Robert C. Brown
Qwest Services Corporation
1801 California Street, 49th Floor
Denver, CO 80202
(303) 672-5839
(303) 295-7069 (fax)
robert.brown@qwest.com

Gregory B. Monson (2294)
David L. Elmont (9640)
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111
(801) 328-3131
(801) 578-6999 (fax)
gbmonson@stoel.com
dlelmont@stoel.com

Attorneys for Qwest Corporation

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
	:	**SURREPLY OF QWEST CORPORATION ON COST POLICY ISSUES**

Qwest Corporation ("Qwest") hereby respectfully replies to the Reply Brief of the Utah Committee of Consumer Services on Cost Policy Issues ("Committee Reply") and Reply Brief of SBS Telecommunications, Inc. and Silver Creek Communications, Inc. on Cost Policy Issues ("SBS Reply") (the Committee Reply and SBS Reply, collectively, the "Opposition Replies"), filed on March 26, 2004.[1]

[1] Although surreplies were not expressly contemplated in the Commission's January 23, 2004 scheduling order, at the scheduling conference all parties speaking on the issue agreed that surreplies would be appropriate in the event new material was raised via reply brief. *See* Transcript (January 15, 2003) at 44-47. The Committee Reply and SBS Reply seek to re-write the scope of cost-policy briefing after it has already been completed. This attempt constitutes new material warranting surreply, and

INTRODUCTION

The Opposition Replies represent untimely, improper attempts to change the scope of initial briefing in this case, contrary to the Commission's January 23, 2004 scheduling order ("Scheduling Order"). The arguments raised in the Opposition Replies should have been made in motions for reconsideration of the scope of briefing after the Scheduling Order was issued, not as belated attempts to cloud the issues involved in the otherwise clear-cut decision the Commission must make: whether Qwest can or should be forced to pay more for facilities placed under Option 2 than it would pay for facilities placed under Option 1.

The reasons for addressing cost policy first were sound when the Commission determined to organize the docket the way it did, and they remain sound now: there are contingent questions that should only be addressed (if at all) after the Commission determines whether or not Qwest may be forced to accept facilities from Option 2 contractors for more than it would have paid to place the facilities itself. The Opposition Replies do nothing to undermine the legitimacy of these reasons, and in fact the diversionary rhetoric found in the replies proves the Commission's wisdom in addressing cost policy first—alone—rather than in a cluttered briefing free-for-all.

This docket was opened by the Commission in response to Qwest's attempt, in Docket No. 02-049-66, to address in one proceeding "all outstanding issues" with Option 2 of the LDA tariff, "and to ensure that the result . . . is a workable, fair LDA tariff."[2] The issues intended to be addressed in this docket include such things as: "(1) the costs Qwest should pay; . . . (3) Qwest's right to control the design and materials used for facilities under the LDA tariff; and (4)

Qwest respectfully requests that the Commission consider this surreply in its deliberations on the cost-policy issue. To the extent Qwest is required to seek leave to file a surreply, Qwest hereby respectfully seeks such leave.

[2] *See* Qwest Corporation's Motion to Enlarge Scope of Proceeding, Docket No. 02-049-62 (January 31, 2003) ("Motion to Enlarge") at 3.

time-frames to be followed under the LDA by Qwest, developers, and contractors"[3] as well as any concerns that interested parties may seek to have addressed.[4] Thus, neither the Committee nor SBS and Silver Creek need fear that by addressing cost policy first the Commission will be prevented from appropriately addressing additional concerns. Addressing cost policy first will merely allow an ordered and efficient discussion of the remaining issues—including the issue of how to appropriately calculate Qwest's costs in the event the Commission determines that Option 2 reimbursement should be limited to those costs.

ARGUMENT

A. The Arguments In The Opposition Replies Lack Merit.

The Opposition Replies put forward somewhat different rationale for essentially the same result, namely, that timing/negotiation issues, verifiable cost estimates, etc. be addressed now rather than later. None of the arguments are sound. The Opposition Replies should be disregarded.

