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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Petition of QWEST CORPORATION for Arbitration of an Interconnection Agreement with UNION TELEPHONE COMPANY d/b/a UNION CELLULAR under Section 252 of the Federal Telecommunications Act	Docket No. 04-049-145
	<b>QWEST'S OPPOSITION TO UNION'S MOTION TO ACCEPT POST-REBUTTAL TESTIMONY OF HENRY D. JACOBSEN OR, IN THE ALTERNATIVE, MOTION TO VACATE SCHEDULE AND MOTION FOR SANCTIONS</b>

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Qwest Corporation ("Qwest"), hereby responds in opposition to Union Telephone Company d/b/a Union Cellular's ("Union") Motion to Accept Post-Rebuttal Testimony of Henry D. Jacobsen ("Motion") dated March 15, 2007. Alternatively, if the Commission nonetheless

grants Union’s Motion, Qwest moves the Commission to vacate the schedule previously set in this matter in the Eighth Amended Scheduling Order issued March 8, 2007 to allow Qwest and the Division of Public Utilities (“Division”) to conduct discovery on the evidence presented in the Post-Rebuttal Testimony of Henry D. Jacobsen (“Jacobsen Testimony”) and to file rebuttal testimony to the Jacobsen Testimony prior to the hearing in this matter.<sup>1</sup>

In addition, Qwest moves the Commission to grant sanctions against Union for its abuse of the discovery process and withholding of information. If the Commission denies the Motion, Qwest requests that Union be foreclosed from using the evidence referenced in the Jacobsen Testimony in any way in this proceeding and that the Commission adopt any other sanctions deemed appropriate in the circumstances.

## **I. INTRODUCTION**

### **A. Procedural Background**

Qwest filed its Petition for Arbitration in this matter on September 30, 2004. After the filing of various motions and joint requests for extension of various scheduling orders, the parties resolved all but six issues under the interconnection agreement through negotiation. The six issues can be grouped into two general subjects—transit traffic issues and the asymmetric reciprocal compensation issue. The parties filed direct testimony on these issues on October 4, 2005, rebuttal testimony on October 24, 2005 and surrebuttal testimony on November 7, 2005. They thereafter jointly moved to continue the hearing while a hearing on an almost identical arbitration in Colorado took place. The Commission granted the motion and set a hearing in

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<sup>1</sup> The Motion suggests that additional time be allowed for the Division to respond to the Jacobsen Testimony and that proportionate additional time be allowed for the filing of responses to the Division testimony. Motion at 2-3. Therefore, it appears that all parties agree that there must be some adjustment in the schedule. However, Qwest believes that Union and Qwest may have significantly differing views on how large the adjustment should be.

March 2006. As the hearing date approached, the parties jointly moved for a continuance and, after a new schedule was set, jointly moved for continuance of that schedule.

The parties have had further settlement discussions on the transit traffic issues and are in the process of finalizing language for the interconnection agreement that would resolve those issues.

The parties have been unable to reach agreement on the asymmetric reciprocal compensation issue. Because Union is proposing asymmetric reciprocal compensation, it is obligated to provide a cost study justifying its proposal. During the course of proceedings thus far, Union filed its original cost study with the Direct Testimony of Jason P. Hendricks (“Hendricks Direct”) dated October 4, 2005. It filed a revised cost study with the Surrebuttal Testimony of Jason P. Hendricks (“Hendricks Surrebuttal”) dated November 7, 2005, revised cost studies on April 28 and May 30, 2006, a further revised cost study with the Supplemental Surrebuttal Testimony of Jason P. Hendricks (“Hendricks Supplemental Surrebuttal”) dated August 11, 2006, and a further correction on August 12, 2006. Union also filed the Surrebuttal Testimony of Alan Hinman (“Hinman Surrebuttal”) dated November 7, 2005, responding to issues raised regarding the lack of evidence on traffic sensitivity of Union’s facilities in the Rebuttal Testimony of Peter B. Copeland dated October 24, 2005. In addition to the testimony previously mentioned, Qwest filed Revised Rebuttal Testimony of Peter B. Copeland (“Copeland Revised Rebuttal”)<sup>2</sup> on July 21, 2006 and the Copeland Surrebuttal on March 5, 2007, after it understood discovery on this issue was finally complete.

