OAH 16-2500-20849
MPUC Dkt. Nos. P-5681, 421/C-09-302

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of Digital Telecommunications Inc. Complaint against Qwest Corporation	**FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Manuel J. Cervantes (ALJ) on October 30 and 31, 2012, and November 1, 2012, at the Offices of the Minnesota Public Utilities Commission, 350 Metro Square Building, 121 Seventh Place East, St. Paul, Minnesota. The OAH record closed on January 25, 2013, upon receipt of the parties' post-hearing briefs.

Karl W. Sonneman, Attorney at Law, 111 Riverfront, Suite 202, Winona, Minnesota 55987, appeared on behalf of SAWT, Inc. (SAWT). Jason D. Topp, Corporate Counsel, Qwest Corporation, 200 South Fifth Street Room 2200, Minneapolis, Minnesota 55402, appeared on behalf of Qwest Corporation dba CenturyLink (Qwest). Linda S. Jensen, Assistant Attorney General, 445 Minnesota Street, Suite 1400, St. Paul, Minnesota 55101-2131, appeared on behalf of the Department of Commerce (Department). Ganesh Krishnan, Public Utilities Commission Analyst, attended the hearings.

STATEMENT OF THE ISSUES

1. Did Qwest have an obligation to negotiate in good faith over any amendments to the Interconnection Agreement?

2. If so, did Qwest's actions constitute a breach of that obligation in the manner that Qwest obtained amendments to the parties' Interconnection Agreement and in the manner that Qwest used the terms in the ICA?

3. Did DTI overpay Qwest for PRI/DSS services?

4. If so, what remedy is appropriate to address the overpayment by DTI?

5. If an overpayment is determined, is Qwest entitled to either set-off or recoupment against any of those amounts?[1]

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background

1. Under 47 U.S.C. § 251, incumbent local exchange carriers (ILECs) are required to negotiate in good faith the terms and conditions of interconnection agreements (ICAs) with competitive local exchange carriers (CLECs) and to lease certain network facilities at TELRIC rates.[2] If an agreement cannot be negotiated, the Act requires that unresolved § 251 disputes be submitted to arbitration, subject to oversight by state public service commissions.[3] Through 2002, the Federal Communications Commission (FCC) took the position that ILECs were required to "unbundle" and provide most basic network elements at TELRIC prices.

2. DTI was founded in 1998 as a long distance telecommunications company. DTI and Qwest entered into an interconnection agreement (ICA) for services in the State of Minnesota that was approved by the Minnesota Public Utilities Commission on August 25, 2002. DTI's business changed from that of a long distance provider to bundled voice and data services marketed to corporate clients. DTI operated its business based in large part on obtaining a combination of unbundled network elements (UNEs). Included in the UNEs was UNE-P, a combination of loops, switching, and transport that constituted a complete end-to-end circuit. DTI purchased access through Qwest's network for services delivered via digital signal level (DS1 or T1), UNE-P, primary rate interface (PRI), and dial selective signaling (DSS). Most of the contracts between Qwest and DTI for these network elements were three years or less in duration. DTI leased these network elements as UNEs at TELRIC rates.[4]

3. Beginning in 2003, the FCC has progressively limited the number of network elements that ILECs must provide under § 251. The initial announcement of

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[1] The Commission's Notice and Order for Hearing in this matter, issued on September 8, 2009, describes the issues to be determined generically and by reference to DTI's affirmative defenses to Qwest's claim for unpaid services as well as DTI's Complaint in this proceeding. The listing of issues is a description of what appears to be at issue in this proceeding through the arguments presented by the parties at hearing and in post-hearing briefing.

[2] A TELRIC rate is based on the total long-run incremental cost of an element, to be determined by a cost study based on the methodology set forth in 47 C.F.R. §§ 51.505. The methodology assumes the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of an ILEC's wire centers.

[3] *See* 47 U.S.C. § 252.

