Kevin M. McDonough, 5109
MISMASH & McDONOUGH, LLC
136 South Main Street, Ste. 404
Salt Lake City, Utah 84101
Telephone (801) 531-6088
Facsimile (801) 531-6093

Attorney for SBS Telecommunications, Inc and Silver Creek Communications, Inc.

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 SBS TELECOMMUNICATIONS, INC. and SILVER CREEK COMMUNICATIONS, INC. ON COST POLICY ISSUES** **HEARING REQUESTED**

SBS Telecommunications, Inc. ("SBS") and Silver Creek Communications, Inc. ("Silver Creek"), by and through their legal counsel of Mismash & McDonough, respectfully submit this reply brief as related to cost policy issues.

As set forth in the March 5, 2004 response brief of these replying parties, the "cost policy" issues cannot be evaluated in a vacuum. The other response briefs filed in this matter support this position. (See brief of Clear Wave Communications, L.C., East Wind Enterprises, L.L.C., and Prohill, Inc., DBA Meridian Communications of Utah (jointly "Clear Wave"), the Division of Public Utilities ("Division") and the Committee of Consumer Services ("Committee"). That is, the substance of the briefs on file in this Docket clearly indicates that

there are tangential and inter-related issues which should necessarily be addressed in deciding the "cost policy" issues.[1]

In throwing its support towards Qwest's position, the Division states that "[f]inally, in today's competitive market there are no other regulated utilities in Utah that are forced to accept, and pay for, the work of outside contractors."[2] While this may be true, it is significant that there are no other regulated utilities in Utah that have the same sort of "dismal held-order record" as Qwest. Further, Qwest is not presently "forced" to accept the work of outside contractors; rather, the facilities placed by outside contractors are subject to performance testing and approval at the sole discretion of Qwest (which raises another inter-related issue).

In relying upon an earlier Order of the Commission, the Division argues that "an agreement regarding costs between Qwest and the LDA contractor [should be entered into] before the installation is performed."[3] The Division further asserts that without such an agreement, "the LDA contractor should not install the facilities and expect Qwest to pay for them."[4] While in theory this may seem to be a plausible partial-resolve to the problem, the same is an overly simplified blanket analysis. That is, Qwest has sole control over the LDA; and

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[1] For example, Qwest's initial brief in this Docket requests the Commission to not only limit prospective payment exposure to what its own facility placement costs would be, but also to retroactively limit the payment exposure; the Division's initial Response Brief addresses the issues of the timing of entering into an LDA agreement; the Committee's initial Response Brief raises the issue of whether or not an Option 2 contractor will have access to the same equipment and supplies and on the same volume discount basis, that Qwest does; Additionally, the Division's second filing, filed with the Commission earlier this week, refers to "Confidential Held Order Report #6 filed with the Division…" and a suggestion "that the parties begin the LDA process as early as possible…".

[2] Response Brief of Division at Page 3.

[3] See Division Brief at Page 4.

[4] *Id.*

Qwest has demonstrated an unwillingness to discuss or negotiate, financial terms until the engineering on the project has been completed. By the time the engineering has been accomplished however, the developer has already made a decision whether to utilize Option 1 or Option 2. Further propagating this problem is the fact that Qwest does not provide detailed and verifiable cost estimates. This presents yet another issue intertwined with the "cost policy" issues.

Similarly, the Committee refers to this Commission's Order in Docket 98-049-33 wherein the Commission concluded that the LDA tariff required "costs be agreed upon at the inception of the agreement and incorporated in the LDA". [5] The Committee asserts that "the real remedy lies with the utility providing timely services and making clear to the developer and contractor in 'prior agreement' negotiations what the reasonable cost estimate for the work in question should be."[6] The Committee concludes that perhaps Qwest should "simply insist its payment obligation is contingent upon a payment agreement reached in writing prior to the performance of the work…". [7] As with the Division's argument, this proposed solution is overly simplistic, if for no other reason, because historically Qwest has refused to "negotiate" in any manner. [8]

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[5] See brief of Committee at Page 5.
[6] *Id.*
[7] *Id* at Page 8
[8] As an example of Qwest's reticence to accept suggestions, let alone "negotiate" with regard to the LDA, SBS has on several occasions suggested that Qwest replace incorrect language contained in the LDA, i.e., the LDA that Qwest sends out refers to the Public Service Commission of Utah as the "Utah State Corporation Commission". Despite repeated requests to correct this error, Qwest has refused. If Qwest remains unwavering in its refusal to correct a plain error referencing the Commission, there is little reason to believe it will negotiate or discuss cost issues.

