

UTAH PUBLIC  
SERVICE COMMISSION

December 1, 2010

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Julie P. Orchard  
Secretary/Commission Administrator  
Utah Public Service Commission  
160 East 300 South  
Salt Lake City, UT 84114

*Via Federal Express Overnight Delivery*  
RECEIVED  
Article No.: 794172163079

Docket No. 10-049-10

Re: **Notice of Initiation of Arbitration Proceeding by TCG Utah Against Qwest Corporation**

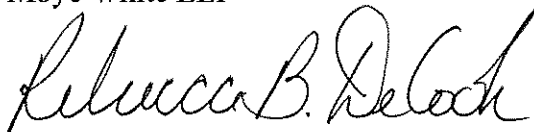
Dear Ms. Orchard:

In accordance with Section 5.18.3 of the TCG Utah ("TCG") – Qwest Corporation ("Qwest") interconnection agreement ("ICA"), TCG provides the Commission with notice of TCG's November 30, 2010 initiation of an arbitration proceeding before the American Arbitration Association ("AAA") against Qwest Corporation. Section 5.18.3 requires that the party that sends a Resolution Request under the ICA must notify the Secretary of the Commission within forty-eight (48) hours of its decision to arbitrate.

In addition, for your convenience, TCG encloses a copy of the Demand for Arbitration and Statement of Claim for Damages filed with the AAA, without exhibits. Should you require any further information, please do not hesitate to contact my office directly.

Sincerely,

Moye White LLP



Rebecca B. DeCook

Enclosure

cc: Client

**IN THE ARBITRATION BEFORE THE  
AMERICAN ARBITRATION ASSOCIATION**

Arbitration No. \_\_\_\_\_

TCG PHOENIX, TCG COLORADO, TCG OREGON, TCG UTAH and TCG SEATTLE, all  
New York general partnerships,

Claimants,

v.

QWEST CORPORATION, a Colorado corporation,

Respondent.

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**DEMAND FOR ARBITRATION AND  
STATEMENT OF CLAIM FOR DAMAGES**

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Claimants, TCG Phoenix, TCG Colorado, TCG Oregon, TCG Utah and TCG Seattle, all New York general partnerships (collectively "TCG" or the "TCG Entities"), through their attorneys, Moye White LLP, state as follows for their Demand for Arbitration and Statement of Claim for Damages ("Demand") against Respondent, Qwest Corporation ("Qwest").

**INTRODUCTION**

TCG and Qwest are parties to a series of telecommunications network interconnection agreements ("ICAs") governed by federal telecommunications and state contract law. Through these ICAs, *inter alia*, Qwest is obligated to provision certain facilities linking TCG's and Qwest's networks, called Direct Trunk Transport or "DTTs," at specified rates on specified terms and conditions. The ICAs expressly provide that the terms of the ICAs supersede any terms in Qwest's tariffs and product offerings. Yet, for several years, Qwest has charged TCG for DTTs at the higher tariffed rates, and has failed and refused to charge TCG the appropriate ICA rates for DTTs. Making matters worse, Qwest has started to refuse to provision the DTT's connecting the parties' networks at all unless TCG accedes to Qwest's unreasonable demand that TCG pay the higher tariffed rates and unless TCG waives their claim for a refund. Accordingly, TCG has no recourse but to file this arbitration, not only to obtain a refund of the charges that Qwest has improperly billed and retained, but also to compel Qwest to provision DTTs in accordance with the terms and conditions of the ICAs.

**PARTIES, JURISDICTION, AND VENUE**

1. The TCG Entities are each a New York general partnership with their principal place of business at One AT&T Way, Bedminster, NJ 07921. The TCG Entities operate as

competitive local exchange carriers ("CLEC") in Arizona, Colorado, Oregon, Utah and Washington, respectively.

2. Qwest Corporation is a Colorado corporation with its principal place of business at 1801 California Street, Denver, Colorado 80202. Qwest operates as an incumbent local exchange carrier ("ILEC") in Arizona, Colorado, Oregon, Utah and Washington.

3. TCG and Qwest are parties to ICAs that were approved by the public utilities commissions in Arizona, Colorado, Oregon, Utah and Washington.<sup>1</sup>

4. The American Arbitration Association has jurisdiction over this matter pursuant to arbitration provisions set forth in each of the ICAs.<sup>2</sup> The arbitration provisions in each ICA are virtually identical and provide, *inter alia*:

If the vice-presidential level representatives or the designated representative with authority to make commitments have not reached a resolution of the Dispute within fifteen (15) Days after the Resolution Request (or such longer period as agreed to in writing by the Parties), or if either Party fails to designate such vice-presidential level representative or their representative with authority to make commitments within seven (7) Days after the date of the Resolution Request, then either Party may request that the Dispute be settled by arbitration. Notwithstanding the foregoing, a Party may request that the Dispute be settled by arbitration two (2) Days after the Resolution Request pursuant to the terms of Section 5.18.3.1. In any case, the arbitration proceeding shall be conducted by a single arbitrator, knowledgeable about the Telecommunications industry unless the Dispute involves amounts exceeding five million (\$5,000,000) in which case the proceeding shall be conducted by a panel of three (3) arbitrators knowledgeable about the Telecommunications industry. The arbitration proceedings shall be conducted under the then-current rules for commercial disputes of the American Arbitration Association (AAA) or J.A.M.S./Endispute, at the election of the Party that initiates dispute resolution under this Section 5.18.

