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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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 REPLY TO UNION'S OPPOSITION TO QWEST'S MOTION FOR MODIFICATION OF SCHEDULE</b>
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Qwest Corporation ("Qwest"), pursuant to Utah Admin. Code R746-100-4.D, hereby replies to the Opposition of Union Telephone Company to Qwest's Motion for Modification of Schedule ("Opposition") dated December 29, 2006.

**I. INTRODUCTION**

Qwest's Motion for Modification of Schedule ("Motion") was filed and served electronically on December 29, 2006 at 1:25 p.m. It requested that the Commission enter an order modifying the schedule in the Seventh Scheduling Order ("Order") issued by the Commission on November 9, 2006, to extend the date for Qwest to file supplemental surrebuttal

testimony on the Union Telephone Company d/b/a Union Cellular (“Union”) third revised cost study from January 5, 2007, to a date 21 days following the date on which Union provides complete answers and confirmations as agreed by the parties in resolution of Qwest’s Motion to Compel and for Confirmation of Oral Representations Regarding Discovery Matters (“Qwest’s Motion to Compel”) and to extend other dates as may be necessary based thereon. Union’s Opposition was filed and served electronically at 5:13 p.m. on the same day. In addition, Union provided supplement responses to Qwest data requests electronically at 4:35 p.m. on the same day.

In support of the Motion, Qwest provided a brief history of the dealings between the parties regarding Qwest’s Motion to Compel starting on November 1, 2006. The genesis for Qwest’s Motion to Compel was Union’s failure to fully and fairly respond to discovery requests regarding its cost study and revised cost studies. Without rehearsing the history of those requests and responses, Qwest notes that throughout the course of this discovery, Union’s typical response, after objecting to the requests for various reasons, including relevance, burdensomeness or ambiguity, was that it had already provided the information to Qwest, that it was attached or that it would be provided if Qwest still needed it. Qwest typically re-asked questions in light of these responses because it did not have the information requested, it was not attached or it was not provided subsequently.

In addition to re-asking questions, Qwest had several informal communications with Union through counsel regarding the requests. These communications resulted in the provision of some additional information by Union and a variety of representations regarding Union’s lack of information. Still, critical data was not provided. Faced with Union’s insistence that the

hearings in the matter be scheduled, Qwest finally filed its Motion to Compel because it still lacked critical information that it needed to respond to the third revised cost study.

After Qwest filed its Motion to Compel, a scheduling hearing was held at which the parties agreed to submit their discovery disputes to the Commission for decision and to submit any additional responses ordered by December 8, 2006. Based on this agreement, Qwest agreed that it would file supplemental surrebuttal testimony on January 5, 2007, and further agreed to the balance of a schedule, including a hearing commencing on January 24. The parties thereafter met and prior to November 28, 2006, entered into an agreement (subject to written confirmation) to resolve their discovery disputes. Essentially, Union agreed to provide three specific items of information and to provide written confirmations of representations regarding its lack of information to respond to other data requests. The three specific items of information Union agreed to provide were (1) its current contracts with Nortel for the major items of equipment included in its cost studies, including at least switches, base station controllers (“BSC”) and base transceiver stations (“BTS”), in all configurations (Request 4-002), (2) the locations of the 325 cell sites included in its third revised cost study (Requests 4-004 and 5-002), and (3) an identification of the equipment included in its cost study that is used to provide data services (Request 4-008).

In the writings exchanged concerning this agreement, Qwest specifically reminded Union of the need to provide this information by December 8 and stated that failure to comply with this schedule might require Qwest to seek an extension of the time to file its supplemental surrebuttal testimony. Qwest confirmed this in writing on two subsequent occasions, the last one being on December 15 when it informed Union that it would need to seek an extension in light of the fact that the information had not yet been provided.

Rather than complying with this schedule, Union provided the second item of information it had agreed to provide on December 22, 2006, after Qwest's counsel's office was closed for the three-day Christmas weekend. Thus, this information was not effectively received by Qwest until December 26. Then, presumably in response to Qwest's Motion, Union provided what it characterizes as an excerpt of the information it agreed it would provide on the first item, plus written confirmation of the oral representations previously made on the eve of the three-day New Year's Day weekend. This information arrived late in the day after Qwest's counsel and staff had already left for the weekend. Thus, this information was effectively received by Qwest on January 2, 2007. Union still has not provided the balance of the information on the first item or the third item of information it agreed to provide in resolution of Qwest's Motion to Compel.