1. The arguments in the SBS Reply lack merit.

The SBS Reply says that timing/negotiation and verifiable cost estimate issues, among others, are interrelated with cost policy and should be addressed simultaneously with cost policy.[5] It asserts that cost policy issues "cannot be evaluated in a vacuum."[6] But it never seriously attempts to demonstrate any interrelatedness between cost policy and other LDA issues. It merely notes that other issues will be left unresolved if the Commission addresses cost-

[3] Order, Docket No. 02-049-66 (July 15, 2003) at 8.

[4] *See* Motion to Enlarge at 7 (noting Qwest's willingness to address issues that, in the view of any party, prevent the LDA tariff from working fairly and effectively).

[5] *See* SBS Reply at 2-4.

[6] *See id*. at 1. It cannot be seriously argued that cost policy will be decided "in a vacuum" in this case. The parties have introduced significant argument on Qwest's held-order history, as well as the history of the LDA tariff and the Commission orders interpreting it—all of which provide significant context to any decision on cost-policy.

policy first, and says, without explaining why, that the resolution of these other issues may affect the "logic" of the cost-policy issue.[7]

Timing, in the sense the SBS Reply uses it,[8] is not related to cost policy; and considerations of Option 2 contractor access to materials[9] or the future usefulness of verifiable cost estimates are only interrelated with cost policy in the sense that they are contingent upon it, and thus cost policy should be decided first. Indeed, everything the SBS Reply urges to be interrelated and needing simultaneous briefing is either wholly unrelated or any relationship argues in favor of determining cost policy first.

In the case of verifiable cost estimates, all parties point out that the Commission has previously determined that verifiable cost estimates should be provided upon request.[10] But the SBS Reply (and the Committee Reply, for that matter) fails to acknowledge that verifiable cost estimates from Qwest make no sense if in fact Option 2 jobs are not somehow limited by Qwest's costs. That is, what is the purpose of Qwest submitting its own cost estimate if the developer or Option 2 contractor can ignore Qwest's projected cost for the project, and instead charge the tariff cap amount (or any amount up to the cap that the Option 2 contractor claims to

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[7] *See id*. at 4.

[8] In one sense, timing is interrelated with cost policy. That is, assuming Option 2 contractors can place facilities more quickly than Qwest, and developers receive a benefit thereby, should Qwest pay for this additional timing benefit or should developers? Put differently, how should any timing differences between Option 1 and Option 2 be accounted for in the costs Qwest must pay for Option 2 facilities? But this is not the sense in which the SBS Reply addresses timing. Rather, the SBS Reply addresses timing from the perspective of Qwest's allegedly current bad behavior in supposedly slowing down the LDA process. *See* SBS Reply at 2-3.

[9] *See id*. at 2, n.1.

[10] *See* Report and Order, Docket No. 98-049-33 (April 30, 1999) ("1999 Order") at 6 ("[B]oth developer and Respondent are required to furnish in good faith detailed, *verifiable* cost estimates on the request of the other party.") To be more precise, all parties have noted the Commission's directive to supply verifiable cost estimates. The Committee, at least, doesn't seem to have absorbed the Commission's "upon request" qualification, and has sought to have Qwest provide a cost estimate in every instance, whether requested or not. *See, e.g.*, Committee Reply at 9.

be the estimated cost for the project)? Perhaps it would still make sense to require cost estimates from the Option 2 contractor if the Commission determined to somehow limit reimbursement to a "reasonable" amount, that the Option 2 contractor must somehow demonstrate; but if Qwest's own costs could not be used to measure "reasonableness," what good would a cost estimate from Qwest be in determining reasonable reimbursement? Or for that matter, if SBS and the Committee are right that the current tariff is clear in requiring Qwest to simply pay any amount charged up to the tariff cap,[11] why does it make sense for Qwest to submit cost estimates even under the tariff language currently in effect? On the other hand, if the Commission determines that Qwest should not have to pay more for Option 2 jobs than it would pay for Option 1 jobs, a verifiable cost estimate from Qwest may make sense, in order that an Option 2 contractor can scrutinize the appropriateness of Qwest's claimed cost estimate; but if costs are limited to Qwest's costs, why should the Option 2 contractor submit its own estimate?

