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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 **QWEST'S MOTION TO COMPEL AND FOR CONFIRMATION OF ORAL REPRESENTATIONS REGARDING DISCOVERY MATTERS**

Qwest Corporation ("Qwest"), pursuant to Utah Admin. Code R746-100-8.B and Utah R. Civ. P. 37, hereby requests that the Commission enter an order compelling Union Telephone Company d/b/a Union Cellular ("Union") to provide full and complete responses to Qwest Data Requests 4-002, 4-004, 4-005, 4-008, 4-009, 5-002 and 5-003. In addition, Qwest requests that the Commission order Union to confirm in writing that (1) Qwest may utilize confidential information provided by Union in discovery in Colorado Public Utilities Commission Docket No. 04B-491T as confidential information in this docket; (2) Union does not have any information other than the information actually provided in its responses to Qwest in Data

Requests 1-017, 4-001, 5-001 that is responsive to those requests; and (3) Union does not track usage of its GSM switch or cell sites by busy or peak hour and, therefore, cannot respond to Qwest Data Request 4-019.[1] In the alternative, if Union cannot confirm the foregoing in writing with respect to any data request, Qwest requests that the Commission enter an order compelling Union to provide a full and complete response to the data request.

I. CERTIFICATION

Qwest certifies that its counsel has had several communications with counsel for Union in an attempt to resolve the issues raised by this Motion. Although Union has provided some additional information in response to those communications and counsel for Union has made oral representations indicating that confidential information produced in Colorado may be used in this docket or that Union does not have certain information requested, the parties remain at impasse regarding Data Requests 4-002, 4-004, 4-005, 4-008, 4-009, 5-002 and 5-003. In addition, Qwest needs written confirmation from Union regarding its counsel's oral representations to assure that there is no misunderstanding regarding them.

II. INTRODUCTION

Qwest filed its Petition for Arbitration in this matter on September 30, 2004. Because Union took the position that the relationship between Qwest and Union should be governed by tariff rather than an interconnection agreement and had refused to negotiate an interconnection agreement with Qwest, Qwest could not identify issues left open in negotiation of an interconnection agreement and requested that the Commission approve its attached template

[1] A copy of Union's responses to the relevant data requests is attached to this Motion as Appendices 1 (First Set), 2 (Fourth Set) and 3 (Fifth Set). Some of the attachments to the responses to the Fourth and Fifth Sets of Data Requests are confidential. Therefore, confidential attachments to data requests other that Data Request 5-002 are not provided in Appendices 2 and 3. The confidential attachment to Data Request 5-002 is provided as Appendix 4 to this Motion pursuant to the terms of the Protective Order entered in this docket.

wireless interconnection agreement. Union responded to the petition, arguing that it should be dismissed for lack of jurisdiction. Alternatively, Union identified nine "initial issues," but failed to propose any alternate contract language or to relate its issues to matters left open in negotiations. Accordingly, Qwest filed a motion to strike the response and for judgment on the pleadings.

The Commission held a scheduling conference and set a schedule in the matter. Thereafter, the parties filed a series of three joint motions to vacate the schedule, waive the statutory deadline for completion of the arbitration and to schedule status conferences. The basis for these motions was that the parties were engaged in negotiations. As a result of these negotiations, the parties eventually resolved all but six issues under the interconnection agreement. One of those issues is whether the reciprocal compensation rate for termination of local traffic should be asymmetrical.

The parties filed direct testimony 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 in a similar arbitration in Colorado took place. The Commission granted the motion and set a hearing in 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.

During the course of these schedule changes, Union filed revised cost studies on April 28, 2006 and May 30, 2006, Qwest filed revised rebuttal testimony on the cost study on July 21, 2006, and Union filed supplemental surrebuttal testimony revising the cost study yet again on August 14, 2006. It has been understood that Qwest would file supplemental surrebuttal testimony to the third revised cost study and supplemental surrebuttal testimony of Union prior

to the hearing. Because of schedule conflicts, no date for the filing of Qwest's supplemental surrebuttal testimony and for the hearing have been set by the Commission. However, a scheduling conference is set for November 8, 2006 to schedule further proceedings in this docket.

During the course of this proceeding, Qwest has submitted five sets of data requests to Union. Three of those sets, the first, fourth and fifth, contain requests for information on Union's cost study. Union has filed 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 has had several communications with counsel for Union regarding Union's responses, some orally and some in writing. In response to those communications, Union has provided some additional information to Qwest, but has failed to provide critical information regarding whether its switch and cell sites included in the cost study are traffic sensitive, 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. Qwest needs this information before it can file surrebuttal testimony in response to Union's latest revised cost study.