## **II. ARGUMENT**

Union takes the position in its Opposition that Qwest does not need 21 additional days to provide its supplemental surrebuttal testimony, but only needs an extension of five days. In support of this position, Union argues that this matter has been pending since September 30, 2004. Union also claims that it provided the information it had agreed to provide on December 22 and December 29, erroneously lumping the third item of information in with the first. Union also argues that it had earlier agreed to allow Qwest access to its contracts with vendors at its offices in Mountain Home, Wyoming, implying that had Qwest accepted this offer, Union would not have needed to provide the information on December 29. It argues that the delay in providing the confirmations is unimportant because they were just written confirmations of previous oral representations. These arguments are inaccurate and, in any event, none of them undermines Qwest's position that it needs 21 days from the date Union provides the complete information it agreed to provide to prepare and file its supplemental surrebuttal testimony.

**A. The Fact That This Matter Has Been Pending Over Two Years Does Not Excuse Union's Failure to Provide Necessary Discovery**

Union refers to the fact that Qwest filed the Petition for Arbitration on September 30, 2004, twice in its opposition, stating that the matter has been pending for a long time and needs to be resolved. Qwest agrees. However, the lengthy pendency of this matter is principally attributable to the fact that the parties have repeatedly agreed to stay and extend the schedule. They did this three times before filing any testimony because they were in negotiations regarding the terms of the interconnection agreement, and they did it three times after some testimony was filed because of the pendency of a similar proceeding before the Colorado Public Utilities Commission. Another significant reason for the lengthy pendency of this matter is the fact that Union has revised its original cost study three times. Every time Qwest files testimony in response to the latest version of the cost study, Union revises it again. Finally, for the past several months, the matter has been delayed as a result of Union's refusal to provide complete and accurate responses to Qwest's discovery requests.

Union appears to have adopted a strategy that if it delays long enough in providing information requested by Qwest, it will never have to provide the information or the information will be provided too late for Qwest to effectively use it in presenting its case. Certainly, such a strategy should not be tolerated, much less rewarded. An addition of approximately 21 days to a proceeding that has already been pending for over two years to allow proper consideration of the issues is no cause for alarm.

**B. The Fact That Union Has Finally Produced Some of the Information It Agreed to Produce Does Not Shorten the Time Qwest Needs to Prepare and File Supplemental Surrebuttal Testimony**

When the parties last scheduled the matter with the Commission, they agreed that Qwest would have the data required by December 8, 2006 and that it would then have until January 5,

2007 to file its supplemental surrebuttal testimony. The period between provision of data and filing testimony contemplated was 28 days. Qwest's request that be allowed 21 days after Union provides complete information is clearly reasonable in light of this earlier stipulation.

This is particularly the case in light of the fact that the first item of information Union agreed to provide has still not been provided. In its Motion, Qwest noted that analysis of the current contracts with Nortel and application of them to the cost study is a detailed and lengthy process. It is reasonable to allow Qwest 21 days after receipt of this information to complete this analysis and file its testimony.

**C. Union Still Has Not Provided the Information It Agreed to Provide.**

In resolution of Qwest's Motion to Compel with respect to Data Request 4-002, Union agreed to provide its current contracts with Nortel for purchase of major items of equipment, including at least the switch, BSCs and BTSs. Rather than providing the current contracts, Union has now provided Qwest with what it characterizes as an excerpt. The document provided, rather than appearing to be an excerpt of a current contract, appears to be a purchase order dated December 10, 2002. It apparently provides prices for the acquisition approximately four years ago of a switch and related equipment. None of the information is current. In addition, Union's cost study includes 325 cell sites or BTSs. The excerpt does not appear to contain any information on the prices, current or outdated, for BTS equipment for these sites. Thus, Qwest is unable to determine whether the third revised cost study complies with Total Element Long-Run Incremental Cost principles.

In addition, Union has not yet provided the information it agreed to provide in response to Data Request 4-008. While the purchase order identifies some equipment as being related to data services, it does not specify all equipment that is related to data services, particularly equipment at cell sites as opposed to at the switch.

