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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 THE UTAH COMMITTEE OF CONSUMER SERVICES ON COST POLICY ISSUES

The Utah Division of Public Utilities ("DPU"); SBS Telecommunications, Inc. and Silver Creek Communications, Inc. (jointly "SBS"); Clear Wave Communications, L.C., East Wind Enterprises, LLC, and Prohill, Inc., DBS Meridian Communications of Utah (jointly "Clear Wave"); and the Utah Committee of Consumer Services ("Committee") have filed response briefs in these proceedings. In addition, the Utah Division of Public Utilities ("DPU" or "Division"), filed on March 22, 2004 its reply brief to other parties' response briefs This is the Committee's reply to other parties' response briefs and to the reply of the Division.

SUMMARY STATEMENT

Qwest is petitioning for relief from the Commission in these proceedings with unclean hands. It asserts third-party contractors are charging more than what Qwest defines as reasonable, i.e., what it would have cost had Qwest performed the services itself. Yet, Qwest appears to be the party primarily responsible for there not being a written LDA in place, setting forth agreed upon scope and cost of work prior to the LDA contractors beginning their work.

Conversely, according to the response brief of SBS, Qwest is at times requiring “additional labor and materials be incorporated into the project for the purpose of enhancing, enlarging and bettering the network” without agreeing to “provide additional compensation beyond the per lot cap of $436.13.”

These payment and scope of work disputes are a manifestation of the parties’ failure to comply with the LDA tariff and clarifying Commission directives requiring a prior written LDA. The disputes are not, contrary to what Qwest asserts, evidence of any need to “fix the Option 2 LDA process.” Minimizing such disputes is the very purpose of a written agreement – and one it has been demonstrated to serve successfully in untold cases since passage of the Statute of Frauds in the17th century. Contractors and developers appear to be trying to comply with Commission requirements by providing good-faith, verifiable cost estimates. Qwest appears to be the party, despite its professional expertise, and the responsibility that goes with it, that is not responding to such estimates in a timely and good-faith manner with complete *and verifiable* cost estimates of its own. Because of its greater expertise and facility owner-requirements, Qwest should be the party to take the initiative to set out appropriate guidelines that developers and contractors can follow in this estimating process so it is accomplished in the most efficient and fair manner possible.

Until Qwest can demonstrate it is in compliance with the tariff and prior Commission directive that “costs be agreed upon at the inception of the agreement and incorporated in the LDA” and “both developer and [Qwest] are required to furnish in good faith detailed, verifiable cost estimates,” Qwest is in no position to seek relief from Option 2 procedures which are themselves the result of the utility’s past failure to perform the work and services expected of it by parties necessarily dependent upon the utility and its duty to serve.

The tariff already provides a cap on Qwest’s financial exposure, limiting it to the distribution portion of the average exchange loop investment times 125% times the number of lots in the development. The relief which Qwest seeks, i.e., a Commission order that the utility not be required to pay more under Option 2 than it would pay under Option 1, should not be further considered until such time as the utility can demonstrate its good faith compliance with existing tariff provisions and Commission directives.

RESPONSE TO STATEMENTS BY OTHER PARTIES

Statement 1. Because the Option 2 contractor must wait for payment from the developers/builders, it is dependent upon the fair and effective processing of the Qwest-developer/builder LDAs in order to receive timely compensation for its contracted efforts.

Regarding Option 2 projects worked on by SBS, on only 3 of the last 68 projects has Qwest furnished the LDA to the Developer prior to the construction efforts beginning; and for most jobs, all construction was complete prior to receipt of an LDA from Qwest.

Qwest has structured a system of processing the LDAs that results in delays in completing the project. Qwest withholds processing an LDA until much and many times ALL of the project work has been completed. By failing or refusing to timely execute an LDA, Qwest has unilaterally gained leverage in its ability to charge Option 2 contractors for the services performed.

Reply. To the extent this statement is accurate it demonstrates unacceptable conduct on the part of a public utility having both a duty to serve and a duty to comply with regulatory directives. Once again, this evidence demonstrates that the time address that scope of work and its cost is while negotiating the LDA prior to the work being performed, not after-the-fact before the Commission.

Statement 2. Qwest's performance measure report, filed with the Division on a quarterly basis, demonstrates that Qwest is facilitating timely placement of facilities. The Division notes that complaints involving provision of Initial Service generally have decreased 85% from 1999 to 2003. Confidential Held Order Report #6 filed with the Division indicates that the amount of held orders is insignificant and far below the allowable service quality level, and that Qwest has been complying with required service quality standards.

Reply. When the Division speaks of Qwest "facilitating timely placement of facilities," it appears to overlook the important distinction in Qwest's responsibilities between *timely placement of wiring and splicing* that must occur early in a new housing development so the developer's open trenches can be backfilled and it can start to put in roads, sidewalks and basements, and the *timely provision of "dial tone"* to a customer many weeks later after the housing development is well advanced and the customer has moved into a completed home and needs phone service.

The best indicator of whether Qwest is performing in a timely manner in the first of these critical aspects, the placement of facilities, would be a statistical break-out of the actual number of new developments where the developer is turning to Qwest for installation of facilities and where it is turning to an LDA contractor. But when SBS asked for such data in Docket No. 99-049-T28 Qwest objected to the request "on the grounds that it is unduly burdensome."