The Commission should compel Union to provide full and complete responses to Data Requests 4-002, 4-004, 4-005, 4-008, 4-009, 5-002 and 5-003 and to confirm in writing the oral representations of its counsel with regard to use of confidential information produced in Colorado and Data Requests 1-017, 4-001, 4-019 and 5-001. If Union cannot confirm the oral

representations of its counsel with respect to any data request identified above, the Commission should compel Union to provide a full and complete response to that data request.

III. ARGUMENT

A. The Information Sought Is Relevant And Is Necessary For Evaluation Of The Third Revised Cost Study.

Union objected to providing the information requested in Qwest Data Requests 4-002 and 4-009 on the ground that the information sought is irrelevant.

1. General Rules on Relevance

Utah R. Civ. P. 26(b) allows discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." and provides that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Utah R. Civ. P. 26(b)(1). Rule 26 is broadly construed to effectuate the purposes of discovery. It encompasses "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Funds, Inc., v. Sanders*, 437 U.S. 340, 350-51 (1978) (interpreting analogous federal rule). Indeed, "the requirement of relevancy should be construed liberally and with common sense, rather than in terms of narrow legalisms. . . . **[I]t is not too strong to say that a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action**." 8 Charles Alan Wright *et al., Federal Practice and Procedure* § 2008 (2d ed. 1994) (emphasis added).

With these broad parameters of relevance in mind, the issue is whether it is possible that the requested information could lead to the discovery of admissible evidence that would assist

the Commission to determine whether Union is entitled to asymmetric reciprocal compensation in this case.

2. Specific Relevance of Information Requested

Data Requests 4-002 and 4-009 seek Union's vendor contracts for the equipment and software included in its cost study and the voice and data capacity and utilization of the 71 GSM-only cell sites included in the cost study. Union objected to these data requests on the ground that the information sought was irrelevant.

Section 251(b)(5) of the Telecommunications Act of 1996 ("Act") imposes on all local exchange carriers ("LECs") "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." As explained by the Federal Communications Commission ("FCC"), this provision "encompass[es] telecommunications traffic that originates on the network of the LEC and terminates on the network of a competing provider in the same local services area."[2]

Terms and conditions for reciprocal compensation are just and reasonable under section 252(d)(2)(A) if they: (i) provide for the mutual transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

Pursuant to section 252(d)(2)(A), FCC rule 51.711 establishes a presumption that the reciprocal compensation rates that two carriers may charge each other are symmetric, with the

[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd. 15499 (FCC Aug. 8, 1996) ("*Local* Competition *Order*") ¶ 1028, *aff'd in part and rev'd in part on other grounds, Iowa Util. Bd. FCC,* 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part on other grounds, AT&T v. Iowa Util. Bd.,* 525 U.S. 366 (1999).

symmetric rate generally set to cover the forward-looking costs of the incumbent LEC ("ILEC") where an ILEC is involved in the call.[3] Under section 51.711(b):

> A state commission may establish asymmetrical rates for transport and termination only if the carrier other than the incumbent LEC (or the smaller of the two incumbent LECs) proves to the state commission on the basis of a cost study using the forward-looking economic cost based pricing methodology . . . that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC (or the smaller of the two LECs), exceed the costs incurred by the incumbent LEC (or the larger incumbent LEC), and, consequently, that such a higher rate is justified.

"Transport" means "the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly services the called party, or equivalent facility provided by a carrier other than an incumbent LEC."[4] Rule 51.701(d) defines "termination" as "the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises."[5]

a. Traffic Sensitivity

In a September 3, 2003 Order, the FCC confirmed its findings in the *Local Competition Order* that "once a call has been delivered to the LEC end office serving the called party, the 'additional cost' to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching."[6] Consistent with the *Local Competition Order* and the *CMRS Order*, "for the purposes of setting rates under section

[3] 47 C.F.R. § 51.711(a).

[4] 47 C.F.R. § 51.701(c).

[5] 47 C.F.R. § 51.701(d).

[6] Order, *In the Matter of Cost-Based Terminating Compensation for CMRS Providers*, 18 FCC Rcd. 18441 (Sep. 3, 2003) ("*CMRS Order*"), ¶ 6.

