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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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

Docket No. 03-049-62

**QWEST'S NOTICE OF  
VIOLATION OF ORDER AND  
STATUTE AND REQUEST FOR  
EXPEDITED RELIEF**

Qwest Corporation ("Qwest"), pursuant to Utah Code Ann. §§ 54-7-27 and 54-7-28, hereby provides notice to the Commission that SBS Telecommunications, Inc. ("SBS") is violating the Commission's Erratum Report and Order issued in this docket on June 6, 2005 ("Order") and Utah Code Ann. § 54-4-25. Qwest respectfully requests that the Commission issue an order requiring SBS to show cause why it should not be fined or otherwise penalized for these violations and ordering SBS to immediately cease and desist from entering into agreements with developers under which it is assigned exclusive

rights to develop a telecommunications network in new subdivisions and from constructing telecommunications facilities intended to be used to provide public telecommunications services without first obtaining a certificate of public convenience and necessity authorizing such construction. Qwest further requests that the Commission conduct this matter and grant relief on an expedited basis because SBS's illegal actions are jeopardizing timely provision of telecommunications service to customers, it is installing facilities pursuant to its unlawful scheme and it is rapidly expanding the scope of its scheme.

## **I. INTRODUCTION**

After years of litigation regarding the meaning and application of Option 2 of the LDA Tariff in this and other dockets, the Commission issued the Order in this docket finding and concluding that Qwest's process for placement of telecommunications facilities in new residential developments as set forth in its Price List filed May 5, 2005, was reasonable and that the Commission was "unable to find that a 1997 tariff Option 2 type of alternative must be made available, in addition to the installation terms and conditions Qwest has voluntarily included." Order at 13. Under Option 2, developers were previously allowed to place telecommunications facilities for Qwest in new single-family residential developments containing four or more lots, and Qwest was obligated to purchase the facilities subject to terms and conditions set forth in Section 4.4 of Qwest's Utah Exchange and Network Services Tariff ("LDA Tariff") and the applicable LDA with the developer. SBS was a party to the litigation and vigorously opposed elimination of Option 2. Although Clear Wave Communications, L.C., East Wind Enterprises, L.L.C. and Prohill, Inc. dba Meridian Communications of Utah (collectively "Clear

Wave”) filed petitions for review of the Order, and may be loosely deemed to have requested a stay of the Order, no stay has been granted and the Order is currently in effect as to those petitioning entities. *See* Utah Admin. Code R746-100-11.E. Moreover, because SBS did not file a timely petition for review of the order, no stay could be applicable to SBS in any event.

Rather than seeking review of the Order, SBS has devised and is implementing a scheme in an attempt to eviscerate it. On July 11, 2005, Qwest received two communications from SBS by fax, copies of which are Attachments 1 and 2 to this notice. The communications state that SBS will be placing cable in two subdivisions within the next 48 hours, pursuant to agreements with developers “assigning exclusive telephone network development rights” to SBS for the subdivisions. (Emphasis in originals.) The communications propose that Qwest purchase the facilities from SBS for a price determined by SBS. In follow-up discussions with SBS and the developers, Qwest learned that SBS was not placing the telecommunications facilities for the developers pursuant to the phase-out provisions in Qwest’s approved price list with respect to Option 2, but was rather placing them on its own with the intention to sell them to Qwest.<sup>1</sup> In addition, Qwest has learned that SBS has induced developers to enter into the exclusive assignments by offering them free trenching. SBS has informed Qwest that it has entered into similar exclusive assignment agreements on 30 additional subdivisions.

The SBS scheme is a flagrant attempt to circumvent the Order and to continue “a 1997 tariff Option 2 type of alternative” contrary to the Order. In addition, in constructing telecommunications facilities in public utility easements to be used for the

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<sup>1</sup> SBS has since stated that it would also be willing to sell the facilities to someone other than Qwest, although it has not identified any other LEC that would be willing to purchase them.

provision of telecommunications services to the public, SBS is improperly acting as a telecommunications corporation and constructing a public utility network without having obtained a certificate of public convenience and necessity from the Commission entitling it to do so. *See* Utah Code Ann. § 54-4-25(1).

Qwest has no intention of purchasing telecommunications facilities placed by SBS pursuant to this unlawful scheme. In addition, because SBS is not certificated as a competitive local exchange carrier, Qwest has no obligation to interconnect with the facilities placed by SBS. This scheme apparently places developers in an inappropriate position in which they are unable to allow Qwest or any other provider to place telecommunications facilities in their open trenches because of the exclusive nature of their agreement with SBS. As a result of SBS's unlawful actions restricting Qwest's entry to place facilities, telecommunications service to customers in these two subdivisions and potentially in other subdivisions may be delayed or unavailable.

Therefore, Qwest requests that the Commission issue an order requiring SBS to show cause why it should not be fined or otherwise penalized for violation of the Order and Section 54-4-25. Qwest further requests that the Commission enter an order requiring SBS to cease and desist from this unlawful practice. Because of the potential impact of this scheme on service to customers, because SBS is threatening to place facilities immediately and because it appears that SBS is attempting to rapidly apply the scheme to multiple new developments, Qwest requests that the Commission consider this matter and impose appropriate relief on an expedited basis.

