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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
	:	**REPLY BRIEF OF QWEST CORPORATION ON COST POLICY ISSUES**

Qwest Corporation ("Qwest") hereby respectfully replies to the Response Brief of the Division of Public Utilities on Cost Policy Issues ("Division Response"), the Response Brief of the Utah Committee of Consumer Services ("Committee Response"), the Brief of Clear Wave Communications, L.C., East Wind Enterprises, LLC, and Prohill, Inc., DBA Meridian Communications of Utah on Cost Policy Issues ("Clear Wave Response"), and the Response Brief of SBS Telecommunications, Inc. and Silver Creek Communications, Inc. on Cost Policy Issues ("SBS Response") (the Committee Response, Clear Wave Response, and SBS Response, collectively the "Opposition Responses"), all filed on March 5, 2004.

INTRODUCTION

The Commission has before it the policy question of whether Qwest should be required to pay more for facilities placed pursuant to Option 2 of the LDA tariff than it would pay if it placed facilities itself under Option 1 of the tariff. Despite the impression one would get from reading the Opposition Responses, that is the only question currently before the Commission. When determining this cost policy question, the Commission needs to bear in mind—as the Opposition Responses do not—what an extraordinary circumstance it is for a public utility to be forced to accept the placement of its facilities from parties with whom it does not have a contractual relationship, whom it cannot fully control, and for costs in excess of those the utility would incur had it placed its facilities itself or directly contracted with another to do so. Qwest is aware of no other public utility, and certainly no competitor of Qwest's, forced to accept facilities under such circumstances.

For the Commission to require Qwest to accept facilities in such circumstances, and particularly to require Qwest to accept the facilities for costs in excess of those it would incur if it placed the facilities itself, there must be a legitimate basis for finding that the public interest demands such. Otherwise, the Commission would usurp the utility's management role, in an arbitrary and discriminatory act that may also effect a taking without just compensation. In this case, there is no support for a finding that the public interest demands Qwest pay more for facilities placed pursuant to Option 2. The Commission should, therefore, order that Qwest is not required to pay more for facilities placed pursuant to Option 2 than it would pay for facilities placed pursuant to Option 1. This docket can then proceed to address how to appropriately estimate the costs Qwest would incur under Option 1 (so that Option 2 contractors can be fairly

compensated), as well as addressing any other remaining issues in order to resolve the problems with Option 2 of the tariff, with the end goal being a fair and workable tariff.

ARGUMENT

As an initial matter, Qwest notes that no other party appears to support Qwest's view that this docket is the appropriate forum for interpreting the Option 2 language currently in effect,[1] in order to determine the compensation rules to be applied to outstanding Option 2 projects. Qwest remains of the opinion that this docket, with broad Option 2 contractor participation and participation from the Division and Committee, provides an appropriate opportunity to resolve current tariff interpretation as well as determine forward-looking cost policy. Nevertheless, Qwest views the forward-looking policy question as the far more important issue to be resolved. The Commission has before it the parties' arguments about the meaning of the current tariff language, as well as the language of the tariff itself and the Commission's prior orders regarding the same. If the Commission chooses to address the meaning of the current tariff language it has all the necessary information to do so, and there is no reason it cannot do so.[2] Qwest's

[1] It is difficult to get past the rhetoric in the Committee Response to determine whether the Committee actually opposes using this docket to interpret the current tariff language. The Committee Response implies that the meaning of Option 2's cost language is already clear. *See* Committee Response at 2 ("Qwest[] . . . would have the Commission . . . retroactively limit the utility's payment exposure for existing claims . . . in disregard of the clearly-stated wording of the tariff . . . ."). The Committee errs in taking this view. The Commission has ordered that "costs be agreed upon at the inception of the agreement and incorporated in the LDA." *See* Report and Order, Docket No. 98-049-33 (April 30, 1999) ("1999 Order") at 6. The Commission has not, however, directed what the default price should be when such agreement cannot be reached.

