the customers to serve via Qwest's facilities under an individual case based contract. [73]

On April 12, 2006, Qwest sent DTI a schedule of rates for a variety of different volume amounts based on a three-year individual case based contract for DSS and PRI circuits.[74] DTI again stated that it was identifying which customers would convert to DTI facilities within 90 days and which would be kept on a three-year contract through Qwest.[75]

On April 25, 2006, Qwest again inquired if DTI had identified any circuits it intended to convert based on the individual case based contract. DTI continued to inform Qwest representatives that it intended to convert all PRI customers to DTI facilities within 90 days of signing the TRO/TRRO Amendment.[76]

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[67] Ex. 59 (January 25, 2005 e-mails between Hahn, Terek).

[68] Ex. 54 (Albersheim surrebuttal), Attachment RA-42.

[69] Ex. 33 (2006 DTI e-mails).

[70] Ex. 35 (March 24, 2006 Rixe e-mail to Terek) and 45 (March 24, 2006 e-mails between Terek, Rixe).

[71] Ex. 55 (Albersheim supplemental surrebuttal), p. 9, ll. 3-6.

[72] Ex. 36 (April 4, 2006 e-mails between Sonneman and Terek).

[73] Ex. 46 (2006 DTI e-mails).

[74] Ex. 39 (2006 DTI e-mails).

[75] *Id.*

[76] *Id.*

Thus, almost up to the day DTI signed the TRO/TRRO Amendment, the record documents Qwest's repeated efforts to secure a decision from DTI about how to manage the impending expiration of its DSS and PRI switching under § 251 – and DTI's continued plan to go its own way.

It may well be true that by the time DTI agreed to the amendment, it had no viable alternative means to secure DSS and PRI switching. But the record indicates that this problem resulted from the practical challenges of building facilities or negotiating with third party providers – not from Qwest's coercive practices or failure to negotiate in good faith. In sum, the Commission concludes that DTI and the Department have failed to prove their claim.

XII. Implementing the 90-day Transition Period: Refusal to Make Concessions

A. Allegation

DTI and the Department argue that Qwest's refusal to make concessions to DTI demonstrates Qwest's failure to negotiate in good faith. They cite examples of statements offered by Qwest representatives over the years indicating an unwillingness to alter existing price structures. And they argue that the terms Qwest offered to DTI during the 90-day transition period were no better than the terms Qwest offered before that period.

The ALJ concurred in DTI's and the Department's reasoning, finding as follows:

> 12. ….At no time did Qwest propose that existing services be converted to any rate other than month-to-month without … the imposition of new term requirements. Qwest considered existing eligibility restrictions, such as the number of loops ordered, to be applicable to DTI as a condition of receiving the lower rates on PRI/DSS services. At no time did Qwest negotiate with DTI regarding any of the foregoing terms and conditions of the interconnection of DTI with Qwest. All of the terms and conditions relied upon by Qwest were existing terms and offered to DTI on a "take it or leave it" basis. Refusal by DTI to execute the contracts offered by Qwest would have resulted in DTI being unable to offer telecommunication services to retail customers.
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> * * *
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> 26. [P]rovision of either PRI or DSS was required to be negotiated in good faith. The price of the element is a provision which needed to be negotiated. Qwest characterized its obligation as being met by not moving on the price of PRI or DSS. But the record demonstrates that price, volume requirements, and term obligations were never the subject of negotiation, despite DTI's repeated requests for such negotiation. The terms that Qwest had reached with other CLECs, no doubt through negotiation, were not offered to DTI or negotiated.
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> 27. Qwest was aware of its obligation to negotiate terms for non-§ 251 UNEs. Eschelon, a CLEC in Minnesota with significant interconnection with Qwest across multiple states, disagreed with Qwest's approach on prices following the TRO and TRRO. Qwest and Eschelon entered into a bridge agreement that arrived at a mutual understanding on various elements for which pricing was changing under those FCC Orders. Under the bridge agreement, the increased UNE price was capped at 115% of the pre-TRRO price (or state Commission-established rate,

> where applicable) and provided for back-billing upon the end of the 12-month bridge pricing period. Penalties were expressly waived for the back-billings. No negotiations were offered or conducted by Qwest to DTI, despite repeated requests by DTI, regarding transition pricing.

Qwest acknowledges that it has offered a variety of pricing options to DTI, and that those options were the same both before and after DTI agreed to the TRO/TRRO Amendment. But Qwest denies that the duty to negotiate in good faith requires Qwest to make substantive concessions on its positions.

