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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Verizon's Objection, Protest and Request for Investigation in Response to Qwest's Recent Filing of its Revised Access Service Tariff Sheets 13, 13.1, and 16	Docket No. 08-2430-01 **QWEST'S REPLY TO VERIZON'S RESPONSE TO QWEST'S MOTION TO COMPEL AND REQUEST FOR EXPEDITED CONSIDERATION**

Qwest Corporation ("Qwest"), pursuant to Utah Admin. Code R746-100-8.B and Utah R. Civ. P. 37, hereby replies to the response of MCI Communications Services, Inc. d/b/a Verizon Business Services ("Verizon") to Qwest's motion to compel full and complete responses to the one data request in Qwest's Third Set of Data Requests ("Data Request").

INTRODUCTION

In its response to Qwest's motion to compel, Verizon incorrectly represents that Qwest and Verizon have necessarily agreed that international traffic is important and material to this docket. However, the question of importance and materiality of "international traffic" are the very issues Qwest is attempting to determine by review of the data that it has requested, based on *Verizon's testimony* about the impact of its international traffic to Qwest's 5% PIU floor.

Verizon also takes umbrage about the fact that Qwest has told this Commission about how Verizon has engaged in a pattern of frivolous objections, games-playing, delay and obstruction throughout this proceeding, as well as several others in other states (Oregon and Colorado). Thus, it resorts to colorful adjectives and adverbs in an attempt to obfuscate the issues here. Verizon protests too much, however. No matter how loud Verizon's bark, the

Commission need look no further than to all of the its responses to Qwest's data requests to get a flavor of Verizon's lack of meaningful cooperation throughout the discovery process here. Qwest stands by its position, and simply reminds the Commission that in addition to late responses in several states, Verizon's responses and objections, and lack of substantive response or data, are set forth in black and white in its written responses which are before the Commission. (See e.g., Attachments A and B to Qwest's motion.)

Further, Verizon makes much ado that Qwest has submitted "numerous data requests" on "three separate occasions," and that its motion to compel deals with only one data request (Response, p. 3), and that Qwest has not moved to compel any other response. (Response p. 11, fn. 14.) Verizon appears to make this point as if this somehow necessarily meant that Verizon has been forthcoming with its discovery obligations. However, what this really shows is *Qwest's restraint*, and that Qwest tried very hard to avoid bothering this Commission with a motion to compel. In fact, this is why, as a result of Verizon's initial stonewalling, Qwest tried to obtain discovery in subsequent requests (second and third sets of data requests), which is clear on the record in those written objections, in order to try to obtain the data it needs here.[1]

Verizon also seems to pat itself on the back because it has provided some data "informally" or "voluntarily." (Response, p. 3, fn. 3, and p. 11.)[2] However, what Verizon does

[1] The truth of the matter is that Verizon has refused to produce relevant data in response to *numerous data requests* for which Qwest considered filing a motion to compel. However, rather than file a motion to compel earlier, Qwest tried to avoid a motion by seeking to obtain the data that it needs in different ways (through its subsequent discovery), but Verizon continued to refuse cooperation, thus making the motion to compel unavoidable. Indeed, Qwest considered filing a motion to compel on *various data requests*, and seeking sanctions for Verizon's bad faith discovery tactics. Ultimately, however, because of the urgency here (including Qwest's seeking expedited consideration, and an upcoming rebuttal testimony deadline and hearing date), Qwest decided to narrow the scope of its motion to compel to *only one data request*. Nevertheless, to be clear, Qwest's doing so is not a recognition that this request was the only one that Qwest believes Verizon has failed to provide; it is simply that Qwest did not want to burden the Commission with multiple data requests, especially since it is forced to seek expedited consideration.

