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*Attorneys for All West Communications, Inc.*

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In Regard to the Request of ALL WEST COMMUNICATIONS, INC. for Revision to Exchange Boundaries	DOCKET NO. 02-2270-01 <b><u>Amended</u> Reply of All West Communications, Inc. to Qwest's Response to Request and Supplement to Request of All West For Revision to Exchange Boundaries and Request for Hearing</b>
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All West Communications, Inc. ("All West"), pursuant to Utah Admin. Code R746-100-4 D., hereby replies to Qwest Corporation's ("Qwest") Response to Request for Agency Action and Supplement to Request for Agency Action dated December 23, 2004 ("Response").

**Reply**

**A. Qwest's Opposition to All West's Request Based on Breach of Legislative Policy does not Reflect the Facts of this Case and is Inconsistent with Qwest's Prior Actions.**

In its Response, Qwest relies on the change in policy, namely opening the telecommunications local exchange market to competition, to oppose All West's request in this matter to realign service territory boundaries in the Promontory development. The fact is that the customers in the affected area of the Promontory development have no choice in service providers today: they must take service from All West/Utah, Inc., All

West's CLEC, because Qwest has no facilities in the development. As a result, even if other CLECs were to interconnect with Qwest in its Park City exchange, without Qwest facilities in Promontory, they could not serve customers in that development. To date, Qwest has shown no interest in extending its facilities to the affected area.<sup>1</sup>

Qwest's opposition to All West's Request is inconsistent with its actions in Docket No. 99-049-40 when it asked All West to take territory in the Rockport Dam area of Summit County because it could not serve the area economically. Qwest showed no concern for the customers' competitive choices in that case. Qwest's position today is also inconsistent with its sales of rural exchanges in 2000. Though the likelihood of wireline competition developing in those exchanges was poor, the possibility of customers having competitive choice became even more remote when Qwest sold the exchanges. As with the rural exchanges Qwest sold, prospects for competition in the Promontory development are not good today but, to address Qwest's stated new concerns of disenfranchisement of itself or of any CLEC, All West would agree to keep the affected area open to competition if the Commission grants All West's Request. That will ensure that customers in the affected area of Promontory lose nothing with respect to competition, but all customers in the Promontory development will have the same calling area and the same services at the same prices.

**B. If the Commission Does Not Act, Neighbors in the Promontory Development Will Be Treated Differently.**

If the Commission does not grant All West's Request and the service territory boundaries are left as they are, All West's and All West/Utah, Inc.'s customers will pay different prices for the same services and will have different calling areas. It is not a

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<sup>1</sup> It would be difficult for Qwest to place distribution facilities in the Promontory development now that infrastructure is in, the trenches are closed, and the area has been landscaped.

question of community of interest or for that matter customer confusion caused by having different NXXs as Qwest suggests in its Response. The issue is the equitable treatment of customers who are similarly situated. A local call on one side of the existing service territory boundary will be a toll call on the other side. Such an outcome is not in the public interest and will certainly cause customer dissatisfaction that will result in complaints to the Commission. Granting All West's Request will solve these problems because neighbors will be treated non-discriminatorily. In its Response Qwest claims there is no need for a boundary change because All West/Utah, Inc. has the flexibility to simply mirror Qwest's rates and charges so that customers to eliminate the disparity. The truth is that All West/Utah, Inc. cannot charge Qwest's low system-wide average rate in a high-cost area and remain in business for long. Were All West/Utah, Inc. forced to stop serving in the affected area for this or any other reason, the customers' service on Qwest's side of the boundary would be in jeopardy. Qwest has no facilities in the affected area and its tariff allows Qwest not to serve if the extension of facilities is considered an "unreasonable expense."<sup>2</sup> Even if Qwest were to extend its facilities to the Promontory development, the costs to the customers could be significant and wasteful since All West has ample facilities in the area already. Notwithstanding Qwest's claims to the contrary, these are compelling reasons to grant All West's Request.

