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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 PRE-HEARING BRIEF**

Qwest Corporation ("Qwest"), pursuant to the Commission's Fourth Scheduling Order and Notice of Hearing issued March 8, 2005, submits this pre-hearing brief to address certain legal issues that have arisen in connection with this proceeding.[1] Qwest's prehearing brief will address the impact of the passage of 1st Substitute Senate Bill 108 ("SB108") during the 2005 General Session of the Utah Legislature on this docket and the Stipulation Between Qwest Corporation and The Salt Lake Home Builders Association ("Stipulation") filed in this case on March 30, 2005.

[1] In filing this brief, Qwest does not waive its right to seek briefing and oral argument of other legal issues, including issues that may arise during the course of the hearing in this matter.

I. INTRODUCTION

This docket was commenced by the Commission on July 15, 2003, to address issues concerning Qwest's Land Development Agreements ("LDA") Tariff. Qwest's current LDA Tariff is section 4.4 of Qwest's Utah Exchange and Network Services Tariff and provides the terms and conditions under which Qwest will install facilities to provide telecommunications services to end user customers in new developments of single-family homes. In addition to Qwest, the Division of Public Utilities ("Division"), the Committee of Consumer Services ("Committee"), SBS Telecommunications, Inc. ("SBS"), and Clear Wave Communications, L.C., East Wind Enterprises, LLC, and Prohill, Inc. dba Meridian Communications of Utah (collectively "Clear Wave") have been active participants in this proceeding.

Although 59 developers and The Salt Lake Home Builders Association ("Salt Lake HBA"), purportedly filed petitions for intervention, which were granted, no developer has filed testimony or otherwise filed a statement of position in the case. 25 of the developers have explicitly stated that they do not intend to participate in the docket, and 22 have implicitly indicated the same thing by failing to acknowledge or respond to discovery requests or follow-up inquiries. At least 18 of the developers have indicated that they did not intend to intervene in the first place. Of the 12 developers who bothered to respond to discovery requests, all but two returned answers prepared for them by an Option 2 contractor. And neither of the two who responded themselves had even intended to intervene in the proceeding. Thus, the parties who have a tariff and contractual relationship with Qwest under the LDA Tariff have not expressed any significant interest in the matter except that the Salt Lake HBA has entered into the Stipulation indicating that it is not opposed to Qwest's position.

Qwest has proposed to revise the LDA Tariff to remove the option under which developers are allowed to install facilities in accordance with Qwest's specifications and subject to its review and approval of engineering plans and inspection and testing of the facilities ("Option 2"). However, it has also proposed to significantly reduce the time intervals in the Tariff to the benefit of developers and has proposed additional options for developers under Option 1, including agreeing to place conduit in open trenches if a developer has complied with its obligations under the Tariff and Qwest is not ready to place its facilities on time, and to place conduit for developers who have not complied with the tariff (if Qwest cannot respond with actual facilities placement in the expedited interval) so long as the developer agrees to pay any increased costs that result. Qwest has also created a New Development Manager whose sole responsibility is to coordinate with developers to facilitate placement of facilities under the Revised Tariff.

The Division supports a major revision to the Tariff so that Qwest's expenditures under Option 2 do not exceed its own costs, but that developers are allowed an option of selecting a contractor from a list of Qwest-approved contractors to place facilities. The Committee supports continuation of the Tariff as it currently exists. SBS and Clear Wave support the continuation of Option 2 with more terms and conditions in the Tariff, and in the case of SBS with an **increased** tariff payment cap, which would have the effect of micro-managing the details of Qwest's facilities placement.

Given the development of competition in the telecommunications industry, including the fact that developers have choices among telecommunications corporations to place facilities in their developments, it is inappropriate to require Qwest alone to have its facilities placed by contractors with whom it has no contractual or tariff relationship at

costs in excess of the costs it would incur if it placed the facilities itself. The passage of SB108, which replaces Qwest's tariffs with price lists, is an acknowledgement by the legislature of the competitive nature of the industry and the need for reduced regulation of Qwest. Qwest's proposals to shorten tariff intervals, place conduit when necessary, and institute a New Development Manager position, all ensure that developers' legitimate needs will be met in the absence of Option 2. The Stipulation makes clear that the real parties in interest, the developers, generally have no objection to Qwest's proposed Revised LDA subject to conditions in the Stipulation. These conditions provide them with assurances that Qwest intends to be responsive to their legitimate needs.

