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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition o f 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

POST-HEARING BRIEF OF QWEST CORPORATION

NON-CONFIDENTIAL VERSION

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Qwest Corporation ("Qwest"), pursuant to the Commission's Ninth Scheduling Order (as adjusted by the Administrative Law Judge with the agreement of the parties), submits this post-hearing brief in support of its proposed interconnection agreement ("ICA") and in opposition to Union Telephone Company d/b/a Union Cellular's ("Union") request for asymmetrical reciprocal compensation.

I. INTRODUCTION

This proceeding is an interconnection arbitration between Qwest and Union. Qwest is an incumbent local exchange carrier ("LEC") that provides local exchange service and intraLATA toll service in major portions of 14 western states, including Utah. Union is a cellular mobile radio service ("CMRS") provider that provides wireless service in Wyoming, Idaho, Colorado and Utah. (Qwest Cross 6)[1] The vast majority of its wireless subscribers are located in Wyoming.[2] Union Telephone Company also operates as an incumbent LEC, providing wireline service in certain local exchange areas in Southwestern Wyoming, Northeastern Utah and Northwestern Colorado. This arbitration does not involve interconnection between Qwest and Union Telephone Company, the incumbent LEC ("Union Telephone").

[1] In this brief, exhibits, including written testimony, will be cited as marked during the hearing except that the word "exhibit" will not be included in the citation. If an exhibit contains multiple pages, the citation will include the page number(s) unless the exhibit has consecutive line numbering throughout the exhibit, in which case the reference will be to the line number(s). If the exhibit includes line numbers but not consecutive line numbering throughout, the page number will be followed by a colon and then the line number(s) on the page. Transcript ("Tr.") cites in this brief are to the page(s) of the transcript followed by a colon and the line number(s) on the page.

[2] Union serves approximately 40,000 wireless subscribers of which approximately 30,000 are located in Wyoming. *See Union Telephone Company v. Qwest Corporation*, 495 F.3d 1187, 1191 (10th Cir. 2007) ("*Union Appeal*").

There are six issues in dispute in this arbitration. The primary dispute between the parties, Issue 6 on the Joint Disputed Issues List submitted by the parties on September 28, 2007 ("Issues List"), concerns the reciprocal compensation rate that Union will be permitted to charge Qwest for transporting and terminating local calls placed by Qwest's customers to Union's wireless subscribers. Section 251(b)(5) of the Telecommunications Act of 1996 (the "Act") imposes a duty upon all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[3] Reciprocal compensation simply means that "when a customer of one local exchange carrier calls the customer of a different local exchange carrier who is within the same local calling area, the first carrier pays the second carrier for completing, or 'terminating,' the call."[4] The Federal Communications Commission ("FCC") has defined the local calling area for wireless calls to be the major trading area ("MTA").[5] Calls exchanged between Qwest and Union within the same MTA are subject to reciprocal compensation.[6] Calls between different MTAs are not.

Qwest and Union have had a dispute concerning the appropriate compensation for local wireless calls for many years. Initially, Union was unwilling to negotiate a reciprocal compensation arrangement and sought to collect access charges from Qwest for terminating local wireless calls. The history of litigation between Qwest and Union is reported in the *Union Appeal* in which the United States Court of Appeals for the Tenth

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[3] 47 USC § 251(b)(5).

[4] *Pacific Bell v. Pac-West Telecom., Inc*., 325 F.3d 1114, 1119 (9th Cir. 2003).

[5] First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 1036 (rel. Aug. 1, 1996)("*Local Competition Order*")(subsequent history omitted).

[6] *Id.*

Circuit rejected Union's claim for access charges on local wireless calls.[7] Having lost that issue, Union now seeks to obtain similar extraordinarily high termination charges through another means.

In this case, Union has requested that it be permitted to charge an asymmetric reciprocal compensation rate to Qwest that is nearly 14 times the rate that Qwest would be permitted to charge to Union. When a Qwest customer calls a Union wireless subscriber located within the same MTA, Union proposes to charge Qwest $0.036533 per minute of use ("MOU"). (Union 2SSR.1, 1) However, when the call flow is reversed and a Union subscriber calls a Qwest customer, Qwest would only be entitled to charge Union $.002659 per MOU. (Qwest 3RR, 5:1-3)

Union's request for an asymmetric reciprocal compensation rate should be rejected. In Section II of this Brief, Qwest will show that Union has failed altogether to meet its burden of proof to justify an asymmetric reciprocal compensation rate. Thus, under the FCC's rules, the reciprocal compensation rate Union is permitted to charge must be symmetrical to the rate that Qwest charges. In Section III of this Brief, Qwest will explain why the Commission should adopt Qwest's proposed language for the remaining disputed interconnection issues, Issues 1 through 5 in the Issues List.

II. ARGUMENT – ISSUE NO. 6: ASYMMETRIC RATE

FCC Rule 51.711(a) establishes a presumption that the reciprocal compensation rates that two carriers may charge each other are to be symmetrical.[8] Under Rule 51.711(a)(1), the presumed rate is the rate set by the Commission for the incumbent LEC,

[7] *Union Appeal*, 495 F.3d at 1190.

[8] 47 CFR § 51.711(a).

or the larger of the LECs, in this case Qwest. Only under the limited circumstances prescribed in Rule 51.711(b) may a state commission authorize an asymmetrical rate:

> A state commission may establish asymmetrical rates for transport and termination of telecommunications traffic *only* if the carrier other than the incumbent LEC … proves to the state commission[,] on the basis of a cost study using the forward-looking economic cost based pricing methodology described in [47 CFR] §§ 51.505 through 51.511, that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC … exceed the costs incurred by the incumbent LEC … and, consequently, that such a higher rate is justified.[9]

Section 252(d)(2) of the Act states that reciprocal compensation rates for transport and termination of calls shall be based on "a reasonable approximation of the additional costs of terminating such calls."[10] In its *Wireless Additional Cost Order* dated September 3, 2003, the FCC provided certain clarifications as to how Rule 51.711(b) should be applied to CMRS providers.[11] Specifically, the FCC confirmed its statements in its *Intercarrier Compensation NPRM* that the determination of compensable wireless network components "should be based on whether the particular wireless network components are cost sensitive to increasing call traffic."[12] The FCC also made clear that

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[9] 47 CFR § 51.711(b) (emphasis added).

[10] 47 USC § 252(d)(2); *Local Competition Order* at ¶ 1054.

[11] Order, *In the Matter of Cost-Based Terminating Compensation for CMRS Providers; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd 18441, ¶ 1 (rel. Sep. 3, 2003) ("*Wireless Additional Cost Order*"), *adopting* Letter from the Wireless Telecommunications Bureau and Common Carrier Bureau dated May 9, 2001, 16 FCC Rcd 9597, p. 2 ("*Wireless Additional Cost Letter*"). The *Wireless Additional Cost Order* is also in the record as Union 2SR.2.

[12] *See Wireless Additional Cost Order* at ¶ 4, *citing* Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, ¶ 104 (rel. Apr. 27, 2001)("*Intercarrier Compensation NPRM"*).

"the CMRS carrier bears the burden of justifying its additional costs, and demonstrating that its analysis complies with all applicable Commission rules."[13]

The FCC has subsequently confirmed that the evidence of "cost sensitivity to increasing call traffic" should be both qualitative and quantitative. In its *Further Notice of Proposed Rulemaking on Intercarrier Compensation*, the FCC directed "parties taking the position that digital switching costs do vary with minutes of use" to "identify the specific portions of the switch for which costs increase when minutes of use increase."[14] It also directed those 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."[15] The FCC would only be seeking this type of detailed information in the "reciprocal compensation" section of the *FNPRM* if it deemed this information critical to its analysis of traffic sensitivity.

A CMRS provider that fails to produce a cost study that complies with the FCC's rules and that meets its burden of proof is not entitled to try again over and over until it finally gets it right. The FCC has stated that "[i]n the absence of such a cost study justifying a departure from the presumption of symmetrical compensation, reciprocal compensation for the transport and termination of traffic shall be based on the incumbent local exchange carrier's cost studies."[16]

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[13] *Wireless Additional Cost Order* at ¶ 9. *See also Intercarrier Compensation NPRM* at ¶ 104.

[14] Further Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, ¶ 68 (rel. Feb. 10, 2005) ("*FNPRM*").

[15] *Id.* (emphasis added).

[16] *Local Competition Order* at ¶ 1089. *See also* 47 CFR § 51.711(b).

Union has completely failed to meet its burden of proof to justify an asymmetric reciprocal compensation rate. First, Union did not submit a cost study in this proceeding that complies with the TELRIC requirements that costs associated with retail services be excluded and that prohibit use of embedded costs. Furthermore, Union did not demonstrate that the costs in its cost study were forward looking and based on the most efficient telecommunications technology currently available and the lowest cost network configuration. Finally, when network components are analyzed separately, the available evidence does not indicate that the costs of specific components increase with increasing call traffic.

A. UNION'S COST STUDY FAILS TO COMPLY WITH THE FCC'S TELRIC REQUIREMENTS.

To meet its burden of proof, Union must demonstrate that its cost study complies with all applicable FCC rules, including specifically FCC Rule 51.505.[17] Union's cost study does not comply with the FCC's TELRIC rules in any material respect. In fact, Union's departures from TELRIC so deeply infect the model that, even if it were appropriate for the Commission to do so, it is impossible to adjust the model's inputs to bring it into compliance with TELRIC.

