

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application	)	
and complaint of <b>COMLINK LLC</b>	)	
against <b>QWEST COMMUNICATIONS</b>	)	Case No. U-16532
<b>COMPANY, LLC.</b>	)	
_____	)	

At the May 26, 2011 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman  
Hon. Monica Martinez, Commissioner  
Hon. Greg R. White, Commissioner

**ORDER**

On January 21, 2011, Comlink LLC filed an application and complaint against Qwest Communications Company, LLC (Qwest), under Sections 203-205, 312(2), and 313 of the Michigan Telecommunications Act (MTA), MCL 484.2203-484.2205, 484.2312(2), and 484.2313, and Rule 501 of the Commission’s Rules of Practice and Procedure, R 460.17501, alleging a wrongful threat by Qwest to terminate toll service to Comlink in violation of the parties’ existing contract. The contract provides for service from Qwest to Comlink, which is resold by Comlink to incumbent local exchange carriers (ILEC) and others.

On March 1, 2011, Qwest filed an answer to the complaint, a notice of hearing, and a motion to dismiss, or, alternatively, for summary disposition. On March 7, 2011, the Commission Staff (Staff) and Comlink filed responses to the motion to dismiss. On March 8, 2011, a prehearing

conference was held before Administrative Law Judge Sharon L. Feldman (ALJ) and a schedule was set. On March 18, 2011, the ALJ heard argument on the motion to dismiss.

On April 5, 2011, the ALJ issued a Proposal for Decision (PFD) in which she recommends that the Commission grant the motion to dismiss for failure to state a claim, in light of Comlink's and Qwest's intervening agreement to terminate their contract. On April 19, 2011, Comlink filed exceptions to the PFD. On May 3, 2011, Qwest and the Staff filed replies to exceptions. On May 6, 2011, Comlink filed a motion to strike portions of Qwest's replies to exceptions. On May 13, 2011, Qwest filed a response to Comlink's motion.

In the complaint, Comlink alleges that it provides toll service to ILECs or their affiliates, who in turn provide toll service to 16,000 end users in Michigan. The resold service is provided to Comlink by Qwest pursuant to a March 2, 2010 contract known as the Qwest Total Advantage Agreement Option Z (contract), attached to the complaint as Exhibit A-1. Comlink alleges that Qwest was informed prior to entering into the contract that Comlink's customers were ILECs or their affiliates, who would be using the service to serve end users, and that the access charges that would be applied by Comlink were used by Qwest in setting the contract rates.

According to the complaint, in December 2010 Comlink received a letter from Qwest stating that Comlink was in violation of the contract by engaging in access arbitrage, and claiming that Comlink owed Qwest access arbitrage fees of \$444,450. Exhibit A-3. The letter also threatened the suspension or termination of services under the contract. Comlink denies these allegations, stating that its form of toll service was contemplated by the contract. Comlink requests the following relief from the Commission: (1) order Qwest to continue service under the contract; (2) find that Comlink's bond is adequate; (3) find that Comlink did not violate the terms of the contract; (4) find that Comlink has not engaged in access arbitrage under the terms of the contract;

(5) find that Qwest is prohibited from discontinuing service under Sections 312 and 313 of the MTA; and (6) grant additional relief including costs and attorneys fees. Complaint, p. 7.

In its motion to dismiss, Qwest argues that the Commission lacks jurisdiction over the complaint because the services provided under the contract are unregulated services under Section 401(1) of the MTA, MCL 484.2401(1), because they involve the reselling of an unlicensed telecommunications service. Qwest further contends that the Commission lacks jurisdiction because the contract was privately negotiated. Qwest also points out that the contract requires disputes to be arbitrated, and to be resolved under Colorado law.

The Staff responded to the motion by arguing that the key factual question of whether Qwest's withdrawal of service to Comlink would have the effect of depriving end use customers of toll service could not be resolved on a motion to dismiss.

On March 17, 2011, Qwest and Comlink filed a stipulation and agreement, which provides as follows:

1. Comlink shall promptly commence migration of its toll traffic from Qwest to another toll provider or providers, and shall complete migration of its toll traffic by the close of business on April 1, 2011.
2. Qwest shall continue to provide toll service to Comlink through the close of business on April 1, 2011 and shall not terminate toll service to Comlink prior to that date. The Qwest Total Advantage Agreement shall be terminated on the close of business on April 1, 2011.
3. Qwest will invoice and Comlink shall pay for toll service provided by Qwest to Comlink on and after March 18, 2011 at Qwest's wholesale rate of 12 cents per minute, rather than at the rates specified in the March 2, 2010 Qwest Total Advantage Agreement between Qwest and Comlink.
4. Both Comlink and Qwest reserve all of their respective rights, claims and defenses against the other party.

Docket item no. 20. By stipulation, then, the parties agreed to terminate the contract effective April 1, 2011. At oral argument, Qwest argued that the complaint had been rendered moot.