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<sup>2</sup> Qwest's Exchange and Network Services Tariff Utah 2.2.2 states:

1. The Company's obligation to furnish service or to continue to furnish service is dependent on its ability to obtain, retain, and maintain suitable rights and facilities, without unreasonable expense, and to provide for the installation of those facilities required incident to the furnishing and maintenance of that service.
2. Such connections are also subject to the availability of required facilities.

**C. The Eagle Mountain and Front Range Airport Cases Are Relevant to All West's Request.**

In an effort to distinguish the Eagle Mountain proceeding from All West's Request, Qwest stated that it was not allowed to compete with the municipal system in Eagle Mountain to the detriment of Eagle Mountain's customers. On information and belief, All West maintains that Eagle Mountain asked Qwest to provide service there but balked when Qwest informed the city how much construction costs would be to extend service to the area. Thereafter, the city started down the ill-fated path of attempting to provide municipal telecommunications service to its citizens. The position Qwest took in the proceeding not to oppose the sale of the Eagle Mountain municipal system to Direct Communications helped solve a thorny problem that had vexed the state for several years. Likewise in this case, by not opposing All West's Request, Qwest could help solve the difficult problem of discriminatory treatment of neighbors in the Promontory development caused by an illogical service territory boundary.

In the Front Range Airport case in Colorado, Qwest argued in its Response that it was only trying to offer customers competitive choice and was not excluding Eastern Slope, the incumbent local exchange carrier, from providing service. Qwest was serving part of the airport already because it was in Qwest's territory. The airport and an adjacent business development in Eastern Slope's territory requested that Qwest serve the entire airport and the business park. Unlike its position in this case where Qwest argues that All West/Utah, Inc. can serve customers in Qwest's territory non-discriminatorily as a CLEC, Qwest petitioned the Colorado Commission to expand its Denver Metro Exchange Aurora zone boundary so that it could serve as an incumbent. Qwest Communications Corporation, a Qwest affiliate and CLEC in Colorado, could have

pursued an interconnection agreement with Eastern Slope and entered the area that way. The airport, however, wanted “to work with one service provider.”<sup>3</sup>

Like the Front Range Airport in Colorado, the Promontory developer asked All West to provide service throughout the entire Promontory development and would like to work with just one service provider. Under Qwest’s Utah position and the circumstances as they exist today, the Promontory developer does not have that competitive choice. All West/Utah, Inc. must serve as a CLEC in the part of the Promontory development that is in Qwest’s territory. Granting All West’s Request will give the Promontory developer the competitive option the developer has requested. All West’s offer to leave the affected area open to competition will ensure that customers retain their competitive options.

**D. Qwest Failed to Address the Effect its Utah Position May Have on the Universal Service Fund and on the Promontory Customers.**

In its Response, Qwest criticized All West for not addressing the effect All West’s Request might have on the state universal service fund. Given the number of customers currently or potentially in Qwest’s territory who All West would serve as the incumbent assuming the Commission grants All West’s Request, the impact on the universal service fund would be minor. In order to ensure that the impact on the fund is minimal, All West will accept the limitations the Commission imposed on previous territory transfers, including those imposed on Direct Communications in the Eagle Mountain proceeding.

In all its criticism, Qwest failed to address the potential impact of its Utah position on the universal service fund. Extending its facilities to the Promontory development will likely require a one-time distribution from the universal fund. In addition, Qwest did not calculate the impact the extension will have on the customers in

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<sup>3</sup> See Exhibit A to Qwest’s Amended Application in Colorado Docket No. 04A-254T, May 17, 2004 letter from Front Range Airport to the Colorado Public Utilities Commission.

Promontory. Those are important considerations Qwest has overlooked and the Commission will need to know.