1. Union's Cost Study Fails to Exclude Costs Union Incurs to Provide Retail Telecommunication Services to Its Wireless Subscribers

Union's cost study violates TELRIC requirements because it fails to exclude costs incurred to offer retail services. FCC Rule 51.505(d)(2) provides that retail costs shall not be considered in calculating a TELRIC cost. "Retail costs include the costs of marketing, billing, collection, and other costs associated with offering retail

[17] 47 CFR § 51.711(b); *Intercarrier Compensation NPRM* at ¶ 104.

telecommunications services …."[18] In this case, Union has failed to remove the costs of providing at least three retail services from its cost study: costs incurred in terminating voice calls to its wireless customers, cost incurred in providing data services to its wireless customers and costs incurred in providing additional calling services and features to its wireless customers.

a. Retail Voice Termination

First, Union's cost study does not remove the cost of providing retail voice termination to its wireless subscribers. Union charges its wireless customers on a per minute basis for completing voice calls to them.[19] Each Union wireless plan allows a Union subscriber to place *or receive* a certain number of minutes per month. (Qwest 3RR, 5:9-6:1) While Union disagreed with Qwest as to how much it charges its customers for receiving calls, it did not dispute that it does in fact charge its subscribers for receiving calls.[20] (Union 2SSR, lines 75-88)

The cost that Union incurs to allow its wireless subscribers to receive calls are largely the same costs Union is attempting to recover though an asymmetric reciprocal compensation rate in this case. The law does not permit such a double recovery. FCC Rule 51.505(d)(2) prohibits Union from including in its cost study the costs incurred to enable its customers to receive calls because those costs are "costs associated with offering retail telecommunications services."

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[18] 47 CFR § 51.505(d)(2).

[19] "On incoming calls, charges may begin prior to the phone ringing and before you press 'SEND' to receive the calls." (Qwest Cross 8)

[20] Union testified that it charges its customers on average $0.17 per minute for call completion. (Union 2SSR, lines 85-86) Thus, even if it were assumed for the sake of argument that Union's embedded cost study were otherwise accurate, it is already recovering 4.7 times its embedded costs of providing call transport and termination from its customers in its retail rates.

b. Data Services

Second, Union has failed to remove investment and expenses incurred to provide data services. Union offers a wide variety of data services including text ("SMS") and multimedia ("MMS") messaging, mobile web, downloadable services such as games and ringtones, general packet radio service ("GPRS") and enhanced data rates for GSM evolution ("EDGE").[21] Costs to provide data services are incurred throughout Union's wireless network and are lumped together with other costs in Union's cost study such that they cannot be removed just by changing certain inputs to the cost study. There are data service components in Union's GSM switch and Base Transceiver Stations ("BTSs").[22] Union allocates one or two radio channels for data services at each BTS. (Tr. 169:7-12, 184: 15-19) Data services require both hardware components and software components.[23]

It is Union's responsibility to remove the costs of providing data services from its cost study. The costs of providing data services are not additional costs of terminating voice traffic delivered by Qwest to Union. Union recovers its cost of providing data services through the retail rates that it charges its customers for data services. (Qwest Cross 8) There is no legitimate basis for Union to recover these costs from Qwest through reciprocal compensation charges.

[21] Mr. Woody referred to EDGE as "GPRS on steroids." (Tr. 128:2-4)

[22] Qwest 3SR, lines143-156; Qwest 3PSR, lines 217-230; Tr. 152:22-24, 266:17-267:8, 270:12-25, 279:3-12.

[23] Qwest 3SR, lines 143-156; Qwest 3PSR lines 217-230; Tr. 128:7-9.

Qwest repeatedly asked Union to identify which components of its network were required for or should be allocated to provision of data services.[24] Although Union never provided that information, its data request responses establish that data costs are included in its cost study. (Qwest 3RR, 23:8-24:9) In its testimony, Union did not dispute that data costs had not been removed from the cost study. Instead, Union's sole argument is that data costs are "minimal," a mantra repeated by each of its witnesses. (*See, e.g.* Tr. 88:5-13) The word "minimal" is ambiguous in the context of a cost study whose purpose is to quantify the compensable "additional costs" of terminating calls. "Minimal" could refer to a range of percentiles relative to some larger set of costs or to a dollar amount. Union simply does not say. Moreover, without identifying and removing the costs incurred to provide data services, Union cannot even know whether the word "minimal" accurately describes the costs incurred to provide data services.

Union based its argument that data costs were minimal on the fact that data revenues were small. (Tr. 119:20-24) Mr. Woody conceded, however, that the reason data revenues were small was because only a small number of Union's subscribers purchased data services. (Tr. 120:5-13) Mr. Woody further acknowledged that Union incurred the costs to make data services available to all of its wireless subscribers regardless of how many actually purchased data services. (Tr. 119:8-12) Thus, it is impossible to determine from Union's cost study or testimony what the effect of removing these so called "minimal" data costs would have on the reciprocal compensation rate Union is seeking to charge.

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[24] *See* Qwest's Motion to Compel and for Confirmation of Oral Representations Regarding Discovery Matters (Nov. 1, 2006) at Appendices 1, 2 and 3, Data Requests 1-017, 4-001, 4-008, 4-009 and 5-001. *See also* Qwest Cross 13, Data Requests 6-007, 6-008, 6-015, 6-016, 6-017, 6-023, 6-027, 6-028 and 6-029.

c. Additional Calling Services and Features

Third, Union has failed to remove the costs associated with providing additional calling services and features to its wireless subscribers. (Qwest 3RR, 19:20-20:5, 24:10-25:10) Union witness Mr. Hinman admitted that the primary reason for moving to a GSM switch and for upgrading it was to provide additional features for wireless subscribers. (Union 1SR, lines 139-141) Examples of the services and calling features Union presently offers to its subscribers in its wireless plans include operator services, voice messaging, call waiting, call forwarding, caller ID, six-way calling and No Answer/Busy Transfer. (Qwest Cross 8) None of the costs of providing these retail services was removed in Union's cost study. (Qwest 3RR, 19:20-20:5, 24:10-25:10) Indeed, Union did not even contend that the costs of providing these additional calling features were "minimal."[25] Thus, Union has failed to show that its cost study complies with the FCC's rule that prohibits inclusion of costs associated with retail telecommunications services.

2. Union's Cost Study Violates the Prohibition Against Use of Embedded Costs

Union's cost study also violates TELRIC because it relies on embedded costs for its inputs. FCC Rule 51.505(d)(1) specifically prohibits the use of embedded costs in a

[25] In the arbitration of the same issue between Verizon and Sprint in New York, the evidence showed that for landline switches "approximately 43% of the central processor is utilized by features." *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*., Case 01-C-0767, 2002 N.Y. PUC LEXIS 407, *34 (NY PSC Aug. 23, 2002)("*New York Sprint Decision*"). If Union is correct that a wireless network requires more extensive electronics (Union 4R, lines 88-91), the portion of a wireless network devoted to features may be even more significant. In any event, whatever the cost of providing features, Union failed to remove such costs from its cost study and thus failed to meet its burden of proof to provide a TELRIC-compliant study demonstrating that its costs of transport and termination are higher than Qwest's.

TELRIC study and contains no exception for "recent" embedded costs. The FCC defines "embedded costs" to be "costs incurred in the past and that are recorded in the … books of accounts."[26] In this case, Union took all of its investment inputs from its books of account, in direct violation of Rule 51.505(d)(1). (Qwest 3RR, 17:7-9 and fn.3)

Embedded (or historical) costs are not used in a TELRIC-compliant cost study because TELRIC assumes a least-cost, most efficient, forward-looking network. The Commission described TELRIC as follows in its most recent cost proceeding involving Qwest:

> We view the TELRIC methodology as providing a proxy cost estimate for elements of a forward-looking monopoly provider's theoretical *least-cost, most efficient, forward-looking network,* designed to provide for current demand. The model is not a representation, nor a blueprint, of an actual network. Rather, it is an estimate of what minimum costs any single efficient forward-looking provider would incur to serve current demand….
>
> … Historical costs, practices, and policies have little to do with setting TELRIC prices.[27]

In Utah, the Commission made its TELRIC determinations for the switch, as an example, based on purchase contracts for *future* switch deliveries.[28] This allowed the parties to verify the switch cost components and to investigate whether the costs in the study properly reflected forward-looking costs. It also allowed the parties to evaluate

[26] Although 47 CFR § 51.505(d)(1) refers to the incumbent LEC's embedded cost, the same rule applies to a CMRS provider when it has the burden of proof to come forward with its own TELRIC-compliant cost study.

[27] Report and Order, *In the Matter of the Determination of the Cost of the Unbundled Loop of Qwest Corporation,* Docket No. 01-49-85, 2003 Utah PUC LEXIS 68, *2 (Utah PSC May 5, 2003) ("*UNE Order*") (emphasis added). The *UNE Order* is also in the record as Hearing Exhibit 1.

[28] *UNE Order* at 20-21.

which portions of the purchase price related to traffic sensitive components that are properly included in the cost study and which components are not.