In the PFD, the ALJ found that the complaint was moot, and recommended that the matter be dismissed for failure to state a claim on which relief can be granted. The ALJ noted that Comlink acknowledged that it was no longer seeking to have the Commission prohibit Qwest from terminating service. The ALJ found that there was no statutory basis for the Commission to resolve any remaining fee dispute between the parties “in light of the express language in section 213(1) exempting toll service from rate regulation by the Commission.” PFD, p. 12. The ALJ noted that, after the stipulation, Qwest was no longer in a position to discontinue service to end users. The ALJ found that Comlink had not shown that the threat of discontinued service gives rise to a claim for damages or fines, nor how any relief granted to Comlink would protect rural ILECs from wrongful termination of service.

In its exceptions, Comlink argues that the dispute is not moot, and that the Commission has jurisdiction to hear and determine the dispute over access arbitrage and whether any fees are owed. Comlink states that its ILEC users provide toll service to over 20,000 end users in rural areas of Michigan, and that the originating and terminating switched access charges applicable to the ILECs served by Comlink were readily available to Qwest in publicly filed tariffs when Qwest established the contract rates. Comlink states that Qwest continues to pursue access arbitrage fees from Comlink. Comlink seeks a ruling that it has not engaged in access arbitrage as that term is defined in Qwest’s tariffs.

Comlink argues that termination of the contract has not mooted this dispute because “the Commission can still fashion a remedy to the controversy, the determination will have practical effects in the case, and the underlying dispute in this case is a matter of public significance that is likely to recur and evade review unless the Commission considers this case.” Exceptions, p. 4. Comlink asserts that it only entered into the stipulation in order to ensure that end users were not

deprived of toll service. Comlink argues that it should “be made whole for the damages and expenses that it suffered as a result” of the threatened termination of service, and that other sanctions should be imposed against Qwest under Section 601 of the MTA. *Id.*, p. 5.

Comlink further argues that the PFD is mistaken in concluding that the dispute is a matter concerning rates for toll service and therefore outside of the Commission’s jurisdiction. Comlink asserts that toll service is a regulated service in that, though the Commission does not set rates for toll service, the service is subject to the requirement of universal availability, the prohibition against discontinuation without prior approval, the filing of tariffs, and the prohibition against offering service at a rate lower than the total service long run incremental cost. Comlink also makes a new argument that the Commission has jurisdiction to hear the case because switched access service is a regulated service in Michigan. Comlink argues that it did not engage in access arbitrage as that term is defined in Qwest tariffs. Comlink argues that Sections 204 and 205 of the MTA grant the Commission authority to resolve disputes among providers and to hear complaints regarding regulated services. Comlink contends that it is not relevant whether the services are subject to rate regulation. Comlink claims that this case is a dispute over the terms and conditions of toll service, and over toll access charges and how they are applied. Finally, Comlink refers to Section 305a(7) of the MTA, which authorizes the Commission to resolve disputes “related to the negotiation of the reciprocal compensation arrangement and the payment of the tariffed rates.” MCL 484.2305a(7).

In its replies, Qwest argues that the ALJ correctly determined that Comlink’s claims were moot, and that the Commission has no jurisdiction over the fee dispute. Qwest maintains that this case does not involve any Michigan tariffs, nor does it involve Qwest’s provision of retail service. Rather, Qwest argues, it involves only the reselling of an unlicensed service on a wholesale basis.

Qwest notes that it is not the only wholesale toll service provider available to Comlink, stating that there are ample providers of both wholesale and retail toll service in all the relevant exchanges.

Qwest asserts that it never threatened to discontinue service to any exchange, but simply offered to provide wholesale toll service to Comlink pursuant to a different type of agreement. Qwest notes Comlink's voluntary agreement to terminate the contract.

Qwest argues that Comlink's assertion that the Commission must determine whether the "termination of service" by Qwest violated Sections 313(2) and (3) of the MTA, MCL 484.2313(2) and (3), is frivolous, because Section 313 only comes into play when a provider terminates service to an entire exchange. Qwest maintains that it proposed to terminate service to a single wholesale customer, not an entire exchange, and that it continued to offer service to that customer under a different contract. Qwest points out that Comlink has made no effort to refute Qwest's assertion that it continues to be both a wholesale and retail toll provider in all the exchanges at issue here, and that over 80 different toll resellers resell Qwest's service in the relevant exchanges. *See*, Exhibit A to Qwest's replies to exceptions.

Qwest argues that the Commission lacks jurisdiction over any fee dispute concerning this privately-negotiated contract, where there has been no Commission participation in or approval of the agreement. *See*, December 6, 2002 order in Case No. U-13501; October 23, 2003 order in Case No. U-13789. Qwest points out that the contract requires such disputes to be resolved in a Colorado state court. Qwest notes that the Commission "shall not review or set the rates for toll service." MCL 484.2312(1). Further, Section 401, MCL 484.2401, classifies the reselling of an unlicensed service, such as toll service, as an unregulated service. Qwest argues that Sections 204 and 205, MCL 484.2204 and 484.2205, only provide jurisdiction over regulated telecommunications services.

