Robert C. Brown
Qwest Services Corporation
1801 California Street, 10th Floor
Denver, CO 80202
(720) 270-5988
(303) 296-3132 (fax)
robert.brown@qwest.com

Gregory B. Monson (2294)
David L. Elmont (9640)
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111
(801) 328-3131
(801) 578-6999 (fax)
gbmonson@stoel.com
dlelmont@stoel.com

Attorneys for Qwest Corporation

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 OPPOSITION TO PETITION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Qwest Corporation ("Qwest") hereby responds to Petition for Temporary Restraining Order and Preliminary Injunction ("Petition") filed in this matter on July 19, 2005 by Clear Wave Communications, L.C., East Wind Enterprises, L.L.C., and Prohill, Inc. (collectively, "Clear Wave" or "Petitioners").

INTRODUCTION

Qwest seriously doubts the procedural appropriateness of making requests for a temporary restraining order and preliminary injunction at all or at least at this stage in this

proceeding. Further, as a substantive matter, Petitioners have not provided and cannot provide adequate support to justify the requested relief. Petitioners will not be irreparably harmed by the fact that Qwest's price list requires Option 2 jobs to be completed by July 31, and at this point in the proceeding have absolutely no likelihood of success on the merits in getting the Commission to reverse the Erratum Report and Order issued June 6, 2005 ("Order") concluding this docket. This is particularly so where the Commission rejected Clear Wave's petition for review of the Order in its Order on Petition for Review issued July 21, 2005. This docket should be closed, and Qwest's LDA price list allowed to remain in effect. Petitioners have no basis to assert that they will be treated unfairly by Qwest in transitioning away from Option 2. To the contrary, as the attached declaration from Don Green establishes, Qwest has made and will continue to make every reasonable effort to reach out to Petitioners to ensure that the transition works smoothly and equitably. Problems, if any, will be due to Petitioners' failure to cooperate in providing information to effectuate the transition.

In these circumstances, the Petition should be denied.

ARGUMENT

A. A Preliminary Injunction Is Inappropriate At This Stage Of The Proceeding; Further, Petitioners Have No Likelihood Of Success On The Merits Given That The Case Is Already Over.

As Petitioners themselves quote, "[t]he main purpose of a preliminary injunction is simply to preserve the status quo pending the outcome" of a case and in issuing a preliminary injunction the tribunal "is primarily attempting to preserve the power to

render a meaningful decision on the merits."[1] It is hard to see the benefit of such status quo preservation when the case is already concluded. Moreover, there can no longer be any likelihood of success on the merits when the final order has been issued (and upheld by the Commission on petition for review). Likewise, although Petitioners can argue that their business will be harmed by the outcome of this docket, that harm is the type that Qwest or any other party must face when it loses a case—it is not the irreparable harm that courts speak of, which prematurely prejudices a party while the case is still pending. For these reasons, the Commission would be justified in denying the relief requested in the Petition as being inappropriate at this stage of this proceeding.[2]

The timing of the Petition is also suspect more generally. Petitioners had ample opportunity to challenge the effective date before now. The effective date was specifically discussed when parties addressed whether the Commission would need to deal with the impact of First Substitute Senate Bill 108 ("SB 108") on the status quo (i.e., whether the old Option 2 or the new LDA price list should be in effect until such time as the Commission issued a final order in this matter). The effective date issue was resolved when Qwest volunteered to defer the initial deadline for the entry of new Option 2 contracts and the Commission determined that it could issue a final order quickly enough

[1] Petition at 4 (quoting *Tri State Generation & Transmission Association, Inc. v. Shoshone River Power, Inc*., 805 F.2d 351, 355 (10th Cir. 1986)).

[2] Indeed, the Commission's authority to directly issue a temporary restraining order or preliminary injunction is not clear even if the hour were not so late. The statute provides that injunctions can be sought by the Commission in court. *See* Utah Code Ann. § 54-7-24. However, Qwest will not contest this issue at this time given the Commission's authority to review price list filings and to order revocation or conditions or restrictions on price lists, *id.* § 54-8b-2.3(8), combined with its authority to pursue penalties for noncompliance with its orders. *Id.* § 54-7-25.

to avoid the prospect of the effective dates having passed without the Commission yet issuing a final order on the elimination of Option 2.

