

APPROVED

DATE: 4-13-09

MOTION

April 13, 2009

**Polar Communications Mutual Aid
Corporation
vs. Qwest Corporation & Information
Technology Department
Complaint**

Case No. PU-09-111

I move the Commission find the March 18, 2009 complaint filed by Polar Communications Mutual Aid Corporation states a *prima facie* case, and serve the complaint on the Respondents, Qwest Corporation and the State of North Dakota Information Technology Department, in Case No. PU-09-111.

PJF



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March 17, 2009

Darrell Nitschke
Executive Secretary
Public Service Commission
State Capitol
Bismarck, North Dakota 58505-0480

Re: Polar Communications Mutual Aid v. Qwest Corp. and Information Technology Department, an agency of the State of North Dakota

Dear Mr. Nitschke:

Enclosed for filing please find the Formal Complaint of Polar Communications Mutual Aid versus Qwest Corporation, and Information Technology Department, an agency of the State of North Dakota. Pursuant to N.D. Admin. Code § 69-02-02-02(3), one copy of the Complaint for each respondent and seven additional copies of the Complaint are included.

If you have any questions, please contact me.

Thank you,

VOGEL LAW FIRM


Kari R. Reichert

Encl. as stated

1 PU-09-111 Filed: 3/18/2009 Pages: 6
Formal Complaint – Use of EAS

Polar Communications Mutual Aid Corporation
Vogel Law Firm by Kari Reichert

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Polar Communications Mutual Aid Corp.

Complainant,

Case No. _____

v.

Qwest Corporation, and
Information Technology Department,
an agency of the State of North Dakota,

COMPLAINT

Respondents,

Complainant for its Complaint against Respondents hereby alleges as follows:

1. Complainant Polar Communications Mutual Aid ("Polar") is a North Dakota mutual aid cooperative association that operates as an incumbent local exchange carrier in designated service areas within the state of North Dakota including the Park River Exchange, the Hoople Exchange, and the St. Thomas Exchange (the Park River Exchange, the Hoople Exchange, and the St. Thomas Exchange are collectively referred to hereafter as the "Polar Exchange Areas").
2. Respondent Qwest Corporation ("Qwest") is a Colorado corporation that operates as an incumbent local exchange carrier in certain service areas within the state of North Dakota including the Grafton Exchange (the Grafton Exchange is hereafter referred to as the "Qwest Grafton Exchange").
3. Respondent Information Technology Department ("ITD") is an agency of the State of North Dakota.
4. Extended Area Service ("EAS") is a service by which a subscriber of one exchange may call a subscriber in another exchange without paying a toll fee or separate charge for the call. EAS is typically mandated for all subscribers within an exchange.
5. The use of EAS trunks (allowing for the toll free calls among the EAS exchanges) is strictly for the benefit of the local subscribers physically located in the involved exchanges. The costs of the EAS facilities are spread over the rates paid by all subscribers in the involved exchanges, and become part of the subscribers' monthly flat rate local telephone service fee.
6. Qwest and Polar have deployed EAS trunks between the Qwest Grafton Exchange and the Polar Exchange Areas that permit subscribers who originate

calls from within one company's EAS exchange to complete calls to the other's designated EAS exchange on a toll-free basis. Thus, subscribers originating calls from the Qwest Grafton Exchange may make calls to the Polar Exchange Areas, and vice versa, without incurring a toll fee.

7. The companies' EAS facilities meet at their respective network borders. Qwest maintains its facilities and the EAS trunks within the Qwest Grafton Exchange and Polar maintains its facilities and EAS trunks within the Polar Exchange Areas.
8. Each company incurs a cost for its portion of the network deployed to support the termination of the other company's EAS traffic. Because of the mutual benefit to their respective end users located within these EAS areas, however, the companies do not charge each other for the termination of this traffic and instead utilize a "bill and keep" system. Each company recovers its costs for its portion of the EAS network through its charges to its own end users in those exchanges. Therefore the cost of the EAS benefits is spread over the rates paid by all subscribers within the involved exchanges, and is included in the flat monthly rate charged by the companies for local service.
9. Qwest and Polar have written EAS agreements covering these EAS arrangements for the Qwest Grafton Exchange and the Polar Exchange Areas. These agreements date from as early as 1971 with the most recent being dated May, 1989.
10. In 1996, with the enactment of the Telecommunications Act, Qwest began the process of terminating its long standing EAS Agreements with telephone companies throughout its 14 state footprint, in part due to concerns that these arrangements could be used for the comingling and termination of non-EAS traffic with the EAS traffic delivered over EAS facilities. While initially making overtures to Polar of its intent to terminate the EAS agreements between Qwest and Polar for these same reasons, the companies continue to operate under these long standing EAS arrangements and continue to provide said EAS services to their respective subscribers within the involved exchanges.
11. The EAS agreements do not explicitly nor implicitly evidence an intent that the EAS facilities between the two companies would be used for the exchange of any traffic not originated by or terminated to its own end users physically located in the company's respective EAS exchange areas. Certainly, it was never Polar's intent to permit the facility deployed by Qwest and Polar for the exchange of EAS traffic to be used by Qwest in its Qwest Grafton Exchange as a free conduit for the dumping of otherwise billable access traffic onto Polar's network.