During the course of this proceeding, Qwest has submitted five sets of data requests to Union. Three of those sets, the first served on October 12, 2005, the fourth served on May 11,

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<sup>2</sup> The Copeland Revised Rebuttal completely replaced the Rebuttal Testimony of Peter B. Copeland filed earlier.

2006, and the fifth served on June 8, 2006, contain requests for information on Union's cost study, including the capacity and utilization of its facilities included in the cost study. Union provided responses to the three sets, objecting to some of the requests and failing to provide any information or providing incomplete information on some of them. Some questions in the fourth set were essentially re-requesting information already requested in the first set. Some of the questions in the fifth set requested the same information requested in the first or fourth sets.

Counsel for Qwest had several communications with counsel for Union regarding Union's responses, some orally and some in writing. In response to those communications, Union provided some additional information to Qwest, but failed to provide critical information regarding whether its switch and cell sites included in the cost study are capacity constrained due to high utilization, whether Union's cost study contains costs for facilities not needed to terminate calls and whether the costs are based on Union's most current vendor contracts. After those discussions broke down, Qwest filed a motion to compel on November 1, 2006. Following briefing, the parties reached a tentative agreement on the discovery motions<sup>3</sup> and requested the Commission to continue the hearing set for resolving the motions.

On December 29, 2006, Qwest moved the Commission to modify the most recent schedule for proceedings based on Union's failure to comply with the settlement agreement on the motion to compel. Following briefing, the Commission granted Qwest's motion on January 4, 2007. Union provided additional information through February 21, 2007, when Union provided the final information it had agreed to provide.

Following the conclusion of discovery, the parties proposed a schedule for the balance of proceedings, including the filing of the Copeland Surrebuttal on March 5, the filing of Division

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<sup>3</sup> Union filed a motion to compel on November 15, 2006, dealing with Qwest's responses to its discovery questions on the transit traffic issues.

testimony on March 16, if desired by the Division, the filing of Qwest and Union testimony responsive to the Division testimony on April 2, the filing of a joint issues matrix if needed on April 17 and hearings on April 24 and 25, 2007. The Commission approved and adopted this schedule in its Eighth Amended Scheduling Order issued March 6, 2007.

On March 15, 2007, Union filed the Motion and the Jacobsen Testimony. Contrary to earlier responses to Qwest data requests and informal representations of Union counsel to Qwest counsel, the Jacobsen Testimony claims that Union has always had data on the capacity and usage of its switch and cell sites, but simply did not have information on busy hour utilization until it acquired software recently to provide that data. The Jacobsen Testimony not only provides data on blocking at the GSM cell sites, but provides detailed, technical information on Union's system in an effort to rebut the Copeland Surrebuttal's conclusion that Union could not establish the traffic sensitivity of its facilities because it had acknowledged that it did not have capacity or usage information for its switch or cell sites.

**B. Information Withheld by Union**

This is the second state in which the parties have arbitrated an interconnection agreement. As noted above, the hearings in Utah were continued because of the pending arbitration in Colorado. Hearings were held in Colorado on December 20 and 21, 2005, and the parties filed position statements there on February 10, 2006. Although Union has continued to revise and attempt to refine its cost study, the positions of the parties on asymmetric reciprocal compensation have not changed materially. Union has contended that its entire system is 100 percent traffic sensitive and that its cost study properly presents the Total Element Long-Run Incremental Cost ("TELRIC") for traffic-sensitive components of its network required to transport and terminate calls initiated by customers of Qwest and terminated to customers of Union. Qwest has consistently maintained that Union has failed in its burden to demonstrate that

the components of its network are traffic sensitive and that its cost study does not comply with other TELRIC principles.