[4] Tr. Vol. 1 (Siewert), at 32; Ex. 44 (Watkins Direct), at 3-5; Ex. 52, Albersheim Direct, at 9-10.

those changes was made in the FCC's Triennial Review Order (TRO).[5] Further changes were made in the FCC's Triennial Review Remand Order (TRRO).[6] In those orders, the FCC adopted a wire-center-based analysis that uses the number of access lines and fiber collocations in a wire center as proxies to determine impairment for high-capacity loops and dedicated transport. Where the triggers are not met, the ILEC must make these elements available under § 251 at TELRIC rates. Where the triggers are met, the wire centers are deemed "unimpaired," the result being that various elements are no longer available as § 251 UNEs at TELRIC rates. Under the TRO and TRRO, Qwest was no longer required to offer PRI/DSS as UNEs [7]

4. Where Qwest was no longer required to provide an element as a UNE at TELRIC prices, the possibility remained that, under 47 U.S.C. § 271, Qwest was required to provide access to many of these elements as a condition of Qwest's authority to provide long-distance service. Under its § 271 obligations, Qwest typically priced loop and transport elements to local service competitors based on its interstate or intrastate access tariff. Other elements, such as dark fiber or the local service platform, Qwest priced based on commercial agreements.

5. In addition to the changes to the UNE obligations, the TRRO also changed the relationship between ILECs and CLECs regarding mass market switching (local circuit switching provided to CLECs to serve end user customers over DSO capacity loops. The TRRO required transition from use of mass market switching for UNEs to an alternative. The FCC established a transition period running from March 11, 2005, through March 11, 2006.[8]

DTI-Qwest Interactions

6. On January 20, 2004, DTI requested that Qwest negotiate changes to the ICA in light of the TRO. That request was subsequently delayed due to uncertainty over the parties' obligations due to the subsequent litigation over the TRO and subsequent FCC orders.[9]

7. Pursuant to the transition obligation, Qwest prepared the "Qwest Platform Plus" agreement (QPP) to govern mass market switching upon expiration of the transition period from providing those services as UNEs. In January, 2005, DTI and Qwest discussed the QPP contract and PRI/DSS pricing. DTI reiterated that it was seeking to negotiate rates, terms, and conditions for unbundled network switching and

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5 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) (TRO).

6 Order on Remand, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd. 2533 (2005), *aff'd, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (TRRO).

7 Ex. 52, Albersheim Direct, at 10.

8 TRRO, supra, at ¶ 199; Ex. 52, Albersheim Direct, at 10.

9 Ex. 31.

transport, including PRI/DSS. DTI objected to the pricing proposed by Qwest for PRI/DSS, characterized as an increase of "more than 2500 percent from UNE prices."[10]

8. In September, 2005, DTI again contacted Qwest regarding QPP and issues raised by the TRRO. Qwest identified Clifford Dinwiddie as the staff responsible for such discussions. In January, 2006, Qwest indicated that pricing PRI/DSS could be, but was not limited to, resale pricing (retail less a 17.66 percent discount) or individual case based pricing (ICB).[11]

9. By 2006, DTI had reached $10 million in annual sales revenue and had become profitable. In early 2006, DTI was paying Qwest approximately $20,000 per month for PRI/DSS services. Through the fall of 2006, DTI had between 93 and 98 customers.[12]

10. On February 13, 2006, a conference call was held between Larry Christensen of Qwest and DTI. DTI asked to negotiate rates, but Qwest refused, contending that it had to offer the same rates to everyone. Qwest indicated that a service representative would show DTI alternate pricing for PRI/DSS after DTI signed the amended ICA.[13]

11. On February 22, 2006, Judy Rixe, a Qwest service representative described the pricing of services to DTI as, "When UNEP hits the dust your option is Resale." Qwest provided a list of retail rates for DSS/PRI to which the resale discount applied. The rates varied by the year term commitment made by the CLEC, the longer the term, the lower the rate.[14]