B. Commission Analysis

Again the Commission finds that DTI and the Department have failed to demonstrate that Qwest violated its duty to negotiate in good faith.

1. Good Faith Negotiations

The duty to negotiate in good faith does not require Qwest to sacrifice its own interests to promote the interests of a competitor.[77] Rather, it requires all parties to engage in an act of creative entrepreneurship, seeking out opportunities for *mutual* gain relative to the status quo.

As a simple example, Qwest's price list offers increasingly steep discounts for competitors that are willing to make a commitment to purchase services for one, two, three, and five years, respectively. Questions about Qwest's good faith might arise if Qwest were to refuse to consider offering a commensurate discount for a *four*-year commitment. That is, the Commission would expect to see Qwest respond to an offer to provide something Qwest values – a long-term purchase commitment – with a proportionate offer of something the competitor values – a discount in the unit price.

Here, the record does not provide examples of Qwest refusing any such offers. Instead, DTI alleges that Qwest failed to respond to DTI's complaint that Qwest's rates were either too burdensome – either in terms of unit price or time commitment – to work with DTI's business model. The record does not show that DTI ever made a counter-offer indicating what it was willing to do to promote *Qwest's* interests in exchange for Qwest making a concession to promote *DTI's* interests. In the absence of any offer of concession on DTI's part, it appears that DTI was simply asking Qwest to make unilateral concessions, bidding against itself.

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[77] *Wal-Lite Div. of U.S. Gypsum Co. v. N.L.R.B.*, 484 F.2d 108, 110-11 (8th Cir. 1973) (the duty to bargain in good faith does not compel a party to agree to another's proposal or require concessions; offering a contract similar to one offered with another company does not evidence bad faith bargaining); *PSI Energy, Inc. v. Exxon Coal USA, Inc*., 17 F.3d 969, 973 (7th Cir. 1994) (good faith does not require the making of concessions); *In re Midway Airlines, Inc*., 180 B.R. 851, 939 (Bankr. N.D. Ill. 1995) ("[r]efusing 'to budge an inch' is not necessarily an indication of lack of good faith"); *Phoenix Mut. Life Ins. Co. v. Shady Grove Plaza Ltd. P'ship*, 734 F.Supp. 1181, 1190 (D. Md. 1990) aff'd, 937 F.2d 603 (4th Cir. 1991) (good faith does not "prohibit a party from bargaining to its own economic advantage" or require parties to reach agreement); *L-7 Designs, Inc. v. Old Navy*, LLC, 09 CIV. 1432 DC, 2013 WL 4569979 (S.D.N.Y. 2013) ("the duty to negotiate in good faith obligates a party only to try to reach an agreement; a party does not act in bad faith merely because, in the end, it refuses to capitulate to the other side's demands").

Good faith does not require such concessions. And where parties believe that a carrier has a duty to make a unilateral concession, parties need not rely on good faith; arbitration may provide a more appropriate path for relief.[78]

2. Qwest's Agreement with Eschelon

The Department cites Qwest's arrangement with Eschelon as a model of the flexibility Qwest has demonstrated in the past, and how that contrasts with the rigidity Qwest allegedly demonstrated toward DTI. However, this example is an exception that proves the rule.

The record shows that Qwest entered into a bridge agreement with Eschelon within the context of an arbitration proceeding.[79] Arbitrations have statutorily-prescribed end dates, granting each party the right to have the disputes resolved, and the new rates implemented, by a time certain. The agreement did not establish the ultimate rate Eschelon would pay, but merely established an interim rate that would apply until final rates could be arbitrated and applied retroactively ("trued-up").[80]

Qwest repeatedly proposed arbitration to DTI, but DTI never chose this option. Instead, DTI negotiated until the end of the FCC-prescribed transition period, and continued to negotiate to the end of the TRO/TRRO Amendment transition period, and then sought a further extension for negotiations. It is within this context of unbounded negotiation, rather than a time-limited arbitration, that Qwest exercised its default options under the amendment.

Again, the Commission does not find that Qwest's conduct regarding Eschelon demonstrates a lack of good faith negotiation, or discrimination, regarding DTI.

XIII. Transitioning DTI's Services to Month-to-Month Wholesale Services

A. Allegation

DTI and the Department argue that Qwest violated its interconnection agreement and its duty to negotiate in good faith when it unilaterally imposed new rates on DTI at the end of the 90-day transition period. According to DTI, the resulting price increases were "unjust and unreasonable and unjustly discriminatory."[81] The Department argues that Qwest's conduct violated a prior Commission order holding that "Qwest may not unilaterally impose different terms on CLECs…."[82]

Qwest argues that it merely acted in accordance with the default language of the TRO/TRRO Amendment.