On October 12, 2005, in its First Set of Data Requests, Qwest asked Union for the capacity of its GSM switch by cell sites, busy hour minutes of use, busy hour calls and handsets. Qwest DR 1-013. In its February 21, 2006 response, Union stated that the capacity was 515 cell sites, but that the other information was unavailable or could not be determined. On May 11, 2006, in its Fourth Set of Data Requests, Qwest asked Union to identify the voice capacity, the present utilization of the voice capacity, the data capacity and the present utilization of the data capacity for each of its 71 GSM-only cell sites. Qwest DR 4-009. In its May 30, 2006 response, Union said that it had provided continuing property records for the various sites and that those records “reflect the equipment upon which Qwest may extrapolate the values requested.” Qwest also asked Union what percent of a typical cell site’s daily minutes of use took place in the busiest hour of the day. Qwest DR 4-019. Union responded, “[t]he information is not tracked thus.”

On August 17, 2006, counsel for Qwest and Union discussed the responses to Qwest DR 4-009 and 4-019. Counsel for Qwest sent an email to counsel for Union that same day with the following statements on these two responses:

4-009: The request asked for information regarding voice and data capacity and utilization for GSM-only sites. The response states that the information requested can be extrapolated from the CPR for the various sites. This is not accurate. Please provide the requested information.

4-019: The request asked what percent of Union cell site’s daily minutes of use take place in the busiest hour of the day. The response says “[t]he information is not tracked thus.” We regard this response as nonresponsive and possibly evasive. Qwest did not ask or assume how the information was tracked, but simply asked for the information. Please provide the requested information or acknowledge that it is not available in any manner.

The email confirmed that Qwest would file a motion to compel if it did not receive the requested information.

Counsel for Union responded to this email with an email on August 29, 2006. With respect to DR 4-009 and 4-019, the response stated:

As to 4-009, Union has repeatedly addressed this issue in its testimony and data responses. The Union system was established and constructed to provide voice capability. If data transits the system, it is an adjunct service, it is not a primary service for which the system was designed.

As to 4-019, Union provided the information it has in regard to the request. Union, as part of any ongoing discovery request, has a responsibility to provide the documentation that it maintains and has in its possession. It has provided those documents.

Counsel for Qwest responded with an email on September 12, 2006. On the two data requests, the response stated:

Third, my email referred to Union's response to data request 4-009. This request asks for information regarding the voice and data capacity of cell sites and what percent of that capacity is being used. In the response to this request, you said Qwest could extrapolate the information from data provided. In my email, I told you that Qwest did not have information from which it could extrapolate the information. In your email, you said that Union had repeatedly addressed the issue in testimony and data responses and that data capacity was simply an adjunct service. There are two problems with this response. First, it does not provide the voice capacity of the cell sites which Union effectively acknowledges is relevant. Second, it assumes that data capacity and use can be ignored because Union regards data services as an adjunct. Qwest does not agree that data capacity and use can be ignored in determining costs of call termination.

Fourth, my email referred to Union's response to data request 4-019. This request asked for the percent of a typical Union cell site's daily minutes of use that takes place in the busiest hour of the day. Union's response was that the data was not tracked "thus." My email requested that Union provide the requested information or acknowledge that it is not available in any manner. Your email responded that Union has already provided the information that it has in regard to the request. Apparently, Union does not know what percent of minutes of use occurs during the busy hour. If so, Union should admit that it does not have the information rather than

suggesting that it does not have the information in the manner requested or that it has already supplied information that might answer the question.

The email confirmed again that Qwest would file a motion to compel if the data were not provided.

On October 5, 2006, Union counsel responded in an email. With respect to these two data requests, the response stated:

3) You requested information pertaining to DR 4-009 relating to the voice and data capacity of cell sites. In addition to that which we have provided to you in the past, I am advised that a tower site is going to contain three sectors and corresponding radios. The equipment is designed to provide voice capability and as an adjunct to the data services. The prioritization built into the system initially allows for voice services and, only when voice service are addressed will data services be provided. Again, as we have repeatedly stated, the data services are ancillary to the voice capability and are provided once voice services are accomplished.