**D. Union's Earlier Suggestion About Reviewing a Random Sample of Documentation at Its Office Does Not Satisfy Its Agreement to Provide the Current Nortel Contracts.**

Union argues in its Opposition that it suggested that Qwest review its contracts and documentation with vendors at its office in Mountain View, Wyoming. The implication of this argument is that Union did this long ago in response to the Data Request 4-002. In fact, Union's response to Data Request 4-002, provided on May 30, 2006, was an objection that the request was unduly burdensome and a statement that it would provide cost information regarding its equipment elsewhere. (A copy of this response was attached to Qwest's Motion to Compel.) The suggestion that Qwest might come to Union's office to review vendor contracts and documentation did not arise until well after Qwest filed its Motion to Compel on November 1, 2006. Then, the suggestion was that Qwest might come to Mountain Home to review a sample of voluminous contracts or invoices, not all contracts or invoices. In response to this suggestion, Qwest clarified that it was only seeking to review the current contract or contracts between Union and Nortel with regard to major items of equipment such as the switch, BSCs and BTSs. At that point, in late November, Union agreed that it would provide the current contracts in resolution of Qwest's Motion to Compel on Data Request 4-002.

Given the foregoing, Union's suggestion made shortly before the parties reached agreement is simply irrelevant. Union agreed to provide the current contracts and it must do so. Its failure to do so is not excused by its slightly earlier suggestion that Qwest come to Mountain Home to review a sample of voluminous contracts and documentation.

It is also disingenuous to imply that had Qwest only accepted the earlier suggestion, no delay in filing the supplemental surrebuttal testimony would be necessary. Union has been unable to provide the current Nortel contracts to date, so there is no reason to assume that it would have produced them had Qwest accepted the initial offer and traveled to Union's office

sometime earlier. Qwest's response to that suggestion was intended to simplify this process for both Union and Qwest by eliminating the need for travel and a comprehensive review of a sample of what Union characterized as voluminous vendor contracts and purchase documentation and focusing instead on the current contracts with just one vendor, Nortel. It is Union's failure to produce those contracts that is delaying this matter, not Qwest's proposal, accepted by Union, for simplification of the discovery.

**E. Qwest Has Not Delayed Preparation of Its Testimony Based on Union's Failure to Provide Written Confirmations of Oral Representations, But Would Have Been Justified in So Doing.**

Union's last point is that its written confirmations of its earlier oral representations regarding lack of data should not be a basis for delay of Qwest's supplemental surrebuttal testimony. The short answer to this argument is that Qwest has not delayed in working on its supplemental surrebuttal testimony based on Union's failure to provide the written confirmations by December 8, 2006; Qwest has been delayed by Union's failure to provide the three items of information it agreed to provide in resolution of Qwest's Motion to Compel.

That said, Qwest would have been justified in delaying work on its testimony until it received the written confirmations. The confirmations go to a fundamental issue in this case. An underlying premise of Qwest's testimony and position based on the representations is that Union does not have capacity or peak hour usage information for its switch or cell sites. Given the course of the discovery process to date, it would have been imprudent to rely on that premise without something in writing from Union that will be admissible in evidence. The fact that Union did not provide the confirmations for months after they were initially promised and for one month after the agreement was reached to resolve Qwest's Motion to Compel was a reasonable basis for concern about the reliability of the representations. In addition, the confirmation Union said it would provide in Union's letter of December 4 was significantly

different than the confirmation Qwest proposed based on Union's earlier oral representations as Qwest clarified in its December 6 reply letter. Although the written confirmation provided on December 29, 2006 was not precisely what Qwest proposed based on the oral representations, Qwest believes it is sufficiently clear to provide the premise for Qwest's supplemental surrebuttal testimony.

### **III. CONCLUSION**

Union's Opposition does not provide any basis for rejection of Qwest's Motion. It is presumptuous of Union to assume how long it will take Qwest to analyze and prepare its testimony once Union provides the data it has agreed to provide. Union does not know what analysis Qwest intends to perform and has no knowledge of the other commitments of the two Qwest personnel involved in the analysis and testimony preparation.

Union still has not provided two of the items of information it agreed to provide in resolution of Qwest's Motion to Compel. Therefore, it is clearly premature for the Commission to set a specific date by which Qwest must file its supplemental surrebuttal testimony.

Union should not be rewarded for its dilatory tactics by requiring Qwest to provide testimony without sufficient time to analyze information that Union has agreed to provide and that is fundamental to addressing its third revised cost study. 21 days is a reasonable time to analyze the data and prepare and file the supplemental surrebuttal testimony. Therefore, Qwest's motion should be granted.

RESPECTFULLY SUBMITTED: January 3, 2007.

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing **QWEST'S REPLY TO UNION'S OPPOSITION TO QWEST'S MOTION FOR MODIFICATION OF SCHEDULE** was served upon the following by electronic mail on January 3, 2007:

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