Of course, these questions are rhetorical and their answers are clear. The ongoing need for, and nature of, verifiable cost estimates is dependent upon the Commission's determination on whether Option 2 reimbursement should be limited to Qwest's costs. Verifiable cost estimates should therefore be addressed after the Commission determines how to handle cost policy.

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[11] *See, e.g.*, Committee Reply at 2, 8-9 (arguing that the tariff already provides the appropriate amount of reimbursement and that that any attempt to limit reimbursement to less than the cap would be an attempt to "retroactively adjust Qwest's tariff and make it applicable to cases currently in dispute."); SBS Reply at 2, n.1, 5 (arguing that Qwest's efforts to limit its payment exposure under the current tariff language is an effort "to retroactively limit the payment exposure," but then contradicting itself by stating that "Simply put, the Commission has not yet ruled on the cost formula."). The Commission has now clarified that this docket will not be used to resolve outstanding disputes about the current tariff. However, if the Commission does address current tariff interpretation, it will be appropriate to disregard arguments about Qwest seeking "retroactive" tariff adjustments. The Commission has not yet given instruction on the costs Qwest must pay, under the current tariff, when the parties cannot reach agreement; and Qwest's arguments on why it should not be forced to simply pay the tariff cap have sound basis in the Commission's prior orders. *See, e.g.*, 1999 Order at 5 (dismissing the argument that Qwest must simply pay the cap as "the maximum bid[ding] fair to become the minimum.").

Likewise, the other arguments the SBS Reply raises regarding "interrelatedness" are spurious. As to timing, negotiation, and materials issues, for example, what difference does it make when an LDA is negotiated—or for that matter what cost issue is there to negotiate?—if reimbursement is not somehow tied to Qwest's costs (i.e., if Qwest must simply pay the tariff cap or any amount up to the cap demanded by the Option 2 contractor)?[12] And what need is there for Option 2 contractors to have access to Qwest's pricing for materials if the Option 2 contractor is not being held to Qwest's costs?[13] The answers to these questions, like the answer to the verifiable cost estimate question, are clear: the cost policy issue should be decided first, after which the parties can appropriately address these contingent issues.

2. The arguments in the Committee Reply lack merit and are beyond the scope of the Committee's statutory mandate.

The Committee Reply argues that Qwest's allegedly "unclean hands" should prevent the Commission from addressing cost policy under Option 2, or indeed any aspect of Option 2, until Qwest "can demonstrate at least some substantial measure of compliance with the Commission's prior directives" regarding the LDA tariff.[14] To wash its "unclean hands," Qwest must "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 must "enter into written LDAs with the

[12] The Committee and Option 2 contractors argue that the tariff cap already is tied to Qwest's costs. That is, the cap was derived from the distribution portion of Qwest's average loop investment. What this misses is that: a) the cap is the average loop investment times 125%; and b) pursuant to the tariff, this cap amount is supposed to be the most Qwest pays on any LDA—not the amount Qwest pays on every LDA. As Qwest demonstrated in Docket No. 02-049-62, Qwest's actual costs on new development are typically significantly less than the tariff cap amount. *See* Motion to Enlarge at Exhibit D (affidavit of Georganne Weidenbach). Paying the tariff cap for every Option 2 job would (as it has in the past) significantly increase Qwest's placement costs.

[13] The materials issue involves broader issues than cost policy, strictly speaking, and even if reimbursement for Option 2 jobs is limited to Qwest's costs, it remains to be discussed if and how the materials issue should be addressed. Qwest has been, and remains, willing to explore the feasibility of providing its own materials for Option 2 jobs.

[14] *See* Committee Reply at 2, 9.

developers that clearly define the scope of work and its cost prior to the initiation of the work."[15] The Committee's arguments lack merit. Moreover, in making these arguments the Committee is largely acting on behalf of developers, whom it has no standing to represent, rather than on behalf of the consumers it is legislatively mandated to protect.

a. The arguments in the Committee Reply lack merit.