4) You requested additional information on Data Request 4-019 that asks for the percent of a typical cell site's daily minutes of use occurring during the busiest hour of the day. You objected to Union's response because it had stated that it did not track the information in this fashion. Again, following inquiry, while the minutes of use are measured, they are not tracked in a fashion that would allow a segregation of minutes for the busiest hour of the day. It is my understanding that software has been ordered that would allow for tracking in such a manner, but it is not in place at this time.

Based on this response, Qwest filed its motion to compel on November 1, 2006. The motion sought a full and complete response to DR 4-009 and, based on the statements of Union counsel, confirmation that Union did not have the data requested in DR 4-019. Prior to the hearing scheduled on the motion to compel, counsel conferred yet again to see if the matters could be resolved short of hearing. Counsel reached tentative agreement subject to written confirmation and informed the Commission that the hearing could be continued without date. Counsel thereafter exchanged letters confirming their understanding of the resolution of the

discovery dispute. With respect to DR 4-009, the letter of counsel for Union to counsel for Qwest dated December 4, 2006, stated:

Q4-009: Qwest had requested for the 71 GSM – only sites that Union identify certain information including the voice capacity and data capacity for the sites. Union objected to the response and indicated that it had provided the CPR for the various sites and that the values could be extrapolated from the information provided. Qwest indicated that such was not sufficient and it wanted a breakdown of the equipment by the type of service provided, i.e. voice or data. Union indicated that it did not maintain records which simulated the equipment costs in such a fashion. Qwest requested written confirmation of such response and the same will be provided by supplementation.

The letter did not mention DR 4-019.

Counsel for Qwest responded to the letter, with a letter on December 6, 2006, clarifying that:

On Qwest Data Request 4-009, for the 71 GSM-only sites in Union's cost study Qwest requested the voice capacity of the cell site, how much of the voice capacity of the cell site is currently being used, the data capacity of the cell site and how much of the data capacity of the cell site is currently being used. Qwest does not have the capacity or usage of each cell site by voice or data or in total. In subsequent communications between us, Qwest informed you that the usage information it was seeking was by the busy or peak hour. Based on those communications, Qwest understands that Union does not have the capacity of each cell site by voice or data or in total and that it does not have usage of each cell site by busy or peak hour for voice or data or in total. Qwest understands that Union will provide a supplemental response *confirming that Union does not have the capacity of each cell site by voice or data or in total and that it does not have usage of each cell site by busy or peak hour for voice or data or in total.* (Emphasis in original.)

Your letter does not refer to the four data requests also covered by Qwest's motion on which Qwest requested confirmation of statements made in our communications. . . . With regard to Data Request 4-019, Qwest requested the percent of a typical Union cell site's daily minutes of use that takes place during the busiest hour of the day. Based on our discussions, Qwest understands that Union does not have data on use of cell sites during the busy or peak hour. Qwest understands that Union will provide a supplemental response *confirming that Union does not have data on usage of cell sites during the busy or peak hour.* (Emphasis in original.)

On January 8, 2007, Qwest received Union's supplemental response to Qwest's data requests. With respect to the two data requests, the supplemental response stated:

**Qwest DR 4-009:**

**Response:** In Qwest data request 4-009, Qwest requested that Union provide the voice capacity for the 71 GSM only sites utilized in Union's cost study. Union initially objected to the data request. In discussions with Qwest, Union indicated that it does not maintain the voice or data capacity in the manner requested for each cell site. Specifically, Union would confirm that it does not maintain the data or voice capacity of each cell site nor can it segregate the usage of each cell site by busy or peak hour voice or data volumes.