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<sup>1</sup> *In the Matter of the Petition of AT&T Communications of the Mountain States, Inc. and TCG Phoenix, for Arbitration with Qwest Corporation, Inc., Pursuant to 47 U.S.C. § 252(b)*, ACC Docket Nos. T-02428A-03-0553 and T-01051B-03-0553; *In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with AT&T Communications of the Mountain States, Inc. and TCG-Colorado Pursuant to 47 U.S.C. § 252(b)*, COPUC Docket No. 03B-287T; *In the Matter of Qwest Corporation's Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with AT&T Communications of the Pacific Northwest, Inc. and TCG Oregon*, ORPUC Docket Nos. ARB 527A and ARB 527B; *In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with AT&T Communications of the Mountain States, Inc. and TCG Utah*, UTPUC Docket No. 04-049-09; *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corporation Pursuant to U.S.C. Section 252(b)*, WUTC Docket No. UT-033035.

<sup>2</sup> For ease of reference, all relevant portions of the ICAs for each state, including Section 5.18, are attached hereto as Exhibits A through E.

Such rules and procedures shall apply notwithstanding any part of such rules that may limit their availability for resolution of a Dispute. The Federal Arbitration Act, 9 U.S.C. Sections 1-16, not State law, shall govern the arbitrability of the Dispute. The arbitrator shall not have authority to award punitive damages. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. Each Party shall bear its own costs and attorneys' fees, and shall share equally in the fees and expenses of the arbitrator. The arbitration proceedings shall occur in the Denver metropolitan area or in another mutually agreeable location. It is acknowledged that the Parties, by mutual, written agreement, may change any of these arbitration practices for a particular, some, or all Dispute(s). The Party which sends the Resolution Request must notify the Secretary of the Commission of the arbitration proceeding within forty eight (48) hours of the determination to arbitrate.

ICAs, Section 5.18.3.

5. The arbitration provisions of the ICAs provide that such arbitration proceedings shall occur in the Denver metropolitan area or in another mutually agreeable location. *See* ICAs, Section 5.18.3.

6. A dispute has arisen between the parties regarding the application of Section 7 of the ICAs governing the interconnection of the parties' networks and the exchange of traffic between the parties, including the rates Qwest can charge TCG for such interconnection. The ICA provisions in dispute for each of the five ICAs are similar or, in some cases, identical. TCG brings this arbitration as a consolidated action because the claims under each ICA involve common questions of law and fact under the ICAs and TCG seeks enforcement of Qwest's obligation under such provisions; the claims involve common questions of law and fact under the Telecommunications Act of 1996 and the implementing rules and decisions of the Federal Communications Commission ("FCC"); and the proof and witnesses will be substantially the same for all claims. In short, the claims under each ICA are mirror images of each other.

7. TCG formally notified Qwest that it was overbilling TCG incorrect rates for certain services provided by Qwest under the ICAs by notice dated May 31, 2008, and revised on June 18, 2008. (Exhibit F.) At that time, the billing dispute notices identified \$1,276,867 in overbilled charges by Qwest going back more than the two prior years. By email dated July 15, 2008, Qwest denied these billing dispute claims submitted by TCG. (Exhibit G.) This billing dispute is ongoing and the amount in dispute continues to grow as Qwest continues to overbill TCG. The amount in dispute for the time period from November 25, 2006 (two years prior to the date of the Tolling Agreement executed by the parties) through and including the October 2010 invoice (for service provided through November 6, 2010) totals \$1,811,315. TCG has paid these disputed overbilled charges to date and seeks a refund of all such amounts, plus interest, and all future amounts overbilled by Qwest until this matter is resolved. TCG has demanded that Qwest bill TCG the ICA rates applicable to the services provided by Qwest under the ICAs in accordance with the ICAs.

8. TCG initiated dispute resolution with Qwest on November 5, 2008, in accordance with Section 5.18 of the ICAs. (Exhibit H.)

9. TCG and Qwest entered into a Tolling Agreement, dated November 25, 2008, to allow the parties time to potentially resolve the dispute. (Exhibit I). The Tolling Agreement was to be effective for at least sixty (60) calendar days. Thereafter, either party could terminate the Tolling Agreement upon fifteen (15) days prior written notice. (*Id.* at ¶ 5.)