Accordingly, while "negotiating" with Qwest might be sound in theory, historically it has been absolutely unobtainable in practice. Therefore, these "negotiation issues" should be addressed simultaneously with "cost-policy issues".

Finally, these replying parties believe there is a potential huge risk that will be taken if the Commission is to rule on the "cost policy" issues in a vacuum. If the cost policy issues are addressed standing alone, and the myriad other issues are addressed later, the risk is run that the various rulings may be incongruous. That is, while a certain decision may be rendered concerning the "cost policy" issues standing alone, when those same issues are considered together with tangential and inter-related issues, the "logic" applied to the first ruling may not be as strong when the other issues are considered. This would leave the Commission with the task of trying to put the toothpaste back in the tube.

Another concern of SBS is that a ruling on the issue of "cost policy" might be taken out of context (or contain dicta) that Qwest might later attempt to use as a sword. We need simply look at the July 15, 2003 Report & Order issued by the Commission in Docket #02-049-06. Although the issue in that docket was confined to the definitional scope of "single-family dwellings", the Commission's Report & Order embellished on tangential issues, without actually ruling upon the same. Recently, in a Motion to Dismiss the Complaint filed by SBS against Qwest in the Third Judicial District Court[9], Qwest refers to this Commission's ruling in Docket #02-049-66, and asserts that "the Commission has already

[9] Qwest's Motion to Dismiss in *SBS Telecommunications, Inc. v. Qwest Corporation*, Case No. 040900339.

rejected the cost formula" set forth in the SBS Complaint. Simply put, the Commission has not yet ruled on the cost formula. To obviate any confusion on the Commission's rulings in this Docket, it is most prudent to consider all tangential issues.

The Division has acknowledged that, historically, application of the LDA has been neither easy, nor simple. We agree; however, addressing inter-related issues in a piecemeal fashion will only serve to complicate matters and muddy the waters.

CONCLUSION

Based upon the foregoing and in conjunction with the myriad tangential issues presented to the Commission through the several filings accomplished by the parties to this Docket, and in an effort to avoid inconsistent rulings by the Commission, SBS and Silver Creek respectfully request that the Commission hold a hearing on this matter.

RESPECTFULLY submitted this _____ of March, 2004.

MISMASH & McDONOUGH, LLC

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Kevin M. McDonough
Attorney for SBS Telecommunications, Inc. and Silver Creek Communications, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF SBS TELECOMMUNICATIONS, INC. and SILVER CREEK COMMUNICATIONS, INC. ON COST POLICY ISSUES** was served upon the following via electronic mail:

David L. Elmont
Stoel Rives, LLP
201 S MAIN ST STE 1100
SALT LAKE CITY, UT, 84111
dlelmont@stoel.com

Patricia E. Schmid
Assistant Attorney General
160 E 300 S
POB 140847
SALT LAKE CITY, UT, 84114
pschmid@utah.gov

Anthony C. Kaye
Jennifer Rigby
Ballard Spahr Andrews & Ingersoll, LLP
201 S MAIN ST STE 600
SALT LAKE CITY, UT, 84111-2221
kaye@ballardspahr.com
rigbyj@ballardspahr.com

Reed Warnick
Assistant Attorney General
500 Heber Wells Building
160 East 300 South
Salt Lake City, Utah 84111
rwarnick@utah.gov

Oliwia Smith
Committee of Consumer Service
160 East 300 South, 2nd Floor
Salt Lake City, Utah 84111
osmith@utah.gov

Lindsay Mathie
Public Service Commission
160 East 300 South
PO Box 45585
Salt Lake City, Utah 84145-0585
lmathie@utah.gov

_/s/ Vesper Starr, Paralegal__