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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 RESPONSE TO
PETITIONS FOR REVIEW**

Qwest Corporation ("Qwest") hereby responds to the petitions for review ("Petitions") filed in this matter on July 1 and July 5, 2005 by Clear Wave Communications, L.C., East Wind Enterprises, L.L.C., and Prohill, Inc. (collectively, "Clear Wave" or "Petitioners").

INTRODUCTION

Petitioners fail to identify any legitimate grounds for granting review, rehearing, or reconsideration of the Commission's Report and Order issued June 2, 2005 or Erratum Report and Order issued June 6, 2005 (collectively, "Order"). In the most serious charge

contained in the Petitions, the claim that the Commission relied on facts and evidence not contained in the record, Petitioners are simply wrong and fail to provide any evidence in support of their position. Likewise, in claiming that the Commission acted beyond the scope of its authority, Petitioners are clearly wrong. Finally, in the charge that the Commission failed to observe its rules when issuing the Order, Petitioners are either factually wrong or fail to raise issues that would substantially prejudice Clear Wave or other Option 2 contractors. In sum, the Petitions either mischaracterize the facts or law or identify minor issues that do not warrant review. Petitioners fail to identify any error by the Commission in determining which issues were relevant or in resolving those relevant issues. The Petitions should be disregarded.

ARGUMENT

A. The Order Appropriately Relied On Record Evidence And Binding Legislation, And The Commission Acted Within The Scope Of Its Authority.

Clear Wave complains that the Order “sets forth evidence and facts which are not contained in the record.”¹ It then specifies the Commission’s reference to the revised Utah Code section 54-8b-2.3, the Commission’s statement that because the developer chooses the Option 2 contractor Qwest “is unable to affect the Option 2 contractor whose services may be causing difficulties for Qwest,” and the Commission’s statement that “Qwest’s terms are more specific and detailed than most, if not all, other carriers with whom it competes” as facts that are allegedly not on the record.² Clear Wave’s claims are baseless.

¹ Petitions at 7.

² Petitions at 7. In the case of the Commission’s use of the revised section 54-8b-2.3, Clear Wave actually claims that the Commission misapplied facts “related to a mixed question of fact and law,” rather than strictly claiming that the facts are not on the record.

As to the Commission's use of the new legislation, Clear Wave states that the Commission "is without authority or jurisdiction to interpret the application of Senate Bill 108 as related to issues in this Docket"³ but then goes on to request that the Commission reverse the Order "so as to accurately reflect the implications and essence of Senate Bill 108."⁴ And it fails to specify the alleged misapplication or its view of what an accurate reflection of the statute would be.

The Commission did not misapply the statute nor did it act beyond the scope of its authority. It merely recognized the point that the revisions to section 54-8b-2.3 were a continuation of changes in the way Qwest is regulated since the introduction of Option 2 in 1997 and that as a result in these legislative changes the Commission no longer regulates the prices for Qwest's telecommunications services.⁵ This was clearly an accurate and modest assessment of the state of the law, and it supported Qwest's argument that in the current competitive environment the Commission should not force Qwest to accept facilities from parties whom it does not choose and with whom it has no contract.⁶ It was also appropriate for the Commission to address this issue, since the Commission is required to seek to effectuate legislative policy and follow legislative directives as reflected in the statute. Indeed, there can hardly be anything more central to the Commission's function than interpreting the statutes it is empowered to administer,

³ Petitions at 6

⁴ *Id.* at 9.

⁵ Order at 5-6.

⁶ *See id.* at 12 ("We conclude that even greater weight should be accorded to Qwest's chosen process in light of the changes to Utah's regulation of telecommunication service providers.").

and the Commission cannot avoid its obligation to effectuate legislative policy merely because a party feels that it has not had adequate opportunity to brief a statutory issue.

Moreover, in this case after Qwest raised the issue of the new legislation in the Surrebuttal Testimony of Laura Scholl filed on March 22, 2005, Clear Wave had opportunities to argue about the impact of the legislative changes in its pre-hearing brief, in its final round of testimony, and at the hearing. Clear Wave did make such arguments. Appropriate procedure was followed and an appropriate decision resulted. Clear Wave's argument should be disregarded.

As to the notion that the Commission erred in stating that Qwest "is unable to affect the Option 2 contractor whose services may be causing difficulties for Qwest," first, the statement in question comes from a part of the Order where the Commission is clearly summarizing Qwest's arguments rather than making its own findings.⁷ Second, to the extent the Commission made a finding it was supported by ample record evidence.⁸ Clear Wave's argument should be disregarded.

Finally, as to the notion that the Commission's statement that "Qwest's terms are more specific and detailed than most, if not all, other carriers with whom it competes" was not supported on the record; again this was clearly a Commission summarization of Qwest's argument,⁹ but to the extent the Commission made any finding it was perfectly appropriate. The Commission has all competitors' price lists on file. It can take

⁷ *See id.* at 8.

⁸ *See, e.g.*, Direct Testimony of Dennis Pappas (Oct. 4, 2004) at 1, 6, 13-14, 21; Rebuttal Testimony of Dennis Pappas (Jan. 28, 2005) at 1; Surrebuttal Testimony of Dennis Pappas (Mar. 22, 2005) at 3, 14, 24; Supplemental Surrebuttal Testimony of Dennis Pappas (Apr. 4, 2005) at 1.