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**Qwest DR 4-019:**

**Response:** In this data request, Qwest requested that Union state what the typical Union cell site minutes of use would be during the busiest hour of the day. Union objected to the request and indicated that it did not track the information as requested by Qwest. Following discussion among counsel, Qwest has requested that Union confirm that Union does not have data on cell site volumes specifically relating to the busy or peak hour. As union does not maintain the data in such a fashion, it would confirm this representation as part of this Response.

**C. Testimony**

Based on the foregoing, Mr. Copeland prepared and filed the Copeland Surrebuttal on March 5, 2007. The Copeland Surrebuttal states:

The responses to DR4-009 and DR4-019 relate to the cell site investment in Union's cost study. Nearly 95 percent of the investment in Union's study (in excess of [CONFIDENTIAL]) is associated with cell site equipment and supporting assets. Union states that 100 percent of the cell site investment is traffic sensitive. However, Union admits that it does not know the capacity of any of its GSM cell sites, nor the utilization of any of the cell sites. Union also admits that it does not track busy or peak hour usage. Both the capacity and utilization data are critical to determine whether cell sites are indeed traffic sensitive. [Footnote omitted.] How can Union provide justification for the "traffic sensitivity" of its cell sites if Union itself has no information on its cell site traffic capacities or utilization? How can Union demonstrate that increasing voice traffic on Union's cellular network has exceeded the capacities of its cell site

equipment, requiring Union to add capacity at its cell sites? Union cannot provide justification for traffic sensitivity of its cell sites.<sup>4</sup>

The Copeland Surrebuttal also discussed the Hinman Surrebuttal in the context of the responses to DR 4-009 and DR 4-019.<sup>5</sup> The Hinman Surrebuttal stated: “As an engineer employed by Union Telephone Company, I have been asked to provide testimony to the Commission in regard to Union’s network to show that in fact that subject facilities are traffic sensitive in that they vary in proportion to the calls.”<sup>6</sup> Mr. Hinman then provided a relatively brief general description of the network and concluded in a summary fashion that the Base Transceiver Station (“BTS”) is a very dynamic function and is very traffic sensitive.<sup>7</sup> The Copeland Surrebuttal pointed out why this conclusion could not be justified on the basis of information provided in discovery.<sup>8</sup>

The Copeland Surrebuttal also refers to Union’s response to DR 1-013, stating:

In Data Request 1-013, Qwest asked Union to state the capacity of the GSM switch in terms of (a) cell sites; (b) busy hour minutes of use; (c) busy hour calls; and (d) handsets (telephone numbers). Union responded that other than the cell site capacity, the other capacities were unavailable or that the response cannot be determined. It is disingenuous, at best, for Mr. Hendricks to state that Union is on the verge of exhausting switch capacity, when the response to the data request indicates that Union does not know of any capacity limitation other than the 515 cell sites.<sup>9</sup>

Now, 16 months after discovery commenced, and many months after Union stated that it did not have capacity or usage data for its switch or cell sites, facts that it confirmed after the filing of a motion to compel, Union files the Motion and the Jacobsen Testimony, providing detailed technical information regarding the network, much of which responds to the Copeland

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<sup>4</sup> Copeland Surrebuttal, lines 62-75.

<sup>5</sup> *Id.*, lines 129-136.

<sup>6</sup> Hinman Surrebuttal, lines 11-14.

<sup>7</sup> *Id.*, line 97.

<sup>8</sup> Copeland Surrebuttal, lines 122-136.

<sup>9</sup> *Id.*, lines 189-196.

Rebuttal filed October 24, 2005 and which does not in any way rely upon the newly available information on blocking at cell sites. In addition, the Jacobsen Testimony acknowledges that Union has always had information on the usage and capacity of its switch and cell sites, just that it did not have peak hour usage information until recently.<sup>10</sup> In addition, the Jacobsen Testimony relies heavily on blocking data that has only recently become available for a one-week period in March 2007 and states that additional data not provided is also available.<sup>11</sup>

**D. Impact on Qwest of Motion and Jacobsen Testimony**

Qwest has devoted substantial resources in this case attempting to determine whether there is any factual basis for Union's claim that its GSM switch and cell sites are traffic sensitive, and, if so, which components of them are traffic sensitive with respect to voice traffic. Because Union has the burden of proof on these issues, Qwest has been satisfied with the prolonged extraction from Union of acknowledgements that Union does not have data that would be necessary to establish the traffic sensitivity of those facilities. After evasively leading Qwest down the path of no data whether by peak hour or not, Union has suddenly, after Qwest filed the final testimony contemplated (other than responses to Division testimony), filed testimony that it has always had capacity and usage data and that it has recently obtained peak hour blocking data for the cell sites.