In this case, Union used embedded costs in its cost study wherever they were available. (Tr. 56:8-19) Despite repeated requests from Qwest for more information, the only support it provided for the costs in discovery was a 2002 contract with Nortel, a 2002 purchase order and a 2004 purchase order. (Qwest 3SR, lines 250-251 and n.15) This deprived Qwest and the Division of Public Utilities ("Division") of the opportunity to determine whether the embedded costs were representative of forward-looking costs. Furthermore, Union did not make even this minimal historical information part of the record in this proceeding.

Union attempted to excuse its violation of the embedded cost prohibition by arguing that its embedded costs are current because they were recently incurred and that costs have generally increased over time. (Tr. 56:8-16; Union 2PSR, lines 187-202) This is an inadequate response. Even if one assumed that costs have generally increased over time, that does not mean that the cost of traffic sensitive network components have increased over time. It is entirely possible that any alleged cost increases are for non-traffic sensitive components or reflect the cost of providing advanced data or feature capabilities demanded by Union's wireless subscribers. Thus, it is not enough for Union to make general claims about the direction of costs. Union is required to provide evidence concerning the forward-looking cost of the most efficient technology for each component of its wireless network.

Moreover, Union's claim that costs of its wireless network components have increased runs counter to the reality that Union operates in a declining cost industry.

Electronic equipment prices have decreased significantly since 2002 when Union purchased its GSM switch. (Qwest 3SR, lines 251-253) In the Commission's cost proceeding for Qwest, "[a]ll parties agree[d] that digital switching costs have dropped and continue to drop significantly over time."[29] Union asks the Commission to ignore the conclusions it reached when evaluating Qwest's switching costs in favor of nonspecific, non-verifiable testimony submitted by Union in its final round of testimony that costs for unidentified wireless network components are increasing. Clearly, Union has failed to meet its burden of proof by failing to provide the forward-looking cost information the Commission needs for each wireless network component.

3. Union's Cost Study Is Not Based on the Forward-Looking Cost of the Most Efficient and Lowest Cost Wireless Network.

Under the FCC's rules, the TELRIC of an element is "the forward-looking cost over the long-run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element" and must be "based on the most efficient telecommunications technology currently available and the lowest cost network configuration" given the location of the carrier's existing wire centers/switches.[30] The FCC's rules also require the support for any contentions that these requirements are met be included in a record sufficient for review.[31] Union's cost study fails to meet these requirements for several reasons.

First, since Union based its cost study on the historical costs in its books, its cost study necessarily includes costs relating to technologies such as TDMA that are not

[29] *UNE Order* at 22.

[30] 47 CFR § 51.505(b) and (b)(1); Tr. 28:4-14.

[31] *Local Competition Order* at ¶ 1089.

forward looking. Union is in the process of switching from TDMA to GSM and, as a result, Union's historical books include TDMA costs. For example, Union clearly included TDMA costs as part of the operational expenses included in its cost study. In the operational expense subaccounts for the 163 BTS sites that were used as a basis for Union's cost study, almost 60% of 2005 operational costs are TDMA. (Qwest 3RR, 28:9-19 and fn. 10; Union 2SSR.1, 15)

Second, Union did not demonstrate that the design, configuration and operation of the network assumed in its cost study is the lowest cost. The only evidence Union offered beyond one or two conclusory statements that its network is appropriately designed and low cost was testimony that its costs and related network design should be presumed efficient and lowest cost because Union is in a highly competitive business. (Union 2PSR, lines 162-164) That assertion is subject to question given the level of competition experienced by Union. Mr. Woody testified that Union has only one other CMRS provider competing in much of its service area – a minimal level of competition. (Tr. 125:5-17) Mr. Woody also acknowledged on cross examination that Union receives from $8 million to $9 million per year in federal universal service fund support because it has deployed service in rural, underserved areas. (Tr. 120:14-122:22) This subsidy is clearly substantial, amounting to approximately [[ ]]%[32] of the total revenue received by Union for GSM usage in 2005. (Union 2SSR.2) Thus, Union's incentive to operate at the

[32] Confidential information or information derived from confidential information that could disclose the confidential information will be double bracketed in the confidential version of this memorandum and omitted in the non-confidential version.

highest levels of efficiency is diminished by the fact that a significant portion of its revenues come in the form of a federal subsidy.[33]

Equally importantly, simple conclusory claims of efficiency are insufficient, particularly when the record contains evidence that the costs reflected on Union's network do not reflect the most efficient network configuration. For example, Mr. Jacobsen testified at hearing that he has recently changed Union's cell site design. (Tr. 169:7-170:22, 267:12-268:5) Implicit in his statements is that Union had old designs in place whose costs are included on Union's books (and therefore in its cost study) that do not reflect the latest, and presumably most efficient, network design adopted by Union.

Third, Union's cost study also incorporates installation costs that were not the most efficient. Union's installation labor costs range from 10 to 34 percent of the equipment costs within specific equipment types. This installation cost range indicates a learning curve for installation of equipment. The more practice a company has with installing equipment, the more efficient it becomes. TELRIC requires that only the most efficient practices be used. (Qwest 3RR, 31:5-13) Union's cost study fails to meet this requirement.

Fourth, Union did not adjust the costs in its cost model to reflect sharing efficiencies. In an efficient, lowest cost network configuration, poles or towers would be shared with other carriers. In the UNE Cost Docket, Docket No. 01-049-85, the

[33] The federal high cost subsidies received by Union are not based on either Union's embedded cost or forward-looking cost; rather, the subsidies are based on costs of the incumbent LEC. As a competitive eligible telecommunications carrier, the rules provide that Union receives the same per line subsidy as the incumbent carrier in designated high cost areas. *See* 47 CFR § 54.307. Thus, Union receives the subsidies for serving customers in any portion of the incumbent LEC's high cost area, even if the portion of the area where Union provides service is not high cost.

Commission ordered that theoretical TELRIC companies have significant sharing opportunities. For example, the Commission set the sharing of poles supporting aerial cable at 50 percent, meaning that on average each pole is shared by one other provider so that no more than 50 percent of the cost of the poles could be included in the cost study. (Tr. 208:10-210:10) Union included no sharing assumption in its cost study. (Tr. 89:2-5)

As will be discussed below, cell towers are not cost sensitive to increasing call traffic and should not be included in Union's cost study in the first instance. However, if towers are included, the cost of the towers would have to be adjusted significantly downward to reflect sharing efficiencies. (Qwest 3SR, lines 278-292) Under TELRIC as applied by the Commission, towers would have to be shared by at least one other carrier and perhaps more.[34] Mr. Woody testified that there is at least one other carrier and sometimes more who compete with Union in its wireless coverage area. (Tr. 125:5-17) In addition, towers may be used by Union to offer long distance and data services. Thus, a portion of the tower costs would have to be allocated to these services. (Tr. 209:8-24) Union's cost study includes no sharing adjustments or allocations and thus fails to comply with TELRIC.

Fifth, a TELRIC-compliant study must also include efficient fill factors. For example, in the *UNE Order*, the Commission adopted TELRIC switching costs that assumed 90% utilization.[35] In this case, Union presented no quantitative evidence concerning the utilization of its switch or any of the other components of its wireless

[34] In response to Data Request 5-004, Union provided data showing that 37 other carriers utilize Union's cell towers at 23 different locations. (Qwest 3SR, lines 281-283). At hearing, Mr. Hendricks admitted that Union does in fact receive sharing revenues from other carriers. (Tr. 25:20-21)

[35] *UNE Order* at 23.

network. Nor did Union present any testimony to support what the appropriate utilization rate should be for an efficient, least cost network so that an appropriate adjustment could be made. Union simply testified that its network is arranged as it is because it provides service in sparsely populated rural areas. In other words, Union assumed that it did not need to have a network with high component utilization rates, because it provides service in rural areas with low population. (Tr. 60:11-24) The fact that Union receives substantial federal USF subsidies to compensate for these inefficiencies has already been discussed above. Thus, Union is already being compensated for the fact that its network is rural in nature with extremely low utilization. There is no basis for compensating it further by allowing it to recover asymmetric rates for call termination based on a study that clearly is not based on an efficient, lowest cost network.

In the New York proceeding, Sprint submitted a cost study that did not include appropriate fill factors. The New York Commission rejected Sprint's cost study and noted the following:

> The newness of Sprint's actual network may make it resemble a TELRIC network more than would the legacy network of an incumbent landline provider, and there is no basis for concluding that the network has been deliberately overbuilt. But more is needed if forward-looking investment is to be properly sized.
>
> For one thing, and contrary to Sprint's claim that it was under no obligation to break down busy hour demand on more than a per-month basis, forward-looking investment must be sized with reference to expected peak-load demand. Verizon did so with respect to switching costs in the Network Element Proceeding and our cost manuals adopted in Case 28425 contemplate that method as well. Sprint's present study makes no attempt to size the network on the basis of peak load demand.

> Moreover, the study lacks persuasive assurance that present customers do not bear an undue share of the costs of future growth. The analysis of fill factors, for example, is limited at best.[36]

In this case, Union presented absolutely no evidence concerning the appropriate fill factors for any of its wireless network components.[37] Thus, it is impossible to determine whether the cost study incorporates efficient utilization levels as required by TELRIC. And because Union has not provided the busy hour capacity of any of its network components, it is not possible to modify Union's cost study to apply the Commission's 90% fill factor.