[2] If Verizon is agreeable, Qwest would be pleased to provide the Commission with the background emails and responses on this "voluntary" provision of data, which would show that Verizon responded to clear requests for data with only partial information (and thus one request from Qwest became multiple data submissions from Verizon), or provided only limited data on different dates than Qwest had requested.

not explain to this Commission is that not only was the data not specific to Qwest's inquiries, and thus was not very meaningful, but Verizon has also attempted to shield the use of any such "informal data" as being protected by Rule 408 of the Evidence Code, on the guise that Verizon has provided it only in "settlement discussions." As such, Verizon has tried to hand-cuff Qwest and has argued that Qwest is prohibited from using such data in this case. However, when Qwest has then attempted to obtain meaningful data through *formal discovery*, Verizon has, as the Commission can plainly see through the responses and objections that are attached with Qwest's motion, frustrated Qwest's discovery by making frivolous objections and not producing meaningful data.[3] This "heads I win, tails you lose" approach to discovery simply cannot be said to be in good faith. Thus, with Verizon's most recent objection being the proverbial last straw that broke the camel's back, Qwest was forced to file this motion to compel.[4]

Verizon also touts that it "is willing to produce information that is more properly tailored to the issues that Qwest claims are material to this proceeding." (Response, p. 2; see also pp. 7-8.) With all due respect, however, this statement is disingenuous, especially since Verizon has not cooperated with Qwest. Moreover, Verizon appears to make this "offer" only *now*, after its back is to the wall with the Commission's mandate that Verizon respond expeditiously to Qwest's motion. If Verizon were truly "willing to produce information that is more properly tailored to the issues," it would have worked with Qwest and made such offer *long ago*, before

[3] The Commission can see for itself the type of objections that Verizon has made. (See e.g., Attachments A and B to Qwest's motion.) Perhaps the most egregious objections are those claiming certain terms of art that any telecommunications carrier would understand (let alone a large, sophisticated IXC like Verizon) to be "vague and ambiguous," or "not defined," or "confusing." (See e.g., Response, p. 11, fn. 14.) Qwest notes, however, that Verizon *never once* sought clarification from Qwest if it truly did "not understand" any term.

[4] Although admittedly not legally germane to the issues here, Qwest notes this is the *first* motion to compel that undersigned counsel has filed in more than six years (and only the third one in ten years) as a regulatory litigator for Qwest before numerous state utility commissions. Qwest raises this fact only to point out that it does not take the filing of a motion to compel lightly. However, at some point, after Verizon's continued lack of good faith in meeting its discovery obligations, Qwest was left with absolutely no choice but to file this motion. And although Verizon tries to cast itself as a victim here, ultimately, Verizon has only itself, and its lack of cooperation, to blame.

forcing Qwest, this Commission, and even Verizon, to expend the time, effort and resources in dealing with this motion to compel. The Commission can reasonably conclude that this is merely an empty gesture made at the eleventh hour while facing a motion to compel.

Finally, rather than address relevance or undue burden, or the actual words of its written objection to the Qwest data request at issue, Verizon proceeds to change the subject. Thus, on the relevance issue, it simply repeats its theory of its case as a reason why it does not believe Qwest's data request has merit. Nowhere does it even discuss, let alone show, that the data that Qwest seeks here is not reasonably calculated to lead to the discovery of admissible evidence. And regarding the overbreadth and undue burden issue, all Verizon does is to repeatedly point to a large number (330,000) of calls. But, Verizon does not show it would be unduly burdensome for it to produce the data, or that it would require a special study, or that it would take "X number of employee hours" to produce the data (or anything else resembling undue burden), particularly in light of the fact that such volumes are commonly encountered in dealing with this matter.

ARGUMENT

I. VERIZON FAILS TO SHOW THAT THE DATA SOUGHT IS NOT RELEVANT

Verizon objected to providing the data requested in the Data Request on grounds that the information sought is purportedly irrelevant. Its written objection did not state why it believes the data request is not relevant, and its response to the motion to compel does little better.