10. On September 15, 2010, TCG sent, *via* overnight delivery, a Resolution Request designating its vice-presidential level representative and requesting Qwest identify its vice-presidential level representative, thereby recommencing dispute resolution with Qwest, in accordance with Section 5.18.2 of the ICAs. (Exhibit J.)

11. TCG sent Qwest notice of termination of the Tolling Agreement on September 15, 2010, in accordance with paragraph 5 of the Tolling Agreement. (*Id.*)

12. TCG extended the date of termination of the Tolling Agreement to October 11, 2010 and then to October 25, 2010, in order to allow for an additional limited period of negotiation between the parties. (Exhibit K.)

13. In order to allow the parties to continue their efforts to resolve the dispute, on October 20, 2010, the parties agreed that the Tolling Agreement would not terminate on October 25, 2010 as TCG had notified Qwest, but that either party could terminate the Tolling Agreement upon seven days prior written notice. (Exhibit L.)

14. To date, no resolution of the dispute has been reached by the vice-presidential level representatives. Accordingly, on November 22, 2010, TCG sent Qwest notice of termination of the Tolling Agreement, effective as of November 29, 2010. (Exhibit M.)

#### **GENERAL ALLEGATIONS**

15. In 1996, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in numerous sections within 47 U.S.C.) (the "1996 Act"). The 1996 Act is designed to open local telephone markets to competition and imposes certain duties on ILECs, such as Qwest. In particular, the 1996 Act includes requirements for the interconnection (or physical linking) of the ILEC's network to the networks of other telecommunications carriers, including CLECs, such as TCG, for the exchange of telecommunications traffic. 47 U.S.C. § 251.

16. As relevant to this dispute, the 1996 Act requires Qwest to allow any requesting telecommunication carrier to interconnect with its network:

- (A) for the transmission and routing of telephone exchange service and exchange access;
- (B) at any technically feasible point within the carrier's network;
- (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

- (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

47 U.S.C. § 251(c)(2).

17. Following the enactment of the 1996 Act, the FCC promulgated rules to implement the Act's interconnection provisions.<sup>3</sup> The FCC's rules define interconnection as the linking of two networks for the mutual exchange of traffic. 47 C.F.R. § 51.5. The rules provide that interconnection at any technically feasible point within an ILEC's network, as required under 47 U.S.C. § 251(c)(2)(B), includes, at a minimum: (i) the line-side of a local switch; (ii) the trunk-side of a local switch; (iii) the trunk interconnection points for a tandem switch; (iv) central office cross-connect points; (v) out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and (vi) the points of access to unbundled network elements. 47 C.F.R. § 51.305(a)(2). The FCC has confirmed that under this rule, CLECs may interconnect at as few as one technically feasible point in each local access and transport area ("LATA").<sup>4</sup>

18. The FCC's rules also govern the transport and termination of traffic on interconnected carrier networks and include cost sharing principles. *See* 47 C.F.R. §51.701, *et seq.* Specifically, these rules require interconnecting carriers to share the costs of the dedicated interconnection transmission facilities in proportion to their relative use.<sup>5</sup>

19. The 1996 Act requires Qwest to negotiate "interconnection agreements" with CLECs, such as TCG. If Qwest and the CLEC fail to reach a negotiated agreement, they may seek to arbitrate any disputed issues before the applicable state public utility commission. 47 U.S.C. § 252. Once all terms have been negotiated or arbitrated, the parties reflect all negotiated

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<sup>3</sup> *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report & Order, 11 FCC Rcd. 15499, ¶¶ 172-225 (1996) ("*Local Competition Order*"), *aff'd in part, vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) ("*Iowa Utils. Bd.*"), *aff'd in part, rev'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd in relevant part sub nom Verizon Comm. Inc. v. FCC*, 121 S. Ct. 877 (2002).

<sup>4</sup> *Application of SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, 15 FCC Rcd. 18354, ¶ 78 (2000) (citing *Local Competition Order*, ¶¶ 172, 209).

<sup>5</sup> 47 C.F.R. § 51.709(b) ("The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network."). *See also Local Competition Order*, ¶1062 (if the providing carrier provides two-way trunks, "the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier").

and arbitrated terms in an ICA, which is submitted to the applicable state public utility commission for approval. 47 U.S.C. § 252(e)(1).