12. Qwest's approach to the TRRO conversion was that DTI would order new services for its existing customers and DTI would specify term commitments to obtain lower rates than the month-to-month rate in the amended ICA for those services. At no time did Qwest propose that existing services be converted to any rate other than month-to-month without submission of LSRs or 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.[15]

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[10] Ex. 14, Siewert Rebuttal, at 3.
[11] Ex. 14, Siewert Rebuttal, at 3-4; Ex. 69, Bahn Direct, at 62; *see also* Ex. 78.
[12] Ex. 2, Siewert Direct, at 9; Tr. Vol. 1 (Siewert), at 87 and 128-129.
[13] Ex. 2, Siewert Direct, at 4; Ex. 14, Siewert Rebuttal, at 4.
[14] Ex. 33.
[15] Tr. Vol. 2 (Easton), at 47-48, 63-65, and 82-83.

13. Further, 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. Qwest expressly indicated that pricing details for PRI/DSS would follow DTI's execution of the amended ICA.[16]

14. After the transition to new PRI/DSS pricing, Qwest charged the tariffed rate for month-to-month PRI. For each PRI ordered, DTI was charged $1,110.74, less the wholesale discount of $196.16, for a final price of $914.58. Similarly, for DSS services, DTI's discounted total price under the month-to-month rate was $788.21. Overall, DTI was paying Qwest approximately $112,000 per month for PRI/DSS services under the month-to-month rate.[17]

15. In an effort to reduce the costs for PRI/DSS services now billed at the month-to-month rate, DTI inquired of Mr. Christensen as to whether some form of bulk pricing or ICB pricing was available. Mr. Christensen related that DTI could realize approximately $17,000 per month savings through ICB pricing. DTI continued to work through Ms. Rixe in an effort to obtain that pricing.[18]

16. In February, 2007, Ms. Rixe passed to Dave Watkins, Vice President of Sales for DTI, the pricing for a promotional rate for PRI and DSS elements. The promotion required a minimum term of 36 months. There were also volume levels that were not specified in Ms. Rixe's communication. Ms. Rixe noted that Mr. Christensen had been involved in attempting to address DTI's situation.[19]

17. By June 11, 2007, DTI attempted to negotiate a waiver of the minimum line volume requirement by directing an inquiry to Mr. Christensen. No waiver was forthcoming, and Mr. Christensen indicated that this was the first time that he had been made aware that DTI did not have sufficient volume in PRI/DSS to qualify for Qwest's ICB pricing.[20] Counting only DTI customers which received service in Minnesota also worked to preclude DTI from reaching the Qwest-required volume levels for more favorable pricing, as DTI's Iowa customers could not be included.[21]

Impact of Pricing on DTI

18. From August 20, 2006, onward, Qwest charged DTI the month-to-month rate for PRI/DSS services. DTI immediately began to fall behind in its payments of Qwest's billings.

19. By February, 2007, Qwest contended that DTI was past due in payment for services received by $532,849.84. These amounts were for a combination of QLSP

[16] Ex. 2, Siewert Direct, at 4; Ex. 14, Siewert Rebuttal, at 4-7.
[17] Ex. 2, Siewert Direct, at 9; Tr. Vol. 1 (Siewert), at 87 and 128-129; Ex. 69, Bahn Direct, at 62.
[18] Ex. 81.
[19] Ex. 40.
[20] Ex. 52 (Albersheim Direct), RA-13.
[21] Tr. Vol. 1 (Siewert), at 97-98.

back billing, PRI, and DSS services. DTI disputed whether the billings were appropriate and attempted to negotiate the amounts due. Qwest did not treat DTI's complaints as initiating the dispute process. DTI sought to resolve the dispute by negotiating partial payment in lieu of the full amounts charged. Qwest did not agree with the approach and did not treat DTI's complaint as a formal dispute. In June, 2008, a partial payment arrangement was informally arrived at with DTI making additional payments over its current monthly billings. By June, 2008, Qwest was claiming total billings to DTI (both Iowa and Minnesota) of $1,289,802.83, of which $201,291.14 were current billings.[22]

