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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of QWEST
CORPORATION'S Land Development
Agreements (LDA) Tariff Provisions

**RESPONSE BRIEF OF THE DIVISION
OF PUBLIC UTILITIES ON COST
POLICY ISSUES**

DOCKET NO. 03-049-62

The Division of Public Utilities (Division) hereby submits its brief addressing whether Qwest should be required to pay more than its costs for contractor-installed facilities. Specifically, the issue is whether, for third party contractors' installation of facilities under Option 2 of Qwest's Land Development Agreements (LDA) tariff, Qwest should be required to pay more than its costs under Option 1.

BACKGROUND

The LDA tariff, in its various forms, often has been before the Commission and also has resulted in proceedings before the Utah Supreme Court and the Utah District Court. In particular, cost issues have been addressed numerous

times. One consistent theme running through all these proceedings is that application of the LDA tariff has been neither easy nor simple.

Most recently, in its July 15, 2003 order in Docket No. 02-049-66 (Order), the Commission noted that there were yet again issues involving the LDA tariff, and established this proceeding to attempt to resolve those issues. Consistent with the Order, interested parties met before Administrative Law Judge Douglas Tingey, and, with his help, established a phased procedure for exploring LDA issues. In this first phase, the parties agreed to address the issue of whether Qwest should be required to pay more for installation of facilities under Option 2 of the LDA tariff than it would be required to pay under Option 1 of the LDA tariff.

In its Initial Brief filed on February 9, 2004, Qwest states,

The Commission must determine whether Qwest should be required to pay more for Option 2 LDAs going forward, separate and apart from how the current tariff is appropriately understood; but given the number of outstanding developments in which there are current Option 2 payment disputes, the Commission should also determine whether Qwest is required to pay more for Option 2 under the tariff currently in effect.¹

However, the Division supports the Commission resolving the issue only on a going forward basis to avoid any allegations of retroactive tariff changes.

ARGUMENT

Importantly, the issue before the Commission is whether Qwest should be required to pay a contractor to do work, under the LDA tariff, more than the costs which Qwest would incur if it were to do the work itself. There seems to be no reason why Qwest should be forced to pay a contractor an amount in excess of

¹ Qwest Initial Brief at p. 2 (footnotes omitted).

the costs that it would incur if Qwest performed the work itself or provided engineering and design services under Option 1.

Qwest should only be required to pay an LDA contractor the costs that Qwest would incur to do the work itself, and should not be required to pay in excess of that amount. The telecommunications industry has changed dramatically since the LDA tariff went into effect and Qwest is no longer subject to rate of return regulation. In addition, Qwest competes for developments with CLEC's which do not have to offer an LDA option. In other words, a Qwest competitor does not have to pay a contractor more to install facilities than it would cost the Qwest competitor to install the facilities itself. Finally, 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.

It even may become appropriate that when additional costs are incurred by the LDA contractor that those costs are either paid by the developer choosing the LDA contractor to do the work, or that those additional costs become a cost of doing business for the contractor, but those costs should not be the responsibility of Qwest. Presumably, the developer selects an LDA contractor because some benefit accrues to the developer from such use, such as expedited cable placement. Receipt of benefits should be accompanied by cost responsibility. Accordingly, the developer benefiting from the use of the LDA contractor should be responsible for any costs in excess of those costs that Qwest would incur if it installed the facilities itself.

The Division stresses that in an earlier order the Commission interpreted the LDA tariff as requiring an agreement regarding costs between Qwest and the LDA contractor before the installation is performed.² Another order noted, “Our review of the record leads us to conclude that the difficulties identified with the LDA result not from the LDA itself, but the lack of compliance with the LDA.”³ Without an agreement, the LDA contractor should not install the facilities and expect Qwest to pay for them. There must be an agreement to install facilities between the LDA contractor and Qwest.

For the reasons set forth above, and to promote the successful application of the LDA tariff, the Division respectfully requests that the Commission order on a prospective basis that Qwest should not be required to pay more for contractor installation under Option 2 of its LDA tariff than Qwest would be required to pay under Option 1 of its LDA tariff.

Dated this _____ day of March 2004.

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² Report and Order, Docket No. 98-049-33 (April 30, 1999).

³ Report and Order, Docket No. 99-048-T28 (October 2, 2000).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **RESPONSE BRIEF OF THE DIVISION OF PUBLIC UTILITIES ON COST POLICY ISSUES** in Docket No. 03-049-62, In the Matter of QWEST Corporation's Land Development Agreements (LDA) Tariff Provisions, was hand delivered, mailed via electronic means or sent by regular U.S. Mail the 5TH day of March 2004 to the following:

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