20. The TCG Entities and Qwest are parties to ICAs that were approved by the state public utilities commissions in Arizona, Colorado, Oregon, Utah and Washington (collectively referred to as the "State Commissions"). Many of the provisions in the ICAs were negotiated and resolved by the parties. Some provisions, however, were not resolved through negotiations and were submitted to the State Commissions for arbitration and resolution. Upon completion of each arbitration, the negotiated and arbitrated provisions were set forth in a final ICA that was submitted to each State Commission for approval. The ICAs at issue were all approved by the State Commissions.<sup>6</sup>

21. The ICAs define interconnection as that "described in the Act," stating it is "the connection between networks for the purpose of transmission and routing of Telephone Exchange Service traffic, and Exchange Access traffic" on the trunk side of the local switch and on the trunk connection points for a tandem switch. ICAs, Section 7.1.1.<sup>7</sup> The ICAs state that Qwest "shall provide Interconnection at any Technically Feasible point, by any Technically Feasible means at locations where CLEC interconnects with Qwest." ICAs, Section 7.1.2. More specifically, the ICAs provide that TCG "may interconnect for the exchange of local/EAS traffic at either the Qwest access tandem or the Qwest local tandem, at CLEC's [TCG's] option." ICAs, Section 7.2.2.9.6.

22. Under the ICAs, TCG may establish "at least one Point of Interconnection in Qwest territory in each LATA where CLEC has local Customers." ICAs, Section 7.1.2.

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<sup>6</sup> See Approval Orders attached as Exhibits N.1 - N.5; see also *In the Matter of the Petition of AT&T Communications of the Mountain States, Inc. and TCG Phoenix for Arbitration with Qwest Corporation, Inc. Pursuant to 47 U.S.C. Section 252(b)*, AZ Corporation Commission Docket Nos. T-02428A-03-0553 and T-01051B-03-0553, Opinion and Order, Decision No. 66888 (dated April 8, 2004); *In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with AT&T Communications of the Mountain States, Inc. and TCG-Colorado Pursuant to 47 U.S.C. § 252(b)*, COPUC Docket No. 03B-287T, Decision Granting Application for Approval of Interconnection Agreement, Decision No. C04-0171 (adopted February 18, 2004); *In the Matter of Qwest Corporation's Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with AT&T Communications of the Pacific Northwest, Inc. and TCG Oregon*, ORPUC Docket Nos. ARB 527A and ARB 527B, Executed Interconnection Agreements Approval Order, Order No. 04-699 (entered December 2, 2004); *In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with AT&T Communications of the Mountain States, Inc. and TCG Utah*, UTPUC Docket No. 04-049-09, ICA Approval Letter and Erratum Notice (effective January 8, 2005); *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corporation Pursuant to 47 U.S.C. Section 252(b)*, WUTC Docket No. UT-033035, Final Order Affirming Arbitrator's Report and Decision; Approving Interconnection Agreement, Order No. 05 (effective February 6, 2004).

<sup>7</sup> All relevant portions of Section 7, the section of the approved ICAs that describes the interconnection terms and conditions applicable between TCG and Qwest and the definitions of terms used in the ICAs, are set forth in Exhibits A through E.

23. The interconnection of the Qwest and TCG networks under the ICAs may be accomplished via several methods: i) interconnection entrance facilities; ii) existing private line transport service; iii) UNE transport (for the CLEC); iv) collocation; v) mid-span meets; vi) intra-building interconnection; vii) third-party transport; or viii) any other technically feasible method submitted via the bona fide request process. *See* ICAs, Section 7.1.2. These methods provide the physical links between the point of interconnection (“POI”) and the Qwest switch.

24. Once the POI and the physical link between the networks are established via one of the methods described in paragraph 23, the party whose customer originates a call destined to a customer of the other party (the “originating carrier”) is responsible (financially and otherwise) for delivering the call to the POI, and the party terminating the call to its customer (the “terminating carrier”) is responsible for transporting the call from the POI to its customer. The steps performed by the terminating carrier are referred to as the “transport and termination” of telecommunications traffic (also referred to in the ICAs as “reciprocal compensation” when the transport and termination is for the mutual exchange of traffic between the CLEC’s [TCG’s] and Qwest’s networks). ICAs, Sections 7.2.2.1.1 and 7.3.1.

25. Under the ICAs, transport is defined generally as the “transmission of terminating Exchange Service from the POI between the two Carriers to the terminating Carrier’s End Office Switch that directly serves the called Party,” utilizing facilities referred to as DTTs. ICAs, Section 7.2.2.1.2. DTTs are provisioned by Qwest between the Qwest Wire Center (or Switch) serving the POI (Serving Wire Center) and Qwest’s Tandem or End Office Switches, if ordered by TCG. ICAs, Section 7.2.2.1.6. When terminating traffic on Qwest’s network, the ICAs state that TCG may elect to purchase DTTs and TCG may elect to use either one-way or two-way DTTs. ICAs, Section 7.2.2.9. It is these DTT facilities from the POI to Qwest’s terminating switches that are at the center of this dispute.

26. Section 7.1.2 of the ICAs states that, where the CLEC chooses transport using two-way DTTs, the “CLEC has the right to choose the POI.” *See also* ICAs, Section 7.3.1.