[2] The Clear Wave Response asserts that in the January 15, 2004 scheduling conference Judge Tingey stated—and all parties agreed—that the purpose of this docket was to address forward-looking issues only. *See* Clear Wave Response at 7. Counsel for Qwest has reviewed the transcript of the scheduling conference and is unable to identify any such statement by Judge Tingey that would foreclose tariff interpretation, or any such agreement by the parties (counsel for Qwest did talk about possible forward-looking tariff filings but never suggested that current tariff interpretation could not also be addressed, and indeed discussed the resolution in this docket of outstanding Option 2 disputes). Nor does the Scheduling Order indicate any such limitation. *See* Scheduling Order, Docket No. 03-049-62 (January 23, 2004). The Commission clearly has the authority, under its broad investigative powers, to address current tariff interpretation in this docket. *See, e.g.*, Utah Code Ann. § 54-4-2 ("Whenever the

remaining arguments in this reply will be focused on the forward-looking policy aspect of Option 2, rather than on interpreting the current tariff language.

A. In The Absence Of A Compelling Reason To The Contrary, A Requirement That Qwest Pay More Than Its Own Costs For The Placement Of Its Network Would Be Unlawful.

The Opposition Responses claim that there are good reasons to force Qwest to pay more for Option 2 than it would for Option 1. However, those Responses fail to acknowledge what an extraordinary act it would be for the Commission to force a utility to accept facilities from parties with whom it has no contractual relationship, whom it cannot fully control, and for costs in excess of those the utility would incur had it placed its facilities itself or directly contracted with another to do so. They fail to acknowledge the longstanding principle that utility commissions "cannot . . . take into their hands the management of utility properties or unreasonably interfere with the right of management"[3] except in cases such as those involving "bad faith, . . . dishonesty, wastefulness, or gross inefficiency."[4] In other words, a utility must be failing in some manner to fulfill its public service obligations in order for the Commission to intrude on management prerogatives. Otherwise, "the Commission is . . . forbidden from intruding into the management of a utility."[5]

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commission believes that . . . it will be . . . in the interest of the public, an investigation should be made of any . . . schedule, classification, rate, price, charge, fare, toll, rental, rule, regulation, service or facility of any public utility, it shall investigate the same upon its own motion . . . .").

[3] *Logan City v. Public Utilities Comm'n*, 296 P. 1006, 1008 (Utah 1931).

[4] *Utah Dept. of Administrative Services v. Public Service Comm'n*, 658 P.2d 601, 618 (Utah 1983) ("*Wexpro II*") (quoting *Logan City*, 296 P. at 1008).

[5] *Id. See also* Report and Order, *In re Mountain Fuel Supply Co.*, Docket Nos. 91-057-11, 91-057-17, 1993 WL 501430, *22 (Utah P.S.C. Sept. 10, 1993) ("The Commission should not substitute its judgment for that of management in complex utility matters . . . .").

Likewise, the Opposition Responses fail to acknowledge that a utility's "right to just compensation under article I, section 22 of the Utah Constitution must be fully protected,"[6] and that forcing a utility to pay too much for facilities has precisely the same economic impact as forcing it to sell facilities for too little. Either way, the utility's property—its money—is being improperly taken.[7] Further, pursuant to the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, "[p]rice control is unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt."[8] The Opposition Responses fail to address the fact that no other public utility in Utah is forced to accept facilities under the circumstances the Opposition Responses advocate for Option 2, and that in the absence of some compelling reason to treat Qwest differently from other utilities, such disparate cost treatment would be unconstitutionally arbitrary and discriminatory.[9]

In sum, the Opposition Responses fail to identify the compelling public interest that requires Qwest to pay more for facilities under Option 2 than it would pay for facilities under Option 1. The arguments advanced in the Opposition Responses simply lack merit.

B. There Is No Basis For A Finding That The Public Interest Requires Qwest To Pay More For Its Network Under Option 2 Than It Would Pay Under Option 1.

The Opposition Responses are essentially in agreement in their arguments about why Qwest should be required to pay more for Option 2 placement than it would for Option 1 placement. They argue that 1) Option 2 contractors provide a valuable service to Qwest for

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[6] *See City of Logan v. Utah Power & Light Co.*, 796 P.2d 697, 700 (Utah 1990)

[7] *Cf., e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) ("[T]he Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory.") (citations omitted).