Sixth, Union's treatment of common costs further demonstrates that its current cost model does not reflect TELRIC's lowest cost requirement. In initial testimony, Union asserted that a reasonable range for common costs was from $277,000 to $361,000 for a company Union's size. (Qwest 3RR, 25:11-26:9) Yet in Union's current revised cost study, these costs nearly doubled. Common costs are costs of overhead functions of a corporation (*e.g.*, human resources, finance) that generally offer increasing efficiencies as the size of the operation grows. It is not consistent with TELRIC standards for a cost model to grow operations and have common costs increase proportionally, as Union has done in its current cost model. (*Id.* at 26:5-9)

Seventh, Union's cost study violates TELRIC because it does not incorporate economic depreciation rates for each wireless network component.[38] On this point, Union's testimony has been a bundle of contradictions. In its initial study, Union used a

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[36] *New York Sprint Decision* at *8-9.

[37] With the exception of radios and trunks, there was not sufficient evidence even to determine utilization of network components, let alone whether they are efficient. With regard to radios, the evidence was that their utilization is only [[ ]]%. (Qwest 3PSR, lines 188-189)

[38] 47 CFR § 51.505(b)(3)) ("The depreciation rates used in calculating forward-looking costs of elements shall be economic depreciation rates.").

ten-year depreciation life for all of its network components. (Union 2, line 135) In response to Mr. Copeland's rebuttal testimony, Union filed a "what if" study on November 7, 2005, to show the effect of the use of the Commission-approved life for the switch in Utah. However, rather than using the Utah lives approved in setting Qwest's interconnection rates, Union mistakenly used a 17-year life for all components of its wireless network, the life approved for switches in Colorado. (Union 2SR.2, Tr. 47:21-48:3) Then, when informed again that the Commission had set a 14.5 year life for Qwest's switches, Union changed the depreciation life it was proposing to 14.5 years for all network components. (Union 2SSR, lines 21-23) When the Division observed correctly that a 25 year life should be used for buildings and towers (DPU 1.0, lines 400-401), Union asserted, without any quantification, that the depreciation life for radio equipment should really be 7 years and that this offset the error resulting from use of an inappropriate life for buildings and towers. (Union 2PSR, lines 492-499)

Clearly, Union has not met its burden of proof to demonstrate what the appropriate depreciation rate[39] is for each network component in an efficient, lowest cost network configuration. In the Colorado arbitration between Union and Qwest, the Colorado Commission concluded that the support for the depreciation rate Union proposed was deficient:

> [T]the record contains no information about the ability to expand and to update the GSM technology by means less expensive than total replacement. Thus, we find that the record contains insufficient

[39] A depreciation life can be translated into a depreciation rate by dividing one by the depreciation life. Thus, the depreciation rate for an asset with an economic life of 10 years would be 10% (1/10), assuming no net salvage value.

> information upon which we can determine whether a ten-year depreciation life for the GSM switch is reasonable.[40]

Union has not provided any better support in Utah than it did in Colorado for its depreciation rates. This is an additional reason that its cost study should be rejected.

B. UNION'S REQUEST FOR AN ASYMMETRIC RATE SHOULD BE DENIED BECAUSE UNION HAS NOT ESTABLISHED THAT THE SEPARATE COMPONENTS OF ITS NETWORK ARE COST SENSITIVE TO INCREASING CALL TRAFFIC.

1. Union's Rural Wireless Network Is Underutilized Such That Its Network Components Are Not Cost Sensitive to Increasing Call Traffic.

In order to demonstrate that the components of its wireless network are cost sensitive to increasing call traffic, Union is required to introduce evidence concerning the capacity and utilization of each component of its wireless network. (Qwest 3RR, 11:12-12:19) Such evidence is necessary because the FCC's "additional cost" standard requires proof that increases in call traffic will require additional investment in a particular wireless network component. Absent such evidence, it is simply impossible to determine whether increases in call traffic will cause exhaustion of capacity thereby causing "additional costs" to be incurred. (*Id*.)

The need for capacity and utilization evidence is best illustrated by the low utilization of radios at each cell site. While Union did not provide any analysis of the utilization of its wireless network, it did, after repeated data requests for capacity and utilization, provide minutes of use on its radios for the week of March 2-8, 2007. Assuming that the usage data was relevant (later Union claimed it was not relevant

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[40] Initial Commission Decision, *In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Union Cellular Telephone Company d/b/a Union Cellular Under Section 252 of the Federal Communications Act of 1996*, 2007 CO PUC LEXIS 795, ¶ 144 (Colo. PUC Oct. 1, 2007)("*Colorado Decision*").

because it was not busy season usage), Qwest undertook its own analysis of the utilization of the radios installed in BTSs in Union's network.

The analysis showed that Union's current average BTS radio utilization is only [[ ]]% of installed capacity. (Qwest 3PSR, lines 187-189, 236-243; Qwest 3PSR.2) At this low level of utilization, it is inconceivable that any reasonably foreseeable increase in call traffic will cause an increase in radio costs. In fact, even if the [[ ]]% increase in call traffic projected by Union in its cost study is considered, only [[ ]]% of the capacity of radios currently installed will be required. (Qwest 3PSR, lines 243-246; Qwest 3PSR.2) Thus, it is apparent that call traffic could double and Union would not have to add additional radios. The average utilization with a doubling of call traffic would be only [[ ]]%, well below installed capacity. Without data to support its claim that the busy season is significantly busier than the March 2007 data, Union clearly has not proved and cannot prove that radio costs will increase with additional traffic.

Union attempts to defend the low utilization by arguing that low utilization is inherent in the rural nature of its service territory. According to Union, it cannot achieve a high level of utilization (or fill factor) because that is impossible to do in rural areas. (Tr. 60:8-17) That is Qwest's point. The rural nature of Union's service territory means that Union's wireless network components will have low utilization rates and low utilization rates mean that there is spare capacity to handle increasing call traffic without additional cost. Increasing call traffic simply does not cause an increase in Union's costs for most, if not all, of its wireless network components.

Stated another way, Union's costs are not cost sensitive to increasing call traffic because they are incurred to provide coverage for minimal use and mobility in the areas

that Union seeks to serve. If Union's wireless network components were cost sensitive to increasing call traffic they would both (1) increase when call traffic increased and (2) decrease when call traffic decreased.[41] In Union's case, it has deployed a network to provide coverage and mobility for minimal use and the costs of the components of the network would not change even if Union terminated no call traffic on the network. (Tr. 210:11-211:11) This is the same type of fact, among others, that led the New York Commission to reject Sprint's 100% traffic sensitivity argument as absurd because, "it implies, taken to the extreme, that zero usage means zero cost, even if the network stands ready to serve."[42]

2. When Network Components Are Analyzed Separately, the Available Evidence Suggests That They Are Not Cost Sensitive to Increasing Call Traffic

In its *Wireless Additional Cost Order*, the FCC ruled that "a determination of compensable wireless network components should be based on whether the *particular* wireless network components are cost sensitive to increasing call traffic."[43] A wireless network includes a large number of different components. Mr. Jacobsen, for example, testified that "[t]he connection from the subscriber to the switch includes antennas, coaxial cable, radios, duplexers, combiners, splitters, amplifiers, radio transceivers, controllers, compression equipment and long back-haul facilities in the form of microwave, fiber optics or leased facilities." (Union 4R, lines 91-94) Union is required to analyze each of these components in its cost study. (Tr. 232:13-25)

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[41] Tr. 211:12-24. *See also FNPRM* at ¶ 68.

[42] *New York Sprint Decision* at *68.

[43] *Wireless Additional Cost Order* at ¶ 4 (emphasis added); Tr. 38:20-39:19.

Union has not separately analyzed any of these components to quantify utilization levels and the impact of additional traffic on Union's costs. In fact, at hearing, Mr. Hendricks admitted that he did not provide any quantitative analysis of the capacity or utilization of the components of Union's network. (Tr. 42:8-13) The failure to analyze capacity and utilization means that Union failed to meet is burden to prove that particular network components are cost sensitive to increasing call traffic. (Qwest 3SR C, lines 43-95; DPU 1.0, lines 474-484)

In contrast, Qwest did attempt to obtain information concerning the capacity and utilization of particular wireless network components. After repeatedly objecting to and otherwise failing to respond to data requests regarding the capacity and utilization of components of its network, Union admitted in response to a motion to compel that it had no such data. (Qwest 3SR, lines 43-75) Then, in response to what was to be Qwest's final testimony before hearing affirming that on the state of the record Union had totally failed to demonstrate that any component of its network was cost sensitive to increasing call traffic (*Id.*,lines 18-21), Union filed testimony on March 15, 2007, not contemplated in the schedule,[44] that included data regarding call blocking at certain cell sites during a one-week period, March 2-8, 2007. (Union 4R.1) After Qwest, over Union's objection, obtained a modification to the schedule to allow it to conduct discovery on the new information, Union provided similar data for other network components for the same one-week period. Rather than providing its own analysis of the actual capacity and utilization of any network components, Union criticized Qwest's analysis of the data Union provided on the ground that it did not represent the busy season. (Tr 161:10-25) In

[44] *See* Eighth Scheduling Order, Docket No. 04-049-145 (Utah PSC Mar. 6, 2007).

doing so, Union ignored the fact that although the data requests were served on April 23, 2007 (Qwest Cross 13 at 18) and not responded to until early July (Tr. 164:21-165:7; 317:17-318:13), it chose to provide only data for one week in early March of 2007 even though the request was not limited to any particular time period and Union was free to take as long as it wanted to respond.[45] And then, despite the fact that both Rule 26(e) of the Utah Rules of Civil Procedure and Qwest's data requests require the supplementation of data responses when new information becomes available (Utah R.Civ.P 26(e); Qwest Cross 13 at 1-2), Union never updated its response to provide data for any other period including the busy season which it claimed occurred in the summer months.

a. Cell Towers

All of the parties to this arbitration agreed that cell towers are not by themselves traffic sensitive.[46] However, in order to recover the costs of towers from Qwest through reciprocal compensation, Union erroneously contends that cell towers are "support structures" such that the cost of towers may be allocated to traffic sensitive components of Union's wireless network. To complete this argument, Union argues that radios are traffic sensitive, that the cell towers support the radios and therefore that the full cost of the cell towers may be included in the asymmetric rate Union is requesting.