27. Consistent with the provisions of the ICAs permitting TCG to select as few as a single POI per LATA (Section 7.2.1 of the ICAs), the parties specifically addressed the situation where TCG would require a lengthy transport trunk by agreeing in Section 7.2.2.1.7 that Qwest will provide DTTs “LATA-wide, where facilities are available.” The parties agreed further that if the DTT needed is greater than fifty (50) miles in length, however, *and* existing facilities are not available in either party’s network, and the parties cannot agree as to who will provide the facility, the parties will bring the matter before the State Commissions for resolution on an individual case basis. ICAs, Section 7.2.2.1.7.

28. The cost of interconnection facilities, including DTTs, has been set by the State Commissions based upon the forward-looking economic cost of the facilities pursuant to 47 U.S.C. § 252(d)(1). Each of the State Commissions has conducted cost proceedings under Section 252(d)(1) to establish the forward-looking cost of interconnection, including the DTT



facilities at issue. These State Commission-approved, cost-based rates have been incorporated into the Pricing Schedule (Exhibit A) to each of the ICAs.<sup>8</sup>

29. As relevant to this dispute, Section 7.3.2.1.1 of the ICAs states that the rates applicable to DTTs are set forth in Exhibit A to the ICAs. Section 7.3.2.1.2 states that whether the DTT is provided to a local tandem or access tandem for Exchange Service (EAS/local traffic), or to an access tandem for Exchange Access (IntraLATA Toll), or Jointly Provided Switched Access traffic, the applicable DTT rate elements in Exhibit A of the ICAs will apply between the Serving Wire Center and the tandem. Section 7.3.2.1.4 states that the fixed and per mile charges for DTTs are set forth in Exhibit A to the ICAs.

30. Further, Section 7.3.2.2 of the ICAs states that if the parties elect to establish two-way trunks for the exchange of traffic, the cost of such facilities shall be shared between the parties by reducing the two-way DTT rate element charges based upon each party's relative use of the facility. This provision is consistent with the mandate in the FCC's rules that interconnecting carriers must share the costs of dedicated transmission facilities in proportion to their relative use.<sup>9</sup> TCG and Qwest have executed amendments to the ICAs that establish a relative use factor ("RUF") for DTTs.<sup>10</sup> These amendments state:

The provider of the two-way DTT facility will initially share the cost of the two-way facility by assuming an initial relative use factor of fifty percent (50%) for a minimum of one quarter. The nominal charge to the other Party for the use of the facility, as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor, based upon actual minutes of use data for non ISP-bound [sic] traffic to substantiate a change in that factor. If either Party demonstrates with non ISP bound [sic] traffic data that actual minutes of use from the most recent quarter justify a relative use factor other than fifty percent (50%), a new factor for bill reductions and payments will apply going forward, for a minimum of one quarter, from the receipt of written notice from the other Party satisfactorily demonstrating that a factor other than 50% should be used or as otherwise agreed by the Parties. ISP-bound traffic is interstate in nature.

ICAs, Amendments, Section 7.3.2.2.1.

31. TCG began placing orders for two-way DTTs pursuant to the ICAs on February 6, 2004. TCG's DTT orders were rejected by Qwest if the requested DTT crossed a Qwest local

<sup>8</sup> The Exhibit A (Pricing Schedule) of each ICA is attached as Exhibits A.5 - E.5.

<sup>9</sup> See footnote 5.

<sup>10</sup> See Exhibits O.1 - O.3. Section 7.3.2.2.1 of the Utah ICA was not amended; the original language in the ICA matches the language contained in the amendments agreed to in the other states. Section 7.3.2.2.1 of the Oregon ICA was never amended because it contains the fifty percent RUF obligation.

calling area ("LCA") boundary and TCG's order did not include certain code information. Qwest advised TCG's ordering personnel that TCG's DTT orders would not be accepted unless TCG added certain additional information to the order form. Specifically, Qwest required TCG to enter the code "XLCAL1" in the "SPEC" field and to put "inter LCA Facility Request" in the "Remarks" field. Qwest represented to TCG personnel that this additional procedure was an administrative requirement only and was designed to ensure that the orders would be properly provisioned in accordance with the ICAs. Since 2004, TCG has submitted 84 DTT orders. These orders were either submitted: 1) without the code information and were rejected by Qwest; or 2) with the code information included in the initial order to avoid rejection.

32. Despite its representations, Qwest has not treated this additional ordering procedure as simply ministerial. Rather, the procedure used by Qwest reflects its attempt to unilaterally amend the parties' ICAs to impose rates other than those set forth in the ICAs for the DTTs purchased by TCG. Indeed, after Qwest began requiring TCG to follow this additional procedure, Qwest has improperly charged TCG rates for DTTs that are higher than those set forth in the ICAs. For the DTTs that cross LCA boundaries, Qwest has assessed the ICA rate only on that portion of the DTT facility that is within the LCA boundary. For the remainder of the DTT facility, Qwest has assessed TCG its higher, tariffed private line rates. By way of example, if the DTT is 60 miles in length, with 40 miles within the LCA and 20 miles outside of the LCA, Qwest has charged TCG the ICA DTT rate for the 40 miles within the LCA and the higher, intrastate tariffed private line rate for the 20-mile portion of the DTT outside of the originating LCA.