With regard to the second critical aspect, the provision of dial tone, it was to correct Qwest's abysmal held-order performance – its failure to timely provide dial tone – that the Commission imposed and has enforced the LDA tariff. In that regard, the Division's statement essentially reinforces the view of the Committee, SBS, and "Clear Wave" that the reduction in customer and contractor complaints and held orders demonstrates the success Option 2 has achieved and why it should continue as a viable option – not why it should be crippled or eliminated. Exhibit A to Clear Wave's brief is a letter from a development contractor that further confirms the Committee's, SBS's and Clear Wave's conclusions.

Qwest cannot provide dial tone when facilities have not been placed. Historically, it far too often failed to place and splice its cables before new homes were occupied. Its failure to expedite LDAs merely maintains its reluctance to fulfill its obligation to serve.

Statement 3. Under R746-340-8, Qwest is allowed no more than four held orders per 1,000 new transfer or change orders at the end of any month for unexcepted areas. Additionally, the rule requires that Qwest must, with a very limited exception for complaints related to initial installation, "meet 90 percent of all new, transfer and change order installation commitments" absent a customer request for a later date and automatically credit $10 to a residential customer, $40 to a business customer, for missing an installation date."

Reply. It is difficult to see how R746-340-8 provides any discernable benefit to developers. Certainly the provision of cellular telephones or billing credits to end-use customers does not. The critical time where delay is very costly for developers is when the trenches are first dug and utilities must be laid and the trench backfilled before excavations and installation of basements for homes can even begin. Option 2 also addresses that delay and its resulting costs – and apparently is addressing them quite successfully despite Qwest's unwillingness to enter into timely LDAs.

<u>Statement 4</u>. It also seems inappropriate to force Qwest to pay a premium to enable developers to receive expedited service. . .

> Qwest's performance, as documented above, does not appear to support the contention of the LDA contractors that developers are choosing LDA contractors due to delay by Qwest, but support instead the concept that the LDA contractors are chosen because the developer perceives some benefit from their use. . . Requiring Qwest to pay a premium for LDA contractor installation is the equivalent of requiring Qwest's customers to subsidize LDA contractors, and the developers who see a benefit from installation by the LDA contractors. This sort of subsidization is improper in the increasingly competitive telecommunications market.

<u>Reply</u>. There is nothing in the data and filings cited by the Division that would show developers are selecting Option 2 contractors instead of Qwest for any other reason than the developers' belief and experience that Option 2 contractors will perform the work in a timely manner. "Expedited service" is not the issue. In fact, it probably does not factually apply, since the facilities services in question can only be performed in a 'window of time' after the trench has been dug. There would be no benefit to anyone for facilities to be expedited earlier than that window of time. Getting their open trenches promptly backfilled so home foundation work can quickly proceed and so the open trenches do not become a public hazard are not "benefits" as much as what developers should reasonably be able to expect. With regard to the "increasingly competitive telecommunications market," that is apparently a circumstance which Qwest is not yet willing to acknowledge, turning as it is to the Commission to resolve a problem which the utility's unwillingness to compete has created. There is no regulation preventing Qwest from committing resources to effectively compete with Option 2 contractors in the timely installation of facilities. As it states in its brief:

> "[i]t can see no reason why in building its network it should not be able to take advantage of any efficiencies and purchasing power it may possess to build the lowest cost network it can, in order to effectively compete.

There is no reason why Qwest can not bring those referenced cost efficiencies and its purchasing power to bear to effectively compete against Option 2 contractors today. If Qwest can do the work at less cost AND more efficiently and quickly, why would the developers not utilize Qwest? Once again, it appears to be Qwest's unwillingness to compete and/or meet its obligation to serve in fulfilling the needs and expectations of its customers that is the problem.

Statement 5. The Division believes that it is appropriate to again state that many problems associated with the LDA tariff would be solved if the LDA contractors and Qwest would abide by the tariff provisions and enter into a written agreement prior to placement of facilities.

Reply: Amen.

CONCLUSION

The stated purpose of this round of briefing is to address the issue whether Qwest should have to pay more for facilities installed under Option 2 of its tariff than for facilities installed under Option 1 of the tariff. Qwest also seeks the further relief of having the Commission retroactively apply a decision that Qwest does not have to pay more to cases already in dispute.

The Commission lacks the necessary statutory power, based on the facts of these proceedings, to retroactively adjust Qwest's tariff and make it applicable to cases currently in dispute. The Committee believes the Commission should decline to further consider the question of altering the utility's tariff on a prospective basis, or to otherwise rule that it is not required to pay more under Option 2 than it would under Option1 until such time as Qwest can demonstrate at least some substantial measure of compliance with the Commission's prior directives – which directives are nothing more than what the tariff already reasonably requires; that is (1) it make available to LDA developers and contractors Qwest's verifiable estimate of the cost of the work involved prior to the work being initiated, and (2) it enter into written LDAs with the developers that clearly define the scope of work and its cost prior to initiation of the work.

Qwest is master of its own ship in this instance. If it wants to deter developers utilizing Option 2 and minimize facilities placement costs to what they would be were the utility to do the work itself, it needs to begin to demonstrate an ability to timely and in good faith respond to the developers' and the customers' needs. That is the "competitive" world the utility needs to move to rather than trying to hide behind regulatory directives.

Submitted this 26th day of March, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the REPLY BRIEF OF THE UTAH COMMITTEE OF CONSUMER SERVICES in Docket No. 03-049-62 was mailed or hand-delivered on this _______ day of March, 2004 to the following:

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