**E. Qwest's Claim that Granting All West's Request is Unconstitutional is Speculative and Unsupported.**

Qwest's claim that granting All West's Request could result in an unconstitutional taking is so speculative that it should not be a consideration. In today's environment in the telecommunications industry, taking is virtually a dead argument for a provider like Qwest where competitors have been allowed to enter Qwest's service territory. Qwest cites no case law in support of its position that realigning service territory boundaries alone results in an unconstitutional taking. In the instant case, Qwest has no facilities in the Promontory development so there is nothing for the Commission to take from Qwest in granting All West's Request. ~~If Qwest had facilities in use in the affected area, Qwest might have a supportable argument.~~ Qwest maintains that it sized its facilities northeast of the affected area in anticipation of serving the Promontory development, but with the other development occurring in the surrounding area, that will be difficult to prove. Even if the Commission is persuaded by Qwest's argument, All West's offer to leave the affected area open to competition eliminates any possible concern.

**F. Granting All West's Request Would Resolve a Serious Problem and Is Not a Patchwork Solution.**

All West has made a Request of the Commission to resolve a serious problem affecting customers, service, and competitive options in the Promontory development. Qwest argues that All West is seeking a patchwork solution. If the Commission were to take Qwest's approach, the Commission would never take any action for fear of the unknowns in the future. Typically the Commission addresses the facts presented to it in a

case and does not try to resolve all the events that may or may not happen. As stated before, All West does not oppose keeping the affected area in Promontory competitive which should allay Qwest's fears.

**G. All West Does Not Oppose Qwest's Request for Hearing by the Commission But Does Not Believe It Is Required.**

All West certainly does not oppose having the Commission hear this case, but it believes the Commission's Administrative Law Judge ("ALJ") is capable of handling the matter fairly and expeditiously as well. This is a unique request. There is no question that the proceeding is significant to All West and to the customers in the Promontory development, but whether or not it "involves an issue of significant public interest" is left solely to the discretion of the Commission under Utah Code Ann. §54-1-3 (2). Given the fact that the ALJ only recommends orders to the Commission following hearing, that the Commission can and has reversed the ALJ, and that Commission orders, whether they are issued by the Commission or the ALJ are appealable to the Utah Supreme Court, it is not clear what Qwest expects to come from this request.

**Conclusion**

All West strongly urges the Commission to grant All West's Request. It does not violate legislative policy with respect to competition, particularly if the affected area in the Promontory development is left open to competition as All West has proposed. All West's solution ensures that all customers in Promontory will be treated fairly and non-discriminatorily. Qwest's position ensures unfair treatment and complaints to the Commission as a result. Qwest leaves the area and Promontory customers in its territory stranded without any choice but to take service from All West/Utah, Inc. Without Qwest facilities, neither Qwest nor other CLECs can reach customers in Promontory. All

West's Request gives the Promontory developer a competitive option that Qwest is trying to offer in Colorado but opposes in Utah. The impact of All West's Request on the state universal service fund will be relatively minor and can be limited by the restrictions imposed by the Commission on other transfers of territory. The impact of Qwest's Utah position on the universal service fund and on the Promontory customers is unknown, but it could be substantial. All West's Request will not result in a taking of Qwest's property without just compensation. There is nothing for the Commission to take since Qwest has no facilities in the affected area, and All West's suggestion to leave the affected area subject to competition eliminates even the possibility of a taking.

For all the foregoing reasons, All West urges the Commission to grant its Request. The Request solves a serious problem and is in the public interest.

Respectfully submitted this ~~3rd~~5th day of January, 2005

Callister Nebeker & McCullough

Stephen F. Mecham

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## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Amended** **Reply of All West Communications, Inc. to Qwest's Response to Request and Supplement to Request of All West For Revision to Exchange Boundaries and Request for Hearing** in Docket No. 02-2270-01 to be mailed by first class mail, postage prepaid, ~~this 5<sup>th</sup>~~ ~~is 3<sup>rd</sup>~~ day of January, 2005 to the following:

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