Since even the Committee must begrudgingly accept that Qwest's "unclean hands" are currently a matter of allegation, not established proof,[16] the Committee is effectively urging that verifiable cost estimates and LDA-timing issues be addressed before cost policy. But, as argued above, the need for (and question of who should submit) verifiable cost estimates, and the manner of addressing LDA-timing/negotiation issues is contingent upon how the cost policy issue is resolved. Thus, apparently the Committee would have this docket proceed by first having the Commission take evidence on verifiable cost estimates and the LDA-timing (so that the cleanliness of Qwest's hands can be determined), in order for the Commission to address cost policy so that it could then address verifiable cost estimates and LDA-timing. And this model of inefficiency is all based on the mere allegation that Qwest is not currently complying with Commission and tariff directives.

Qwest is complying with Commission and tariff directives. Qwest does provide cost estimates upon request, and those estimates are verifiable in that they contain sufficient detail for an Option 2 contractor to reasonably review the various components of the estimate. Option 2 contractors can scrutinize what Qwest claims to be the cost for itemized materials, for miscellaneous materials, and for itemized labor costs—which are separated into engineering,

[15] *See id*. at 9.

[16] *See, e.g., id.* at 4 ("To the extent this statement is accurate . . .").

placing and splicing.[17] In regard to materials, while some Option 2 contractors would have Qwest include contracted vendor-specific prices,[18] Qwest believes such level of detail is unnecessary and goes beyond what is necessary for what is, after all, a cost estimate.[19]

As to the timing of Qwest and developers negotiating and entering LDAs, Qwest agrees with the Committee that it is preferable for an LDA to be entered before construction begins, not after.[20] This would indeed avoid the difficulties mentioned by SBS and in the Clear Wave complaint (Docket No. 04-049-06) of having facilities installed without an LDA in place.[21] However, the fact that construction, under Option 2, is often begun without an LDA in place does not mean that Qwest is failing to meet its timing obligations.

The only section of the tariff addressing timing is section 4.4.B.2.e., which provides that the developer is to give ninety days notice prior the date on which the trench will be opened for placing facilities. Qwest rarely, if ever, receives anything close to such notice; if it did,

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[17] *See, e.g.*, Brief of Clear Wave Communications, L.C., et al., (March 5, 2004) ("Clear Wave Brief") at Exhibit B (showing examples of Qwest cost estimates).

[18] As it has done in other regulatory proceedings, Qwest can provide its vendor-specific prices pursuant to a protective order if the Commission deems this necessary.

[19] Qwest has its own concerns regarding the cost estimates of Option 2 contractors, which often—if they are submitted at all (*see contra* SBS and Silver Creek)—contain malleable line-items for things such as profit, with the result being an estimated cost often coincidentally at or near the tariff cap. *See, e.g.*, Clear Wave Brief at Exhibit B (showing examples of various Option 2 contractor cost estimates). But such concerns, whether from Option 2 contractors or Qwest, can be dealt with later in this proceeding.

[20] *See* Committee Reply at 9.

[21] Qwest does note, however, that a key aspect of the problem of construction commencing before an LDA is entered (the aspect, often complained about by SBS and Silver Creek, of Option 2 contractors being "held captive" to Qwest because the contractors don't get paid by developers until developers get paid by Qwest) is a problem of the Option 2 contractors' own making. Pursuant to the terms of the tariff, developers are supposed to have paid for facilities prior to the transfer of ownership to Qwest. That is, Qwest is supposed to reimburse developers' costs. *See* Exchange and Network Services Tariff §§ 4.4.C.2.d, 4.4.C.2.e. If Option 2 contractors are negotiating with developers such that the contractors do not get paid until after Qwest pays the developers (i.e., developers incur no out-of-pocket costs), such terms are the opposite of what the tariff contemplates, and cannot be attributed to Qwest.

