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BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF UTAH

IN THE MATTER OF THE COMPLAINT OF )  
UNION TELEPHONE COMPANY, a Wyoming )  
Corporation, Against QWEST Corporation, ) Docket No. 05-054-01  
f/k/a U S WEST COMMUNICATIONS, INC., )  
a Colorado Corporation )

**REPLY MEMORANDUM IN SUPPORT OF  
QWEST CORPORATION'S PARTIAL MOTION TO DISMISS**

Qwest Corporation ("Qwest"), by its attorneys, submits the following reply memorandum in support of its partial motion to dismiss the second amended complaint filed by Union Telephone Company ("Union").

**Background**

In this proceeding, Union seeks to recover access charges for the termination of both wireline and wireless telephone calls. Qwest has moved to dismiss the second amended complaint to the extent that it seeks to recover access charges for the termination of wireless calls. Dismissal is appropriate for three reasons. First, under the Telecommunications Act of 1996 (the "1996 Act"), as interpreted by the FCC, intrastate

access charges may not be assessed for the termination of intraMTA wireless traffic. Second, the FCC's *T-Mobile*<sup>1</sup> decision has not changed the law's prohibition against the collection of access charges for the termination of intraMTA wireless traffic. Finally, the Wyoming Federal Court has already rejected Union's claims based on its Access Service Tariff for both intraMTA and interMTA wireless traffic. Therefore, the Public Service Commission (the "Commission") should at a minimum abstain from considering these claims if it does not dismiss them.

### **Argument**

In its response to Qwest's motion, Union makes four arguments. First, Union asserts that it is entitled to recover reciprocal compensation from Qwest. Second, Union claims that it may be entitled to recover under an unjust enrichment theory. Third, Union asserts that the *T-Mobile* decision somehow supports its position. Finally, Union contends that the Wyoming Federal Court's decision<sup>2</sup> dismissed only Union's Wyoming claims. Union is simply wrong on each of these points.

Union's argument that it is entitled to reciprocal compensation from Qwest fails because Union did not follow the procedures prescribed by Sections 251 and 252 of the 1996 Act. Union does not allege in its Second Amended Complaint that it entered into an interconnection agreement setting forth the terms of reciprocal compensation. The 1996 Act establishes a system of negotiations and arbitrations to establish the terms of reciprocal compensation. As has been held by several courts, the "comprehensive" process set out in Sections 251 and 252 of the Act are the "exclusive" means for

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<sup>1</sup> *In the Matter of Developing a Unified Intercarrier Compensation Regime and T-Mobile et al Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92 (February 24, 2005) ("*T-Mobile Decision*").

<sup>2</sup> Copies of the Court's May 11, 2004 and September 3, 2004 orders are attached as exhibits to Qwest's partial motion to dismiss.

establishing the arrangements contemplated by the Act.<sup>3</sup> Union may not circumvent this process of negotiating and, if necessary, arbitrating an interconnection agreement by unilaterally filing a tariff.<sup>4</sup>

Union's argument that it is entitled to recover under an unjust enrichment theory is defeated by the very authority that Union relies upon. In *Iowa Network Services, Inc. v. Qwest Corporation*, the Eighth Circuit stated, as quoted by Union:

[T]o the extent that the basis for INS's claim of unjust enrichment is covered by an express contract, *whether in the form of a tariff or a reciprocal compensation arrangement*, INS cannot state a claim for unjust enrichment under Iowa law.<sup>5</sup>

Here, since Union bases its claim on its Access Services Tariff, Union is similarly precluded from asserting a claim for unjust enrichment. (Second Amended Complaint, ¶15). Moreover, the Commission is not a Court of Equity with jurisdiction to decide and administer equitable claims such as unjust enrichment. The Wyoming Federal Court has already rejected Union's claim for unjust enrichment.<sup>6</sup> This matter was referred to the Commission by the Wyoming Federal Court to decide one issue – whether Union is entitled under its Access Service Tariff to recover access charges from Qwest for wireline traffic that merely transits Qwest's network.

Union's third argument that *T-Mobile* permits it to recover access charges for termination of wireless traffic is also wrong. *T-Mobile* held that tariffs approved by a state commission to set forth the terms of cost-based reciprocal compensation applicable only in the absence of an interconnection agreement were not *per se* unlawful. *T-Mobile* did not hold that an access service tariff could be used in lieu of an interconnection

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<sup>3</sup> *Verizon North, Inc. v. Strand*, 309 F.3d 935, 939 (6<sup>th</sup> Cir. 2002).

<sup>4</sup> *Verizon North Inc. v. Strand*, 367 F.3d 577, 584-85 (7<sup>th</sup> Cir. 2004).

<sup>5</sup> Union Response to Partial Motion to Dismiss Second Amended Complaint, p. 4.

<sup>6</sup> September 3, 2004 Order, p. 5.

agreement to set forth the terms of reciprocal compensation. Indeed, *T-Mobile* distinguished the circumstances it was addressing from the situation where a carrier such as Union is attempting to circumvent the processes contained in Sections 251 and 252 of the 1996 Act.<sup>7</sup>

Finally, Union is simply wrong when it asserts that the Wyoming Federal Court did not decide Union's wireless claims for the state of Utah. In its May 11, 2004 order, the Wyoming Federal Court expressly stated "the Court has determined that Union's tariffs are inapplicable to intraMTA wireless traffic that terminate on Union's network, regardless of whether the traffic originates on or transits Qwest's network and irrespective of whether that traffic terminates in Wyoming, Utah or Colorado."<sup>8</sup> In its September 3, 2004 order, the Wyoming Federal Court ruled that "Union's claims regarding the applicability of its Utah and Colorado tariffs to interMTA traffic are dismissed with prejudice."<sup>9</sup>

### **Conclusion**

For the foregoing reasons, the second amended complaint filed by Union Telephone Company should be dismissed to the extent that it seeks compensation from

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<sup>7</sup> T-Mobile, ¶13, fn. 54.

<sup>8</sup> May 11, 2004 Order, p. 34.

<sup>9</sup> September 3, 2004 order, p. 6.

Qwest for the termination of intraMTA and interMTA wireless traffic.

Dated this 19<sup>th</sup> day of September, 2005

Respectfully submitted,

/s/ Robert Brown

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## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF QWEST CORPORATION'S PARTIAL MOTION TO DISMISS SECOND AMENDED COMPLAINT** to be served by electronic mail and/or by U.S. Mail, postage prepaid, to the following on this 19th day of September, 2005:

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