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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION, a Colorado
corporation,

Plaintiff,

v.

ANOVIAN, INC., et al.,

Defendants.

CASE NO. C08-1715 RSM

ORDER GRANTING DEFENDANT
UNIPOINT'S MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM,
WITH LEAVE TO AMEND

This matter is now before the Court for consideration of defendant UniPoint's motion to dismiss for failure to state a claim upon which relief can be granted or, in the alternative, to defer to the primary jurisdiction of the Federal Communications Commission. The Court has considered the pleadings, the memoranda of the parties, and the declarations submitted, and heard oral argument on both issues on October 28, 2009. For the reasons set forth below, the Court does not reach the issue presented in the alternative because the Court finds that the plaintiff has failed to state a claim upon which relief can be granted.

FACTUAL BACKGROUND

This matter arises out of Qwest Corporation's allegations that defendants Anovian, Broadvox, Transcom, and UniPoint failed to pay legally required charges (access charges) for their use of Qwest's services in completing long-distance telephone calls. Like the other defendants, UniPoint Holdings,

1 Inc., UniPoint Enhanced Services, Inc., and UniPoint Services, Inc. (collectively, “UniPoint”) are
2 providers involved in the telecommunications industry that participate, through the use of new Internet
3 technology, in the routing of telephone calls, some of which originate or terminate in Washington.
4 Qwest alleges that the defendants are liable for these charges because they “act as” interexchange
5 carriers within the meaning of 47 C.F.R. § 69.5(b), which assesses access charges “upon all
6 interexchange carriers that use local exchange switching facilities” in providing interstate
7 telecommunications services.

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9 To determine the sufficiency of Qwest’s claim for nonpayment of access charges, it is first
10 necessary to briefly outline UniPoint’s role in the complex field of telecommunications. With regard to
11 traditional, wireline communications, two types of providers offer service. First, as the defendant
12 explains, the providers to which consumers typically refer as local telephone companies, “local
13 exchange carriers (‘LECs’) like Qwest, transport calls within local exchanges and provide ‘access’ to
14 the end-user customers on either end of the call.” Dkt. # 44 at 4 (*citing Competitive Telecomms. Ass’n*
15 *v. FCC*, 117 F.3d 1068, 1071 n.2 (8th Cir. 1997)). Second, the providers to which consumers typically
16 refer as long-distance telephone companies are known as interexchange carriers (“IXCs”), which
17 “transport calls between local exchanges, and they rely on the LECs at either end for access to
18 consumers.” *Id.* (*citing Iowa Network Servs. v. Qwest Corp.*, 363 F.3d 683, 688 (8th Cir. 2004)).

19 However, while these two types of providers offer service for what is deemed the more
20 traditional, wireline communications, a new communications technology—“IP telephony”—has
21 changed the way telephone service is provided. Instead of using solely the traditional public switched
22 telephone network (“PSTN”), services such as defendant UniPoint are now using IP technology to
23 provide communications over the Internet. Qwest and other incumbent LECs receive access charge
24 payments under federal law when they originate or terminate traditional PSTN long-distance calls for
25 IXCs, but federal law does not extend access-charge liability to non-IXCs. *See* 47 U.S.C. § 251(b)(5).
26 According to the regulations, “[c]arrier’s carrier charges shall be computed and assessed upon all
27 interexchange carriers that use local exchange switching facilities for the provision of interstate or
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1 foreign telecommunications services.” 47 C.F.R. § 69.5(b).

2 UniPoint does not deal directly with Qwest but instead routes calls to another provider, which
3 then routes the calls to Qwest for termination. Qwest claims primarily that UniPoint “acts as” an
4 interexchange carrier, despite the fact that it does not use the traditional wireline service. Qwest asserts
5 that the defendant has failed to pay Qwest legally required access charges in fraudulently routing this
6 traffic through local, and not long-distance, facilities.

8 ANALYSIS

9 The recent Supreme Court decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), affirmed the
10 current law on the requirements of stating a valid claim under Federal Rule of Civil Procedure 8(a)(2),
11 as previously set out in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007). Federal Rule of
12 Civil Procedure 8(a)(2) states that a plaintiff must provide “a short and plain statement of the claim
13 showing that the pleader is entitled to relief.” As the *Iqbal* Court interpreted *Twombly*, “the pleading
14 standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an
15 unadorned, the-defendant-unlawfully-harmed-me accusation.” 129 S.Ct. at 1949 (*citing Twombly*, 550
16 U.S. at 555). Specifically, to “survive a motion to dismiss, a complaint must contain sufficient factual
17 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (*quoting Twombly*,
18 550 U.S. at 570). A claim is facially plausible “when the plaintiff pleads factual content that allows the
19 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*
20 According to the *Iqbal* Court, two basic principles underlie its decision in *Twombly*. First, legal
21 conclusions are not entitled to the typical assumption of truth: “the tenet that a court must accept as true
22 all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Id.* Second, a
23 complaint must state a plausible claim for relief to survive a motion to dismiss, as determined by a
24 court’s experience and common sense. *Id.*

1 The Federal Rules' pleading requirements are admittedly minimal. However, while the plaintiff
2 is not required to plead with detailed specificity in regards to each claim, it must still assert a legal claim
3 for which relief may be granted—a claim for relief that is based on more than legal conclusions and that
4 is facially plausible. Here, Qwest has failed to plead a critical element of its claim against UniPoint;
5 nowhere did Qwest assert that UniPoint is an IXC. Qwest states only that because the defendants
6 “participate in the provision of Telephone Toll Service with regard to the calls at issue in this
7 Complaint, each and every Defendant *acts as* an interexchange carrier with regard to these calls.” Dkt.
8 # 1 at ¶ 18 (emphasis added). The language of 47 C.F.R. § 69.5(b) does not state that it imposes access-
9 charge liability on those who merely “act as” IXCs. The text of the regulation itself states that carrier’s
10 carrier charges, also referred to as access charges, “shall be computed and assessed *upon all*
11 *interexchange carriers* that use local exchange switching facilities for the provision of interstate or
12 foreign telecommunications services” (emphasis added).

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16 Thus, as currently pled, the Complaint fails to assert an essential element of the claim: that
17 UniPoint is an IXC and therefore owes Qwest access charges. Even in reading the facts in the light most
18 favorable to the plaintiff, in the absence of this critical allegation, Qwest has not stated a plausible claim
19 for relief. The statement that the defendants “act as” IXCs and thus owe access charges is an
20 unsupported legal conclusion. And, as the *Iqbal* Court made clear, legal conclusions do not merit an
21 assumption of truth or create a legally cognizable claim absent other factual evidence.

22
23 UniPoint’s alleged failure to pay access charges is at the heart of all of Qwest’s federal and state
24 claims. Because Qwest has failed in asserting that UniPoint is an IXC, it has thereby failed in stating
25 any claim upon which relief can be granted and does not survive a motion for dismissal under Federal
26 Rule of Civil Procedure 12(b)(6).
27

CONCLUSION

The Court has found that Qwest has not stated a claim upon which relief can be granted. Accordingly, the defendant's Rule 12(b)(6) motion to dismiss is GRANTED, and the Complaint is DISMISSED, with leave to amend. The plaintiff shall have thirty days to file an Amended Complaint. If no Amended Complaint is filed, the action shall be dismissed without prejudice.

DATED this 15 day of December 2009.



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE