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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of QWEST  
CORPORATION'S Land Development  
Agreements (LDA) Tariff Provisions

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Docket No. 03-049-62  
**BRIEF OF QWEST CORPORATION  
ON COST POLICY ISSUES**

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Qwest Corporation ("Qwest"), pursuant to the Scheduling Order issued by the Commission on January 23, 2004, submits this brief on the issue of whether Qwest must pay more for facilities placed under Option 2 of Qwest's Land Development Agreements ("LDA") tariff than it would pay for facilities placed under Option 1 of the tariff.

## BACKGROUND

This docket was opened pursuant to the Commission's July 15, 2003 final order in Docket No. 02-049-66 ("SBS Order"), wherein the Commission responded to Qwest's desire to fix the Option 2 LDA process that had resulted in repeated disputes over recent years. As identified by the Commission in the SBS Order, among the issues Qwest sought to have resolved were: "(1) the costs Qwest should pay; (2) whether townhomes should be included; (3) Qwest's right to control the design and materials used for facilities under the LDA tariff; and (4) time-frames to be followed under the LDA by Qwest, developers, and contractors."<sup>1</sup>

Issue (2) was resolved in the SBS Order. The Scheduling Order now puts issues (3) and (4) on hold, as well as the question under issue (1) of how to actually calculate the costs Qwest must pay. This brief, therefore, addresses only the policy question raised by issue (1)—whether Qwest should be required to pay more for facilities placed under Option 2 of the LDA tariff than it would pay for facilities placed under Option 1 of the tariff.

The Commission must determine whether Qwest should be required to pay more for Option 2 LDAs going forward, separate and apart from how the current tariff is appropriately understood;<sup>2</sup> but, given the number of outstanding developments<sup>3</sup> in which there are current

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<sup>1</sup> SBS Order at 8.

<sup>2</sup> In Docket No. 02-049-66, Qwest submitted an illustrative tariff providing a clarification of the amount Qwest is required to pay for placement under Option 2 LDAs. If the Commission approves Qwest's position on the cost policy question, Qwest will submit new tariff language, similar to that provided in the illustrative tariff, to clarify the cost issue going forward.

<sup>3</sup> There are multiple outstanding Option 2 projects on which Qwest and Option 2 contractors have been unable to reach agreement on payment, some of which are addressed in the Commission complaint filed by Clear Wave Communications, L.C. ("Clear Wave"), East Wind Enterprises, LLC ("East Wind"), and Prohill, Inc. ("Prohill"), or in the Third District Court complaint filed by SBS Telecommunications, Inc ("SBS"). It is also likely that new Option 2 developments will be initiated while this docket proceeds.

Option 2 payment disputes, the Commission should also determine whether Qwest is required to pay more for Option 2 under the tariff currently in effect.<sup>4</sup>

## INTRODUCTION

Whether the issue is being considered under the current LDA tariff language or being considered as a forward-looking policy question, there is no basis to require Qwest to pay more than its own costs to provide service in areas of new residential development. It makes no sense either from an economic or from an equitable perspective to require Qwest to pay more for its network simply because another party has been chosen to place Qwest's facilities. Qwest should only be required to pay up to its own reasonable costs for either Option 1 or Option 2 jobs. Developers can then choose whether they wish to pay any additional amount for an Option 2 contractor to place facilities.

Option 2 contractors seeking to require Qwest on all Option 2 jobs to continue to pay the tariff cap amount (such as SBS)<sup>5</sup> or seeking to require Qwest to pay the contractors' estimated costs near or at the cap (such as Clear Wave, East Wind and Prohill) misunderstand a fundamental issue: pursuant to the Commission's direction, cost terms for Option 2 jobs are supposed to be reached by agreement. In other words, cost terms are a product of negotiation,

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<sup>4</sup> Qwest acknowledges that the Commission has previously concluded that the current Option 2 language does not limit Qwest's Option 2 costs to those it would pay under Option 1. *See* Report and Order, Docket No. 98-049-33 (April 30, 1999) ("1999 Order") at 5. Nonetheless, in the same order where the Commission concluded this, it also recognized the merits of Qwest's argument and stated that the "reference to [the tariff cap] makes sense if it is assumed that the costs have been identified, agreed upon, and incorporated in the LDA." *Id.* It is Qwest's position that the negotiation contemplated by the Commission would not be meaningful if Qwest were automatically required to accept Option 2 contractors' costs. In any event, putting aside the current tariff language, Qwest requests that the Commission now make clear on a going-forward basis that Qwest is not required to pay more under Option 2 than it would pay under Option 1 for placing facilities in its own network.

<sup>5</sup> SBS continues to demand the tariff cap amount on all Option 2 jobs, in disregard of the Commission's clear directives issued in the SBS Order, and simply cites its contracts with developers calling for the cap amount when asked for verifiable cost estimates. *See infra* note 12 and accompanying text. Silver Creek Communications also continues to seek the cap amount, and has thus far not responded to requests for verifiable cost estimates. *See infra* note 13 and accompanying text.

and as such, Qwest cannot be forced to pay more than it is reasonably willing to pay. There is no basis to require Qwest to pay more for its network when an Option 2 contractor is chosen by a developer to place facilities.

## ARGUMENT

### **A. There Is No Policy Reason For Qwest To Pay More Under Option 2 Than It Would Pay Under Option 1.**

There is no policy reason for Qwest to pay more under an Option 2 LDA than it would pay under an Option 1 LDA.<sup>6</sup> Qwest is aware of no other public utility that is required to allow persons with whom it has no contractual privity to place its facilities, and it is certainly aware of no Qwest competitor that faces such a requirement. Yet, under Option 2 of the LDA tariff, that is precisely what Qwest is required to do.<sup>7</sup> It does so in order to allow the valued developers with whom it works to have an alternative placement option when they choose to have Qwest service. Qwest also understands that some developers perceive a value—such as the perceived ability to get facilities placed more quickly<sup>8</sup>—from using Option 2. Qwest can see no reason, however, why allowing developers to use Option 2 should lead to Qwest having to pay more for its network than it would if it placed the facilities itself. It can see no reason why in building its network it should not be able to take advantage of any efficiencies and purchasing power it may possess to build the lowest cost network it can, in order to effectively compete. Indeed, it would be fundamentally unfair require Qwest to pay an artificially inflated amount for the distribution portion of its network, simply because some developers choosing Qwest to provide service also choose Option 2 contractors to place the facilities.

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<sup>6</sup> Qwest acknowledges that what it would actually be required to pay under Option 1 is a factual issue that will need to be resolved in this docket before the Commission can implement a method for determining the appropriate payment amount for Option 2 jobs.

<sup>7</sup> Under Section 4.4.A of the tariff, “[t]he Company offers two [LDA] options. Option 1, Company Engineered/Designed; Option 2, Developer Engineered/Designed.” Option 2 contractors operate pursuant to agreement with developers, under which they perform the work that developers are allowed to do under Option 2.

<sup>8</sup> Much has been said by Option 2 contractors about the timeliness of Qwest’s facility placement. As Qwest has noted, one of the issues that can be addressed in this proceeding is the appropriate timing requirements under the LDA tariff. However, once appropriate timelines are established, those timelines are all that Qwest should be required to meet under the tariff. If developers are informed that Qwest will

The benefits of using Option 2 accrue to developers, and the cost provisions of the tariff should reflect that reality. Qwest would prefer to retain total control over design, placement methods, materials, and quality, by placing facilities itself. It would prefer to be free to change the materials it uses and standards it applies on an as-needed basis, without fear of being considered unfair to Option 2 contractors who may be used to another standard or may have acquired an inventory of materials. It would also prefer not to have to layoff its own employees because there is not enough placement work. There is no good reason to require Qwest to both bear these burdens associated with Option 2 and in the process have to pay more for doing so.

Option 2 contractors seek to compete with Qwest in placing facilities for Qwest's network, and under the LDA tariff they may do so. They should not, however, be entitled to competition subsidized by Qwest. When Qwest is required to pay whatever the Option 2 contractors demand (up to the tariff cap), price is eliminated from the competition equation and Qwest is required to subsidize the Option 2 contractors if the contractors' costs exceed Qwest's own. Under this system, the developer has no stake in the pricing decision, because as long as the price remains under the tariff cap the developer will incur no expense whether Qwest or an Option 2 contractor places the facilities. Inappropriate economic signals are sent both because the developer does not have incentive to cut placement costs and the Option 2 contractor does have incentive to increase profit margins.

There is no valid policy reason for Option 2 to operate this way. If Option 2 contractors want to compete for the placement of Qwest's facilities, they should either place the facilities at or below Qwest's cost, or they should convince developers to choose them for placement (for

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only be required to reimburse Option 2 costs up to the amount Qwest would have paid for an Option 1 job, developers can choose whether any additional speed in placement by Option 2 contractors would be worth potential additional costs to the developers.

example, if they can place the facilities more quickly) even though it will be more expensive for the developers to do so. This will allow developers to make “informed decision[s] as to whether to have Qwest, or another party such as [an Option 2 contractor], install the facilities.”<sup>9</sup> If Qwest is required to pay more than its own costs, there is no cost decision—informed or otherwise—to be made by developers at all.