20. In December, 2008, Qwest filed a petition with the Commission to authorize disconnection of DTI from Qwest's telecommunications network. The past due amounts attributed to DTI were the basis for Qwest's petition.[23]

21. In March, 2009, DTI filed a complaint with the Commission, alleging that Qwest's pricing of PRI/DSS was discriminatory. DTI proposed ongoing PRI/DSS payments in amounts approximating a 100% increase over payments for those network elements under UNE-P. By DTI's calculation, this amount would closely approximate the rate charged by Qwest under its bulk wholesale rates or promotional rates. DTI also acquired a $600,000 line of credit issued by Winona National Bank to assure Qwest of solvency. A security provided for the line of credit was DTI's rights under the complaint that Qwest had overcharged DTI for services.[24]

22. DTI filed for bankruptcy protection under Chapter 11 on August 16, 2010. Qwest was granted permission by the Commission to draw upon the entire $600,000 line of credit. The Commission granted permission, subject to refund of any amount up to the total drawn if it was later determined that the amount was not owed. DTI's assets were acquired by the secured lender, Winona National Bank, through foreclosure following the bankruptcy filing.[25]

23. On March 31, 2011, DTI's Chapter 11 filing was converted to a Chapter 7 liquidation. DTI's remaining debts were extinguished through conversion to Chapter 7. The bankruptcy trustee continued to operate DTI post-conversion. Qwest and the bankruptcy trustee reached an agreement regarding ongoing operations. Some of the ongoing billings were paid up to the point of the disconnection of the post-bankruptcy operation. At the time of disconnection, the bankruptcy estate had incurred $319,271.12 in billings from Qwest which remained unpaid.[26]

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[22] Ex. 61 (Nielsen Surrebuttal), at 4-6, JN-4, and RA-28.
[23] Ex. 1 Siewert Direct, at 15; Ex. 61 (Nielsen Surrebuttal), JN-8.
[24] Ex. 1 Siewert Direct, at 16.
[25] Commission Order Authorizing $600,000 Draw on Irrevocable Letter of Credit, Docket Nos. C-08-1443 and C-09-302 (Order issued September 9, 2010).
[26] Tr. Vol. 3 (Nielsen), at 51-54.

24. Qwest wrote off over $2 million in unpaid balances from pre- and post-bankruptcy operations of DTI and the bankruptcy trustee due to the Chapter 7 bankruptcy and dissolution of DTI.[27]

Obligation to Negotiate

25. As envisioned by the FCC, the "conversion" of an element occurs when an ILEC is no longer required to provide an element to a CLEC as a § 251 UNE. Conversion changes the status of an element from a § 251 UNE to some other status. Conversions take place on live, existing circuits. In declining to adopt rules governing how conversions were to be established, the FCC stated:

> 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.[28]

26. As a non-§ 251 UNE, provision 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.

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.[29] No negotiations were offered or conducted by Qwest to DTI, despite repeated requests by DTI, regarding transition pricing.

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27 Tr. Vol. 2 (Nielsen), at 122-123.
28 TRO, supra, ¶ 585 (footnote omitted).
29 Ex. 72, Johnson Rebuttal, BJJ-3.

