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 Plaintiffs

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

SBS Telecommunications, Inc. ("SBS") and Silver Creek Communications, Inc. ("Silver Creek"), by and through their legal counsel of Mismash & McDonough, submit this brief in response to Brief of Qwest Corporation on Cost Policy Issues.

INTRODUCTION

Qwest asserts that this Docket was opened as a result of the Commission responding to "Qwest's desire to fix the Option 2 LDA process that had resulted in repeated disputes over recent years."[1] Not only have there been repeated disputes concerning the LDA, the issues dealing with the LDA tariff have been the subject of several actions before this Commission in recent years.

Consistent with the Commission's July 15, 2003 final Order in Docket No. 02-049-66, the instant Docket was opened for the purpose of determining, inter

[1] These responding parties question whether or not the Option 2 LDA is actually broken; or whether the "problem" is more likely related to Qwest's failure to abide by the LDA provisions.

alia, "the costs Qwest should pay" relative to Option 2 contracts. [2] In this regard, and as acknowledged by Qwest in footnote 4 of its brief, " [t]he Commission has previously concluded that the current Option 2 language does not limit Qwest's Option 2 costs to those it would pay under Option 1."

In addressing the cost policy issues concerning the LDA, it is most prudent to glean at least a bit of a historical perspective of the Option 2 LDA process. Option 2 of the LDA was established in 1997 to speed up the process of placing telephone plant in new subdivisions; and to alleviate the back log of held-orders. The LDA was agreed upon by Qwest (or its predecessor in interest) and the Home Builder's Association; and approved by the Public Service Commission.

The tariff requires Qwest to offer two options for entering into the LDA. Under the first option ("Option 1"), Qwest performs the engineering, design, placement and splicing of the facilities for the developer. These tasks and services are performed for no charge to the developer so long as Qwest's costs do not exceed the specified formula amount of "the distribution portion of the average exchange loop investment times 125%, times the number of lots in the development." Qwest claims that this equals $436.13 per lot; however, it is unknown just how this number was derived.

Under the second option ("Option 2"), Qwest is obligated to pay the developer/builder to perform the engineering, design, placement and splicing of the facilities for an amount that "does not exceed" the formula set forth in the

[2] Qwest has put its own spin on the issue by framing it as "whether Qwest must pay more for facilities placed under Option 2 of Qwest's Land Development Agreement ("LDA") tariff than it would pay for facilities placed under Option 1 of the tariff."

preceding paragraph. Under Option 2, Qwest is also obligated to purchase the engineered, designed, procured, placed, spliced, completed, thoroughly inspected and maintained fully compliant network from the developer/builder. Both SBS and Silver Creek were formed for the purpose of utilizing the LDA provision, thereby creating an industry niche, and simultaneously providing valuable services to developers and to Qwest.

Option 2 of the tariff is not viable without the services of SBS, Silver Creek and other similarly situated businesses.

As a normal part of their business, Developers/Builders do not have the expertise, skills or equipment capable of adequately performing the work encompassed by the tariff. It is through contracting the services of Option 2 contractors that developers/builders are able to use this provision of the tariff to improve the quality of services incorporated into their projects; and to timely install the network plant.

Typically, Developers/Builders are not willing to risk a financial outlay for the construction of the telephone network on their projects. The Option 2 contractor performs the construction work for developers/builders and receives payment for its services after the work is completed **and ownership of the network is transferred to Qwest**, i.e. Qwest has paid for the network.

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 LDA's in order to receive timely compensation for its

contracted efforts.[3]

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 LDA's that results in delays in completing the project. That is, rather than providing an LDA at the front end of 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.

Moreover, in many instances Qwest requires that additional labor and materials be incorporated into the project for the purpose of enhancing, enlarging and bettering the network ("betterments"). These betterments are not required to provide telephone service within the specified development; however, are claimed to be needed by Qwest in order to support future developments, i.e., excess facility capacity.

The cost of the betterments are often times substantial, relative to the base value of the telecommunications network development services. Not only has the cost of betterments been substantial relative to the base value of the

[3] In every instance, regardless of the option chosen by developers, Qwest has refused to provide an LDA to the developer/builder until all engineering is complete, inspected, and approved through multiple layers of Qwest's management. In fact, Qwest refuses to exchange any cost data with developers prior to this point. In order to get to this point the developer MUST have already made the decision whether to have Qwest or an independent Option 2 contractor install the facilities.

network development services, occasionally the cost of betterments have exceeded the total base development value that is capped at $436.13 per lot. Notwithstanding the additional costs incurred by Option 2 contractors as related to implementing the betterments, Qwest claims no responsibility to provide additional compensation beyond the per lot cap of $436.13. Qwest's present position regarding betterments is a clear and marked deviation from the way that Qwest has historically treated betterment costs. That is, neither Qwest nor its predecessors in interest have attempted to pass on the cost of betterments to the developer. Qwest's present position however, is extremely onerous; especially in light of the fact that Qwest is now refusing to pay some of its Option 2 contractors even the base amount of the contract unless the Option 2 contractor waives its right to reimbursement for the betterments completed within any project.