[8] *In Re Permian Basin Area Rate Cases*, 390 U.S. 747, 769-70 (1968) (quotation omitted).

[9] *See, e.g.*, Division Response at 3 ("[T]here are no other regulated utilities in Utah that are forced to accept, and pay for, the work of outside contractors.").

which it should be willing to pay;[10] and 2) Option 2 was mandated by the Commission in response to Qwest's "dismal record" regarding held orders, and Qwest cannot complain about the costs of Option 2 because the need for that option is Qwest's own fault[11]—in other words, Option 2 is a remedial provision mandated by the public interest in adequate telephone service. Neither argument has merit. The first argument is irrelevant and the second argument is demonstrably false.

1. Qwest's management judgment about the perceived value of Option 2 is not at issue in this case.

The first argument ought to bear no part in the Commission's decision-making on the Option 2 cost policy question. The Commission's function is to ensure that utilities fulfill their public service obligations; otherwise, "the Commission is . . . forbidden from intruding into the management of a utility."[12] The Commission's legislative mandate does not extend so far as to require Qwest to do things simply because those things are allegedly "symbiotic"[13] or supposedly make business sense. If Qwest does not agree that it makes sense to pay more for

[10] *See, e.g.*, Clear Wave Response at 5 (Alleging that "over the last two and a half years, the Option 2 process has operated smoothly and has been remarkably successful. In reality, a symbiotic relationship exists between Qwest and Option 2 contractors. . . . Qwest and Qwest's subscribers are the ultimate beneficiaries."); SBS Response at 9-10 (Alleging that "[i]t was only through the work of the Option 2 contractors that Qwest was able to eliminate or decrease its backlog of held-orders" and that Option 2 contractors "not long ago bailed Qwest out of a predicament it had gotten itself into.").

[11] *See, e.g.*, Committee Response at 3-4 (noting Qwest's alleged "dismal record" regarding held orders, and alleging that "[t]he regulatory environment in which Qwest operates responded to the utility's failure to place its plant in a timely fashion by requiring the creation of the LDA tariff."); Clear Wave Response at 2 ("Option 2 was implemented by Qwest in 1997, under mounting pressure from the Commission, developers, and the general public over Qwest's inability to timely install and deliver service at new residential developments. To resolve the problem of 'held orders,' the Commission approved Option 2 . . . ."") (citation omitted); SBS Response at 9 ("It must be remembered that Qwest's own neglect for, or inability to deal with, developers concerns, is what precipitated the inception of Option 2. That is, Qwest's demonstrated inability to keep pace with development resulted in numerous 'held-orders.'").

[12] *Wexpro II*, 658 P.2d at 618.

[13] *See* Clear Wave Response at 5

Option 2 than it would pay for Option 1, there needs to be a public policy foundation for any Commission decision to override Qwest's management discretion. Qwest is not seeking to eliminate Option 2.[14] However, it is not willing to voluntarily pay more for facilities placed under Option 2 than it would pay for facilities it placed itself or contracted with others to place under Option 1. The question before the Commission is not whether Qwest should re-think its position. The question is, given that Qwest is unwilling to voluntarily pay more for Option 2, is there a policy basis to force Qwest to pay more for Option 2 notwithstanding its opposition. And the answer is, there is no such policy basis to force Qwest to pay more for its network in circumstances where Option 2 is chosen by a developer.

2. Option 2 was not mandated by the Commission in response to held orders, and is not necessary in order to protect the public interest in adequate telephone service.