Union is wrong both in its contention that cell towers are "support structures" and in its contention that the radios deployed in Union's rural network are traffic sensitive. The FCC defines the facilities included in "support structures" in its Part 32 rules. (Qwest

[45] Qwest Cross 13 at 6. Despite the fact that the Scheduling Order in effect at the time required responses to data requests within 10 calendar days, Qwest told Union that given the potential breadth of its request, it would anticipate allowing Union greater time to respond. However, after taking almost two and one-half months to respond, Union provided data only for the same one-week period in early March for which the data was included in its March testimony.

[46] DPU 1.0, lines 403-419; Tr. 91:2-16, 277:13-21, 292:15-19.

Cross 1) Cell towers, or similar facilities such as poles in a wireline network, are not listed as a support structures in the Part 32 rules. (*Id.*) Thus, Union is not entitled to allocate the cost of cell towers to other wireless network components. Under the FCC's rules, cell towers are like poles and fall within the category of cable and wire facilities. (Qwest Cross 2) As such, they are considered to be direct costs of providing wireless service. (Tr. 277:13-15) They function to provide geographic coverage for Union's wireless network. Being direct costs, under the FCC's rules they must be analyzed individually to determine whether they are cost sensitive to increasing call traffic. (*Id.*) Because towers provide geographic coverage for Union's wireless network, when so analyzed, cell towers are clearly not traffic sensitive, a point on which all parties agree.

b. Radios

Although Qwest requested capacity and utilization information for all of the components of Union's wireless network, Union only provided usage information for its radio channels and trunks. (Qwest 3PSR, lines 62-64) As discussed earlier, based on the information that Union provided, Qwest determined that the utilization of radio channels was only [[ ]]%. (*Id.*, lines 187-189, 241-243; Qwest 3PSR.2) Thus, Union's radios are able to carry significant increases in traffic without additional cost.[47] If, for example, call traffic increased 50% as Union's cost study assumes, the utilization of the radios would increase to only [[ ]]%,[48] leaving plenty of unused capacity.

[47] Union testified at hearing that Union currently deploys at least two radios at each cell site to provide redundancy (Tr. 147:12-15) though Qwest did not find this practice implemented on a wide scale based on Union's data responses. Even without at least two radios at each site, there is excess radio capacity, and this is confirmed by the low radio utilization rate.

[48] Calculated: [[ ]]% X 150% = [[ ]]%.

Union responded to Qwest's utilization calculation by arguing that Qwest should have used offered load capacity rather than carried load capacity in its calculation. (Union 4PSR, lines 377-379) According to Union, this would have increased the utilization rate by 30%. (*Id.*, lines 382-384) Union also argued that Qwest should have used busy season data instead of the data Union provided for the one week in March. According to Union, the effect would have been to increase utilization by another 40% to 60%, for a total increase of approximately 100%. (*Id.*, lines 385-387)

Union's response is wrong for two reasons. First, Union never provided either offered load capacity information or busy season data. In fact, Mr. Jacobsen reluctantly admitted that offered load capacity data is not actually available. (Tr. 185:14-17) Union only provided usage data for March 2-8, 2007, notwithstanding that it took until July, a period of nearly two and one-half months to respond to the data requests and that it had a duty to supplement its data request responses with more current information that became available. Certainly, the summer busy season data (if there were quantitative evidence to show that the busy season is actually in summer) was available sometime prior to hearing in this case and should have been provided if Union thought it relevant. Mr. Jacobsen admitted at hearing that Union had the information and did not produce it. (Tr. 165:1-7) Thus, there is no data in the record that would support Mr. Jacobsen's claim that Qwest understated Union's network utilization.

Second, even if one assumes that Qwest's utilization calculation understates Union's utilization by 100%, there would still be plenty of unused radio capacity to handle increasing call traffic without additional cost. A 100% increase to a [[ ]]% utilization rate would bring Union's utilization rate to [[ ]]%. If call traffic then

increased 50% over the study period as Union's cost study assumes, the utilization rate would rise to only [[ ]]%, leaving [[ ]]% of the radio capacity unused. Thus, Union's criticisms of Mr. Copeland's utilization calculation do not lead to the conclusion that Union's radios are cost sensitive to increasing call traffic. Union's radios can handle increased call traffic without additional cost.

c. Base Transceiver Stations Other Than Towers and Radios

BTSs encompass cell towers and the buildings and equipment located at cell sites including radios, antennas, cable, power amplifiers, controllers and other equipment. Cell towers and radios have already been discussed above. The antennas and cables attached to cell towers are primarily there for access and coverage and are therefore not traffic sensitive. (DPU 1, lines 421-423) The power equipment associated with the BTS, including emergency backup generators, is engineered for the life of the facility and is not traffic sensitive. (*Id*., line 418-419) While it is theoretically possible that certain BTS equipment might be cost sensitive to increasing call traffic, Union lumped all of its BTS costs together such that it is impossible to separate traffic sensitive equipment from equipment that is not traffic sensitive.

d. Base Station Controllers

The BSCs in Union's network control cell site radio signaling and perform radio signal management functions for BTSs. (DPU 1.0, lines 438-447) One of their functions is to provide coverage. Mr. Anderson testified that the processor in the BSC is not traffic sensitive and that the entire BSC is not traffic sensitive to the extent that it serves to provide mobility or coverage. (*Id.*, lines 119-122, 315-319) Only the BSC ports are potentially traffic sensitive.

Union did not provide any analysis of the utilization of its BSCs or attempt to breakdown the costs of the BSCs into traffic sensitive and non-traffic sensitive components. Nor did Union introduce evidence as to the cost of the BSC ports. Furthermore, the cost study does not have a traffic sensitivity factor for the BSCs. Thus, there is no way to either calculate a traffic sensitivity factor for BSCs or input such a factor into the cost study.

e. GSM Switch

Union claimed at hearing that it would soon have to retire its GSM switch and implied that this was because the GSM switch was approaching capacity. However, the evidence in the record establishes that the GSM switch has ample capacity to handle additional call traffic without causing Union to incur additional costs. In its responses to Qwest's data requests, Union acknowledged that its GSM switch has capacity to serve 515 cell sites. In its most recent study, Union forecasts that its network will grow to 325 cell sites by 2008. Thus, in 2008, Union will be using just 63% (*i.e.*, 325/515) of its switch capacity. (Qwest 3RR, 22:15-18)

In responding to this utilization evidence, Mr. Jacobsen admitted that at least part of the switch is not traffic sensitive. (Union 4R, lines 103-116) According to Union, the switch consists of the following components: (1) processor and common control, (2) the switching matrix, (3) memory and (4) switch ports. (*Id*.) Mr. Jacobsen admitted that the processor and common control and switching matrix portions of the switch are not traffic sensitive. (*Id*.) In addition, in its responses to data requests, Union admitted that Union sizes the switch memory for the life of the switch and therefore that the switch memory is not cost sensitive to increasing call traffic. (Qwest 3PSR, lines 148-172)

Moreover, Union's testimony concerning the alleged need to augment the GSM switch is contradictory at best. In Colorado, Union's witnesses testified that it would not have to replace the GSM switch prior to the end of the ten-year period covered by its cost study.[49] In Utah, Mr. Hendricks claimed that Union would have "to augment its switch with additional call processing capabilities because Union's switch is on the verge of exhausting capacity." (Union 2SSR, lines 260-262) However, Union did not identify which capacity limits were near exhaust, identify which parts of the switch would have to be augmented or attempt to quantify the cost of any such augmentation to the traffic sensitive components of its GSM switch. Mr. Hinman, Union's engineer, testified that the reason that additional capacity would have to be added to the GSM switch was to enable Union to offer additional features and services that its subscribers demanded. (Union 1, lines 31-33, 135-136) Significantly, no Union witness testified that any upgrades or augments were needed for the GSM switch to be able to terminate additional call traffic.