As the Commission can see, although Verizon spends more than seven pages on its relevance argument (Response, pp. 3-10), it does not ever squarely address the issue of relevance. Instead, it goes on to argue what it believes are the calls that are at issue in this proceeding (*id*., pp. 3-5), Qwest's data request and what Qwest said in its motion to compel (*id*., pp. 5-6), and why it believes that Qwest's data request is overly broad and not necessary to the issues (*id*., pp. 6-10). However, if the Commission examines this discussion, it can see that this

discussion is simply premised on Verizon's theory of the case, and thus why Verizon does not believe Qwest needs the data, as well as the large number of calls potentially at issue in a complete response.[5] Nevertheless, whatever Verizon thinks about Qwest's case is irrelevant-there is no question that the data regarding all of Verizon's long distance calls to Qwest on one day in Utah are at the heart of this case because it is all traffic that is subject to Qwest's access tariff, and thus whether Qwest's proposed 5% Percent Interstate Usage ("PIU") floor of unidentified traffic is reasonable. If anything, Verizon's long dissertation about what it sees as the shortcomings of Qwest's case simply proves the relevance of the data that Qwest seeks.

What Verizon's relevance objection really boils down to, however, is that (1) it does not believe Qwest's case and theories have merit, and (2) Qwest's data request is overly broad because Qwest seeks data for a large number (330,000) of telephone calls. The former is not a proper basis for a relevance objection, and thus Verizon does not meet its very heavy burden to show that this data is not "reasonably calculated to lead to the discovery of admissible evidence."[6] The latter, of course, is not a relevance objection at all, but goes to the overbroad and undue burden objection, which Qwest discusses next.

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[5] For example, Verizon argues that Qwest's position that what it (Qwest) is doing is similar to what other ILECs (including Verizon's own ILEC affiliate) are doing is a "myth." (Response, p. 2.) However, whether Verizon believes that Qwest's tariff changes are not "consistent" with the practices of these other carriers is beside the point. Qwest is very confident that the evidence will show its actions here are *very similar* to those of Verizon's ILEC affiliate and AT&T. Nevertheless, Verizon's advocacy about whether what Qwest is doing is (or is not) similar enough to what Verizon ILEC is doing is completely irrelevant to whether Verizon can meet its heavy burden to show that the data that Qwest seeks here is not relevant. Verizon clearly fails to meet that burden.

[6] Qwest also notes that, like a radio talk show host's attempts to take a politician's words out of context in order to make a political point, Verizon mischaracterizes what Qwest said about traffic that is not "at issue" here. For example, Verizon takes Qwest's statement about international traffic from Canada, Mexico and the Caribbean not being "at issue" out of context. (Response, pp. 6-7.) The Commission can clearly see that what Qwest is saying is that *of* the "international" traffic that Verizon sends to Qwest, this traffic (from Canada, Mexico and the Caribbean) *does* include the 10-digit North American Numbering Plan ("NANP") protocol information, and thus, it is not part of the "unidentified" international traffic that is what Verizon claims Qwest cannot identify, and thus that Verizon says will cause it financial harm as a result of Qwest's tariff changes. However, as Qwest noted, and to use Verizon's phrase, even these "identifiable" international calls are part of the total "bucket" of long distance calls from Verizon that form the *denominato*r of calls at issue here. Thus, Qwest has the right to seek this data so it can determine the numerator (i.e., the "unidentified"/non-NANP/non-10-digit "international" calls that Verizon claims are such a large part of its calls and that would cause it to exceed Qwest's Percent Interstate Usage ("PIU") floor).

In short, stripped of all of Verizon's arguments about why "Qwest does not need this discovery," there is no showing that such data cannot bear on (or reasonably could lead to other matters 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)), or that there is no *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)). In other words, Verizon has grossly failed to meet its substantial burden of its relevance objection.

