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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

RESPONSE BRIEF OF THE UTAH COMMITTEE OF CONSUMER SERVICES

The Utah Committee of Consumer Services ("Committee") here files with the Public Service Commission of Utah ("Commission") its response to Qwest Corporation's ("Qwest" or "utility") February 9, 2004 initial brief.

**Background**

The Commission opened the present docket to further explore issues associated with the LDA tariff, including: (1) the costs Qwest should pay under the LDA tariff; (2) Qwest's right to control the design and materials used for facilities under the LDA tariff; and (3) time frames to be followed under the LDA tariff by Qwest, developers, and contractors. At a January 15, 2004 scheduling conference, the attending parties agreed upon a briefing schedule to further explore the "foundational issue":

> whether Qwest can or should be required to pay more than its costs would be

> under Option 1 of the LDA tariff for facilities placed under Option 2 of the tariff, assuming the same specifications and timing.

Qwest's initial brief on that issue would have the Commission not only limit the utility's *prospective* payment exposure to what its own facility placement costs would be, but also retroactively limit the utility's payment exposure for *existing* claims to that same amount in disregard of the clearly-stated wording of the tariff that sets that cap at 125% of the utility's average exchange loop investment ("AELI").

Qwest's proposed changes do nothing to correct or ameliorate the underlying problem of the utility's unwillingness to meet its obligation to serve by installing new development infrastructure within a time line that meets the needs and expectations of its utility customers and the installation time constraints of the developers. In fact, its proposed changes only further entrench the problem.

## ARGUMENT

Qwest argues that "there is no policy reason for Qwest to pay more under an Option 2 LDA than it would pay under an Option 1 LDA." (Qwest's brief, p. 2.) Yes, there is.

Qwest further argues that it "allow[s] persons with whom it has no contractual privity to place its facilities . . . in order to allow the valued developers with whom it works to have an alternative placement option". (Qwest's brief, p. 4.) Not really.

The Commission stated in its April 30, 1999 Report and Order in Docket No. 98-049-33 with regard to the origin and need of Option 2:

> . . . 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.

That “dismal . . . record” stemmed not only from the utility’s failure to install new development infrastructure in a manner that meets the needs and expectations of its customers, but also from its failure to meet the time constraints of “the valued developers.”

Qwest has the unfortunate reputation of delaying developers’ progress with their ground works because of its failure to place infrastructure in a timely way. It is not that developers see added value in being able “to get facilities placed more quickly,” it is that they incur greater costs when facilities are not placed expeditiously.

Qwest apparently wants the regulatory climate to be one where its failure to timely meet its obligation to serve gives rise to no market or regulatory consequences. 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. That developers often prefer Option 2 is a clear signal that Qwest has not yet adopted the responses appropriate to a fully competitive arena. The utility states “[i]t would also prefer not to have to lay off its own employees because there is not enough placement work.” (Qwest’s brief, p. 5.) In a competitive marketplace, a company losing work to others and otherwise seeking to survive and prosper would look to correct the problems in its performance that were causing that loss of work and operational control.

The utility advances the idea that developers can “choose to have Qwest service”, implying that they can also choose to have some other entity (a CLEC perhaps?) provide network infrastructure on their sub-divisions. The Committee invites Qwest to expand upon that contention in its reply brief. It will be particularly helpful if the utility will explain the idea in the context of the certificate of convenience and necessity it holds from the Commission, together with its understanding of its obligation to serve in its service territory. The Committee will also appreciate Qwest identifying and detailing those single home sub-divisions where developers have chosen an entity other than the utility "to provide service."

Qwest argues that "there is no basis to require Qwest to pay more for its network when an Option 2 contractor is chosen by a developer to place facilities." (Qwest's brief, p. 3.) The Committee disagrees: this is the same argument the utility made in the Docket No. 98-049-33 proceedings.

It is unreasonable to expect that a contractor will have access to the same equipment and supplies, and on the same volume discount basis, that Qwest does. If Qwest is unwilling to make such equipment and supplies available to the contractor on a timely and cost-pass-through basis, then it is not unreasonable to expect that the contractor's cost estimate will likely exceed that of the utility's. 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.

While it dismissed the service contractors' complaint in Docket 98-049-33 on grounds of lack of party and subject-matter jurisdiction, the Commission nevertheless concluded Section 4.4(B)(6) of the LDA tariff required that (i) "costs be agreed upon at the inception of the agreement and incorporated in the LDA;" and (ii) "once costs, limited by the formula in Section 4.4(B)(6), have been identified, agreed upon, and incorporated into the LDA, [the utility's] liability for reimbursement may not be escalated thereafter."