Furthermore, Union did not analyze the GSM switch investment included in its cost study to identify the costs relating to components it contended were traffic sensitive. However, Qwest did perform such an analysis based on the limited information that Union provided in discovery and found that at least 73% of the costs were either not voice-related or not traffic sensitive. (Qwest 3SR, lines 154-156; Qwest 3SR.1) Based on his review of Union's responses to data requests, Mr. Copeland was able to determine that Union's switch investment included such things as training and travel expenses, equipment used to provide data services or vertical features to Union's wireless

[49] *Colorado Decision* at ¶ 147.

subscribers, and software and other one-time costs that are by their nature not traffic sensitive. (Qwest 3SR, lines 147-151) Mr. Copeland was not able to determine from the information Union provided whether any of the remaining 27% of the switch investment involved traffic sensitive components. Nor did Union present any such evidence.

f. Backhaul

Union's cost model does not provide any support for the costs Union includes in the cost study for backhaul costs. (Qwest 3RR, 19:1-3, 29:1-11, 31:14-18; DPU 1.0, lines 247-249) Union backhauls its transport from one cell site to another to reach BSCs in its network and thus traffic from the most remote cell site is aggregated at various points along with other traffic before reaching the BSC. (Tr. 140:21-141:7; Union 4PSR.1). Union provided no evidence that any of the backhaul facilities have sufficiently high utilization rates such that increasing call traffic would require Union to augment the backhaul and cause Union to incur additional costs. Thus, there is no evidence that backhaul facilities in Utah are cost sensitive to increasing call traffic.

3. Union's Claim That Its Network Is 100% Traffic Sensitive Is Not Reasonable.

Union claims that 100% of its rural wireless network is cost sensitive to increasing call traffic. Union's primary argument in support of its position is a claim that none of its wireless components is dedicated to a single customer. According to Union, the shared nature of its wireless components means that they are cost sensitive to increasing call traffic. (Tr. 141:22-142:3)

The contention that the shared nature of wireless network components makes them 100% traffic sensitive has been rejected by each commission that has considered the

argument. For example, the New York Commission stated the following when it rejected a similar argument made by Sprint:

> It would be neither surprising nor unreasonable to discover that wireless termination costs overall are more traffic sensitive than landline termination costs. But it would be both surprising and unreasonable to conclude that all wireless costs (except those of the handset) are traffic sensitive. Sprint argues to that effect largely on the premise that no part of the wireless network (except again for the handset) is dedicated to individual customers and that only such dedicated investment can be considered non-traffic sensitive. That premise, however, is incorrect. Landline loop investment, for example, is excluded from reciprocal compensation because it is non-traffic sensitive, even though the feeder portion of the loop is not dedicated to single users. And in the Network Elements Proceeding, we adopted an explicit allocation of switching costs—clearly a shared resource—between traffic-sensitive and non-traffic sensitive components.
>
> ***
>
> As the party with the burden of proof, Sprint was obligated to show the allocation of costs between traffic sensitive and non-traffic sensitive components. It took the view that all costs are traffic sensitive. Verizon has gone forward with a presentation that calls that result into question, at least prima facie, and Sprint has failed to rebut it. Accordingly, Sprint has, again, not carried its burden of proving asymmetric reciprocal compensation to be warranted.[50]

The Colorado Commission reached a similar result in the *Colorado Decision*.[51]

As discussed above, whether a shared wireless component is cost sensitive to increasing call traffic depends upon the extent to which it is utilized. An underutilized component can carry increasing call traffic without additional cost if its utilization is low in relation to its capacity. Moreover, even a wireless network component that has traffic sensitive cost components can also have cost components that are not cost sensitive to increasing call traffic.

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[50] *New York Sprint Decision* at *66-*67.

[51] *Colorado Decision* at ¶¶ 162-163, 174.

Union's claim that 100% of its wireless network is traffic sensitive is not based on an analysis of each of the costs associated with each of its network components. Thus, the claim is not reasonable.

C. THE COMMISSION SHOULD NOT ATTEMPT TO ADJUST UNION'S COST STUDY TO MAKE IT TELRIC-COMPLIANT OR TO REFLECT ONLY TRAFFIC SENSITIVE COSTS AND COULD NOT DO SO EVEN IF IT WERE APPROPRIATE.

Apparently recognizing the weakness of its position, Union argued late in the course of this three-year arbitration that if the Commission did not find its sixth-revised cost study TELRIC-compliant or if it concluded that all components of its network were not cost sensitive to increasing call traffic, it should make adjustments to the study to satisfy its concerns. (Tr. 26:2-14; Union 2PSR, lines 25-32) Union argued that in Qwest cost dockets that is what the Commission does, so it should do so here also. (*Id.*) In support of this position, although Union claims that 100% of its rural wireless network is cost sensitive to increasing call traffic, Union noted that its cost study now contains two input factors that allow the Commission to assume that less than all of the wireless network is cost sensitive to increasing call traffic. (Tr. 69:16-22)

Union's argument is incorrect for at least two reasons. First, it is not necessary or appropriate for the Commission to adjust Union's defective cost study. Second, even if it were appropriate for the Commission to adjust the study, there is insufficient information for the Commission to do so.

1. It Is Not Necessary or Appropriate for the Commission to Adjust Union's Study.

In a Qwest cost docket, the Commission must determine a rate for interconnection between Qwest as the incumbent LEC and other carriers as competitive local exchange

carriers ("CLECs") and the rates for unbundled network elements ("UNEs") that Qwest must make available to CLECs. If the Commission fails to determine these rates, either interconnection and UNEs will not be available or the cost of interconnection and the use of UNEs will not be known making it impossible for CLECs to determine how they wish to conduct business.

Here, the Commission has already determined these rates for Qwest. Union knows how much it must pay and how much it will receive if it interconnects and exchanges local traffic with Qwest. As noted previously, the law presumes that the reciprocal compensation rate set for Qwest is reasonable for both Union and Qwest. Thus, there is no necessity for the Commission to determine an asymmetric reciprocal compensation rate.

Rather, if Union believes that its costs of transport and termination of local calls are higher than Qwest's, it is required to demonstrate those costs through a TELRIC-compliant study. If it fails to do so, the symmetrical reciprocal compensation rates previously established for Qwest are deemed adequate. As the FCC stated in the *Local Competition Order*:

> Given the advantages of symmetrical rates, we direct states to establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic …. *If a competing local service provider believes that its cost will be greater than that of the incumbent LEC for transport and termination, then it must submit a forward-looking economic cost study to rebut this presumptive symmetrical rate. In that case, we direct state commissions,* when arbitrating interconnection agreements, *to depart from symmetrical rates only if they find that the costs of efficiently configured and operated systems are not symmetrical and justify a different compensation rate.* In doing so, however, *state commissions must give full and fair effect to the economic costing methodology we set forth in this order, and create a factual record, including the cost study, sufficient for purposes of review* after notice and opportunity for the

> affected parties to participate. *In the absence of such cost study justifying a departure from the presumption of symmetrical compensation, reciprocal compensation for the transport and termination of traffic shall be based on the incumbent local exchange carrier's cost studies.*[52]

Thus, the FCC has made it clear that if Union's cost study is not TELRIC-compliant or if Union fails to create a factual record sufficient for purposes of review, the symmetrical rate will be used. The Commission is not to attempt to correct Union's study or send Union back to the drawing board to make adjustments itself. Union has failed in six attempts to produce a TELRIC-compliant cost study that includes only components of its network that are cost sensitive to increasing call traffic. Likewise, Union has failed over a period of three years to create a factual record that would justify any departure from the symmetric rate. Accordingly, Union's request that the Commission fix its study or let it do so, is misplaced and contrary to law.

Rejecting Union's cost study does not treat Union unfairly in comparison to Qwest. State commissions have penalized Qwest for failure to provide convincing evidence in cost dockets when it had the burden to do so. When the Minnesota Commission concluded that there was no evidence that there was an additional cost to terminate calls, the Minnesota Commission set Qwest's end office switching rate at zero.[53]

Union made the same claim in its petition for rehearing, reargument and reconsideration in the Colorado arbitration. (Qwest Cross 4 at 1-2) There Union contended that the Colorado Commission's decision rejecting its cost study because it failed to meet its burden of proof was in error and that "the Commission could have

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[52] *Local Competition Order* at ¶ 1089 (emphasis added).

[53] *Ace Telephone Association v. Koppendrayer*, 432 F.3d 876, 879-881 (8th Cir. 2005).

required modifications to the study based on those specific portions of Union's cost study that the Colorado Commission believed were not supported." (*Id.*) On November 21, 2007, the Colorado Commission denied Union's petition.[54]

2. The Commission Could Not Adjust the Cost Study Even If It Were Appropriate to Do So.

The flaws in Union's cost study have been thoroughly exposed above. Rather than reiterating these problems, it is sufficient to note that there is not sufficient information on the record for the Commission to adjust the cost study even if it were appropriate for it to do so either with respect to TELRIC issues or traffic sensitivity.