252(d)(2), only that portion of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an 'additional cost' to be recovered through termination charges."[7] To establish entitlement to an asymmetric reciprocal compensation rate, a wireless carrier must establish such "additional costs . . . through a cost study using a forward-looking economic cost mode."[8]

What the FCC meant by "usage" or "traffic" sensitive became even clearer after the FCC issued its Further Notice of Proposed Rulemaking in its intercarrier compensation docket.[9] It directed parties to "explain how costs decrease as minutes on the switch decrease" and "to provide objective evidence demonstrating that their switching costs have increased or decreased with MOU."[10] The FCC would only be seeking this type of detailed information in the "reciprocal compensation" section of the Further Notice of Proposed Rulemaking if it deemed this information critical to its analysis of traffic sensitivity.

The rules establishing the forward-looking costs of a CLEC address the Total Element Long-Run Incremental Cost ("TELRIC") standard. As this Commission has noted, the TELRIC rules call for the development of the cost of a hypothetical carrier based on the "lowest cost network configuration" using "the most efficient telecommunications technology currently available." The TELRIC methodology provides "a proxy cost estimate for elements of a

[7] *Local Competition Order*, ¶ 1057; *CMRS Order*, ¶ 6. *See also*, Opinion, 16 FCC Rcd 9597 (May 9, 2001) ("*Joint Letter*") ("the determination of compensable wireless network components should be based on whether the particular wireless network components are cost sensitive to increasing call traffic").

[8] *CMRS Order*, ¶ 8.

[9] Further Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685 (Feb. 10, 2005).

[10] *Id.*, ¶ 68.

forward-looking monopoly provider's theoretical least-cost, most-efficient, forward-looking network designed to provide for current demand."[11]

In discussing switching costs and fill factors, the Commission stated, "All parties agree that digital switching costs have dropped and continue to drop significantly over time . . . . [M]odern digital switches have no real internal capacity constraints at meaningful calling length and frequency levels."[12] The Commission concluded that switching is not traffic sensitive. Other jurisdictions have also found that the switch is not traffic sensitive.[13]

Under the TELRIC rules and the *CMRS Order*, Union must delineate its traffic sensitive and non-traffic sensitive costs for call termination. In the *Sprint Order*,[14] the New York Public Service Commission concluded that Sprint had "failed to bear its burden of showing the magnitude of the costs that should be reflected in an asymmetrical reciprocal compensation arrangement"[15] and upheld the presumption of symmetry. The commission explained that "the proponent of a TELRIC study is required, among other things, to demonstrate the amount of equipment needed to serve the relevant demand, recognizing that the equipment will not be 100% utilized."[16]

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[11] Report and Order, *In the Matter of the Determination of the Cost of the Unbundled Loop of Qwest Corporation*, Docket No. 01-049-85 (Utah PSC May 5, 2003), 3.

[12] *Id.*, 8-9.

[13] *See, e.g.*, *Ameritech Indiana*, Cause No. 40611-51 (Ind. URC Mar. 28, 2002); Order Setting Prices and Establishing Procedural Schedule *Investigation into Ameritech Wisconsin's Unbundled Network Elements Prices*, Docket No. P-421/CI-01-1375 (Minn. PUC Oct. 2, 2002); Order, *Investigation into the Compliance of Illinois Bell Telephone Company with the Order in Docket No. 96-0486/0569 Consolidated*, Docket No. 98-0396 (III. CC Oct. 16, 2001).

[14] Arbitration Order, *Petition of Spring Spectrum L.P. d/b/a Spring PCS, Pursuant to Section 252(b) of the 1996 Telecommunications Act, for Arbitration to Establish an Intercarrier Agreement with Verizon New York Inc.*, 2002 WL 31505732 (NY PSC Aug. 23, 2002) ("*Sprint Order*"). A copy of the *Sprint Order* is attached to this Motion as Appendix 5.

[15] *Id.*, 4.

[16] *Id.*, 5.