Qwest is not familiar with the blocking data provided in the Jacobsen Testimony and, if the testimony is received, will need to do discovery to understand it and the additional data that has not been provided, but which is apparently available. Although Qwest anticipates that Mr. Copeland will be able to analyze the data and discovery responses provided and to provide additional surrebuttal testimony responding to the Jacobsen Testimony, it is possible that

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<sup>10</sup> Jacobsen Testimony, lines. 50-62.

<sup>11</sup> *Id.*, lines 152-159.

additional expertise may be required. Therefore, if the Motion is granted, Qwest will need a currently undeterminable amount of time to conduct discovery and to prepare rebuttal testimony.

Furthermore, if the Motion is granted, Qwest will have devoted substantial resources in an attempt to obtain definite answers to discovery requests and in preparation of the Copeland Surrebuttal based on the premise that Union did not have capacity or usage information for its GSM switch or cell sites. This effort will have been wasted as a result of Union's evasion and withholding of information in discovery and its attempt to ambush Qwest with last-minute information that it believes will change the character of the debate before the Commission.

The Motion is a further example of Union's gamesmanship in this proceeding. The Motion should be denied and sanctions should be imposed on Union as a consequence of its evasive tactics in discovery and its withholding of relevant information. Alternatively, if the Motion is granted, the current schedule in this matter should be vacated to allow Qwest and the Division time to conduct discovery, analyze the new information provided in the Jacobsen testimony and in discovery responses and provide rebuttal to the Jacobsen Testimony.

## **II. ARGUMENT**

The Motion is an attempt by Union to introduce previously-withheld capacity, usage and blocking data on its 71 GSM cell sites ("Data") into the proceeding after Qwest has already finalized its position based on the absence of this information. In light of these recent disclosures by Union, it is clear that Union not only failed to adequately respond to Qwest's discovery requests or supplement those requests as required, but Union has gone as far as representing to Qwest that the requested data does not exist, only to provide such data after Qwest has prepared testimony in reliance on Union's previous representations. Furthermore, Union now offers in the Jacobsen Testimony information regarding the traffic-sensitivity of the GSM switch that was clearly available when the Hinman Surrebuttal was filed on November 7,

2005. The Motion provides no excuse, and could provide no excuse, for Union's withholding of that information until now, long after the time set in the schedule for filing such testimony. Union's actions are in violation of the applicable discovery rules, were calculated to mislead Qwest and frustrate the administrative process. The Commission should not tolerate Union's improper actions. Accordingly, the Motion should be denied.

Pursuant to Commission Rule R746-100-8, discovery is to be conducted in accordance with Rules 26 and 37 of the Utah Rules of Civil Procedure.<sup>12</sup> Pursuant to Rule 26, in addition to properly responding to a request for discovery, a party is under a duty to supplement "if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process."<sup>13</sup>

By its motion to compel dated November 1, 2006, Qwest addressed Union's inadequate discovery responses and sought an order from the Commission compelling Union to, among other things, either provide the capacity and usage of its 71 GSM cell sites by voice and data, or confirm that it did not have such data and confirm that it does not have data on the usage of any of its cell sites by busy or peak hour. As noted by Qwest in the motion, this capacity and usage data was essential to the preparation of Qwest's surrebuttal testimony to Union's revised cost study. Pursuant to the Seventh Amended Scheduling Order issued on November 9, 2006, complete data responses were due by December 8, 2006. Union failed to provide complete responses by this date. On December 29, 2006, in response to DR 4-009, Union provided its Supplemental Response to Qwest's Data Requests, wherein Union unequivocally stated "Union

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<sup>12</sup> Utah Admin. Code R746-100-8.