II. HISTORY OF LDA TARIFF

Prior to 1985, Qwest's tariff required developers to pay an upfront charge covering the entire cost of facilities placed to provide telecommunications services in their developments. The charge would be repaid over five years as customers subscribed to service. Developers were required to provide trenching and backfill for the placement of facilities by Qwest.[2] From 1985 to 1996, developers had the option of paying a nonrefundable amount of $100 per lot in developments inside the Base Rate Area, the area in close proximity to Qwest's central offices. From 1991 to 1996, developers were given the option of paying a nonrefundable 50 percent of estimated costs in areas outside the Base Rate Area. If the latter option was exercised, Qwest provided trenching and backfill.

[2] Qwest's predecessors, The Mountain States Telephone and Telegraph Company and U S WEST Communications, Inc., will be referred to as Qwest in this pre-hearing brief.

In late 1996, Qwest proposed the LDA Tariff. Pursuant to an agreement with the Home Builders Association of Utah ("Utah HBA"), the Tariff was designed to avoid up-front placement costs for developers in all but the highest-cost developments (such as those with large lots, where extra cable and materials are required to serve the development, or those in remote locations), and to provide an Option 2 for developers to provide additional flexibility and save money in high cost areas if they could place facilities less expensively than Qwest. The maximum amount Qwest is required to incur under either option in the Tariff is 125 percent of the distribution portion of the average exchange loop investment, times the number of lots in the development ("Cap").

Almost from the outset, Option 2 has been subject to litigation. Option 2 contractors began to market their services to developers, typically charging the Cap amount regardless of the contractors' actual costs. Because developers incur no costs if the costs of placement are at or below the Cap, they had no incentive to minimize the costs charged by Option 2 contractors. When Qwest refused to pay the Cap amount when it was in excess of Qwest's estimated costs, Silver Creek Communications ("Silver Creek"), an Option 2 contractor, filed a complaint with the Commission in Docket No. 98-049-03. The Commission ruled that under the Tariff language as written, Qwest was not necessarily entitled to limit its payment to its own estimated costs, but also stated that Option 2 was not intended to allow contractors to inflate their costs and that the parties should provide verifiable cost estimates to each other so that they could agree in the LDA on the amount that would be reimbursed.

After this decision, Qwest proposed to eliminate Option 2 in a new tariff in Docket No. 99-049-T28. Despite opposition to the change from Option 2 contractors, the

Utah HBA supported it based on Qwest's agreement to increase the Cap. The Commission initially ruled to allow the tariff change, but reversed its decision on rehearing, stating that the problem was not with the Tariff, but with failure to comply with its terms and conditions. The Commission reemphasized that the parties were to exchange verifiable cost estimates so that the amount Qwest would pay would be agreed upon in the LDA.

Problems continued with Option 2 contractors failing to provide verifiable cost estimates and failing to comply with the processes established in the Tariff. Therefore, in 2001, Qwest proposed a tariff change in Docket No. 01-049-T12, under which it would not be required to pay more for Option 2 jobs than its estimated costs. Based on opposition from Option 2 contractors, the Commission suspended the tariff change, and Qwest eventually withdrew it.

In 2002, Option 2 contractors filed a complaint in Docket No. 02-049-66, alleging that Qwest was violating the Tariff by failing to accept their placement of facilities in developments consisting of multiunit buildings. During the course of the proceeding, issues regarding the amount paid for Option 2 jobs were raised. The Commission ruled that the Tariff applied only to single family detached developments, said that the Cap was not the default price and reaffirmed that verifiable costs estimates must be provided.