33. As described above, the ICAs clearly and unambiguously state that TCG may obtain and Qwest will provide DTTs LATA-wide, from as few as a single POI per LATA, at the prices set forth in the ICAs. The ICAs do not contain any differing terms, conditions or rates for DTTs that cross LCA boundaries. Nor is there any ICA provision that permits Qwest to charge TCG intrastate private line rates for any portion of the DTTs. Qwest's attempt to impose differing obligations and rates for such DTTs thus violates the clear and unambiguous terms of the ICAs and has resulted in TCG being overcharged for the DTTs.

34. In addition, Qwest has an obligation under the 1996 Act and its implementing rules and decisions, as well as Sections 7.2.2.1.2.2., 7.3.1 and 7.3.2.2 of the ICAs, to share the cost of two-way DTT facilities, including the cost of the 84 DTTs in dispute. As discussed herein, the ICAs require the use of a RUF to apportion the shared costs of the DTT facilities between Qwest and TCG. Qwest has not applied the RUF agreed to by the parties to that portion of the DTTs that extend outside of the originating LCA for these 84 DTTs. Using the above example, this means that on the 40-mile segment of the DTT that is within the LCA, Qwest has applied the RUF adjustment. However, on the 20-mile segment of the DTT that is outside of the originating LCA, not only has Qwest not applied the proper rate to this segment, it has also not applied the RUF adjustment. Qwest's failure to reduce the costs of the entire DTT to account for its share under the RUF violates the clear and unambiguous terms of the ICAs and has resulted in TCG being overcharged for the DTTs.

35. Qwest contends that it is entitled to charge TCG intrastate tariffed private line rates for DTTs that extend outside of an LCA boundary under a product it has introduced called "InterLCA Interconnection."<sup>11</sup> Qwest's claim is without merit for several reasons.

36. First, the ICAs contain no reference to the InterLCA product that Qwest points to as support for its billing. Under the ICAs, TCG may have as few as a single POI per LATA and obtain DTTs LATA-wide, at the rates set forth in the ICAs. This unambiguously means that even if only a single POI is established by the CLEC in a LATA, the ICA rate must apply to the entire DTT facility within that LATA, regardless of whether LCA boundaries therein are crossed. There is no differentiating language in the ICAs based on whether LCA boundaries within a LATA are crossed and, thus, no contract language exists that would support the application of different rates on that basis.

37. Second, the terms of the InterLCA product offering are in direct conflict with the terms of the ICAs.<sup>12</sup> For example, the InterLCA amendment requires the CLEC to establish a POI in every Qwest local calling area in which the CLEC operates (Section 7.1.2 of the InterLCA Amendment). This requirement, however, directly conflicts with Section 7.1.2 of the ICAs, which permits TCG to establish one POI in each LATA. Section 2.3 of the ICAs states that, in the event of such conflict between Qwest's product offerings and the provisions of the ICAs, the ICAs control.

38. In prior negotiations with Qwest, CLECs, including TCG, were particularly concerned that Qwest might attempt to alter the terms and conditions of the services it provides to them under the ICAs. To address this concern, TCG negotiated, and Qwest agreed to, the following provision contained in Section 2.3 of the ICAs:

Unless otherwise specifically determined by the Commission, in cases of conflict between this Agreement and Qwest's Tariffs, *PCAT* [Qwest's short hand term for its Product Catalog], methods and procedures, *technical publications*, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under this Agreement, then the rates, terms and conditions of this Agreement shall prevail. To the extent another document abridges or

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<sup>11</sup> The terms of InterLCA Interconnection are set forth in the form amendment Qwest provided to TCG, attached hereto as Exhibit P. Under the InterLCA Interconnection product offering, TCG would be required to establish a POI in every Qwest LCA and to pay private line rates for DTT outside of the LCA boundary, with no application of the RUF, TCG would only be able to obtain DTTs to access tandems, and TCG's use of DTTs would be restricted to local exchange traffic. This amendment would materially modify agreed-to and State Commission-approved terms in Section 7 of the ICAs, including the deletion of Sections 7.1.2 (an extensive section describing various methods of interconnection), 7.2.2.9.6, and 7.2.2.9.6.1 (allows interconnection at Qwest access or local tandems), and 7.2.2.9.3.1 (allows TCG to combine other non-local traffic on a single interconnection trunk).