28. The FCC envisioned the conversion process to be conducted with minimal disruption to service, stating, "Converting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality."[30] A potential for disruption arising from the need to groom interexchange traffic was identified, but is inapplicable in this matter. In the context of charges for conversions, the FCC stated:

> 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 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.[31]

29. Qwest asserted that the ICA, specifically section 5.1.2.1, which conditions conversions on submission of LSRs for other products or services, governs the conversion process. Qwest also noted that section 5.1.2.2.2 authorized conversion of services to month-to-month resale services. Qwest does not indicate how the terms of the ICA were met by Qwest when Qwest both: a) failed to meet its obligation to negotiate the terms and conditions of the document, particularly regarding pricing of existing services being transitioned; and b) failed to follow through on Qwest's own promises to conduct further discussion of the price of PRI/DSS. The record demonstrates that Qwest's approach to prices (although not disclosed to DTI) was take-it-or-leave-it and no negotiation was conducted. This amounts to treating DTI, a wholesale customer, as if DTI were a retail customer. This approach is contrary to the FCC's expressly stated obligation on both the ILEC and CLEC to negotiate over the terms of the transition. The manner in which Qwest failed to meet its obligations constitutes a breach of the ICA.[32]

30. As implemented by Qwest, converting the pricing of PRI/DSS from UNE to month-to-month was accomplished without any physical change to facilities. All the required changes were made to records in Qwest's billing system. No LSR was required to initiate the process and no committee review was required before taking that action. Qwest did not negotiate the manner in which conversions would be accomplished, either in the demand for an LSR from DTI and triggering a new term

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[30] TRO, supra, ¶ 586 (footnote omitted).

[31] TRO, supra, ¶ 587 (citing 47 U.S.C. §§ 202(a) and 251(c)(3)) (footnotes omitted).

[32] *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475, 480 (5th Cir.2000)("the Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved." Citing *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), aff'd in part, rev'd in part on other grounds, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999)).

commitment or the absence of an LSR from Qwest when moving to month-to-month pricing.

31. Qwest's requirement that DTI submit an LSR specifying a new term for the converted network element was imposed unilaterally without negotiation and Qwest's failure to negotiate the terms and conditions of such conversions violates the relevant FCC Orders governing conversions.

Appropriate Relief

32. With the record supporting the conclusions that Qwest failed to meet its obligation to negotiate, that this failure breached the ICA, and this resulted in an overpayment by DTI, a mechanism must be arrived at in order to afford appropriate relief to DTI. DTI proposed that a 100% increase over Qwest's § 251 UNE pricing would be just and reasonable.[33] The Department's witness calculated an overcharge amount based on DTI's information by subtracting 200% of the § 251 UNE price from the Qwest-charged amounts from September, 2006 to December, 2009. This overcharge amount comes to $1,539,724. From September, 2006, to the bankruptcy petition filing in August, 2010, the overcharge by this calculation comes to $1,762,054.[34]

33. The Department proposed that DTI be charged the lowest Qwest tariffed rate for a contract with a five-year term, or any ICB term rate that was in effect under the tariff, unless Qwest establishes another date of installation and term of years, reduced by the applicable discount. In the Department's view, requiring any forward-looking term of years commitment to afford the wholesale rate less discount would be discriminatory. This contention is based on the Department's reading of the TRO. Because the new rate is incurred solely because the CLEC is forced to convert by the provisions of the TRO, and the FCC ordered that the conversion process is not to discriminate in treatment between ILECs and CLECs, and the ILEC's customers were not presented with any changes in their terms and conditions of service, so too the CLECs could not be, in effect, charged for the conversion to non-§ 251 elements.[35]

34. Qwest disputes the applicability of the yearly term wholesale rates as DTI lacked the volume of orders that Qwest imposes for eligibility to obtain those rates. Qwest's position is contradicted by the obligation to negotiate. If Qwest had no such obligation, then offering terms from a price list with no changes possible would be appropriate. Since Qwest had an obligation to negotiate, terms such as volume levels are not disqualifiers for reaching an agreement over application of a wholesale rate. Further, Qwest's own conduct in negotiating the bridge agreement with Eschelon shows that prices and other terms, in the context of the TRO/TRRO transition, are subject to the agreement of the parties, not whether or not those prices and their accompanying terms are already on a list.

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[33] Ex. 2, Siewert Direct, at 16.

[34] Ex. 72, Johnson Rebuttal, at 5; Ex. 73, BJJ-1.