Sprint sought rehearing. Affirming its decision, the commission reiterated that:

> A TELRIC study must reasonably demonstrate the amount of equipment needed to serve the relevant demand . . . . We found Sprint's study flawed in that regard, for it had failed to size forward-looking investment with reference to peak-load demand . . . . In addition, the study lacked persuasive assurance that current customers would not bear an undue share of costs of future growth; it included, for example, only a limited analysis of fill factors.[17]

Fill factor considerations apply to the cell sites in Union's cost study. As noted in the *Sprint Order*, Verizon argued that in sparsely populated areas, there would be no traffic sensitive costs at all. This is because to provide service in a rural area, a carrier must make a minimum level of investment to establish a viable network. The minimum investment results in excess capacity because of the low volumes of calls in rural areas. In its *CMRS Order*, the FCC confirmed that "a cost-based approach—one that looks at whether the particular wireless network components are cost sensitive to increasing call traffic—should be used to identify compensable wireless network components."[18] A wireless carrier's cost study must include the "additional traffic sensitive costs associated with those network elements."[19]

In the *Sprint Rehearing Order*, the New York commission concluded:

> As the party with the burden of proof, [Sprint] is required to show the extent to which components of its network are traffic sensitive. That requires a qualitative analysis of how the costs of the component should be allocated between TS and NTS portions.[20]

Union takes the position that increased volumes of traffic may be handled either by the

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[17] Order on Petition for Rehearing, *Petition of Sprint Spectrum L.P. d/b/a Sprint PCS Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Intercarrier Agreement with Verizon New York, Inc.*, 2002 WL 32063948 (NY PSC Dec. 3, 2002) ("*Sprint Rehearing Order*"), 2-3. A copy of the *Sprint Rehearing Order* is attached to this Motion as Appendix 6.

[18] *CMRS Order*, ¶ 9 (quoting Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9648 (2000), ¶ 104; *aff'd Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001)).

[19] *Id.*

[20] *Sprint Rehearing Order*, 5-6.

addition of radio carriers (electronic equipment added to an existing base transceiver station ("BTS") or by "cell splitting" (adding whole new cell sites, which would mean acquiring rights-of-way, erecting a tower and building, installing a generator, BTS, Base Station Receiver, antennas, and other equipment).[21] Given this position, Qwest needs to know whether the cell sites included in the cost study, particularly those that are projected and do not currently exist, are included as projections of future cell splitting.

b. Data and Voice Services

To show that it is entitled to an asymmetric rate, Union must submit proof that demonstrates that Qwest end-user customers cause Union to incur additional costs.

Union's wireless network provides both voice and data services. Qwest believes that these data services include such features and capabilities as Internet browsing, games, ring tones, wallpaper graphics, downloading video and music clips, multimedia messaging service, and short message service (text messaging). Union's provisioning of data services involves costs caused by the services provided to its wireless subscribers. Consequently, an important distinction to examine in Union's cost study is which part of the costs in the study Union has assigned to data and which to voice. None of the additional costs associated with data services are caused by Qwest end users who place basic local exchange calls and, therefore, cannot be used to justify an asymmetric reciprocal compensation rate. Including the costs associated with Union's data services in calculation of an asymmetrical rate in this docket would amount to asking Qwest end users to subsidize the Internet browsing, games and other features and capabilities enjoyed by Union's wireless subscribers.

[21] *See* Confidential Surrebuttal Testimony of Jason P. Hendricks (Nov. 7, 2005), 14-15. *See also* Surrebuttal Testimony of Alan Hinman (Nov. 7, 2005), 6.

c. Facility Costs.

Given the TELRIC standard discussed above, the Commission recognizes that the costs actually incurred currently by a provider in acquiring facilities and software are relevant and essential information with regard to establishing costs of switching.[22] Qwest has consistently been required to produce its current vendor contracts to allow the Commission, Division of Public Utilities and CLECs to verify its current costs for facilities and software.

B. Providing The Requested Information Is Neither Overly Broad Nor Unduly Burdensome.

Union objected to providing the information requested in Qwest Data Requests 4-002, 4-004, 4-005, 4-009, 5-002 and 5-003 on the ground that the requests are unduly burdensome.

1. General Standard on Unduly Burdensome

Whether a discovery request imposes an undue burden depends on such factors as relevance, the need of the party for the information, the breadth of the information request, the particularity with which the information request is described, and the burden imposed. 23 Am. Jur. 2d, *Depositions and Discovery* § 155 (2006). Under Rule 26 of the Utah Rules of Civil Procedure, the nature of the burden imposed by a discovery request will be evaluated in light of "the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. Utah R. Civ. P. 26(b)(2)(iii). In particular, in instances where discovery in question will aid in "clarifying the issues on which the contest may prove to be necessary," discovery should be "liberally permitted." *State of Utah v. Petty*, 412 P.2d 914, 917 (Utah 1966).

[22] Final Order, *In the Matter of the Determination of the Cost of the Unbundled Loop of Qwest Corporation*, Docket No. 01-049-85 (Utah PSC May 5, 2003), 16.