The only remaining arguments in the Opposition Responses are the claims that Option 2 was a remedial measure forced upon Qwest in response to held orders, and that Option 2 remains necessary in order to prevent such held orders. These arguments are demonstrably false. The

[14] It is interesting that the Opposition Responses all predict the crippling or demise of Option 2 if Qwest is not required to pay more than its own costs for facilities placed pursuant to that option. *See, e.g.*, Committee Response at 5 ("A Commission order that limits Qwest's payment obligation to what Qwest would have paid had it performed the work, would simply hamstring the Option 2 alternative."); SBS Response at 10 (arguing that limiting Qwest's payment under Option 2 would "eliminate the Option 2 contractor's services" and that "if the reimbursement schedules are not followed, there is a very real likelihood that Option 2 contractors will go by the wayside."); Clear Wave Response at 3 ("Limiting the amount Option 2 contractors are reimbursed to Qwest's own costs as presently calculated by Qwest . . . would eliminate Option 2 as a viable option."). These predictions, which assume that it is impossible for an Option 2 contractor to be efficient enough to place facilities at or below Qwest's cost, amount to a collective opinion that developers do not value Option 2 sufficiently to be willing to pay any difference between Qwest's costs and costs Option 2 contractors would charge to place facilities. There is nothing to suggest that this opinion accurately reflects the views of those developers who use Option 2; but if it does, it is difficult to take seriously the Opposition Responses' arguments about the importance to developers of Option 2. Developers are the parties that can choose to use, and ostensibly benefit from, Option 2. If the parties choosing to use Option 2 don't value it enough to bear **any** costs associated with the option (remembering that developers pay nothing if Option 2 costs do not exceed Qwest's costs, as limited by the tariff cap), Qwest wonders how Option 2 can be so important as to mandate subsidies from Qwest to ensure the option's viability.

Commission did not mandate the insertion of Option 2 at all, nor did it do so in response to held orders; Qwest's held orders in the mid-1990s began to steeply decline **before** the LDA tariff was implemented; and held orders today are virtually non-existent. There has simply never been any evidence submitted to demonstrate that Option 2 is necessary in order to ameliorate held orders. Thus, there is no basis for a finding that Qwest must pay more for Option 2 than it would pay for Option 1 in order to remedy an alleged problem with held orders.

With the notable exception of the Division Response, the party responses in this matter reflect a uniform disregard for the facts in addressing the history of Option 2. The Opposition Responses quote the statement made by Judge Thurman in Docket No. 98-049-33 that "we are mindful that [Qwest] grudgingly accorded developers a self-help option only under pressure emanating from its own dismal held-order record over the past several years."[15] Yet, inexplicably, the Opposition Responses fail to acknowledge the existence of Judge Thurman's later order, issued on May 26, 2000 in Docket No. 99-049-T28 ("2000 Order"). In the 2000 Order, after receiving evidence, which he had not done in Docket No. 98-049-33, Judge Thurman stated:

> The LDA tariff was the subject of a previous Commission proceeding in which the Commission set forth its intent regarding interpretation of the 125% reimbursement provision. **In the course of discussing the legal issues presented (there were no factual issues), the Administrative Law Judge mentioned in passing his understanding that the LDA tariff, and in particular the self-help option, was adopted by [Qwest] as a means of alleviating the backlog of held orders. The Administrative Law Judge's understanding is apparently erroneous. The impetus for the LDA tariff's adoption was an ongoing series of disputes with developers over the financing of new infrastructure, not held orders.** In fact, at the time the LDA tariff was adopted, the held order situation was already improving. Moreover, [Qwest] attributes most

[15] *See* 1999 Order at 5.

> of its held order problems to other delays in providing trunk lines to developments, not secondary lines within subdivisions.[16]

According to the very person who issued the "dismal held-order record" language in the 1999 Order, that earlier language was not based on any evidence (i.e., "there were no factual issues"), it was merely "mentioned in passing," and it was "erroneous."[17] In fact, the evidence (as opposed to speculation) showed that "the impetus for the LDA tariff's adoption was an ongoing series of disputes with developers over the financing of new infrastructure, not held orders."[18] And, "at the time the LDA tariff was adopted, the held order situation was already improving."[19]

In light of this, Qwest wonders how the parties can in good faith continue to cite the 1999 Order without even acknowledging the existence of the later 2000 Order.[20] This is particularly troubling in the case of the Committee, which without any factual basis, makes charges that Qwest has an "underlying utility service problem" and a "fundamental problem" of "not

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[16] 2000 Order at 3-4 (emphasis added).

[17] *See id*. at 3.