Qwest admits that it supplies a verifiable cost estimate only "upon request." (Qwest's brief, p. 6.) Apparently some contractors have alleged that the estimate Qwest often uses to attempt to negotiate a price for the contractor's installation work is merely a "generic" cost estimate tied neither to the actual site location nor supply conditions. To the extent that is true it obviously does not comply with the intent of the Commission's directive that there be "good faith detailed, *verifiable"* cost estimates.

As the Commission stated:

> . . . both developer and [Qwest] are required to furnish in good faith detailed, *verifiable* cost estimates on the request of the other party. It will not do for [Qwest] to hide behind alleged proprietary concerns to avoid such disclosure. [Qwest] itself has created the need for this tariff provision, and it now must act in good faith to see that it is implemented fairly and effectively.

While Option 2 may provide little incentive for the developers and contractors to charge anything less, it has been asserted by some developers and contractors that Qwest itself has in the past encouraged the developer/contractor to simply bill the 125% of AELI amount rather than supplying actual cost verification. The Committee has yet to verify this assertion.

Qwest errs in seeking to have the Commission correct that problem when the real remedy lies with the utility providing timely service and making clear to the developer and contractor in "prior agreement" negotiations what the reasonable cost estimate for the work in question should be.

The Committee's fundamental interest in these proceedings is the problem which gave rise to Qwest's Option 2 tariff provision in the first place; namely, the poor service to utility customers that results from undue delay in providing new development infrastructure. If that underlying utility service problem did not exist the present controversy would probably not exist. It is of critical importance to the Committee that the present controversy be addressed in a manner that facilitates resolution of that fundamental problem , and does not avoid it or make it worse.

The position Qwest has taken in its initial brief may simply be a reflection of the utility's continuing failure to conform in good faith to the Commission directive requiring prior agreement between the utility and the developer on reimbursable costs. To that degree, Qwest's position constitutes circumvention rather than compliance. In any case, what the utility proposes does nothing to repair or lessen the fundamental problem that the utility is not installing new development infrastructure in a manner that meets the needs and expectations of its customers or the time constraints of the developers. The utility's proposals would only undermine the availability of Option 2, and thus further exacerbate the underlying problem.

To the extent the problem of identifying the relevant costs at the inception of the LDA is a result of bad faith on the part of the developer and/or its service contractor, the most effective solution to that problem is for Qwest to simply insist its payment obligation is contingent upon a payment agreement reached in writing prior to performance of the work, and if the developer proceeds with the contractor to install infrastructure prior to such an agreement with Qwest, the developer and not Qwest will be liable for the resulting costs. If the developer and Qwest are unable to come to a reasonably prompt prior agreement as to reimbursable costs, either one can put the Commission on notice to investigate the matter in furtherance of the Commission's directives in its April 30, 1999 Report and Order in Docket 98-049-33.

In a different reality, the Committee would perhaps concur with the utility that it should "retain total control over design, placement methods, materials and quality, by placing the facilities itself." Unfortunately, the utility's own prior disregard of the interests of its customers in having new infrastructure placed in accord with their needs and expectations, and the time constraints of the developers, has made that preference not presently available.

## SUMMARY

Qwest's argument that its payment obligation under Option 2 be limited to no more than what the utility would pay for facilities placed under Option 1 of the tariff is an attempt to hamstring the purpose and value of Option 2, and does nothing to resolve or ameliorate the fundamental problem that gave rise to the need of Option 2 in the first place.

The solution to the problems the utility identifies has already been ordered by the

Commission: (1) both Qwest and the developer contractor are to furnish the other upon request "good faith detailed, *verifiable* cost estimates" of the subject work; and (2) Qwest and the developer are to have a written agreement in place identifying what Qwest is responsible to pay for prior to initiation of work by the developer's contractor. In the meantime, if Qwest wants to see more of its own employees engaged in such installation work and less use by developers of Option 2, it needs to concentrate its efforts on its obligation to serve and on the timely installation of new development infrastructure meeting the needs and expectations of the developers and its utility customers.

Dated this 5th day of March, 2004.

Reed T. Warnick
Utah Committee of Consumer Services

I hereby certify that a copy of the RESPONSE BRIEF OF THE UTAH COMMITTEE OF CONSUMER SERVICES in Docket Number 03-049-62 on this the 5TH day of March, 2004 to the following:

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