2. Specific Application of Standard to Information Sought

Data Requests 4-002, 4-004, 4-005, 4-009, 5-002 and 5-003 request information regarding Union's current vendor contracts, the location and coverage area of each cell site included in Union's cost study and the voice and data capacity and utilization of the GSM-only sites in Union's cost study. Union objected to providing this information on the ground that the information was unduly burdensome to produce.

As demonstrated above, the information sought is essential to determine whether the facilities and software included in Union's cost study is traffic sensitive, whether Union has excluded costs associated with facilities or software that is not required to provide call termination for basic calls from Qwest customers and whether the costs included in the study reflect Union's current and actual costs under its contracts with vendors for the equipment and software. Union has the burden of demonstrating the traffic sensitive nature of the costs, segregating the costs for data services from voice services and of verifying that the costs which are the basis of its claim for asymmetric reciprocal compensation are current. Therefore, Union should have already compiled and analyzed this data in preparation of its cost study. If it has not done so, its cost study is deficient as a matter of law. In any event, production of data necessary to determine whether components of the network are traffic sensitive, are used for call termination or reflect the actual costs incurred by Union under its current vendor contracts are essential and cannot be avoided on a claim that the requests for the data are overly broad or unduly burdensome.

C. The Data Requests Are Not Ambiguous.

Union objected to Data Requests 4-002 and 4-008 on the ground that they are ambiguous. Data Request 4-002 simply asks for current contracts or documentation for Union's agreements with vendors from which Union purchases equipment or software that is included in its cost

study. Data Request 4-008 simply requests an itemization of the equipment or components used to provision general packet radio service, short message service and any other non-voice service provided by Union.

The fact that an information request might be somewhat vague and general is not itself justification for a refusal to answer, at least where requiring an answer would not be overly burdensome. *Pressley v. Boehlke*, 33 F.R.D. 316, 317 (W.D.N.C. 1963). The party requesting information need only provide "sufficient information to enable [the party to whom the request is directed] to identify responsive documents" and information. *Kidwiler v. Progressive Paloverde Insurance Co.*, 192 F.R.D. 193, 202 (N.D. W. Va. 2000).

As discussed above, Union must demonstrate that the costs for equipment and software included in its cost study are current and reasonable and that the equipment and components of its network included in its cost study are limited to those equipment and components necessary to terminate basic telephone calls from Qwest customers to Union's wireless customers. These questions clearly seek this relevant information, and Union should be required to provide the information sought.

D. Union Has Not Previously Provided The Information Requested And It Is Not Available To Qwest.

Union objected or responded to Data Requests 4-002, 4-004, 4-005, 4-009, 5-002 and 5-003 by either stating that it had already provided the information requested, would do so or was doing so in an attachment to its response. While Union has in a few cases since providing some of the foregoing responses provided information that addresses issues related to the information sought, it has not produced the requested information.

- Union has never produced the vendor contracts or documentation of its agreements with vendors sought in Data Request 4-002.

- Union has never produced a map or other documentation of the location of the 325 cell sites included in its cost study as requested in Data Requests 4-004 and 5-002. A lengthy attachment to the fifth set of data requests, not identified as being responsive to Data Request 5-002, includes approximate locations of 612 sites without specifying which of those sites are in Union's cost study. Many of the cell sites in the cost study have names that do not correspond to names of any site on the lengthy attachment.
- Union has never identified the coverage area of each of the 325 cell sites included in its cost study as requested in Data Requests 4-005 and 5-003. The GSM Home Coverage Map provided in response to Data Request 5-003 does not identify the location of any cell site and provides only broad coverage areas without tying them to any cell site. Furthermore, it does not provide any information regarding the proposed coverage area of any cell site included in the study that does not currently exist. Without this information, Qwest cannot determine why the projected cell sites are needed. Union's counsel stated that Union probably has propagation studies for each of its cell sites, but that production of the studies would be too burdensome.
- Qwest is not able to extrapolate the information requested in Data Request 4-009 from the continuing property records provided by Union.

Union bears the burden of demonstrating to the Commission under proper TELRIC standards that its additional costs of terminating calls exceed those incurred by Qwest. It must respond to legitimate requests for relevant information that would allow Qwest and the Commission to evaluate its cost study and cannot simply provide alternative data or suggest that Qwest can determine the information it needs from data previously provided without

demonstrating how that may be done. Accordingly, the Commission should order Union to respond fully and completely to these data requests.