At the very scheduling conference where Qwest volunteered to delay the first (May 9, 2005) effective date for the entry of contracts, Option 2 contractors also requested that Qwest delay the effective date (July 31, 2005) for completing Option 2 construction. Qwest declined to delay that date. Had Petitioners made their arguments about irreparable harm at that time (when surely the issues raised in the Petition were foreseeable, and when Option 2 contractors did in fact mention the problems allegedly attendant to a wet construction season), arguments could have been made about the appropriate way to handle the transition away from Option 2 and whether Petitioners would be unfairly harmed by a July 31 deadline for completing Option 2 work. Instead, Petitioners have waited until the last few days before phase-out of Option 2 is supposed to be completed (failing to respond to Qwest's requests for information about their projects so that the transition could be made smoothly,[3] and even failing to address their concerns when they had the opportunity in their petition for review), when there is no time left to address the issues in an orderly manner and when considerable confusion to developers and increased costs to Qwest will certainly result if the Petition is granted. Petitioners should not have waited until the 12th hour to address their concerns. This is another legitimate basis for the Commission to reject the Petition.

B. Petitioners Will Not Be Irreparably Harmed By The July 31 Effective Date.

The Public Utilities Code and Commission procedure contemplate a party's right to seek a stay of the effective date of a Commission order at the time that party seeks

[3] *See, e.g.*, Green Declaration, attached hereto as Exhibit A, at ¶¶ 6, 11, 16.

review or rehearing of the order,[4] at which time the consideration of irreparable harm pending appeal is relevant.[5] Petitioners failed to seek a stay pursuant to Rule 746-100-11.E and failed to request relief in a timely manner. Aside from this, their claim of irreparable harm also fails as a substantive matter.

Qwest sent a letter to developers and Option 2 contractors on June 9, 2005, providing notice that Option 2 had been eliminated pursuant to the Order, but that, pursuant to the terms of the price list, Option 2 jobs would still be honored if signed authorization was provided by June 10 and if the jobs were completed by July 31.[6] Petitioners already knew these things from the earlier price list filings and scheduling conference, but this reminder was provided shortly after issuance of the Order to all developers and Option 2 contractors as further confirmation of the status of Option 2. Thereafter, Qwest discussed the issue with individual developers and Option 2 contractors. On July 8, Qwest sent a further letter reminding developers and Option 2 contractors of the coming deadline for completing the phase-out of Option 2.[7] In that letter Qwest asked Option 2 contractors to identify their outstanding projects in one of three categories: (1) jobs that would be completed by July 31, (2) jobs where engineering and construction would begin by July 31 but the job would not be completed by that date,

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[4] *See* Utah Code Ann. § 54-7-15; Utah Admin. Code R746-100-11.E.

[5] *See, e.g., Re US WEST Communications*, Docket Nos. 90-049-03, 90-049-06, 1991 WL 511062, *2 (Utah P.S.C. July 3, 1991) ("The only Commission rule which is at all relevant [to a request for a stay] is rule R750-100-11(E), which we applied in disposing of the petition for a delay in the Report and Order's effective date. That rule requires that good cause be shown. We interpret our rule to require, however, that such good cause include risk of some irreparable harm to the petitioner in the event the stay were not granted.").

[6] *See* Green Declaration at ¶ 4. Although the letter was inadvertently not mailed to Option 2 contractors initially, Qwest had verbal communications with Option 2 contractors thereafter confirming the substance of the letter, including Mr. Allen on June 20th. *See id*. at ¶¶ 5-6.

[7] *See id*. at ¶ 11.

and (3) jobs where neither engineering nor construction would begin by July 31.[8] The same information had been requested orally from Petitioners in June, with at least one follow-up conversation in July.[9]

It is only those jobs in category 2 where there is any theoretical risk that "Clear Wave will not be adequately compensated for the work that it has thus far performed."[10] Only for those jobs might a July 31 cut-off date "impose[] a substantial hardship upon Petitioners herein to the extent that they have expended considerable time, effort, labor and monetary resources for the purpose of completing" the project.[11] Jobs in category 1 will have been completed by the cut-off date and Petitioners will be paid for their work. Jobs in category 3 have not yet required any significant work to be done.

As for the jobs in category 2, if Petitioners had been willing to discuss the issues with Qwest, as have some Option 2 contractors, they would already have understood that Qwest has every intention of fairly compensating Option 2 contractors for whatever work they have done to date in engineering and constructing facilities. For those Option 2 contractors that have cooperated with Qwest in providing information about the extent of the work done on their Option 2 projects, Qwest has been able to negotiate (or is in the process of negotiating) a fair payment for the work completed—even though, in the case of engineering, Qwest is paying for work that it will have to duplicate.[12] In some cases

[8] *See id*.

[9] *See id*. at ¶¶ 6, 16.

[10] *See* Petition at 7.

[11] *See id*. at 4.

[12] *See, e.g.*, Green Declaration at ¶ 15.

where work is very near completion, Qwest in its discretion may be willing to allow the Option 2 contractor to finish the job.[13]

Obviously, if Qwest does not pay anything for the Option 2 work but still uses the facilities it may be subject to claims by developers.[14] And, if the parties are unable to reach agreement on the amount Qwest should pay for construction and engineering completed before July 31, Qwest acknowledges that payment should be handled pursuant to the Commission's Order issued June 10, 2005, in Docket No. 04-049-06, under which the contractor should be reimbursed for its reasonable expenses (supported by adequate evidence) up to the per-lot cap identified in LDA tariff.