Apparently recognizing the weakness of its position on traffic sensitivity, Union now asserts that its model has two traffic sensitive input factors that the Commission can adjust if it finds that Union's entire wireless network is not 100% traffic sensitive. One factor applies to the switch. A second factor applies to all of the cell site components in Union's cost study. (Tr. 69:16-22)

Union's two proposed traffic sensitivity factors do not address the deficiencies in either Union's cost study or the evidence Union presented at hearing. First, all of the costs included in the cost study are tainted by TELRIC violations. Union made no attempt to remove the costs associated with retail telecommunications services from the costs it used in its study. The costs of providing retail voice termination, data services and other retail features and services permeate the data used in the cost study. In addition, many of the costs in the cost study are embedded costs. Union did not present

[54] Decision Denying Application for Rehearing, Reargument, or Reconsideration, Decision No. C07-0984, Docket No. 04B-491T (Colo. PUC Nov. 21, 2007).

evidence to permit the Commission to adjust each of the hundreds of entries in Union's books that were input into the cost model.

Second, Union's cost study does not include separate factors for each component of its wireless network. The FCC's rules require that components be separately analyzed. Union failed to break down the costs for each wireless component in its network. Accordingly, there is no way to split the costs up for each component to arrive at a traffic sensitive factor that could be applied to each component and then aggregated to arrive at a single traffic sensitive factor for all components other than the switch.

The cost study that Union presented at hearing was Union's sixth model in this proceeding. (Qwest 3SR, lines 33-34). All six variations of the cost study have been based on embedded costs. All six variations have failed to exclude the costs associated with retail telecommunications services. And all six variations have failed to provide the required detailed analysis of each wireless network component. To correct the errors in the study would require Union to restructure its cost study and develop an entirely new record.

Rejection of Union's cost study and its request for an asymmetrical rate does not leave Union uncompensated. Union will still receive the symmetrical rate.

D. THERE IS NO REASON FOR THE COMMISSION TO REACH A DIFFERENT RESULT THAN THE COLORADO COMMISSION.

Union made the same claim before the Colorado Commission that it makes here. In fact, it initially filed the same cost study in Colorado that it filed here. (Tr. 31:16-19) (Tr. 32:5-14) In surrebuttal testimony, the studies remained identical, including the filing of an alternative "what if" study in Utah that utilized the depreciation life ordered for the switch in Colorado rather than the life ordered in Utah. (Union 2SR.2, Tr. 47:21-48:3)

After the Colorado hearing, Union did adjust its study in Utah to use some of the inputs approved for Qwest in Utah and also modified the model by providing new inputs that would in theory allow adjustment of the model by inputting a traffic sensitivity factor for the switch and another traffic sensitivity factor for all other components located at cell sites. However, Union continued steadfastly to maintain that the entire network is traffic sensitive, so the new inputs were effectively never used by leaving them set at 100%. Finally, with the passage of time, Union also updated its study in Utah to include embedded investment rather than projected costs for GSM BTSs. (Tr. 57:15-18) Based on these changes, Union claims that the Commission should ignore the decision in Colorado because Union has addressed the deficiencies in its model that caused the Colorado Commission to reject it. (2PSR. p.28:639-648)

Union cited what it claimed were seven differences between the most-recent model filed in Utah and the model rejected in Colorado. These included use of actual GSM cell sites costs as opposed to projected GSM cell site costs, inclusion of different expense assumptions and costs based on actual wireless experience, including use of the productivity offset approved for Qwest in Utah, use of a projected MOU factor, use of other inputs approved for Qwest's cost studies in Utah and inclusion of the user-adjustable traffic sensitivity factors mentioned above. (Union 2PSR, lines 619-637) On the basis of these changes, Union claimed that the cost study in Utah is a more accurate predictor of costs and rates than the one rejected by the Colorado Commission. (*Id.*, lines 639-640) Finally, Union claimed that it had produced much more voluminous data in Utah than it had in Colorado in support of its study. (*Id.*, lines 640-643)

During cross examination, it was established that none of the changes made in the Utah study affected the analysis or reasoning of the Colorado Commission in any way. For example, a "what if" study was introduced in Colorado that included the Colorado approved inputs for the same factors that Union updated in Utah to include Utah factors. (Tr. 44:8-48:3) Thus, if the change to use these factors were significant, the Colorado Commission had opportunity to review them and was unpersuaded that they overcame that basic flaws in Union's study. In addition, the updates for actual costs in Utah had the counterintuitive effect of increasing costs and the proposed asymmetric rate in the Utah study. (Tr. 64:9-67:19) If the Colorado Commission found the lower costs and lower rate unsupported, it is unlikely that an adjustment to increase the rate would have been found persuasive. Finally, the ability to make an adjustment to the study to assume some portion of the switch or other elements of the network are traffic sensitive does not improve the study for two reasons. First, costs associated with particular components of the network are to be excluded if the components are not cost sensitive to increasing call traffic. Because Union has failed to provide evidence of traffic sensitivity of individual components and because it has failed to segregate the costs of its system among such components, it is not possible to determine the appropriate factors to input for the percentages. Second, and more importantly, by leaving these inputs at 100%, Union has effectively not utilized them, so the Utah study is effectively equivalent to the study rejected in Colorado. Union has the burden to present a TELRIC-compliant study that includes only traffic sensitive components of the network. It is not up to other parties or the Commission to correct a study that fails to do those things even if inputs are available through which such corrections could be made.

In this case, Union's cost study suffers from all of the same material deficiencies that the Colorado Commission noted in rejecting Union's cost study in the Colorado arbitration. The Colorado Commission summarized its reasons for rejecting Union's cost study as follows:

> We find that Union Cellular's cost study is deficient in at least the following areas: (a) it does not distinguish between voice and data services; (b) it assumes, without analysis, that Union Cellular's entire wireless network is traffic sensitive (that is, cost sensitive to increasing call traffic); and (c) neither the cost study nor Union Cellular provides critical detail and analysis required by law.[55]

Here, Union has again failed to separate out the costs of providing retail voice termination, data services and features and services to its subscribers. Union has again assumed that its entire wireless network is cost sensitive to increasing call traffic without analyzing the capacity and utilization of each wireless network component. Finally, as discussed above, Union has again failed to provide critical detail and analysis concerning the specific components that make up its wireless network. Thus, the study has not changed the fundamental characteristics that caused the Colorado Commission to reject it. There is no reason for this Commission to reach a different result.

III. ARGUMENT – OTHER ISSUES

A. ISSUE NO. 1: TYPE OF INTERCONNECTION

In this arbitration, Qwest seeks to directly interconnect with Union through an industry standard Type 2 interconnection. (Qwest 1, lines128–151) Under the FCC's regulations, Qwest is entitled to request interconnection with Union. Rule 20.11(e) expressly provides that "[a]n incumbent local exchange carrier may request

[55] *Colorado Decision* at ¶ 174.

interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in Section 252."[56]

Type 2 interconnection between Qwest and Union's wireless switch is necessary so that Qwest can properly rate and bill wireless traffic that Union delivers to Qwest.[57] (Qwest 1, lines 166-189; Qwest 1R, lines 43-54) Qwest has established provisioning, recording and billing processes specifically associated with Type 2 trunks in order to properly rate mobile-to-land traffic. If Union combines its wireless traffic with Union Telephone's wireline traffic, Qwest will not be able to distinguish the wireless traffic from the wireline traffic and rate and bill the wireless traffic correctly. (Qwest 1R, lines 78-88; Qwest 1SR, lines 35-39) In addition, Qwest will be unable to prepare transit records for third parties who terminate Union's traffic that transits Qwest's network. (Qwest 1, lines 224-232; Qwest 1R, lines 89-97)

Union has offered no alternative to direct trunking that would allow Qwest to prepare its own bills and to provide records for third party terminating carriers. (Qwest 1, lines 182-189; Qwest 1R, lines 84-88) In particular, Union has not offered to provide these records itself so that Qwest and other carriers would have the information they need to bill Union appropriately for Union's wireless traffic. (Qwest 1R, lines 78-83) Thus, the Commission should require Union to establish Type 2 interconnection trunks from its wireless switch to Qwest tandems and/or end offices.

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[56] 47 CFR § 20.11(e).

[57] Wireless calls that originate and terminate within the same MTA are treated as local calls and are subject to reciprocal compensation even if they cross wireline local calling boundaries established by the Commission. *Local Competition Order* at ¶ 1036. A call that is between MTAs is referred to as an interMTA call, is not local and is not subject to reciprocal compensation.

By requiring Union to establish Type 2 interconnection trunks, the Commission will not be forcing Union or Union Telephone to make any significant investments to reconfigure their networks. Today, Union has interim Type 2 interconnection trunks in place. (Qwest 1, lines 160-165; Qwest 1.4; Qwest 1.5) Union and Union Telephone are able to use existing facilities and simply designate trunks groups as either wireline or wireless trunks. (Qwest 1R, lines 36-42) This designation does not require Union or Union Telephone to build out network facilities to accomplish traffic separation. (*Id*.)

In the Colorado arbitration, the Colorado Commission did not require Union to establish Type 2 interconnection trunks to separate its wireless traffic from its wireline traffic. However, it based its decision on three assumptions that are not present in this case. First, the Colorado Commission assumed that Union would be supplying records that Qwest and other carriers could use to bill for wireless traffic delivered by Union.[58] In this case, Union has not offered to produce such records and has not proposed an alternative to Type 2 interconnection trunks that will allow Qwest to separate Union's wireless traffic from Union Telephone's wireline traffic. Second, the Colorado Commission ordered Union to use Feature Group D ("FGD") trunks instead of Type 2 interconnection trunks based on the incorrect assumption that FGD trunks would address Qwest's billing concern.[59] In this case, Union presented no evidence demonstrating that FGD trunks will work as an alternative to Type 2 interconnection trunks to address Qwest's billing concern. Finally, the Colorado Commission may have assumed that it

[58] *Colorado Decision* at ¶ 39.