[18] *See id*. *See also, e.g*., Transcript, Docket 99-049-T28 (March 22, 2000) at 216-17 (Farr) ("Q. And when did [the revised tariff] first get initiated? A. In the June 1996 time frame, **we met with the Public Service Commission, the Division of Public Utilities, and Committee of Consumer Services to talk about changes that we wanted to make** to our land development agreement tariffs, and the TAP tariff . . . as well as some other special construction issues. Q. And what was the reason for the Company wanting to change the LDA tariff? A. There were existing problems with the LDA tariff. Under the existing tariff at that time, [if] a developer was outside the base rate area, they basically had to front a hundred percent of the cost of the subdivision, and that was refundable over a period of five years as [the subdivision] developed. And what we were running into was increasing numbers of developers that were basically stiff-arming us and not willing to do that. And we were having situations where we were put into a position where we violate our tariff or we go ahead and just do the work for the end user customers. . . . **Q. Getting to the point, was the change to the tariff, the implementation of that Option 2, self-help option, was it done to address the Company's held order problems? A. No, it was not**. It was at our accord that we recommended to the Commission in that initial meeting that we propose this [as] an alternative to the existing tariff that was in place at that time.") (emphasis added).

[19] *See* 2000 Order at 3.

[20] While the Commission, on reconsideration, determined to leave the LDA tariff intact in the PAHD Docket, it did nothing to indicate any dispute with the factual findings made by Judge Thurman. *See* Order on Reconsideration, Docket No. 99-049-T28 (October 2, 2000).

installing new development infrastructure" within the required time;[21] and that "the regulatory environment in which Qwest operates responded to the utility's failure to place its plant in a timely fashion by requiring the creation of the LDA tariff."[22] The Committee has access to the relevant findings from past proceedings and access to Qwest's held-order information, and should not have taken a position in this matter that is not supported by any facts indicating that Option 2 is necessary to protect consumers from held orders.[23] The Committee says that "in a different reality" it might agree that Qwest should maintain control of its plant and costs,[24] but its argument is not based on "reality" at all. The Committee knows—or should know—full well, that despite its protests about an allegedly current "dismal record,"[25] Qwest is in full compliance with the Commission's rule on held orders and has been for years.[26]

The Opposition Responses rely solely on the held-order language from the 1999 Order as their basis for arguing that Option 2 was a remedial requirement to correct held orders, and rely on nothing at all for the claim that Qwest remains incapable of avoiding held orders in the absence of Option 2.[27] The language from the 1999 Order was later disavowed by the drafter as

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[21] *See* Committee Response at 7, 8.

[22] *See id*. at 4.

[23] Unlike the Option 2 contractors, who are justified in merely looking out for their business interests, the Committee has a statutory mandate to look out for the interests of Utah consumers. *See* Utah Code Ann. § 54-10-4. Qwest fails to understand the consumer interest that would be protected by having Qwest incur more costs to place its network, when there is no indication Qwest is failing to meet its obligation to provide adequate telephone service.

[24] *See* Committee Response at 9.

[25] *See id*. at 3.

[26] Qwest asks that the Commission take administrative notice of Qwest's quarterly Service Quality Results filings, on file with the Commission.

[27] The Clear Wave Response does cite two pieces of evidence allegedly supporting its argument, in addition to relying on the "dismal held-order record" language. First, it cites the testimony of Emily Marshall, from Docket No. 99-049-T28, for the proposition that "[s]ince the inception of Option 2, the number of held orders has apparently decreased." *See* Clear Wave Response at 4. While this may be true (and, concededly, Option 2 jobs completed on a timely basis do not exacerbate held orders), it does not

being erroneous speculation, mentioned in passing, and not based on evidence. There is no basis for the claim that Option 2 was implemented upon the mandate of the Commission for correcting held orders. The past evidence and Commission findings are to the contrary.[28] Thus, there is no basis for a Commission order finding that public policy demands Qwest to pay more for Option 2 than it would for Option 1. In such circumstances, it would be unlawful for the Commission to require Qwest to pay more for Option 2 than it would pay for Option 1.