[35] Ex. 72, Johnson Rebuttal, at 14-16, 18-19.

35. The approach advocated by DTI would require the Commission to impute a new rate set at 200% of the prior charge for the converted elements. This would constitute rate setting of elements made available through § 271. The rate setting authority in that area has been found to be preempted by operation of 47 U.S.C. § 271.[36]

36. The approach proposed by the Department requires no rate setting as those are existing rates. The record in this proceeding supports the conclusion that those rates would have been appropriate as a result of negotiation between Qwest and DTI, had Qwest met its obligation to negotiate in good faith upon the transition from TELRIC rates to market-based rates.

37. A further, separate basis of the Commission's authority in this proceeding is the Commission's Order authorizing the draw on DTI's $600,000 line of credit. The Commission's Order subjected the payment, up to the entire amount, to refund or return should a later determination be made that Qwest is not entitled to those funds.[37] Exercise of the Commission's authority to determine if the amount is owed is not preempted rate-setting under 47 U.S.C. § 271.

38. The record demonstrates that DTI's business model relied upon three-year contracts. For that reason, application of the three year wholesale rate less the discount is the appropriate remedy to address Qwest's failure to meet its obligation to negotiate in the transition to the non-§ 251 regime.

39. To determine the actual amount of overpayment, a compliance filing is needed using the information maintained by Qwest. The compliance filing must identify for each PRI/DSS billing account with DTI: 1) the amount actually charged by Qwest; 2) the amount that would have been payable under the applicable three-year wholesale rate less the discount; and, 3) the amount paid by DTI. DTI should be credited for any amounts billed as late fees or finance charges.

Impact of DTI Bankruptcy on Qwest's Claim of Offset

40. DTI filed for bankruptcy protection under Chapter 11. DTI's assets were acquired by the secured lender, Winona National Bank, through foreclosure and then to SAWT by foreclosure sale. Among the assets obtained by SAWT through the foreclosure sale from Winona National Bank was the right to recover overpayments from Qwest in the amounts overcharged to DTI.[38]

41. On March 31, 2011, DTI's Chapter 11 filing was converted to a Chapter 7 liquidation. DTI's remaining debts were extinguished through conversion to Chapter 7. The bankruptcy trustee continued to operate DTI post conversion. Qwest and the bankruptcy trustee reached an agreement regarding ongoing operations. Some of the

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36 Qwest Corp. v. Minn. Public Utilities Commission, 684 F.3d 721 (8th Cir, 2012).

37 Commission Order Authorizing $600,000 Draw on Irrevocable Letter of Credit, Docket Nos. C-08-1443 and C-09-302 (Order issued September 9, 2010).

38 Tr. Vol. 3 (Nielsen), at 66; *see* SAWT Motion to Substitute, Attachment A (filed August 19, 2011).

ongoing billings were paid up to the point of the disconnection of the post-bankruptcy operation. At the time of disconnection, the bankruptcy estate had incurred $319,271.12 in billings from Qwest which remained unpaid.[39]

42. Qwest contended that any overpayment must be set off against the amounts owing by DTI. In the alternative, Qwest asserted that the equitable doctrine of recoupment applied to any amounts that might be determined to be overpayments.

43. The Department disputed Qwest's claims to setoff and recoupment, maintaining that the foreclosure on the claim for overpayment (which was provided as security for a line of credit advanced to DTI) extinguished any right to setoff that may have existed. Further, the Department maintained that no equitable remedy should be available to Qwest, as Qwest was unjustly enriched by overpayments made by DTI.[40]

44. Setoff allows a creditor to reduce the amount owed to the debtor in a bankruptcy proceeding where there is a "mutual debt owing by such creditor to the debtor that arose before the commencement of the case."[41] Setoff does not apply to this proceeding as there is no debt that has arisen prior to the commencement of the bankruptcy proceeding.[42] The determination that Qwest may owe any sum arising from overpayments charged to DTI lies with the Commission and will be made at some time in the future. The property interest in the potential recovery of overpayments passed to Winona National Bank and then SAWT through the foreclosure sale. If SAWT owes any money to Qwest at the time of the Commission's determination that an overpayment must be reimbursed, an offset would be appropriate at that time. Such an offset is outside the scope of the setoff provisions in the bankruptcy code.