II. VERIZON FAILS TO SHOW THAT THE REQUESTED DATA IS OVERLY BROAD OR WOULD BE UNDULY BURDENSOME TO PRODUCE

The Commission will note that although Verizon makes much ado about how many calls it allegedly delivers to Qwest, and repeatedly uses a large number (330,000), and thus claims that Qwest's data request therefore must be "overly broad," it never shows with *any evidence* that there is any undue burden for it to produce the data. Instead, it just repeatedly harps on the fact that there are a large number of calls.[7] But that in and of itself does not matter. Indeed, given the number of calls it sends to Qwest, and that it objects to Qwest's 5% PIU floor or threshold (and presumably wants it to be more like the 7% PIU floor that its sister ILEC operations use in 18 states), and makes so much about the non-NANP/non-10-digit international calls, it stands to reason that the data to be discovered is going to involve a large set of calls. Given that even a 2% difference in the PIU floor in Qwest's tariff would amount, based on Verizon's number, to more than 6,000 calls a day, and almost *2.5 million calls a year*, for which Verizon would ostensibly get a "free ride" (getting to pay at its PIU for those calls instead of the intrastate rate),

[7] It is ironic that Verizon claims it is so "willing to provide" meaningful data to Qwest, and that all that Qwest needs is the number of total calls (330,000), but no call detail, and yet it never once provided any meaningful data (not even the total number of calls that Verizon now repeats over and over again). And Verizon's own theory about the 330,000 total calls is in question given that it likewise argues that only information related to "per-minute usage" (and not the number of calls) is relevant. (Response, p. 8, fn. 13.) Moreover, Qwest asked for minutes of use data, but once again, Verizon objected and failed to provide it. Finally, the call detail records that Qwest is seeking would necessarily already *have minutes of use data* (which is why they are called "call detail records," or CDRs).

it is no wonder that the data at issue in discovery will involve some large numbers. Further, how Verizon believes anyone can consider the reasonableness of its proposed adjustment process without considering such volumes of data – let alone how to develop and implement such a process – is a mystery.

Verizon's pretense that Qwest's reasonable request for only one day's traffic, in this instance approximately 330,000 records, is overly broad or unduly burdensome is false and is completely belied by telecommunications industry custom and practice. Verizon is well aware that carriers request much greater volumes of records on a regular basis when trying to validate self-reported PIUs. In fact, Mr. Merrick's own testimony (at pp. 13-14) mentions Qwest's access tariff and its provisions that allow Qwest to audit and an IXC's reported PIU factors. The language that Mr. Merrick acknowledges is in Qwest's tariff has standard language which allows Qwest to request all CDRs (call detail records) for a *three-month period* for validation purposes. Specifically, section 1.2.10.C.1.d. of Qwest's Utah Access Service Tariff provides:

> **2.3.10 JURISDICTIONAL REPORT REQUIREMENTS**
>
> C.1.d. The Company may request the actual call detail records or a statistically valid sample of such records, on a prospective basis, not to exceed a consecutive *three-month period*. The *actual call detail records* will be used to statistically substantiate the interstate percentage provided to the Company and the process by which it is developed. Such call detail records shall consist of call information, including call terminating address (i.e., called number), call duration, the trunk group number(s), or access line number(s) over which the call is routed and the point at which the call enters the customer's network. The Company will not request such data more than once a year. (Emphasis added.)

Thus, the issue is really that Verizon simply expects Qwest to trust it, but Qwest's own data and Verizon's lack of cooperation since it intervened in these proceedings simply do not lead Qwest to that level of trust.[8]

[8] To paraphrase former President Ronald Reagan's frequent quote ("trust, but verify"), Qwest simply seeks to verify Verizon's claims and data.