Finally, Qwest objects to Comlink's new argument regarding switched toll access services and Section 305a(7), MCL 484.2305(7), contending that the position is devoid of arguable legal merit. Qwest maintains that the only entities providing switched toll access service in this transaction are Comlink's ILEC customers, who charge Qwest for this service, and who are not parties to this proceeding. Qwest charges Comlink with intentionally misidentifying its tariffs as subject to the Commission's jurisdiction, and with raising this frivolous argument in its exceptions. Qwest contends that the positions taken by Comlink in its exceptions are frivolous, and requests award of its costs, including reasonable attorney fees, under MCL 484.2209.

The Staff also replies that the PFD is correct, and that the sole legal issue cognizable by the Commission in Comlink's complaint has been resolved by the stipulation. The Staff urges the Commission to adopt the reasoning and conclusions of the PFD and dismiss the case.

The Staff notes that Comlink's business plan involved reselling wholesale toll service purchased from Qwest, again on a wholesale basis, to thirteen small ILECs, who would resell it on a retail basis to end users. The Staff points out that at the time that the complaint was filed it was not known "whether some of these ILECs were the sole retail provider of toll service to end users in any of the exchanges." Staff's replies to exceptions, p. 2. Comlink alleges that Qwest was aware of Comlink's plan to resell the service wholesale to ILECs. The Staff emphasizes that the primary allegation, for the Commission's purposes, is the allegation that Qwest's termination of service to Comlink would have the effect of denying toll service to 16,000 end users. Complaint, ¶ 19. The Staff notes that the allegation indicates that some end users could abruptly lose all toll service without the option of an alternative toll provider. Because Qwest is no longer the wholesale provider of those services, however, the Staff argues that the issue is moot.

The Staff further notes that Comlink did not seek relief in its complaint for Qwest's alleged failure to provide proper notice of its intent to discontinue service to an exchange, and argues that, even if Comlink had, there is no relief available under Section 313(2). The Staff moreover points out that there is no requirement in Section 313(3) that a provider can violate, and there is no Commission authority over the remaining issues alleged in the complaint. Finally, the Staff contends that Comlink never explains how the Commission's jurisdiction over switched access service relates to the facts of this case, because access service (switched or otherwise) is not being provided by either of the parties to the contract.

In the motion to strike, Comlink argues that Qwest's replies to exceptions raise objections to the PFD for the first time, in violation of R 460.17341 of the Commission's Rules of Practice and Procedure (Rule 341), which provides that objections to the PFD that are not filed as exceptions are waived. Comlink contends that Qwest's replies contain arguments made for the first time, specifically the request for costs and attorneys fees under MCL 484.2209. Comlink notes that the PFD did not find Comlink's arguments to be frivolous, and made no awards under Section 209. Comlink argues that Qwest is, in its replies, seeking findings that should have been sought in timely exceptions which would have allowed other parties to respond. Comlink cites the February 3, 2009 order in Case No. U-15454, in which the Commission refused to consider replies to exceptions that were, in fact, exceptions.

In response, Qwest maintains that Section 209 contains no requirement that exceptions be filed in order to seek sanctions for frivolous arguments. Qwest further notes that Comlink's frivolous positions were, for the most part, raised for the first time in the exceptions, so could not have been responded to prior to that filing. Qwest contends that Comlink may not avoid the

consequences of taking frivolous positions by waiting to raise those positions for the first time in its exceptions.

The Commission agrees with the Staff and adopts the findings and recommendations of the PFD. Toll service is a regulated service to the extent that the Commission is required to ensure that toll service is universally available. MCL 484.2312(2). The other requirements related to toll service are intended to ensure availability, including the requirement to interconnect, and the prohibition on discontinuing service to an exchange where there is no alternative telecommunications provider. MCL 484.2306; MCL 484.2313(1). In this case, the threat of loss of service to any exchange no longer exists as a result of the stipulation, and there was never a disruption of universal service nor a discontinuation of service to an exchange as addressed by Sections 312 and 313 of the MTA. Finally, Section 312(1) expressly withholds from the Commission the authority to review or set rates for toll service. MCL 484.2312(1). Thus, as the ALJ correctly found, there is nothing for the Commission to decide.

The Commission finds that Comlink's motion to strike should be denied. Section 209 was not invoked in Qwest's answer or motion to dismiss, and the ALJ did not analyze or make any findings with respect to frivolous claims. Thus, there was nothing in that regard for Qwest to except to. Qwest's Section 209 arguments, made in its replies, were in response to positions taken for the first time in Comlink's exceptions.

The Commission is not persuaded that sanctions under Section 209 of the MTA are appropriate here. MCL 484.2209. As the Commission recently stated, though arguments may be lately-raised or unpersuasive, "there is a significant difference between arguments found to be unavailing and those that are intentionally dishonest or frivolous." April 26, 2011 order in

Case No. U-16444, p. 3. The Commission finds that the case should be dismissed for failure to state a claim on which relief may be granted.

THEREFORE, IT IS ORDERED that the complaint is dismissed for failure to state a claim on which relief may be granted.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, under MCL 484.2203(12).

MICHIGAN PUBLIC SERVICE COMMISSION

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Orjiakor N. Isiogu, Chairman

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Monica Martinez, Commissioner

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Greg R. White, Commissioner

By its action of May 26, 2011.

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Mary Jo Kunkle, Executive Secretary