E. Union Should Be Required To Confirm The Oral Representations Of Its Counsel In Writing, Or, If It Is Unable To Do So, It Should Be Compelled To Provide Responses To The Data Requests

In response to certain data requests, Union stated that Qwest already had data. When Qwest responded that it did not have the data, Union continued to maintain the position that Qwest already had the data. Finally, in a telephone conversation between counsel, Union said that the data had been provided in the Colorado docket. Counsel for Qwest reminded counsel for Union that the data had been produced as confidential data in Colorado subject to the terms of a protective order in that docket. Counsel for Union stated that Qwest could use that data in this docket so long as it treated it as confidential pursuant to the terms of the protective order in this docket.

Qwest Data Request 1-017 asked how much of the cost of Union's GSM switch is required for certain features or services that are not required to terminate basic telephone calls from Qwest customers to Union wireless customers. After objecting, Union responded that it had previously supplied information to Qwest and also referred Qwest to the testimony of Jason Hendricks. Because Union had not previously provided information to Qwest that stated how much of the cost of the switch was required for the features or services and because Mr. Hendricks' testimony did not provide the information, Qwest followed up in Data Request 4-001, stating that it was not aware of any information that had previously been provided that answered the question and asked for the information. Again, Union objected, and then simply repeated its former answer. So in Qwest Data Request 5-001, Qwest rehearsed this history and asked for the data again. Union responded this time with a statement that it had previously supplied the information, but was attaching it in electronic format. There was no attachment to

the responses, electronic or otherwise, that provided the information requested.

When the foregoing was reviewed with counsel for Union, he stated that Union had provided the information to the extent it had it and that Union does not segregate its accounts in the manner requested by Qwest. Counsel for Qwest responded that the response to Data Request 5-001 and Union's counsel's statement seemed inconsistent, and asked for clarification whether it was Union's position that it did not have the data or that it had it in an electronic attachment that had not been provided. In response, counsel for Union responded that Union had provided all of the data it had. Thereafter, counsel for Union informed counsel for Qwest orally that Union did not have any information responsive to the request that it had not already provided.

Qwest Data Request 4-019 asked Union to provide the percent of its typical cell site's daily minutes of use that take place in the busiest hour of the day. Union objected on the ground that the request was not relevant and then stated that "[t]he information is not tracked thus." Counsel for Qwest stated that the response was unsatisfactory and asked whether busy hour usage was tracked in any manner. Counsel for Union responded that while 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." He also stated that software was being ordered that would allow such tracking in the future. Thereafter, in further discussion, counsel for Union informed counsel for Qwest orally that Union did not have busy hour minutes of use.

At the conclusion of the telephone conference at which the foregoing statements were made by counsel for Union, counsel for Union stated that he would follow-up on matters discussed and that he would also confirm the discussion in writing. No such follow-up or written confirmation has yet been received by Qwest.

Based upon the foregoing, it is apparent that Qwest needs written confirmation of the

statements of counsel so that there is no confusion as final supplemental surrebuttal testimony is prepared and as Qwest prepares for the hearing in this matter. The Commission should order Union to provide such confirmation. If Union is unable to provide written confirmation with respect to any of the Data Requests discussed above, the Commission should require Union to respond in a full and complete manner to the Data Request.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant Qwest's Motion and compel Union to provide full and complete responses to Qwest Data Requests 4-002, 4-004, 4-005, 4-008, 4-009, 5-002 and 5-003. In addition, the Commission should order Union to confirm in writing that (1) Qwest may utilize confidential information provided by Union in discovery in Colorado Public Utilities Commission Docket No. 04B-491T as confidential information in this docket; (2) Union does not have any information other than the information actually provided in its responses to Qwest in Data Requests 1-017, 4-001, 5-001 that is responsive to those requests; and (3) Union does not track usage of its switch or cell sites by busy or peak hour and, therefore, cannot respond to Qwest Data Request 4-019. In the alternative, if Union cannot confirm the foregoing in writing with respect to any of Data Requests 1-017, 4-001, 5-001 or 4-019, the Commission should order Union to provide a full and complete response to the data request.

RESPECTFULLY SUBMITTED: November 1, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **QWEST'S MOTION TO COMPEL AND FOR CONFIRMATION OF ORAL REPRESENTATIONS REGARDING DISCOVERY MATTERS** was served upon the following by electronic mail on November 1, 2006:

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