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[78] See Tr. Vol. 3 (Johnson), 113:1-11.

[79] Ex. 57 (Easton supplemental), 2:5-5:13.

[80] *Id.*, 2:16-19. See also Ex. 73, Exh. BJJ-2, ¶¶ 2.1 and 2.2.

[81] DTI's Complaint at ¶ 22.

[82] Department Brief at 22, citing *In the Matter of Qwest Corporation's Conversion of UNEs to Non-UNEs*, Docket No. P-421/C-07-370, Order Resolving Interconnection Issues and Requiring Compliance Filing (May 24, 2010) (UNE Conversion Order) at 7.

B. Commission Analysis

The Commission concurs with Qwest.

The order cited by the Department reads, more fully, as follows: "Qwest may not unilaterally impose different terms on CLECs; instead Qwest (and any CLEC) may pursue changes through the change management process set forth in interconnection agreements and if that process fails to produce results, by seeking arbitration."[83] This larger quotation makes it clear that Qwest's conduct complies, rather than conflicts, with the order.

More specifically, Qwest and DTI adopted the TRO/TRRO Amendment through negotiation as provided in their interconnection agreement's change management process. The amendment's Section 5.1.2.2.2 states that at the end of the 90-day transition period, services provided via expiring § 251 elements would be converted to equivalent month-to-month resale arrangements. DTI received the benefit of the TRO/TRRO Amendment, including QPP rates; it is appropriate that DTI would also bear the amendment's burdens. Qwest's duty to negotiate in good faith does not require Qwest to unilaterally surrender benefits it secured during previous negotiations.

The Commission makes two final observations regarding options that DTI and Qwest did *not* exercise. First, whatever the shortcomings in how Qwest implemented new rates for DTI's DSS and PRI switching, it is unclear that the transfer hurt DTI's legitimate interests. Qwest began billing for DSS and PRI switching on a *month-to-month* resale basis. This means that DTI had the option of changing these arrangements to any viable alternative with only a month's notice. The fact that DTI continued to take this wholesale service on a month-to-month basis suggests that this outcome represented the best arrangement actually available to DTI.

Second, whatever the ambiguity of section 5.1.2.2.2, no party has alleged ambiguity regarding the preceding provision, section 5.1.2.2.1: "[A]bsent CLEC transition by the ninety-first day or by March 10, 2006, whichever is earlier, Qwest will disconnect any remaining services on or after this date." Qwest's choice to begin charging DTI higher prices in lieu of initiating the process of disconnecting service undermines any suggestion that Qwest acted with ill will or anticompetitive intent toward DTI.

XIV. Conclusion

The Commission finds that it has authority to interpret and enforce the interconnection agreement amendment under the 1996 Act, the Federal Communication Commission's orders, Minnesota contract law, and the original interconnection agreement of DTI and Qwest.

The Commission finds that Qwest had an obligation to negotiate in good faith the terms, conditions, and rates that it would apply to DTI.

The Commission further finds that the amended interconnection agreement between DTI and Qwest is a valid and enforceable contract. The Commission finds insufficient evidence to support the argument that Qwest procured the agreement through coercion or other breach of the duty to negotiate in good faith.

[83] UNE Conversion Order at 7.

Finding that Qwest did not breach its amended interconnection agreement with DTI, the Commission will reject DTI's claims and deny the relief sought.

Finally, the Commission adopts the Supplemental Record Analysis except as it conflicts with the Commission's findings. Likewise, the Commission will reject the ALJ's Report to the extent that it is contradicted herein, and as set forth in the ordering paragraphs.

ORDER

1. For the foregoing reasons the relief sought by Digital Telecommunications Inc. from Qwest Corporation is denied.

2. The Commission adopts the Supplemental Record Analysis except as it conflicts with the Commission's findings herein.

3. The Commission rejects the Administrative Law Judge's Findings of Fact, Conclusions and Recommendation to the extent that they conflict with the Commission's findings herein. In particular –

   A. The Commission rejects Findings 12, 13, 26, 27, 29, and 31, and Conclusions 3 and 4.

   B. Because the Commission rejects DTI's complaint, the Commission declines to adopt the ALJ's Findings and Conclusions regarding calculation of appropriate relief for DTI.

4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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