12. In fact, however, Qwest does allow toll calls originating outside of the Qwest Grafton Exchange to be terminated as "EAS" traffic to the Polar Exchange Areas via the established EAS trunks, thereby causing the avoidance of the payment to Polar of intrastate access charges lawfully attributable to a toll call.
13. Specifically, and as alleged below, Qwest knowingly permits the State of North Dakota to originate calls from outside of the Qwest Grafton Exchange and to terminate those calls in the Polar Exchange Areas under the EAS arrangements. By doing so, Qwest misuses the EAS arrangement to allow the State of North Dakota to receive an access service (i.e., the termination of toll traffic) from Polar while avoiding Polar's terminating intrastate access charges.
14. Polar has no information or knowledge as to whether Qwest extends this benefit to other subscribers, other than the State of North Dakota, but presumably it does since it has stated that this is a proper use of the EAS arrangement.
15. The State of North Dakota has leased private line facilities for connectivity by and among most, if not all, of its business locations and numerous other non-state governmental offices located throughout the state of North Dakota. This allows for voice and data communication services by and among those various locations without the use of the public switch telephone network. This point-to-point connectivity network includes the State of North Dakota's business location(s) in the Qwest Grafton Exchange.
16. On information and belief, ITD utilizes a private branch exchange ("PBX") at the State's Grafton location (the "Grafton PBX"). A PBX is essentially a smaller version of a phone company's central switching office. It is owned by the subscriber, and allows for in-house implementation of numerous features rather than utilizing the features of the telephone company's central office switch. The PBX switch is typically connected to the telecommunications company's central office through trunks connecting the PBX switch to the central office.
17. On information and belief, ITD has configured the State of North Dakota's communications' network (which includes State agencies and non-State entities that use the network) so that calls originated from outside of the Grafton Exchange made to the St. Thomas Exchange, the Park River Exchange, or the Hoople Exchange are routed first to the Grafton PBX. These toll calls made from outside the Qwest Grafton Exchange to the Polar Exchange Areas are sometimes referred to herein as the "Non-EAS Toll Calls."

18. The Grafton PBX, upon receiving the re-routed Non-EAS Toll Calls, then re-originates the toll calls through Qwest's switch serving the Qwest Grafton Exchange which then delivers the traffic over the EAS trunks to the Polar Exchange Areas as an "EAS" call. Doing so avoids Polar's exchange access network and the payment of intrastate access charges.
19. The Non-EAS Toll Calls essentially bypass the access network deployed by Polar and receive a "free ride" on the EAS network deployed for use by, and paid for by, the end users served in the respective EAS areas. This practice enables ITD (and the calling State agencies and non-State entities) – acting as an interexchange telecommunications company to avoid appropriate tariffed intrastate access charges by routing as "EAS" a call that is clearly toll.
20. ITD's and Qwest's use of the EAS trunks for the termination of Non-EAS Toll Calls is not permissible EAS traffic. Rather, it is toll traffic that is subject to Polar's intrastate access charges.
21. Polar is not a party to the contract between ITD and/or the State of North Dakota and Qwest, or the contracts between ITD and certain non-State entities that use the State's network, and receives no compensation of any sort for the unauthorized use of its network by the State of North Dakota and the other non-State entities that use the State's network.
22. When Polar discovered that ITD had configured the State's communications network to allow the impermissible use of the EAS system for Non-EAS Toll Calls, Polar requested Qwest to specifically prohibit the use of the EAS trunks for the termination of intrastate access traffic or to set forth reasonable compensation sharing arrangements for the delivery of this toll traffic by either party. Without explanation, Qwest rejected Polar's request.
23. Polar also contacted ITD and requested that it cease the practice of re-routing toll calls to the Polar Exchange Areas via the Grafton PBX to avoid the lawful payment of intrastate access charges otherwise owed to Polar and to cease delivering toll calls as EAS. ITD has failed to comply with the request.
24. ITD initially defended this arrangement on the basis that it allegedly was paying Qwest for the privilege of using the EAS facilities for the termination of these toll calls. However, none of this alleged compensation paid to Qwest has been offered to Polar for the loss of applicable intrastate access charges associated with this toll traffic.
25. The uncompensated use of Polar's EAS facilities for Non-EAS Toll Calls was not consented to by Polar at the time of the initial EAS agreement or at any time thereafter.

26. As a result of Respondents' actions, or inactions, respecting this impermissible practice, Polar has lost and continues to lose intrastate terminating access revenue to the detriment of Polar, its members, and its subscribers.
27. The Respondents' practices described above result in an unlawful and disproportionate benefit to certain unauthorized callers and carriers; fall outside of the permissibility of acceptable EAS practice and the current EAS agreements between the parties; harm the terminating local exchange carrier and its members; result in unreasonable discrimination; and, constitute unfair and destructive competitive practices.

Wherefore, Complainant requests the North Dakota Public Service Commission to issue an order:

1. Requiring that Qwest prohibit the unauthorized use of the EAS network by callers outside of the Qwest Grafton Exchange or pay reasonable compensation therefor at Polar's filed access rates.
2. Prohibiting and enjoining ITD from configuring its communications network to re-route Non-EAS Toll Calls to the Grafton PBX thereby prohibiting Polar's ability to bill intrastate access charges.
3. Finding that Respondents have caused monetary damages to Complainant in the amount of all avoided intrastate access charges for the Non-EAS Toll Calls made over the EAS network.
4. For such other and further relief as the Commission deems appropriate under the circumstances.

Dated this 17th day of March, 2009.

VOGEL LAW FIRM



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