construction wouldn't need to be undertaken prior to an LDA being negotiated.[22] Further, under the current tariff language as interpreted by the Commission, while the parties are directed to negotiate and come to an agreement on Option 2 costs,[23] what happens if (or, usually, when) the parties do not agree? There is not yet a Commission answer to this question. Thus, a failure to reach agreement on Option 2 costs often leads to a negotiation stand-off, which delays the entry of an LDA. It will not, therefore, do for the Committee to blithely say that problems with Option 2 are merely reflections of party failure to abide by the terms of the tariff.[24] Without further Commission direction, there is no bottom-line cost for Option 2, and good faith negotiation alone cannot resolve the problem. There is an absolute need for Commission direction on cost policy, so that clarifying tariff language on costs—such as that included in Qwest's illustrative tariff submitted in Docket No. 02-049-62[25]—can be implemented and followed.

Qwest recognizes that the lack of tariff detail regarding timing, and the actual length of time contemplated in the one tariff provision that does address timing, may warrant further attention. Therefore, in the illustrative tariff submitted in Docket No. 02-049-62, Qwest set forth more detailed, shorter timeframes for the relevant activities that must be accomplished under either Option 1 or Option 2. Those timeframes can be discussed in this docket. Nonetheless,

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[22] The Committee Reply cites as "unacceptable conduct" the allegation made by SBS that of the last 68 Option 2 projects placed by SBS only 3 had LDAs entered prior to construction beginning. *See* Committee Reply at 4. Even if this number is accurate, the Committee fails to note that SBS never supplies any sort of a cost estimate, verifiable or otherwise (unless one counts its continued disingenuous claim that the relevant cost estimate is that of the developer—not the Option 2 contractor; and that the developer's "cost estimate" is whatever SBS charges, which happens to always be the tariff cap amount). It should be clear why this presents a problem for negotiating appropriate reimbursement amounts, and therefore causes delays in LDA processing. Indeed, SBS's unwillingness to comply with Commission directives with regard to cost estimates would justify a Qwest refusal to accept facilities from SBS at all.

[23] *See, e.g.*, 1999 Order at 5 (costs should be "identified, agreed upon, and incorporated in the LDA.").

[24] *See* Committee Reply at 13.

[25] *See* Motion to Enlarge at Exhibit GW-4.

Qwest does not have "unclean hands" with regard to timing issues. The Committee's arguments to the contrary are baseless.

b. The arguments in the Committee Reply are beyond the scope of the Committee's statutory mandate.

The reply brief filed by the Division in this matter conclusively demonstrated that Qwest does not, and has not for a very long time, had a held-order problem. The Committee Reply acknowledges this fact, but says the timely provision of service is not enough, because "It is difficult to see how R746-340-8 provides any discernable benefit to developers."[26] The Committee Reply goes on at some length to argue about matters such as developers' building costs, their ability to get roads and sidewalks placed, and basements dug.[27]

While the developer concerns the Committee identifies may be legitimate, and Qwest takes them seriously, the Committee's statutory mandate is to assist residential and small business utility consumers.[28] It is difficult to see, in this case, how the Committee's mandate extends beyond a concern with Qwest's timely provision of telephone service, to the homebuilding operations of developers. Indeed, it is difficult to see how even the Commission's jurisdiction extends to the homebuilding operations of developers. The Committee's efforts should focus on the timely provision of telephone service; and Utah Admin. Code R746-340-8, the Commission's general investigative authority over Qwest, and Qwest's tariff already provide ample protection to ensure that Qwest provides such timely service.

To the extent the Committee Reply exceeds it statutory mandate, the Committee has no standing to make its arguments and the reply should be disregarded. Developers are not under-represented consumers dependent on the Committee for help, nor are developers generally

[26] *See* Committee Reply at 4-6 (emphasis added).

[27] *See id*. at 5-7.