In its decision in Docket No. 02-049-66, the Commission stated that it would open a docket to review the ongoing issues and problems with the LDA Tariff. This docket resulted. Also, following the Commission's decision in Docket No. 02-049-66, Qwest sent a letter to developers and Option 2 contractors stating that it would require verifiable cost estimates on all jobs and that it would no longer pay the Cap as the default

price on Option 2 jobs but instead would require negotiated agreement on Option 2 costs. In response to this letter and Qwest's refusal to pay more than its verifiable cost estimate on jobs for which no verifiable cost estimate was provided by the Option 2 contractor and a cost was not agreed upon, SBS filed a complaint in district court, alleging among other things that Qwest was tortiously interfering with its business relationship with developers. That lawsuit has been stayed pending the outcome of these proceedings before the Commission.

Finally, in 2004, Clear Wave filed a complaint in Docket No. 04-049-06, alleging that Qwest was improperly limiting its payment to its cost estimates. SBS intervened in the case. In order to allow projects to be completed during the pendency of the matter, the parties agreed to a stipulation proposed by Qwest that Qwest would pay its estimate until the case was resolved and would then pay any additional amount ordered by the Commission, with interest. The case in Docket No. 04-049-06 involves the interpretation of the existing LDA Tariff. The parties briefed the issue of interpretation of the Tariff, and that issue is now pending before the Commission for decision. The Division recommended that the Commission hold its decision in that docket in abeyance until this docket is concluded.

In this docket, the parties have conducted discovery and have filed four rounds of testimony. As noted above, Qwest has urged the Commission to allow it to define its own relationship with developers within the constraints of the competitive market. Developers now have a choice of providers in addition to Qwest to place facilities to provide telecommunications service to customers in their developments. Therefore, Qwest has every incentive to satisfy the reasonable needs of developers. Qwest has

pointed out that no public policy is served by requiring Qwest alone among all competitive providers to allow its facilities to be placed by Option 2 contractors with whom it has no contractual or tariff relationship, at costs in excess of those it would incur to place the facilities itself. The passage of SB108 and the Stipulation of the Salt Lake HBA make it even more apparent that Qwest should have this freedom and that the real party in interest, the community of developers, does not oppose Qwest's proposal.

III. SB108

SB108 was passed by the Utah Legislature on February 9, 2005, and was signed by Governor Huntsman and Lieutenant Governor Herbert on February 15, 2005. It will be effective on May 2, 2005. *See* Utah Const. art. VI, § 25. The passage of SB108 was based on the development of competition in the telecommunications industry. It was designed to grant Qwest regulatory parity with its competitors with regard to pricing and offering of retail services.

Among other things, SB108 amended Utah Code Ann. § 54-8b-2.3(2)(a) to provide as follows:

> [B]eginning on May 2, 2005, an incumbent telephone corporation may offer retail end user public telecommunications services by means of a price list or competitive contract in the same manner as a competing telecommunications corporation as provided in Subsection (1):
>
> (i) if the incumbent telephone corporation:
>
> (A) is in substantial compliance with rules and orders of the commission issued under Section 54-8b-2.2; and
>
> (B) has more than 30,000 access lines . . . .

Qwest meets these criteria. Therefore, starting May 2, 2005, it is entitled to offer retail end user public telecommunications services in the same manner as competing telecommunications corporations. Competing telecommunications corporations offer their public telecommunications services solely pursuant to price lists.

In addition to amendments to section 54-8b-2.3, SB108 amended several other sections of the Public Telecommunications Law, Chapter 8b of Title 54, consistent with the legislative intent to decrease regulation for Qwest and its competitors. For example, section 54-8b-2.4, which required price index adjustments to the prices of services offered pursuant to tariff was repealed. Section 54-8b-3.3, which had previously provided a price floor test applicable only to Qwest and not its competitors, was amended to remove that test. Other sections were amended to allow pricing by Qwest that might otherwise be considered discriminatory in promotional offers, market trials or to meet competition, just as has been allowed to its competitors.