<sup>12</sup> A description of the InterLCA product offering is found in the amendment attached as Exhibit P hereto, and in Qwest's Local Interconnection Service Product Catalog and Technical Publication 77398. The Local Interconnection Service Product Catalog is attached hereto as Exhibit Q and the Technical Publication is available at the following link: <http://www.qwest.com/wholesale/pcat/lis.html>.

expands the rights or obligations of either Party under this Agreement, the rates, terms and conditions of this Agreement shall prevail.<sup>13</sup>

Under the plain meaning of this provision, in the event of a conflict between Qwest's product offerings and the ICAs, the ICAs control. Accordingly, Qwest cannot unilaterally impose conflicting terms, conditions and rates on TCG under the guise of "product" offerings.

39. Qwest's own product documentation acknowledges that the existing ICAs control in situations as described herein. For example, Qwest's documentation describing a single point of presence interconnection product called "SPOP" states:

Qwest must honor existing Interconnection Agreement language. CLECs may amend their existing Interconnection Agreements to include new SPOP terms. This descriptive information is not an interconnection Agreement and CLECs may have agreements with language that differs from this description.<sup>14</sup>

40. Similarly, Qwest's Local Interconnection Service ("LIS") product catalog ("PCAT") states that the "terms and conditions for LIS can vary by individual Interconnection Agreement" and the "information in this documents describes the terms and conditions of a typical" CLEC agreement with Qwest.<sup>15</sup>

41. In sum, the "products" offered by Qwest cannot be the basis for Qwest deviating from its DTT obligations set forth in the ICAs. Qwest must honor the terms of its existing ICAs with TCG and provide DTTs in accordance with the provisions of those ICAs. Qwest's failure to do so and its attempt to unilaterally impose the interLCA product (including its higher rates) on the DTTs at issue here violates the clear and unambiguous terms of the ICAs.

42. The ICAs set forth the terms for amending the ICAs. Section 5.30 of the ICAs states:

5.30.1 Except as otherwise provided in this Agreement, the provisions of this Agreement may not be amended, modified or supplemented unless executed in writing and signed by an authorized representative of both Parties. Waivers or consents to departures from the provisions of this Agreement may not be given unless the same is in writing and signed by an authorized representative of the Party against whom such waiver or consent is claimed. No waiver by either Party of any default, misrepresentation or breach of any provision of this Agreement, whether intentional or not, will be deemed to extend to any prior or subsequent default, misrepresentation or breach of any provision of this Agreement or affect in any way any rights arising by virtue of any prior or subsequent occurrence. In addition, no course of dealing or performance or failure of a Party to strictly

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<sup>13</sup> See Exhibits A.1 - E.1.

<sup>14</sup> Exhibit R at p. 1, fn. 1.

<sup>15</sup> Exhibit Q at p. 1 (emphasis added).

enforce any provision of this Agreement shall be construed as an amendment, modification, supplement to, or waiver of any such provision. By entering into this Agreement neither Party waives any rights granted to them pursuant to the Act.

5.30.2 Either Party may request an amendment to this Agreement at any time by providing to the other Party in writing information about the desired amendment and proposed language changes. If the Parties have not reached agreement on the requested amendment within sixty (60) Days after receipt of the request, either Party may pursue resolution of the amendment through the Dispute Resolution provisions of this Agreement.

The parties have not mutually agreed to amend the ICAs to include the terms, conditions and prices for InterLCA Interconnection. Nor has Qwest sought to amend the ICAs in accordance with the above terms.

43. Notwithstanding TCG's prior purchase, and Qwest's provision, of DTTs that cross LCA boundaries, Qwest now takes the position that it will not provision the DTTs TCG orders that cross LCA boundaries unless TCG executes an "InterLCA Amendment" to the ICAs and pays rates higher than those set forth in the existing ICAs, which were agreed to by the parties and approved by the State Commissions.<sup>16</sup> In fact, Qwest has refused to process orders submitted by TCG for DTTs.<sup>17</sup> Qwest's refusal to process TCG's orders is in direct contravention of Section 5.30 of the ICAs and its obligation to provide interconnection under the 1996 Act. Qwest may not unilaterally impose amendments to the ICAs on TCG. The parties must enter into such agreements willingly, or Qwest must follow the procedures set forth in Section 5.30.2.

44. The amount of the overbilled charges in dispute for the time period from November 25, 2006 through and including November 6, 2010 totals \$1,811,315. The amount of overbilled charges at issue increases every month, upon Qwest's issuance of its invoice for the DTTs that are in service. TCG has paid all invoices, including all overbilled charges, to date (so that TCG maintains the ability to serve their customers via these facilities) and anticipates it will continue to pay these invoices until this matter is resolved. TCG seeks a refund of all the overbilled amounts, plus interest, and all future amounts that are overbilled by Qwest until this matter is resolved. In addition, TCG requests that Qwest be directed to bill TCG only the ICA rates for DTTs going forward, as required by the ICAs, and to provision DTTs ordered by TCG, as required by the ICAs and the 1996 Act.