C. The Remaining Opposition Response Arguments Are Erroneous And Irrelevant To This Phase Of The Docket.

The Committee Response, Clear Wave Response, and SBS Response contain various other arguments that have nothing to do with the policy question at issue in this round of briefing. All three responses, for example, fault Qwest for its handling of verifiable cost estimates.[29] Qwest disputes the allegations made on this and other issues, but also notes that in the scheduling conference it was expressly determined by Judge Tingey that verifiable cost estimates would not form a part of the initial briefing in this docket.[30] Likewise, the questions of how Qwest's costs should be calculated if Option 2 reimbursement is to be limited to Qwest's

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establish that in the absence of Option 2 Qwest would be failing to meet its service obligations. Indeed, the fact that held orders steeply declined **prior** to the inception of Option 2 belies any claim that Option 2 is the cause of the elimination of held-order problems. *See* 2000 Order at 4 ("In fact, at the time the LDA tariff was adopted, the held order situation was already improving."). There has never been any evidence that Option 2 was or is necessary or required to meet Qwest's service obligations, and Docket No. 99-049-T28 directly explored the issue. Second, the Clear Wave Response cites a letter from a developer for the proposition that Qwest was slow in completing one Option 1 job in 1997. *See* Clear Wave Response at 5. This, of course, is insufficient to establish that Qwest required Option 2 in 1997 to alleviate held orders, and has no bearing at all on the situation in 2004.

[28] Indeed, if the Commission had sought to mandate a tariff provision to remedy held orders, it would have been odd for the Commission to choose a provision that placed Qwest's service obligations in the hands of developers, so that if developers did not choose Option 2 nothing would be done to address the problem. If the Commission were to effectively address held orders in a tariff requirement, it would make sense for the tariff to address held orders regardless of which option was used.

[29] *See, e.g.*, SBS Response at 4; Clear Wave Response at 5; Committee Response at 6-7.

[30] *See* Transcript (January 15, 2004) at 41-42.

costs,[31] what the appropriate timelines should be for entering an LDA and placing facilities, and whether Qwest should provide materials to Option 2 contractors,[32] are issues for later in this proceeding.

The only issue to be addressed at this time is whether Qwest should be forced to pay more for facilities placed pursuant to Option 2 than it would pay for facilities placed pursuant to Option 1.

CONCLUSION

The Opposition Responses do not provide any basis for a Commission order finding that public policy demands Qwest to pay more for Option 2 than it would for Option 1. For the reasons set forth above, as well as the reasons set forth in Qwest's initial brief and the Division Response, it would be erroneous and unlawful for the Commission to require Qwest to pay more for Option 2 than it would pay for Option 1.

[31] At the scheduling conference and in their briefing, the Option 2 contractors seemed to have difficulty grasping the concept of a pure cost-policy determination. *See, e.g.*, Clear Wave Response at 5-6 (focusing on issues such as materials, sales taxes, and costs for repairs, and alleging that "[w]hile Qwest may have an incentive to install facilities at cost, those costs have never been fully identified"); SBS Response at 7 ("[I]t is difficult to adequately analyze the 'cost policy' issue when the Option 2 contractors . . . are not privy to how costs are initially determined; and as importantly, if the alleged costs are verifiable."). Qwest does not understand the Option 2 contractors' difficulty. The policy question is largely a generic one, and could easily be put as whether a utility (not even specifically Qwest) can or should be required to pay more for its facilities in the circumstances at issue in this case. Qwest has readily conceded that if the Commission determines that Qwest should not, as a policy, be required to pay more than its own costs, the next phase of this docket can and should focus on how Qwest's costs should be determined (including whether or how materials costs, sales taxes, repair costs—to cite examples from the Opposition Responses—or anything else that the parties wish to argue about, should be accounted for).

[32] This concept, which Qwest has previously discussed with several Option 2 contractors, and which was suggested by the Committee Response and the Clear Wave Response, is not objectionable to Qwest in theory, and Qwest is entirely willing to explore whether it can be implemented in practice.

For these reasons, Qwest respectfully requests a Commission order declaring that Qwest is not 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.

RESPECTFULLY SUBMITTED: March 26, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF QWEST CORPORATION ON COST POLICY ISSUES** was served upon the following by electronic mail, on March 26, 2004:

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