<sup>13</sup> Utah R. Civ. P. 26(e)(1). This requirement was also confirmed in the instructions in the data requests served by Qwest.

would confirm that it does not maintain the data or voice capacity of each cell site nor can it segregate the usage of each cell site by busy or peak hour voice or data volumes.”<sup>14</sup> Further data from Union continued to trickle in over the following several weeks related to other data requests.

As noted, based on Union’s representation regarding the Data and other data responses from Union, Qwest filed the Copeland Surrebuttal on March 5, 2007. Ten days after Qwest filed the Copeland Surrebuttal, Union filed the Motion, seeking leave to submit the Jacobsen Testimony that (1) was not contemplated under the schedule, (2) purportedly provides the Data that had previously been requested by Qwest and which Union claimed not to have. The Motion suggests that Union is providing the Data at this time as a courtesy to the parties, to “ensure that all Parties have the same information on this issue.”<sup>15</sup> Additionally, the Jacobsen Testimony eludes to other “traffic-related performance” data that Union has had and utilized since the “inception” of its network, data that Union should have provided in response to Qwest’s testimony or discovery requests but was never provided.<sup>16</sup> Once again, at no time prior to the filing of the Motion was Qwest provided, or even made aware, of the existence of this Data or other “traffic-related performance” data. To the contrary, Union expressly represented that such data did not exist.

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<sup>14</sup> Union Supplemental Data Response, at 2.

<sup>15</sup> Motion at 2. The Motion and the Jacobsen Testimony state that peak hour data was acquired through the a new “traffic monitoring software package” that Union notes was “recently installed” during “this year.” *Id.*, Jacobsen Testimony, lines 63-65. However, both the Motion and the attached Jacobsen Testimony avoid identifying the date on which this software was installed and functioning. Rather, both only vaguely refer to its installation sometime this year. The information attached to the Jacobsen Testimony purportedly provides Blocking Data for the first week of March 2007. The Copeland Surrebuttal was filed on March 5, 2007, and, therefore, Union was in the process of collecting the new data before the Copeland Surrebuttal was filed.

<sup>16</sup> Jacobsen Testimony, lines 50-61.

The Data provided by Union in the Jacobsen Testimony still does not provide the capacity or usage of the cell sites, but rather provides blocking statistics during the busy hour. As noted above, Qwest is not familiar with this data and does not understand precisely what it indicates. However, it seems apparent that if blocking during the busy hour can be measured, the Data is based on some information about capacity and usage of the cell sites.

The Motion is an improper attempt by Union to introduce into evidence information that Union previously represented it did not have, a representation relied on by Qwest in preparation of the Copeland Surrebuttal. The introduction of the Jacobsen Testimony and the data contained therein will prejudice Qwest, and reward Union for its persistent evasive and dilatory tactics. Introduction of the data at this stage in the proceeding is clearly untimely, contradicts Union's previous representations, and violates Rule 26 and the applicable scheduling order. Accordingly, the Motion should be denied.

### **III. ALTERNATIVE MOTION THAT THE SCHEDULE BE VACATED**

If the Commission grants the Motion (which it should not do), Qwest requests that the Schedule be revised to allow Qwest an opportunity to conduct discovery on and to review and respond to the Data. After consistently maintaining for over a year that it did not have capacity or usage data on components of its network, Union has now attempted to introduce such data. Mr. Jacobsen's testimony indicates that additional Data is also available that still has not been provided. Qwest needs to conduct discovery on the Data to understand its impact on the revised cost study filed by Union and the hypothetical cost study prepared by Mr. Copeland. Based on this discovery it is possible that Qwest may need to retain additional expertise to review and analyze this Data. Therefore, if the Commission determines to grant the Motion, Qwest requests that the Commission vacate the schedule in this matter until such time as Qwest has conducted discovery on this recently disclosed information and provided rebuttal testimony on it.