## II. ARGUMENT

Sections 54-7-27 and 54-7-28 do not tolerate violation of orders of the Commission or provisions of the Public Utility Code by corporations or individuals that are not public utilities. Section 54-7-27 provides that:

Every corporation other than a public utility, which violates any provision of this title, or which fails to obey, observe or comply with any order, decision, rule, direction, demand or requirement, or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such corporation, is subject to a penalty of not less than \$500 nor more than \$2,00 for each and every offense.

Utah Code Ann. § 54-7-27. Section 54-7-28, provides that individuals or officers and employees of a corporation that violate statutes or Commission orders are guilty of a class A misdemeanor.

Throughout this proceeding and the broader operation of Option 2 SBS has displayed an attitude that it can ignore the Commission's orders. The recent activities of SBS are a further demonstration of this attitude. Having lost its attempt to require Qwest to continue to offer Option 2, SBS has turned around and attempted to impose its own type of Option 2 by persuading developers to enter into exclusive arrangements under which SBS will construct a telecommunications network in their subdivisions in exchange for an agreement by SBS to provide trenching without cost to the developer. This scheme is contrary to the letter and spirit of the Order and is illegal under statute.

The issue decided by the Order was whether Qwest would be allowed to eliminate Option 2 under which developers were allowed to place telecommunications facilities in new residential subdivisions for purchase by Qwest subject to terms and conditions in the LDA Tariff. After years of abuse of this provision by SBS, the Order found and

concluded that Qwest’s elimination of the option through its new price list was appropriate and that it was not in the public interest to require Qwest, alone among all competitors in the telecommunications market, to have its facilities constructed by contractors with whom it had no contractual relationship at prices that exceeded its own costs. SBS’s scheme is a flagrant attempt to achieve exactly what the Order prohibited.

Section 54-4-25 provides in part:

a . . . telephone corporation . . . may not establish, or begin construction or operation of a line, route, plant, or system or of any extension of a line, route, plant, or system, without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require the construction.

Utah Code Ann. § 54-4-25(1). A telephone corporation is defined as an entity that “owns, controls, operates, manages or resells a public telecommunications service as defined in Section 54-8b-2.” *Id.* § 54-2-1(23)(a). A public telecommunications service is broadly defined in section 54-8b-2 to mean

the two-way transmission of signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, lightwaves, or other electromagnetic means offered to the public generally.

Utah Code Ann. § 54-8b-2(16).

The only purpose for the placement of telecommunications facilities in subdivisions is to provide public telecommunications services to customers located in those subdivisions. Therefore, SBS, as the exclusive developer of telecommunications network facilities, is acting as a telephone company. In addition, the very fact that SBS is placing facilities in public utility easements, indicates that SBS is acting as a public utility in doing so. Section 54-3-27 defines a public utility easement as “the area on a

recorded plat map or other recorded document that is dedicated to the use and installation of public utility facilities.” *Id.* § 54-3-27(1).

When SBS, another Option 2 contractor or a developer was placing telecommunications facilities under Option 2 of Qwest’s LDA Tariff, it was placing the facilities for and in behalf of Qwest, a company holding a certificate from the Commission. While the theory of that system didn’t translate to effective practice, at least there were construction and materials guidelines in place, usually an opportunity to inspect, and limited recourse via refusal to accept facilities in cases of serious problems (though since that recourse involved the risk of delays to customer service it was almost never feasible to use). While SBS could do the same thing for another LEC if that LEC desired its services, merely placing facilities under no direction from any certificated entity and with no assurance that a LEC will be interested in using the facilities has serious implications on timely customer service, particularly when most or all facilities-based CLECs place fiber to the home rather than copper as SBS has traditionally placed for Qwest. The question to be asked is: who is SBS placing the facilities for, and are the facilities being placed according to that service provider’s standards and specifications? The public telecommunications network is affected with the public interest and cannot be constructed by unauthorized persons if there is to be adequate quality assurance and an expectation of timely customer service. Therefore, it is appropriate that section 54-4-25 requires a certificate to construct telecommunications facilities.

While the passage of the Telecommunications Reform Act in 1995 opened the local telecommunications market to competition and provided for competitors to enter the market, it did not obviate the need for certification. Section 54-8b-2.1 simply allows the

Commission to issue a certificate to a competitor, upon a showing that the competitor has sufficient technical, financial, and managerial resources and abilities to provide public telecommunications services and that it is in the public interest to issue the certificate. *Id.* § 54-8b-2.1(1) & (2).

If SBS wishes to install telecommunications networks within subdivisions without acting for and with authorization of a certificated provider in so doing, it is required to obtain a certificate from the Commission. SBS has not sought or obtained a certificate and is therefore in violation of section 54-4-25.

### III. CONCLUSION

The Commission should not tolerate SBS's disregard of the Order and public utility statutes, particularly where the actions of SBS are jeopardizing public telecommunications service to customers located in new subdivisions in Utah. It is respectfully submitted that the Commission should issue an order requiring SBS to show cause why it should not be fined or otherwise penalized for its violations and should issue an order requiring SBS to cease and desist from such unlawful conduct. For the reasons previously stated, the Commission should consider this matter on an expedited basis.

RESPECTFULLY SUBMITTED: July 15, 2005.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **QWEST'S NOTICE OF VIOLATION OF ORDER AND STATUTE AND REQUEST FOR EXPEDITED RELIEF** was served upon the following by electronic mail, on July 15, 2005:

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