IV. STIPULATION

As described in the Supplemental Surrebuttal Testimony of Laura L. Scholl, the Stipulation was entered into after two in-person meetings and several telephone and email communications between Qwest and the Salt Lake HBA. Because Qwest is anxious to place its facilities in new developments whenever possible so that it has the opportunity to compete for the business of customers in those developments, it is also anxious to meet the reasonable needs of developers with respect to placement of facilities. After reviewing the Revised LDA and the testimony filed by Qwest and other parties, the HBA indicated that it had no objection to Qwest's Revised LDA subject to assurances by Qwest that it would continue to work cooperatively with developers. Accordingly, Qwest

agreed to provide six assurances to developers that are contained in paragraph 4 of the Stipulation. Most of the assurances were already contained in the Revised LDA and Qwest's testimony (and Qwest intends to treat all developers equally under the Revised LDA regardless of whether they are members of the HBA), but were set forth again in the Stipulation for the convenience of members of the Salt Lake HBA. In summary, and without modifying the assurances as stated in the Revised LDA, Qwest's testimony and the Stipulation, the assurances are as follows:

1. Qwest has a Utah New Development Manager to facilitate placement of telecommunications facilities in accordance with the timelines and procedures in the Revised LDA.

2. Qwest has shortened intervals in the Revised LDA to expedite placement of telecommunications facilities.

3. Qwest acknowledges that it will be bound by the Revised LDA and that it will be filed with and be subject to review by the Commission. Following May 2, 2005, it will be subject to the provisions of section 54-8b-2.3 as amended by SB108.

4. If a developer complies with its obligations under the Revised LDA and Qwest is unable to place its facilities on time, Qwest will install conduit for its later placement of facilities in order to allow the developer to backfill the trench in accordance with the timelines in the Revised LDA. If Qwest is unable to place conduit in the foregoing scenario, the developer, after notifying the Utah New Development Manager, may proceed to place conduit conforming to Qwest's specifications in the trench and Qwest will reimburse the developer's reasonable costs of placement.

5. The Cap remains the same under the Revised LDA. Qwest anticipates that it will rarely if ever be exceeded (thus rarely requiring the developer to pay excess charges) except in developments with large lot sizes or that are remotely located. If the Salt Lake HBA believes its members are incurring excess charges more often than reasonable, Qwest will negotiate in good faith an increase in the Cap.

6. If the Salt Lake HBA requests, Qwest agrees to meet with the Salt Lake HBA to review of the status of performance of the parties under the Revised LDA six months following its effective date and annually following the first review. If the review demonstrates that Qwest is not meeting its obligations on more than fifteen percent of lots, Qwest will negotiate in good faith to modify the Revised LDA or the associated LDA or processes.

Thus, the only party in addition to Qwest that has meaningfully participated in this proceeding (through entering into the Stipulation) that has a direct interest in the LDA Tariff does not object to Qwest's proposed Revised LDA.

V. ARGUMENT

A. GIVEN THE PASSAGE OF SB108, QWEST SHOULD BE ALLOWED TO STRUCTURE ITS RELATIONSHIP WITH DEVELOPERS IN THE COMPETITIVE MARKET IN ITS DISCRETION.

Qwest's Exchange and Network Services Tariff provides the terms and conditions under which Qwest provides telecommunications services to the public. Included in these terms and conditions is section 4, Construction Charges and Other Special Charges, which provides the terms and conditions under which Qwest will construct facilities to provide telecommunications services to the public. Included in section 4 is section 4.4, the LDA Tariff, which provides the terms and conditions under which Qwest will

construct facilities in new developments of detached single family homes consisting of four or more lots. All of these provisions relate to the terms and conditions under which Qwest will provide public telecommunications services to end user customers. Any such terms and conditions for a competitor would be contained in the competitor's price list. In accordance with section 54-8b-2.3(2)(a), as amended by SB108, Qwest is permitted, commencing May 2, 2005, to include these terms and conditions in its price list also.

Price lists are effective five days after filing. *See* Utah Code Ann. § 54-8b-23.(5). The Commission may set an upper limit on the price of a service if necessary to protect the public interest, but the limit must apply to all regulated providers in a competitively neutral manner. *Id.* § 54-8b-2.3(7). The Commission may even condition, restrict or revoke pricing flexibility for a service if statutes or rules applicable to the service are violated, there has been or is an imminent threat of a material and substantial diminution in the level of competition or competition has not developed and the conditions restrictions or revocation are in the public interest, but the person proposing the same bears the burden of proof. *Id.* § 54-8b-2.3(8).