Perhaps more importantly, nowhere does Verizon argue that it cannot provide the data. It certainly does not argue (as it implied in its written objection) that because the data is not maintained in an Excel format in the ordinary course of business, it is somehow difficult or unduly burdensome to produce, or would require some unduly burdensome special study.[9] Verizon, for example, does not indicate how many minutes or hours of its personnel time would be needed to provide the data. In short, Verizon apparently believes that if it mentions a large number (330,000) often enough, this somehow necessarily means that the data that Qwest seeks is "overbroad" or unduly burdensome. Verizon has clearly failed its burden here. Moreover, Qwest notes that Verizon has never proposed any alternative format for the data; it has simply refused to provide it. If Verizon is willing, however, Qwest will accept the data in EMI format.

Finally, Qwest notes that one of the arguments that Verizon seems make is that Qwest does not need the data requested because (1) Qwest already has some data of its own,[10] and (2) it (Verizon) has "informally" provided other data.[11] But as Qwest has made clear, Qwest needs to

[9] Although Verizon discusses its "Excel" objection in a footnote in its response (Response, p. 7, fn. 12), it appears to have completely abandoned that part of its objection. However, as Qwest noted, although Verizon claims that such data "is not maintained" in Excel, it never claims, much less prove, that it would be unduly burdensome to put the data in an Excel spreadsheet. Nor could it credibly make such a claim because, as a large, sophisticated, international company like Verizon, with more than 100,000 employees, it most certainly has knowledgeable personnel to convert or put whatever data it has onto an Excel spreadsheet. Verizon essentially admits as much, without explicitly saying so, in its footnote. Indeed, as Qwest mentioned, Qwest knows that Verizon is able to provide such data in the Excel format because it has previously done so. Clearly, its written objection was frivolous.

[10] As Qwest noted, its analysis found that the non-NANP, 10-digit international traffic that it received from Verizon was *less than 1%*. This percentage seriously casts doubt on Verizon's argument that such traffic is a significant portion of its long distance traffic that it terminates to Qwest. In fact, based on Qwest's preliminary results, Qwest is of the opinion that terminating traffic with an *originating 8XX-calling party numbers* (and not non-NANP/non-10-digit international traffic) could be a significant amount of Verizon's indeterminate traffic that would thus be subject to the PIU floor in Qwest's tariff.

[11] As stated, this other data is largely useless because apart from the lack of meaningful data that Verizon has provided, Verizon has taken the position that Qwest cannot use that data as evidence in this proceeding because it is purportedly subject to Rule 408 of the Evidence Code.

receive Verizon's own data to validate it and thus determine whether the data results are similar, and/or why the data results differ.[12]

CONCLUSION

For the foregoing reasons, Qwest respectfully submits that the Commission should grant Qwest's Motion and compel Verizon to provide full and complete responses to the Data Request, and that it do so on an **expedited basis** as requested above. Qwest should have the ability to critically examine representative data that Verizon concludes establishes that international traffic is important, material and is not appropriately accounted for within Qwest's proposed tariff's 5% PIU floor. As Qwest mentioned in its motion to compel, its rebuttal testimony is due on June 16, 2009, and thus Qwest respectfully requests that the Commission rule on this motion to compel on an expedited basis, and that Verizon be ordered to provide the data by Friday, **June 12, 2009**.

DATED: June 8, 2009

Respectfully submitted,
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[12] Indeed, Mr. Merrick's testimony also raises questions as to whether the amount of international traffic that Verizon terminates to Qwest exceeds the 5% allowance already contained in the tariff. For example, Confidential Exhibit PHM-2 contains various categories of traffic that Verizon terminates to Qwest and believes to be unidentified. The international percentage is the largest category given. In Mr. Merrick's testimony (at page 21), he states that the "…the amount of non-NANP originated international traffic that Qwest considers 'unidentified' may be higher then the 5 percent floor…" Verizon now seems to be saying international traffic may not even be 5%. Thus, Qwest has no way of knowing which percentage it should believe (the percentage in its confidential exhibit or the "may be higher than the 5%" percentage in Mr. Merrick's testimony). Only by seeing the totality of the traffic can Qwest confirm the conflicting data that Verizon is providing.