⁹ *See* Order at 9.

administrative notice of the contents of such price lists.¹⁰ Clear Wave's argument should be disregarded.

B. The Commission Followed Appropriate Procedure And Petitioners Were Not Prejudiced.

Not every nitpicky claim of a procedural violation warrants Commission review. Only when a party is substantially prejudiced by a failure to follow agency rules is there any reversible error.¹¹ "A decision of the Commission will therefore not be overturned because of claimed procedural irregularities when due process requirements have been met." *Empire Elec. Ass'n, Inc. v. Public Service Commission*, 604 P.2d 930, 932 (Utah 1979). Yet it would be hard to think of a less substantive claim than that asserted by Petitioners when they claim that the Commission should grant review because it failed to include a synopsis of its decision at the beginning of the Order.

Petitioners' claim that review should be granted because it is allegedly "questionable" whether the hearing officer submitted a recommended report is likewise baseless. The Commission's rule regarding recommended orders does not indicate that the Commission must give notice to the parties that a hearing officer has or has not made a recommendation. Moreover, the Commission can require decisions and orders to be drafted by "the Commission or parties as the Commission may direct."¹² If even a party could permissibly submit a draft order, no prejudice resulted to Petitioners regardless of whether Mr. Mooy issued a recommended order or not.

¹⁰ See, e.g., Utah Admin. Code R746-100-10.F.3, Utah Code Ann. § 63-46b-8(1)(b)(iv). Qwest also made such arguments on the record in this proceeding, as is evident from the Commission's recital, in the Order, of Qwest's position.

¹¹ See, e.g., Utah Code Ann. § 63-46b-16(4).

¹² See Utah Admin. Code R746-100-11.A.

Clear Wave is correct that a key purpose for procedural rules regarding Commission orders should be to make clear the basis of an order.¹³ In this case, however, that purpose was clearly met. The Commission plainly set forth the relevant issues when it stated:

Those opposing Qwest's new installation terms have a very high burden to meet if the Commission is to reject Qwest's chosen, preferred methods and impose an alternative process contrary to Qwest's wishes. Longstanding, precedential case law and public policy gives great deference to utility management in its decisions of what utility plant is to be provided and how it is to be installed.¹⁴

And it just as plainly set forth its resolution of the issues when it found that "those opposing Qwest's position have failed to establish an adequate record upon which we can depart from the decades old presumption favoring Qwest's management's choice and supplant it with one opposed by the company,"¹⁵ that there was no basis on the record to conclude that Qwest's decision to eliminate Option 2 arose from bad faith, dishonesty, wastefulness or gross inefficiency (per *Logan City, supra* note 15),¹⁶ that even greater weight should be given to Qwest's facility-placement preferences in light of changes in regulation,¹⁷ and that Qwest's proposed method of facility placement in the new price list was reasonable.¹⁸

¹³ See Petitions at 6.

¹⁴ Order at 11 (citing *Logan City v. Public Utilities Commission of Utah*, 77 Utah 442, 447, 296 P. 1006 (Utah 1931)).

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 13.

¹⁷ *Id.*

¹⁸ *Id.*

Clear Wave makes blanket statements about alleged disregard of Option 2 contractor and developer testimony,¹⁹ but fails to identify what specific salient facts or conclusions the Commission either got wrong or failed to identify, and what evidence on the record undermines the Commission's Order. The closest Clear Wave comes is in stating that "[w]hile it is true that there are multiple carriers for telecommunications services, the reference to 'competing providers' in relation to the issues at hand are [sic] inapposite. That is, competing carriers of telecommunications services do not necessarily engage in the provisioning of telecommunications network facilities."²⁰

If Petitioners mean by this that the real issue isn't whether customers have competitive options for telecommunications services, it is whether developers have competitive options for the placement of Qwest's facilities, Petitioners are clearly wrong. The competition the legislature (and therefore the Commission) is concerned about is the competition among telecommunication service providers. The Commission squarely and appropriately rejected Petitioners' argument that there must be competition for Qwest's facilities placement when it cited the long-standing policy preference for utility management discretion; and it squarely rejected the factual basis for Petitioners' approach when it stated that developers supporting Option 2 "simply want to have an alternative installation option for what they expect to be Qwest's future failings.

¹⁹ *See, e.g.*, Petitions at 8. Qwest notes that it would have been inappropriate for the Commission to consider the public witness statements of the developers who appeared at the hearing, in determining disputed facts. Qwest objected to the introduction of any testimony as to disputed factual matters from such developers and was sustained in that objection. *See, e.g.*, Tr. (Apr. 14, 2005) at 65-74.

²⁰ Petitions at 8.

Unfortunately, from their perspective, they have not established an adequate basis to foist an unwanted Option 2 alternative upon Qwest.”²¹

Clear Wave Clear Wave fails to substantiate any argument that the Commission identified the wrong issues or that it resolved the issues incorrectly. The Order gives ample identification of the issues and of the basis for the Commission’s resolution of the issues. Even if there were any procedural defects in the style of the Order or in the nature of its drafting, they were clearly not prejudicial to Clear Wave.

CONCLUSION

For the aforementioned reasons, Qwest respectfully requests that the Petitions be denied and that the Order be allowed to stand.

RESPECTFULLY SUBMITTED: July 15, 2005.

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²¹ Order at 13.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **QWEST'S RESPONSE TO PETITIONS FOR REVIEW** was served upon the following by electronic mail, on July 15, 2005:

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