The implications of SB108 for this proceeding are apparent. Because of the increased competition in the telecommunications industry, the legislature has seen fit to provide parity to Qwest with regard to regulatory requirements related to its offering of retail services. The competitive marketplace will now govern the prices, terms and conditions on which services are provided in Qwest's service territory unless significant issues arise involving competitive distortions that demand the Commission's intervention in the public interest. This amounts to legislative confirmation of Qwest's position in this proceeding that it is no longer appropriate to require Qwest to allow its facilities to be

placed by contractors with whom it has no contractual relationship at costs which exceed its costs. Qwest should be free to compete for the opportunity to place facilities in new developments in the same manner as its real competitors, companies providing telecommunications services. It should be free to attempt to install its facilities at the lowest reasonable cost so that it can effectively compete for the business of customers. Its constraints regarding facility placement should not come from additional regulation of the type Option 2 requires but rather by the fact that it is competing with other providers to place facilities in new developments (backed-up, of course, by Qwest's quality of service obligations). Qwest has already demonstrated its recognition of this market reality by voluntarily proposing in this proceeding to reduce placement intervals and provide other options, facilitation and assurances to developers. Qwest will be free under the price list in the future to make other changes in the terms and conditions on which it will place facilities in new developments in response to competitive market forces. Thus, the issues in this proceeding are in a sense moot in light of the passage of SB108.

Nonetheless, because the terms of its price list would be subject to review upon complaint of a party with standing to challenge them, Qwest seeks approval of the Commission in this proceeding for its Revised LDA. At the same time, however, the passage of SB108 provides substantial additional weight in favor of approval of the Revised LDA consistent with the reduced regulation and greater freedom granted Qwest in SB108. Qwest should be afforded the opportunity in its discretion to deal with developers on whatever terms it believes will allow it to compete effectively.

B. THE STIPULATION, AND OTHERWISE LACK OF PARTICIPATION BY DEVELOPERS IN THIS PROCEEDING, FURTHER DEMONSTRATES THAT THE OPTION 2 CONTRACTORS MERELY REPRESENT THEIR OWN PRIVATE INTERESTS AND THAT QWEST CAN WORK EFFECTIVELY WITH DEVELOPERS.

The irony of the LDA Tariff, as noted by Qwest in its testimony, is that while it was intended to improve Qwest's relationship with developers, it has spawned a minor industry of contractors who have interests adverse to Qwest's. As a result, Qwest's relationship with developers has been harmed while its placement costs have gone up. These Option 2 contractors are not even mentioned in the tariff, and Qwest has no tariff or contractual relationship with them. Yet, it is these contractors with whom Qwest continually has disputes under the Tariff and who file complaints and seek expansive interpretation and enforcement of Tariff provisions (and now even changes to the Tariff). While at the same time thumbing their noses at Commission jurisdiction to control them or their actions,[3] Option 2 contractors seek to use the Commission to further their interests when it is convenient to do so. Conspicuously absent in these disputes have been developers—the real parties in interest.

Qwest wants to have the LDA Tariff (and eventual price list) fixed so that it meets developers' and Qwest's needs and so that the repeated litigation involving Option 2 can come to an end once and for all. Because of this, and because Option 2 contractors have claimed to speak for the interests of developers, Qwest has chosen not to dispute the ability of Option 2 contractors to participate in this docket. Nevertheless, the fact is that because Option 2 contractors are neither the customers governed by the LDA Tariff nor

[3] For example, in the face of repeated Commission direction that verifiable cost estimates be provided by the parties, SBS candidly admitted in its testimony that it "does not care one whit about Qwest's cost estimate" (J.Bodine Direct Testimony at 14), and for its cost estimate SBS continues to merely claim entitlement to the Cap amount for all jobs.

the parties with which Qwest has the tariff and contractual relationship, they really have no standing to forward their own private interests regarding the LDA Tariff.[4]

In apparent recognition of this fact, the Option 2 contractors secured the purported intervention of 59 developers and the Salt Lake HBA in this proceeding in an attempt to bolster their position, and have focused their arguments on the alleged benefits of Option 2 to developers. However, it has now become apparent that all but a few of those developers have no interest in participating in this docket, that several of them did not even know they had intervened and that the entity that represents a large body of developers, the Salt Lake HBA, does not object to the Revised LDA. Moreover, in response to Qwest's proposals of shortening tariff intervals and responding to expedited developer schedules through conduit placement, the Option 2 contractors have submitted no testimony demonstrating that developers' legitimate needs would not be satisfied by such a regime. Instead, as the supplemental surrebuttal testimony of Laura Scholl indicates, in a continued effort to undermine Qwest's relationship with developers SBS has desperately resorted to unfairly characterizing the Stipulation as a selling "down the river" "for a handful of beads," essentially implying that Qwest's proposals regarding its future dealings with developers are worthless.