Instead of using a legitimately negotiated contract, or using an LDA executed at the front end of the project, Qwest has developed a pattern of adhering to ever-changing informal processes and "policies" and unilaterally dictating the standards that will apply to the business relationships.[4] For the last three years SBS has repeatedly requested Qwest to furnish them with, or otherwise advise them of the "standard [Qwest] specifications," or segments thereof, that are referenced in the tariff. SBS has not been furnished with any "standard specifications".

[4] For example, Qwest has long used the cost cutting measure in its facilities of trailing the end of a cable run with a 6 pair cable and a 4 inch pedestal with no terminal. However, after SBS began using this same method, Qwest changed the "standards" and began disallowing this practice. Interestingly, Qwest has continued to use this "banned" practice on its new projects even after demanding that Option 2 contractors refrain from its use.

Because there are no negotiated contracts executed at the front end of the project and no "standard [Qwest] specifications" provided, SBS is essentially left to the mercy of Qwest with regard to the labor and materials Qwest demands, and how much Qwest will pay for the betterments that Qwest itself requires.

Qwest's practice of keeping the processes and standards in an informal structure has allowed Qwest to exercise an inappropriate level of leverage, power and control over Option 2 contractors. Unless and until Qwest is satisfied with the betterments implemented into the design, Qwest refuses to process an LDA, which in turn precludes the Option 2 contractor from being paid by the developer/builder, for work already performed.

In 1999, issues concerning the LDA tariff came before the Commission in Docket No. 99-049-T28, wherein Qwest proposed replacing the LDA tariff with tariff provisions referred to as the "Provisioning Agreement For Housing Developments" or "PAHD". On reconsideration of the original order in that docket, this Commission rejected the PAHD, and reinstated the LDA. Therein, the Commission set forth as follows:

> Our review and re-consideration 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. Rather than replacing the LDA with a new process, we decide to retain the LDA process for the placement of facilities in new developments. We continue to believe, as we did in our 1997 approval of the current LDA process, that the LDA provides appropriate alternatives for the timely deployment of facilities necessary to meet demand for telecommunication services in new developments. **We conclude that the difficulties that Qwest attributes to the LDA come from the failure of Qwest, developers and/or developer's agents performing the activities under the existing tariff, to comply with the terms of the LDA**. (*Emphasis added)* See Order on Reconsideration, Docket No. 99-049-T28.

Subsequently, by way of letter dated April 10, 2001 to the PSC, Qwest proposed changes to the Network and Exchange Services Tariff. Docket No. 01-049-T12 was opened (In the Matter of the Revision to Qwest Corp's Exchange and Network Tariff, Re: A New PAHD Tariff to Replace the Old LDA Tariff) wherein Qwest proposed wholesale changes to section 4.4 of the tariff. Interestingly, one of Qwest's proposed changes asserts that "all charges to be borne by [Qwest] will not exceed [Qwest's] estimated cost to complete the job, but in no event shall the charges exceed a cap of $519.00 per lot."

This proposal, taken in conjunction with the present "cap" of $436.13 begs several questions: "What accounts for the discrepancy between $519.00/per lot and $436.13/per lot?"; "Is there verifiable data supporting each of the per lot caps?"; "How are costs estimated?"; "What are the actual costs?"; "Have the cost studies been verified…and if so, by whom?"

Again, it is difficult to adequately analyze the "cost policy" issue when the Option 2 contractor (including these Respondents) are not privy to how costs are initially determined; and as importantly, if the alleged costs are verifiable.

ARGUMENT

Preliminarily, these Respondents object to the Commission exercising jurisdiction over this Docket to the extent that the Commission takes action to either enact or to change the tariff without full compliance with the Administrative Procedures Act. Respondents further object to the Commission exerscising jurisdiction over this Docket to the extent that the Commission attempts to give retro-active application to existing tariff claims. Given the history of the LDA,

taken in conjunction with the controversies associated therewith, these Respondents believe that the "cost policy" issue cannot be evaluated in a vacuum.[5] It is difficult to argue "policy" when there are so many unknowns. Having these proceedings bifurcated is akin to putting the proverbial cart before the horse. In arguing "cost policy", Respondents are at distinct disadvantage inasmuch as they do not have access to documents of Qwest detailing cost and pricing. Additionally, inasmuch as the Commission has requested the parties to brief this "cost policy" issue without the benefit of any discovery, the Respondents are somewhat hamstrung.

POINT I

Option 2 Contractors Provide Valuable Services for Developers, Qwest and the Public at Large.

Option 2 contractors are private companies engaged in the business of providing developers/builders with engineering, design, placement and splicing services in conjunction with the communication distribution facilities for new development projects. Developers choose independent Option 2 contractors because it ensures that they can complete the communication facilities within the time frame established for their specific development. Contrary to the picture painted by Qwest, Option 2 contractors are not cavalier profiteers; rather they are companies attempting to provide a much needed competitive service for land developers.