**B. Qwest Should Not Be Required To Pay More Than Its Own Costs Under The Tariff Currently In Effect.**

In previously addressing the appropriate costs for placement under Option 2, the Commission has stated, “[o]nce costs, limited by the formula in Section 4.4(B)(6), have been identified, **agreed upon, and incorporated into the LDA**, Respondent’s liability for reimbursement may not be escalated thereafter.”<sup>10</sup> The Commission further clarified this directive in the SBS Order, stating:

If Qwest and developers complied with this directive, before the LDA was entered into, and provided up-front, good faith detailed, verifiable costs estimates, then a developer could make an informed decision as to whether to have Qwest, or another party such as one of the Complainants, install the facilities. ... With such estimates, **costs would be agreed to up front and incorporated into an LDA between Qwest and the developer.**<sup>11</sup>

Qwest has attempted to comply with this Commission directive by requiring, since September 2003, that Option 2 contractors supply verifiable cost estimates (with Qwest doing the same upon request) and that the parties negotiate the price terms for Option 2 jobs. Such negotiation has been successful in some cases. In other cases, such as developments involving Clear Wave, East Wind and Prohill, the Option 2 contractor has submitted verifiable cost estimates but the parties have been unable to reach agreement. In still other cases, such as

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<sup>9</sup> SBS Order at 7.

<sup>10</sup> 1999 Order at 6 (emphasis added).

<sup>11</sup> SBS Order at 7 (emphasis added).

developments involving SBS and Silver Creek, Qwest has been unable to obtain cost estimates at all—in the case of SBS because its cost estimates continue to simply be references to its contracts with developers that incorporate the tariff cap,<sup>12</sup> and in the case of Silver Creek because it does not respond to Qwest’s requests for estimates.<sup>13</sup>

Qwest believes that the Commission’s instructions have been clear: that Option 2 costs will be agreed upon through negotiation. Qwest has sought to engage in such negotiation and has offered compromises in order to reach agreement. However, agreement has been elusive on certain Option 2 jobs. The Commission has stated “if Qwest and developers [submitted good faith, detailed verifiable cost estimates up-front], then a developer could make an informed decision as to whether to have Qwest, or another party such as [an Option 2 contractor], install the facilities.”<sup>14</sup> The developer’s decision will not be informed as to cost, however, unless it has a meaningful choice to make. The developer will be reimbursed at least up to Qwest’s costs under either option of the tariff (i.e., the developer pays nothing up to the amount of Qwest’s cost). If Qwest is required to pay up to the Option 2 contractors’ cost estimate (up to the tariff cap), the developer has no cost incentive to choose Qwest over the Option 2 contractor and there is no meaningful negotiation. By clarifying that Qwest is only obligated to pay its own costs, the “informed [developer] decision” contemplated by the Commission will be possible. Otherwise, the Commission’s directives regarding negotiation will have no meaning.

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<sup>12</sup> See, e.g., correspondence between Qwest and SBS attached hereto as Exhibit 1. It is inexplicable to Qwest how SBS can justify a continued entitlement to the tariff cap amount on every job. The Commission was quite clear in the SBS Order in saying, “To be good faith and verifiable the cost estimates must be more than a quote from one of the Complainants or a similar company to do the job for the amount of the cap under the LDA tariff.” SBS Order at 8. SBS was one of the complainants to which the SBS Order was directed. Its continued “quote[s] ... to do the job for the amount of the cap” are in direct contravention of the Commission’s order.

<sup>13</sup> See, e.g., Letter from Don Green to Mike Marty (December 15, 2003) at 1, an unsigned copy of which is attached hereto as Exhibit 2.

<sup>14</sup> SBS Order at 7.

## CONCLUSION

For the reasons stated herein, Qwest respectfully requests a Commission order declaring that, both under the LDA tariff currently in effect and going forward, Qwest is not required to pay more for facilities placed under Option 2 of the tariff than it would pay for facilities placed under Option 1 of the tariff.

RESPECTFULLY SUBMITTED: February 9, 2004.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **BRIEF OF QWEST CORPORATION ON COST POLICY ISSUES** was served upon the following by electronic mail, on February 9, 2004:

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