

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

*Attorneys for SBS Telecommunications, Inc. and Silver Creek Communications, Inc.*

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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In the Matter of QWEST CORPORATION'S Land Development Agreements (LDA) Tariff Provisions	Docket No. 03-049-62  <b>REPLY TO OPPOSITION TO MOTION TO STRIKE SURREPLY OF QWEST CORPORATION ON COST POLICY ISSUES</b>
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SBS Telecommunications, Inc. ("SBS") and Silver Creek Communications, Inc. ("Silver Creek"), by and through their legal counsel of Mismash & McDonough, respectfully submit this Reply to Qwest's Opposition to Motion to Strike Surreply.

SBS and Silver Creek feel compelled to at least briefly address some of the statements set forth in Qwest's opposition memorandum.

**1. CONTEMPLATION OF SURREPLIES.**

At page 2 of its opposition memorandum, Qwest asserts that "surreplies (if necessary) were contemplated by the parties in the January 15, 2004 scheduling conference." In this regard, Qwest has attached "relevant portions" of the transcript of the January 15<sup>th</sup> hearing and asserts that the transcript "speak[s] for itself." Indeed, much was "contemplated" during the scheduling conference. Mere contemplation, however, does not equate to a ruling or order on any particular issue. For example, Administrative Law Judge Douglas C. Tingey "contemplated" that the briefing of the cost policy issue be limited to a total of two rounds.

("That's what was thrown out originally was three rounds. And I sort of felt the idea of two rounds, but I didn't get a great reception over there." Transcript at pg. 44, lines 9-11.) After "contemplating" two rounds, Judge Tingey later "contemplated" three rounds of briefing.

THE COURT: Make that three weeks and then give you a week back on the other end for replies.

MR. ELMONT: That sounds like a great approach.

MS. SCHMID: Three weeks, three weeks, and three weeks; is that what I'm hearing?

THE COURT: Yes, so let's, who has a calendar?

Transcript at pg. 45, lines 4-9.

Additionally, the following dialogue occurred during the January 15<sup>th</sup> hearing, thereby establishing further "contemplation."

MS. SCHMID: And then the final Qwest reply would be, final Qwest brief would be due on March 18.

MR. ELMONT: If other parties have a reply at that time, we are fine with that. And same issue in terms of raising new issues that might need further rounds, but we wouldn't seek to limit the March 18<sup>th</sup> reply to only Qwest.

MS. SCHMID: Okay. So everyone could respond to every else's on the 18<sup>th</sup>. So, all parties, all parties. Okay, that's better.

THE COURT: Yes. . . .

Transcript at pg. 45, line 23 to pg. 46, line 7.

Although different parties may have "contemplated" different things at that hearing, the Scheduling Order, as acknowledged by Qwest, sets forth no provision for surreplies. Accordingly, it is customary that when a party seeks to file additional memoranda beyond the scope of a scheduling order, that party seek leave of court to file the same.

## **2. SEEKING LEAVE TO FILE A SURREPLY**

At page two of its opposition memorandum, Qwest asserts that it "did seek leave of the Commission to file its surreply." Technically, Qwest indeed sought leave to file its surreply; **however**, the procedure utilized by Qwest is a bit troubling. That is, Qwest sought

leave and simultaneously granted itself leave while filing its surreply memorandum. The appropriate procedure would have been to first seek leave, then allow the Commission to review the matter, and IF leave was granted, then submit the surreply brief.

Qwest then makes the disingenuous argument that SBS and Silver Creek sought permission in their motion to respond to Qwest's surreply. The reason SBS and Silver Creek took this approach was merely to protect its own interest in light of what Qwest had done. That is, to the extent that Qwest's surreply is considered, it is only fair and equitable that the response to the surreply be considered as well.

### **3. SUBMISSION OF PROPOSED TARIFF.**

Qwest asserts that the submission of a proposed tariff by SBS and Silver Creek was made "ostensibly" in response to Qwest's surreply; and that such a submission was "baseless". Such is not the case. Inasmuch as Qwest attempted to get its proposed tariff in the record in these proceedings, and by not following the appropriate rules, in an effort to protect itself again, SBS and Silver Creek furnished its own proposed tariff.

In this regard, Qwest makes the further statement that SBS and Silver Creek "have no right to impose upon Qwest the terms under which it will provide service". (Opposition Memorandum at pg. 3) Neither SBS nor Silver Creek is attempting to "impose" anything upon Qwest. The proposed tariff was merely that, a proposal, a suggestion, an idea.

Additionally, and contrary to Qwest's statement at page 4 of its opposition memorandum, SBS and Silver Creek have not "demand[ed]" anything. Again, they are merely requesting that their draft tariff be given equal consideration by the Public Service Commission if the Commission deems it appropriate to consider Qwest's proposed new tariff within this Docket.

Finally, SBS and Silver Creek agree that the Commission "cannot . . . take into [its] hands the management of utility properties or unreasonably interfere with the right of management". SBS is not requesting the Commission to "manage" any utility; nor is SBS asking the Commission to "unreasonably interfere" with Qwest's right of management. SBS is merely requesting that the Commission, consistent with the authority granted to it, make certain that Qwest plays by the procedural rules in any attempt to amend the existing Tariff.

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of June, 2004.

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Kevin M. McDonough  
MISMASH & McDONOUGH  
Attorneys 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 TO  
OPPOSITION TO MOTION TO STRIKE SURREPLY OF QWEST CORPORATION  
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](mailto:dlelmont@stoel.com)

Patricia E. Schmid  
Assistant Attorney General  
160 E 300 S  
POB 140847  
SALT LAKE CITY, UT, 84114  
[pschmid@utah.gov](mailto: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](mailto:kaye@ballardspahr.com)  
[rigbyj@ballardspahr.com](mailto:rigbyj@ballardspahr.com)

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

Oliwia Smith  
Committee of Consumer Service  
160 East 300 South, 2<sup>nd</sup> Floor  
Salt Lake City, Utah 84111  
[osmith@utah.gov](mailto:osmith@utah.gov)

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

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