[5] Despite objections from several Option 2 contractors, Judge Tingey bifurcated the issues in this Docket, ruling that the parties should first address the "cost policy" issues; and later, if necessary, address other associated issues.

Indeed, this Commission has recognized and affirmed the value of these services. Specifically, the Commission stated, "we are satisfied…that [Option 2 contractors] have provided a valuable service in shortening the builder/developers construction schedule." Moreover, the Commission has stated as follows:

> "[W]e 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. It follows that we do not wish to discourage unnecessarily the use of the self-help option since we have no confidence at this point that [Qwest] could or would shoulder the full burden of provisioning plant to serve new development." (Report and Order p. 5 of Docket #98-049-33).

If indeed a valuable service is bestowed upon the developer, Qwest and the public by virtue of the work undertaken by Option 2 contractors, then it follows that the Commission should be genuinely concerned about maintaining that valuable service.

POINT II

In the Interest of Public Policy, Tariff Reimbursement Schedules Should Be Adhered To.

It must be remembered that Qwest's own neglect for, or inability to deal with, developers concerns, is what precipitated the inception of Option 2. That is, Qwest's demonstrated inability to keep pace with development resulted in numerous "held-orders". These held-orders resulted in construction delays, thereby hindering the developers' ability to adequately provide a much needed service to the community at large. It was only through the work of the Option 2 contractors that Qwest was able to eliminate or decrease its backlog of held-

orders, thereby permitting the developers to receive approval for long distance telephone service in the State of Utah. It is curious that Qwest now seeks to curtail or restrict the benefits legitimately inuring to the very same entities who not long ago bailed Qwest out of a predicament it had gotten itself into.

This Commission should be primarily concerned with what is in the public's best interest when deciding whether the reimbursement schedules should be followed. It is the Commission's duty to be more concerned with what is in the public's best interest than Qwest's best interest. The Commission has recognized that Qwest has had problems with held-orders and that Option 2 contractors provide "a valuable service" to developers and thus to the public. It would not appear to be in the public's best interest to eliminate the Option 2 contractor's services, thus increasing Qwest's services, in light of the fact that apparently Qwest cannot meet its current demand. That is, if the reimbursement schedules are not followed, there is a very real likelihood that Option 2 contractors will go by the wayside. If this occurs, it is only a matter of time before Qwest, developers, and the public at large are back to square one, with Qwest again experiencing a "dismal held-order record." A re-occurrence of this held order scenario will adversely affect the public by stunting development and further growth.

Finally, Qwest asserts that the Option 2 contractor should not be entitled to competition subsidized by Qwest. This argument is made of whole cloth. That is, Qwest's position on this issue of subsidized competition is valid only if the "cap" amount is extraordinary. It is not. The "cap" is based upon Qwest's

average construction costs. The "cap" provides for only marginal profits, at best, and is the principle reason several Option 2 contractors have come and gone by the wayside. The Option 2 contractors are indeed providing a beneficial service to Qwest; and reimbursement of the developers cost can be characterized as a cost of doing business for Qwest. This especially so given the fact that Qwest takes control and ownership of the plant facility at the time of completion. In essence, the work of Option 2 contractors is what drives improved construction services, ensures timely network completion by reducing held-orders, and insures that only the best performing Option 2 contractors will remain in the market. (If the quality of work is insufficient, the required re-work will consume all profits). It is almost never in the public's best interest to eliminate competition.

CONCLUSION

It is difficult, if not next to impossible, to examine "cost policy issues" in a vacuum. The "cost policy" issue is inextricably intertwined with other issues such as cost studies, estimated costs, actual costs, verification of costs and studies, etc.

As recognized by this Commission in its April 30, 1999 Report and Order (Docket No. 98-049-33), "[Qwest's] practice has been unilaterally to estimate its own costs for the project, *ex post facto*, and reimburse accordingly. That practice, of course, leaves the developer…at the mercy of [Qwest]…".

In that Report and Order, the Commission indicated that both the developer and Qwest are required to furnish in good faith detailed and verifiable cost estimates on the request of the other party. The Commission further

recognized that “it will not do for [Qwest] to hide behind alleged proprietary concerns to avoid such disclosures. [Qwest] itself has created the need for the tariff provision, and now it must act in good faith to see that it is implemented fairly and effectively.”

Based upon the foregoing, Qwest is obligated to reimburse the developer for its actual costs.

DATED this 5th day of March, 2004.

MISMASH & McDONOUGH, LLC

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KEVIN M. McDONOUGH
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONSE 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
dlelmont@stoel.com

Patricia E. Schmid
Assistant Attorney General
pschmid@utah.gov

Anthony C. Kaye
Jennifer Rigby
Ballard Spahr Andrews & Ingersoll, LLP
kaye@ballardspahr.com
rigbyj@ballardspahr.com

_/s/ Vesper Starr, Paralegal__