45. Recoupment is an equitable doctrine applicable where both debts arise from an "integrated transaction" and the debtor would enjoy the benefits of that transaction without also meeting its obligations.[43] The amounts for which Qwest seeks recoupment are for services beyond the PRI/DSS elements that are the subject of this overcharge proceeding.[44] Further, Qwest is seeking to benefit from equity where Qwest's own conduct contributed to, if not directly caused, DTI's bankruptcy. Under these circumstances, recoupment is not available to Qwest to lessen any amounts later determined to be overcharges.

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39 Tr. Vol. 3 (Nielsen), at 51-54.

40 See Department Reply to Motion for Summary Disposition, at 40-46 (filed June 15, 2012).

41 11 U.S.C. § 553(a).

42 *See MNC Commercial Corporation v. Joseph T. Ryerson & Son, Inc.*,882 F.2d 615 (2nd Cir. 1989)(holder of perfected security interest in receivables takes precedence over later claim of setoff); *see also U.S. Aeroteam, Inc. v. Delphi Automotive Systems, LLC*., 327 B.R. 852 (Bankr. S.D. Ohio 2005)(accounts receivable owed **prior** to bankruptcy petition subject to setoff despite security interest of third party).

43 *University Med. Ctr. v. Sullivan*, 973 F.2d 1065, 1079-1081 (3d Cir. 1992).

44 *See In re Davidovich*, 901 F.2d 1533, 1537 (10th Cir. 1990); *Conoco Inc. v. Styler*, 82 F.3d 956, 962-63 (10th Cir. 1996) (overarching distributorship agreement considered separate transactions); *California Canners & Growers v. Military Distributors of Virginia*, 62 B.R. 18 (9th Cir. BAP 1986) (each delivery under contract a separate transaction).

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Public Utilities Commission and the ALJ have jurisdiction of this matter pursuant to Minn. Stat. §§ 14.50 and 237.081.

2. Under 47 U.S.C. § 271, and the relevant orders of the FCC, Qwest had an obligation to negotiate in good faith over the conversion of § 251 elements to non-§ 251 elements obtained by DTI.

3. Qwest breached its obligation to negotiate in good faith in the manner by which Qwest set post UNE-P rates and imposed them on DTI for PRI/DSS elements.

4. Qwest's actions constituted unjust discriminatory conduct resulting in overpayments by DTI for PRI/DSS elements.

5. An appropriate remedy for the overpayments by DTI for PRI/DSS elements would be recalculation of the billing using the three-year wholesale rate for those elements charged under the Commission-approved tariff available to CLECs.

6. The record in this proceeding is insufficient to determine the amount of the overpayments by DTI to Qwest for the PRI/DSS elements purchased after August 20, 2006.

7. There is no basis for any claim of setoff or recoupment against any amount determined to be an overpayment by DTI for the PRI/DSS elements obtained from Qwest.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that the Commission order the repayment of those amounts overpaid by DTI to Qwest for PRI/DSS elements purchased after August 20, 2006, those overpayments being the amounts by which DTI's payments exceeded the three-year wholesale rate less the discount for those elements as set out in the applicable Commission-approved tariff. The Administrative Law Judge further recommends that the Commission order a compliance filing to determine the amount of those overpayments and require that the filing be made within 90 days of the Commission's decision in this case.