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<sup>16</sup> See InterLCA form amendment, Exhibit P.

<sup>17</sup> TCG submitted orders for DTTs as recently as September 2010, and Qwest has refused to process those and other orders for DTTs.

**FIRST CLAIM FOR RELIEF**  
**(Breach of Contract)**

45. TCG incorporates all allegations of this Demand by this reference.

46. Qwest has breached and continues to breach the ICAs by failing to provision DTTs in accordance with the terms of the ICAs, at the rates set forth in the Pricing Schedules (Exhibit A) of the ICAs.

47. TCG substantially fulfilled its obligations and satisfied all conditions precedent, if any, in the ICAs.

48. TCG has suffered damages and continues to suffer damages as a result of these breaches by Qwest in an amount to be established in arbitration, estimated to be approximately \$1,811,315, plus interest, as of the date of the filing of this Demand.

**SECOND CLAIM FOR RELIEF**  
**(Breach of Implied Duty of Good Faith and Fair Dealing)**

49. TCG incorporates all allegations of this Demand by this reference.

50. Qwest has a duty to act fairly and in good faith in its performance of its duties under the ICAs.

51. Qwest has a duty to act within accepted commercial practices and consistent with TCG's justified expectations.

52. Qwest has breached these duties by refusing to honor the terms of the ICAs, including assessment of the rates agreed to by the parties and approved by the State Commissions, and by refusing to accept orders submitted by TCG for DTTs that cross local calling area boundaries.

53. TCG has suffered damages and continues to suffer damages as a result of these breaches by Qwest in an amount to be established in arbitration, estimated to be approximately \$1,811,315, plus interest, as of the date of the filing of this Demand.

**THIRD CLAIM FOR RELIEF**  
**(Unjust Enrichment)**

54. TCG incorporates all allegations of this Demand by this reference.

55. Qwest continues to refuse to honor the terms of the ICAs, including by failing to assess the rates agreed to by the parties and approved by the State Commissions and by failing to accept orders submitted by TCG for DTTs that cross local calling area boundaries.

56. Qwest knowingly obtained the benefit of charging TCG higher rates than is authorized under the ICAs and not sharing the costs of the DTT facilities as is required under the

ICAs and federal law under circumstances that would make it unjust for Qwest to retain the benefit of its conduct.

57. Qwest has retained such benefit at the expense of TCG and TCG has suffered damages and continues to suffer damages as a result of Qwest's actions in an amount to be established in arbitration, estimated to be approximately \$1,811,315, plus interest, as of the date of the filing of this Demand.

**FOURTH CLAIM FOR RELIEF**  
**(Declaratory Judgment)**

58. TCG incorporates its previous allegations as though fully incorporated herein.

59. TCG seeks a declaratory judgment that:

- a. The ICAs are valid and enforceable contracts, which clearly and unambiguously state that TCG may obtain, and Qwest will provide DTTs LATA-wide, from as few as a single POI per LATA, at the rates set forth in the Pricing Schedules (Exhibit A) of the ICAs;
- b. At all times material hereto, Qwest has been and remains obligated to comply with the terms of the ICAs by, among other things, providing DTTs in accordance with the terms of the ICAs, at the prices set forth in the Pricing Schedules (Exhibit A);
- c. Qwest has overbilled TCG in violation of the ICAs by improperly charging TCG prices for DTTs that are higher than the prices set forth in the ICAs and Qwest must refund any and all overbilled amounts, plus interest, to TCG; and
- d. Qwest has wrongfully refused to provision DTTs in accordance with the terms of the ICAs and in violation of its interconnection obligations under the 1996 Act.

60. An actual and justiciable controversy exists between TCG and Qwest regarding the parties' respective rights and obligations.

61. A declaration is necessary to settle such controversies.

62. All necessary parties are before the American Arbitration Association pursuant to C.R.C.P. 57(j).

63. Pursuant to C.R.S. §§ 13-51-101, *et seq.*, and C.R.C.P. 57, the American Arbitration Association may declare the respective rights, status and other legal relations of TCG and Qwest.

**PRAYER FOR RELIEF**

WHEREFORE, Claimants respectfully request that the arbitrator enter judgment in their favor and against Respondent, and :

- A. Determine that Qwest is required to provision DTTs to TCG in accordance with the terms of the ICAs and its interconnection obligations under the 1996 Act, at the rates set forth in the Pricing Schedules of the ICAs;
- B. Grant an award of compensatory damages caused by Respondent's actions in an amount to be determined at arbitration;
- C. Grant an award of the costs and expenses, including reasonable attorneys' fees, incurred by Claimants in connection with this action;
- D. Grant an award of prejudgment and post-judgment interest;
- E. Grant such other and further relief as the arbitrator deems just and proper.

Dated: November 30, 2010.

Respectfully submitted,

MOYE WHITE LLP

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