[28] *See* Utah Code Ann. § 54-10-4.

without options other than Qwest for the placement of facilities. Indeed, developers often use CLECs, and in recent years have even begun creating their own telecommunications service providers. Qwest, therefore, already has every incentive to serve developers' needs as best it can, in order to get its facilities placed in new subdivisions and compete to provide service.[29] That is the reason Qwest introduced shorter, more specific timeframes for the LDA process in the illustrative tariff it filed in Docket No. 02-049-62. The Committee's arguments on behalf of developers, not aimed at the timely provision of telecommunications service, should be disregarded.

B. The Opposition Replies Are Inappropriate, Untimely Attempts To Enlarge The Scope Of Briefing.

The Scheduling Order in this matter clearly ordered that the initial round of briefing was limited to the foundational policy issue of whether Qwest can or should be required to pay more for facilities placed under Option 2 than it would pay for facilities placed under Option 1.[30] For the reasons argued above, that cost-policy question needs to be resolved first, in order to clarify how and if contingent issues should be handled; and the Commission should retain the bifurcation contemplated by the Scheduling Order. The Scheduling Order was issued on January 23, 2004. It was unchallenged by the Committee, SBS and Silver Creek until after Qwest filed its initial brief on cost policy on February 9th, and even after the remaining parties, including the Committee, SBS and Silver Creek, filed their response briefs on March 5th. Indeed, the

[29] The Committee Reply contains specious arguments about competition, chiding Qwest for its alleged "unwillingness to compete" with Option 2 contractors—instead "turning . . . to the Commission" to resolve its problems. *See* Committee Reply at 7-8. The point the Committee fails to grasp is that the competition the Public Telecommunications Law seeks to encourage is competition among providers of telecommunications service. It is not the competition of a local exchange carrier for the placement of its own facilities; and to the extent Qwest's placement costs are unnecessarily increased by Option 2, its ability to compete will other service providers is harmed. Qwest's "turning to the Commission" is merely an attempt to better level the playing field in competing as the law intended.

[30] *See* Scheduling Order at 1.

Committee, SBS and Silver Creek waited until the end of March to challenge the scope of briefing, and even then did not do so by appropriate motion, but rather by reply brief. If SBS, Silver Creek and the Committee did not like the approach the Commission took to scheduling this docket they should have moved for reconsideration when the Scheduling Order was issued. Now, after other parties have already spent the time and money briefing the cost-policy question, it is inappropriate for the Committee, SBS and Silver Creek to seek through reply briefs to change the scope of briefing.

The Committee, SBS and Silver Creek need not fear that the sky will fall if the Commission makes a determination on cost policy that is favorable to Qwest—although their overblown concern about addressing cost policy first does speak volumes about the weakness of their arguments on why Qwest should be required to pay more for its network simply because an Option 2 contractor is selected by a developer. This docket will remain open after the Commission issues an order on cost policy, and the Commission remains fully capable of taking whatever action needs to be taken so that the final result of this docket is a fair, workable LDA tariff.

CONCLUSION

For the reasons stated above, the Commission should disregard the Opposition Replies. The Commission should instead proceed to issue an order that Qwest is not required to pay more for facilities placed pursuant to Option 2 than it would pay for facilities placed pursuant to Option 1. Addressing cost policy first will allow an ordered and efficient discussion of the remaining issues, which this docket can then move forward to address (including how to appropriately estimate the costs Qwest would incur under Option 1 so that Option 2 contractors can be fairly compensated). The Commission should issue an order on the cost policy question,

as well as an order setting a scheduling conference for the parties to discuss the issues and schedule for the remainder of this docket.

RESPECTFULLY SUBMITTED: April 19, 2004.

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Gregory B. Monson
David L. Elmont
STOEL RIVES LLP

Robert C. Brown
Qwest Services Corporation

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **SURREPLY OF QWEST CORPORATION ON COST POLICY ISSUES** was served upon the following by electronic mail, on April 19, 2004:

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

Reed T. Warnick
Oliwia Smith
Committee of Consumer Services
rwarnick@utah.gov
osmith@utah.gov

Jennifer Rigby
Ballard Spahr Andrews & Ingersoll, LLP
rigbyj@ballardspahr.com

Kevin M. McDonough
Mismash & McDonough
kevin@mmcdlaw.com

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