Dated: April 12, 2013

/s/ Manuel J. Cervantes
MANUEL J. CERVANTES
Administrative Law Judge

Reported: Transcribed (three volumes)
Shaddix & Associates

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 and Minn. R. 7829.2700, any party adversely affected by this Report shall file exceptions to it within 20 days of the filing of the Report. Exceptions should be filed with the Executive Secretary, Minnesota Public Utilities Commission, 350 Metro Square, 121 Seventh Place East, St. Paul, MN 55101. Any replies to exceptions shall be filed and served within ten days of the due date for exceptions. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the Administrative Law Judge's recommendation who request such argument. Such request must accompany the filed exceptions or reply.

The Minnesota Public Utilities Commission will make the final decision after the expiration of the period for filing exceptions and replies or after oral argument, if held. Further notice is hereby given that the Commission may, at its own discretion, adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations.

Under Minn. Stat. § 14.62, subd. 1, the Commission is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

600 North Robert Street
Saint Paul, Minnesota 55101

Mailing Address:
P.O. Box 64620
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April 15, 2013

See Attached Service List

**Re: In the Matter of Digital Telecommunications' Complaint Against Qwest Corporation - PUC Docket No. P-5681 and 421/C-09-302
OAH 16-2500-20849**

The documents listed below have been filed with the E-Docket system and served as specified on the attached service list.

Findings of Fact, Conclusions and Recommendation

Sincerely,

/s/ Manuel J. Cervantes

MANUEL J. CERVANTES
Administrative Law Judge

Telephone: (651) 361-7945

MJC:mo

Encl.

[9095/1]

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
PO BOX 64620
600 NORTH ROBERT STREET
ST. PAUL, MINNESOTA 55164

CERTIFICATE OF SERVICE

In the Matter of Digital Telecommunications' Complaint Against Qwest Corporation – PUC Docket Nos. P-5681, 421/C-09-302	OAH Docket No. 16-2500-20849

Mary Osborn, certifies that on April 15, 2013 she served a true and correct copy of the attached Findings of Fact, Conclusions and Recommendation by eService, and U.S. Mail, (in the manner indicated below) to the following individuals:

Please see attached service list.

Susan Schleisman

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret
Julia	Anderson	Julia.Anderson@ag.state.mn.us	Office of the Attorney General-DOC	1800 BRM Tower 445 Minnesota St St. Paul, MN 551012134	Electronic Service	Yes
Manuel	Cervantes	Manuel.Cervantes@state.mn.us	Office of Administrative Hearings	PO Box 64620 St. Paul, MN 551640620	Electronic Service	Yes
Linda	Chavez	linda.chavez@state.mn.us	Department of Commerce	85 7th Place E Ste 500 Saint Paul, MN 55101-2198	Electronic Service	Yes
Burl W.	Haar	burl.haar@state.mn.us	Public Utilities Commission	Suite 350 121 7th Place East St. Paul, MN 551012147	Electronic Service	Yes
Linda	Jensen	linda.s.jensen@ag.state.mn.us	Office of the Attorney General-DOC	1800 BRM Tower 445 Minnesota Street St. Paul, MN 551012134	Electronic Service	Yes
Douglas	Kassebaum	dkassebaum@fredlaw.com	Fredrikson & Byron, P.A.	200 S. Sixth Street, Suite 4000 Minneapolis, MN 55402	Electronic Service	No
John	Lindell	agorud.ecf@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012130	Electronic Service	Yes
Janet	Shaddix Elling	jshaddix@janetshaddix.com	Shaddix And Associates	Ste 122 9100 W Bloomington Frwy Bloomington, MN 55431	Electronic Service	Yes
Tom	Siewert	N/A	Digital Telecommunications Inc.	689 E Lake Blvd Winona, MN 55987-5320	Paper Service	Yes
Karl	Sonneman	karl17@hbci.com	Law Office of Karl W. Sonneman	111 Riverfront Suite 202 Winona, MN 55987	Electronic Service	Yes
Jason	Topp	jason.topp@centurylink.com	CenturyLink	200 S 5th St Ste 2200 Minneapolis, MN 55402	Electronic Service	Yes