In such circumstances there is no possibility of irreparable harm to Clear Wave. Either Qwest and Petitioners will be able to negotiate an appropriate payment for the engineering and construction, or at the very worst Clear Wave will be required to demonstrate to the Commission by adequate evidence that its claimed expenses are reasonable and that Qwest should be required to pay them.

The only real potential harm to Petitioners is the loss of future projects that they could have constructed if Option 2 had remained in effect. But that does not go at all to Petitioners' false claims that they won't be compensated for work already completed and is nothing remotely like the "irreparable harm" that is relevant to the Commission's consideration of the Petition. Indeed, such harm can be fully mitigated by Petitioners

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[13] *See id*. at ¶ 17.

[14] And for facilities substantially installed under Option 2 prior to the July 31 cut-off (for which a contract between the developer and the Option 2 contractor was signed by June 10), Qwest has every intention of using the facilities. *See id*. For work completed by SBS pursuant to its new "exclusive provider" scheme, as identified in Qwest's Notice of Violation of Order and Statute and Request for Expedited Relief filed on July 15, 2005, Qwest has no intention of using the facilities.

through entering the marketplace to sell their services—just as long as they comply with the law and don't attempt forced sales to Qwest.

If Petitioners wanted a longer phase-out of the elimination of Option 2, they should have negotiated it during the multiple discussions between the parties about how all pending LDA-related disputes might be resolved without the necessity of further litigation. Without going into the substance of settlement negotiations, each effort to negotiate a global solution concluded with Petitioners or SBS Telecommunications, Inc. terminating the discussion.

The Commission's duty is to identify and protect the public interest. Granting Petitioners the relief they seek, when the Commission has already determined that there is no public interest requirement for Qwest to maintain Option 2, would only benefit the narrow private interest of Petitioners. It would confuse developers and cause Qwest significant additional expense, both as Qwest is required to continue paying more for Option 2 jobs than it would if it placed facilities itself and as the work Qwest has already done in engineering and preparing for construction on the jobs Petitioners have not identified as being completed by July 31, 2005, would go to waste.

Clear Wave will not be irreparably harmed by the Commission allowing the LDA price list to remain in full effect on July 31. Qwest will treat Clear Wave fairly and compensate it appropriately for work already completed. If Clear Wave does not believe Qwest has done so, it may seek Commission resolution of any dispute under the Commission's Order in Docket No. 04-049-06.

CONCLUSION

For the aforementioned reasons, Qwest respectfully requests that the Petition be denied and that the July 31 deadline in the LDA price list be retained.

RESPECTFULLY SUBMITTED: July 26, 2005.

Gregory B. Monson
David L. Elmont
Stoel Rives LLP

Robert C. Brown
Qwest Services Corporation

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **QWEST'S OPPOSITION TO PETITION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** was served upon the following by electronic mail, on July 26, 2005:

Patricia E. Schmid
Assistant Attorney General
pschmid@utah.gov

Paul H. Proctor
Assistant Attorney General
pproctor@utah.gov

Kevin M. McDonough
Mismash & McDonough
kevin@mmcdlaw.com

and upon the following by first-class mail, postage prepaid, on July 26, 2005**:**

The Salt Lake Home Builders Association
Derek Wright, President
9069 South 1300 West
West Jordan, UT 84088

Quail Hollow LLC
John Smiley, Managing Partner
285 North Main
Spanish Fork, UT 84660

A & A Wiser Construction
Anthony Wiser, Partner
P.O. Box 722
Logan, UT 84323

Deseret Purchasing & Marketing, LLC
Keith Swain
323 North 825 East
American Fork, Utah 84003

Jay Grygla, Owner
Elite Development
3053 West Kranborg Circle
Riverton, UT 84065

Elyas Raigne, Development Manager
Ensign Development
5941 Redwood Road
Taylorsville, UT 84123

Envision Development, LLC
Kay Heaps
1220 North Main
Springville, UT 84663-4013

G & G Investments, L.C.
Grant Bangerter
P.O. Box 34
American Fork, UT 84003

Blaine Gough, Managing Member
Gough Construction
8186 South 1300 West
West Jordan, UT 84088

Timothy Butler, Owner
Great American Homes
P.O. Box 9488
Ogden, UT 84409

Horizon Enterprises, Inc.
William D. Bertolio, President
435 East 125 North
Providence, UT 84332

Patterson Construction, Inc.
Isaac Patterson, Project Manager
11009 North 6400 West
Highland, UT 84003

NBD Development
1544 N. Woodland Pk. Drive #310
Layton, UT 84041

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