#### IV. MOTION FOR SANCTIONS

If the Commission denies the Motion, Qwest hereby moves the Commission to impose sanctions against Union for its abuse of the discovery process and withholding of information, prohibiting Union from using the Data referenced in the Jacobsen Testimony in any way in this proceeding.

Rule 37 of the Utah Rules of Civil Procedure empowers the Commission to sanction a party for discovery violations.<sup>17</sup> The Utah Supreme Court has stated clearly that “a party’s conduct merits sanctions under rule 37 if any of the following circumstances are found: (1) the party’s behavior was willful; (2) the party has acted in bad faith; (3) the court can attribute some fault to the party; or (4) the party has engaged in persistent dilatory tactics tending to frustrate the judicial process.”<sup>18</sup> Rule 37 allows for broad discretion in the selection of which sanction to apply.<sup>19</sup> For instance, if a party fails to disclose information or amend previous disclosures as required by Rule 26, Rule 37 provides “that party shall not be permitted to use the . . . material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose.”<sup>20</sup> Furthermore, Rule 37 provides that “[i]n addition to or in lieu of this sanction, the court may order any other sanctions, including payment of reasonable costs and attorney fees.”<sup>21</sup> As set forth in *Morton*, sanctions are appropriate if it is found “on the part of

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<sup>17</sup> Utah R. Civ. P. 37; *see also Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508, 513 (Ut. Ct. App. 1999).

<sup>18</sup> *Morton v. Continental Baking Company*, 938 P.2d 271, 276 (Utah 1997).

<sup>19</sup> *Hales v. Oldroyd*, 999 P.2d 588 (Utah Ct. App. 2000).

<sup>20</sup> Utah R. Civ. P. 37(f).

<sup>21</sup> *Id.*

the noncomplying party willfulness, bad faith, . . . fault . . . or persistent dilatory tactics frustrating the [administrative] process.”<sup>22</sup> Such evidence exists in this case.

Union’s history of evasion and delay in disclosing the requested information has previously been described. Now, it is apparent that Union’s disclosure relating to the Data was incomplete, a material misrepresentation of the facts, and intended to prevent Qwest from reviewing and responding to the Data. Furthermore, Union’s actions have created additional delay and continue to frustrate this proceeding. Union’s incomplete disclosures were clearly intentional, in bad faith and undertaken with the intent to impair the Commission’s ability to resolve this matter appropriately. Accordingly, the Commission should impose appropriate sanctions against Union.

Qwest proposes that if the Commission denies the Motion (as it should do), Union be foreclosed from using the evidence referenced in the Jacobsen Testimony in any way in this proceeding. Whether or not the Commission denies the Motion, Qwest requests that the Commission impose other sanctions deemed appropriate.

## V. CONCLUSION

Qwest respectfully submits that the Commission should deny Union’s Motion. In the alternative, if the Commission does not deny the Motion, the Commission should vacate the schedule to allow Qwest and the Division to conduct additional discovery and to provide rebuttal testimony to the Jacobsen Testimony. If the Commission denies the Motion, Qwest submits that the Commission should foreclose Union’s use of the Data in the Jacobsen Testimony in any way in this proceeding. Regardless of the Commission’s decision on the Motion, Qwest requests that

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<sup>22</sup> *Morton*, 938 P.2d at 274 (citations omitted).

the Commission impose any appropriate sanctions on Union for its evasion and withholding of information in this proceeding.

RESPECTFULLY SUBMITTED: March 30, 2007.

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing QWEST'S OPPOSITION TO UNION'S MOTION TO ACCEPT POST-REBUTTAL TESTIMONY OF HENRY D. JACOBSEN OR, IN THE ALTERNATIVE, MOTION TO VACATE SCHEDULE AND MOTION FOR SANCTIONS was served upon the following by electronic mail on March 30, 2007:

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