[59] *Id*. at ¶¶ 63-65. Had Union proposed FGD trunks for intraMTA wireless traffic, Qwest would have presented evidence that the billing systems associated with FGD trunks cannot separate wireless traffic from wireline traffic or appropriately bill intraMTA wireless traffic.

would be costly for Union to establish Type 2 interconnection trunks.[60] The evidence in this case demonstrates that not to be true. (Qwest 1R, lines 36-42; Qwest 1SR, lines 40-49)

To ensure that Qwest can properly rate and bill Union's wireless traffic, the Commission should adopt Qwest's proposed language for Issue No. 1.[61]

B. ISSUE NO. 2: ACCESS TANDEM DEFINITION

In Issue No. 2, Union attempts to include Union Telephone's incumbent LEC wireline access tandem within the definition in Section 4.3 of an Access Tandem for purposes of interconnection between Qwest and Union. Union's proposed addition to Section 4.3 should be rejected because it serves no purpose in the ICA. Qwest's incumbent LEC tandems are referenced in the agreement only because Union has a right to interconnect at any technically feasible point within Qwest's network, including at Qwest's access tandems. Thus, Qwest's tandems must be referenced because they are possible points of interconnection. (Qwest 1, lines 260-288) The same is not true of Union Telephone's incumbent LEC wireline tandem. The parties will not interconnect at Union Telephone's incumbent LEC wireline tandem because it is not a point within Qwest's network in Utah and Qwest is not seeking to interconnect with Union Telephone, the incumbent LEC. (*Id.*, lines 300-319) Qwest is seeking interconnection with Union, the CMRS provider.

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[60] *Id*. at ¶ 60.

[61] References to "Type II" should not be removed from the agreement. The Commission should not adopt Union's proposed Section 6.2.4.1.1 which would require Qwest to establish one-way trunk groups from its network to Union Telephone's "access tandem or end-office switch(es)" rather than Union's wireless switch. Finally, the Commission should not adopt Union's proposed Section 6.2.4.2.1 requiring non-local traffic be routed over Union Telephone's tandem FGD facilities.

In addition, Union has not established that its tandem serves a comparable geographic area as Qwest's Utah tandems. Under the FCC's rules, Union is not entitled to have its switch treated as a tandem absent such proof.[62]

C. ISSUE NO. 3: LOCATION OF POINT OF INTERCONNECTION

Issue No. 3 concerns the location of the point of interconnection ("POI") between Qwest and Union. Qwest's proposed language requires that the POI be located within Qwest's network, consistent with the Act and the FCC's rules. At issue in this proceeding is interconnection under Section 251(c)(2) of the Act. Section 251(c)(2) provides for interconnection with the incumbent LEC's network "at any technically feasible point within the carrier's network."[63]

Union proposes changes to Sections 4.68, 6.1.1, 6.1.2.1, 6.3.1.4.1 and 6.3.1.4.2, the effect of which is to require interconnection anywhere Union proposes. For example, in Section 6.1.1, Union proposes to delete the language "within its network" after the statement that "Qwest will provide Interconnection at any technically feasible point requested by Union." Union's proposed changes go beyond what is required of Qwest by the Act or the FCC's regulations.

Interconnection under the Act is limited to interconnection with the incumbent LEC's existing network. Qwest is not required to extend its network to accommodate interconnection with Union. Further, Qwest has a right to insist on at least one interconnection point within each LATA.[64] Accordingly, Union's proposed changes to Sections 4.68, 6.1.1, 6.1.2.1, 6.3.1.4.1 and 6.3.1.4.2 should be rejected. As the Colorado

[62] 47 CFR § 51.711(a)(3).

[63] 47 USC § 251(c)(2); s*ee also* 47 CFR § 51.305(a).

[64] *Intercarrier Compensation NPRM* at ¶112.

Commission found, Qwest does not have an obligation to interconnect at points outside of its incumbent LEC service area.[65]

D. ISSUE NO. 4: TRANSIT TRAFFIC

The parties reached settlement prior to the hearing concerning Sections 6.2.4.3.1 and 6.2.4.3.3 of the ICA. The agreed language is reflected in the Issues List filed by the parties. The only remaining disputed language in Issue No. 4 concerns Union's proposed modifications to Section 6.2.1.1.

Section 6.2.1.1 makes clear that the ICA is between Qwest and Union for the exchange of traffic between them. The traffic to be exchanged will either be wireless (Union) to wireline (Qwest) or wireline (Qwest) to wireless (Union) in all cases other than when Qwest is acting as a transiting carrier. Accordingly, as the Colorado Commission found, Union's proposed deletion to Section 6.2.1.1 of the language describing the traffic to be exchanged is inappropriate and should be rejected.[66] Union Telephone, the incumbent LEC, does not have rights under the ICA.[67]

In addition, the traffic to be exchanged between Qwest and Union will not involve a third-party transit provider. As a result, it will be necessary to amend the agreement to establish terms to apply if Union seeks to deliver traffic to Qwest through a third-party transit provider. While the Colorado Commission did not agree with Qwest on this point,

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[65] *Colorado Decision* at ¶¶ 70-101.

[66] *Id.* at ¶¶ 105-112.

[67] Expanding the ICA to include Union Telephone's incumbent LEC operations would create a situation in which two incumbent LECs were interconnecting. Union Telephone, in its capacity as an incumbent LEC, does not have the same rights under the Act as Union, the CMRS provider. Indeed, Qwest, as the party requesting interconnection, would arguably have the right to select the point of interconnection and the manner in which it interconnects with Union Telephone, the incumbent LEC.

it based its decision on the false premise that the term "third party transit provider" is ambiguous.[68] However, Union cannot be a "third-party" transit provider for its own traffic. Union and Union Telephone operate as a single legal entity. Thus, the Commission should reject Union's proposed deletion to Section 6.2.1.1 that calls for an amendment if the parties agree to exchange traffic through a third party transit provider.

E. ISSUE NO. 5: NON-LOCAL TRAFFIC

Issue No. 5 concerns modifications that Union has proposed for Sections 6.3.8.14 and 6.3.9.1 of the ICA. In essence, Union is seeking to have Union Telephone's wireline access tariffs apply to Union's wireless operations. Union attempts to justify its changes by arguing that Qwest and Union should be treated reciprocally. The Commission should reject Union's proposed changes for the same reasons that the Colorado Commission rejected them.[69]

Union's proposed modifications to Sections 6.3.8.14 and 6.3.9.1 should be rejected because they are not lawful. First, while wireline carriers are permitted to file access tariffs, wireless carriers such as Union are not permitted to file access tariffs.[70] Second, even if Union could assess access charges, the party that would be responsible for paying the access charges would be the customer's presubscribed interexchange carrier. (Qwest 2, lines 386-428; Qwest 2R, lines 339-377) Third, wireless carriers

[68] *Colorado Decision* at ¶¶ 118-120.

[69] *Id.* at ¶¶ 121-136.

[70] In 1994, the FCC temporarily prohibited CMRS carriers from filing tariffs for interstate access service. Second Report and Order, *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services,* 9 FCC Rcd 1411, ¶ 179 (rel. Mar. 7, 1994). The FCC has taken notice and comment concerning the appropriate intercarrier compensation for wireless traffic, but has not lifted this temporary prohibition. *See Sprint Spectrum, L.P. v. AT&T Corporation*, 168 F. Supp.2d 1095, 1100-01 (2001).

charge their wireless subscribers for receiving interMTA calls in lieu of charging switched access, a fact that distinguishes Union from Qwest. Indeed, Mr. Hendricks testified that Union effectively charges its wireless subscribers $0.17 per minutes for receiving calls. (Union 2SSR, lines 85-86) Union would be receiving a double recovery if it charged both its subscribers and Qwest for terminating calls. Thus, as the Colorado Commission recognized in rejecting Union's proposed language, the symmetry Union seeks to create does not exist under the law.[71]

Union's proposed changes to Section 6.3.8.14 should also be rejected because, by its terms, Section 6.3.8.14 cannot be symmetrical.[72] Section 6.3.8.14 concerns only land-to-mobile calls. (Qwest 2, lines 369-384) Union cannot by definition deliver a land-to-mobile call to Qwest because Union customers will make only mobile-to-land calls. (*Id.*) Section 6.3.8.14 has a limited purpose applicable only to land-to-mobile calls. It is part of Section 6.3.8 which deals with how local traffic is billed. Section 6.3.8.14 provides the formula for how interMTA traffic is deducted from the bill for local land-to-mobile minutes to arrive at the proper charge for reciprocal compensation. (Qwest 2, lines 350-368)

IV. CONCLUSION

For the foregoing reasons, the Commission should reject Union's request for an asymmetric reciprocal compensation rate and adopt Qwest's proposed language for each issue in dispute.

[71] *Colorado Decision* at ¶¶ 32-136.

[72] *Id*. at ¶¶ 125-129.

RESPECTFULLY SUBMITTED: December 18, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **POST-HEARING BRIEF OF QWEST CORPORATION** was served upon the following by electronic mail on December 18, 2007:

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