In other words, the only meaningful, direct participation by real parties in interest in this docket—the entry into the Stipulation by the Salt Lake HBA—has demonstrated that Qwest and developers can work directly together to meet their mutual needs without the burdens associated with Option 2 or the interference of Option 2 contractors. The

[4] For third parties to assert claims under a contract they must be intended, not merely incidental, third-party beneficiaries. *See, e.g., Broadwater v. Old Republic Sur*., 854 P.2d 527, 536-37 (Utah 1993).

lack of participation by developers that were recruited (knowingly or unknowingly) by Option 2 contractors to participate in this docket, and the inability of Option 2 contractors to refute Qwest's argument that developers' legitimate needs will be fully met under the Revised LDA, further demonstrate that Option 2 is not necessary. All that remains in opposition to the elimination of Option 2 is the private interests of Option 2 contractors (demonstrated by their blatantly unfair communications with developers regarding the Stipulation) and the misguided position of the Committee.[5] Option 2 contractors have no standing to forward those interests regarding Qwest's proposed changes to the LDA Tariff. Nor are those private interests a cognizable public-interest basis for the Commission to require Qwest to maintain Option 2.

The Commission has the responsibility to ensure that public utilities provide service at just and reasonable rates and in a safe and reliable manner. *See generally* Chapters 3 and 4 of Title 54 of the Utah Code. In performing these responsibilities, the Commission is required to balance the interests of a public utility and its customers. In the case of telecommunications services, as competition has developed in the industry competition has replaced or modified some of these responsibilities and the Commission has also been granted responsibility to regulate certain aspects of the relationship between Qwest and its competitors providing telecommunications services, in the interests of promoting competition and the availability of advanced telecommunications services. *See generally* Chapter 8b of Title 54 of the Utah Code. In all of these responsibilities,

[5] The Committee's belief that the interests of customers in obtaining service more promptly is served under Option 2 has been thoroughly rebutted in Qwest's testimony with facts demonstrating that it is not correct.

there is no reference to a responsibility to protect the private interests of a group of contractors who wish to install facilities for Qwest without Qwest's consent.

The Stipulation, and the course of conduct in this docket by the real parties in interest, demonstrate that Option 2 is not necessary to meet the needs of developers and Qwest.

VI. CONCLUSION

Given the development of competition in the telecommunications industry, including the fact that developers have choices among telecommunications corporations to place facilities in their developments, it is inappropriate to require Qwest alone to have its facilities placed by contractors with whom it has no contractual or tariff relationship at costs in excess of the costs it would incur if it placed the facilities itself. Option 2 contractors should be free to contract with those telecommunications providers (potentially including Qwest) whom they can convince that they are offering a valuable service at a desirable price; but Qwest should likewise be free to choose the contractors that will place its facilities.

The passage of SB108, which replaces Qwest's tariffs with price lists, is an acknowledgement by the Legislature of the competitive nature of the industry and the need for reduced regulation of Qwest. Qwest's proposals to shorten tariff intervals, place conduit when necessary, and institute a New Development Manager position, all ensure that developers' legitimate needs will be met in the absence of Option 2. The Stipulation makes clear that the real parties in interest, the developers, generally have no objection to Qwest's proposed Revised LDA subject to conditions in the Stipulation which provide them with assurances that Qwest intends to be responsive to their legitimate needs.

Based on the foregoing, the Commission should approve Qwest's Revised LDA.

RESPECTFULLY SUBMITTED: April 5, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **QWEST'S PRE-HEARING BRIEF** was served upon the following by electronic mail, on April 5, 2005:

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