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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Application of Broadweave Networks of Utah, LLC for a Certificate of Public Convenience and Necessity to Provide Local Exchange and Facilities-Based Interexchange Services within the State of Utah	)))))	Docket No. 03-2410-01

BROADWEAVE'S RESPONSE TO QWEST'S RESPONSE TO PROCEDURAL ORDER AND PROVISIONAL MOTION TO STAY

Broadweave Networks of Utah, LLC ("Broadweave"), by and through its counsel of record, Ballard Spahr Andrews & Ingersoll, LLP, hereby submits this Response to Qwest Corporation's ("Qwest") statement of issues alleged to require further deliberations on reconsideration of the Public Service Commission's (the "Commission") order granting Broadweave a Certificate of Public Convenience and Necessity and provisional motion to stay ("Statement of Issues")[1], as follows:

[1] The Response of the Division of Public Utilities ("Division") to the Commission's November 12, 2003 Order was filed on December 5, 2003. Because the Division's filing incorporates by reference the issues raised by (continued...)

BACKGROUND

1. Broadweave filed its Application for a Certificate of Public Convenience and Necessity ("CPCN") in this docket on July 9, 2003. (*See* Application of Broadweave Networks of Utah, LLC for a Certificate of Public Convenience and Necessity to Provide Switched and Dedicated, and Facilities-Based Local Exchange and Interexchange Services dated July 9, 2003 ("Application").)

2. The Commission is statutorily authorized to grant such an application for a CPCN after a determination that "(a) the applicant has sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for; and (b) the issuance of the certificate to the applicant is in the public interest." Utah Code Ann. § 54-8b-2.1(2).

3. Qwest sought to intervene by Notice of Intervention filed on July 18, 2003 ("NOI"). In its NOI, Qwest took no position on whether Broadweave has "sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for." (NOI at 2.) Qwest sought intervention merely to "preserve its interest in appropriate competitive access to residential and business customers" at Traverse Mountain Master Planned Community ("Traverse Mountain"), given the "apparent direct or indirect relationship" between Broadweave and Mountain Home Development Corporation, the developer and owner of Traverse Mountain ("Mountain Home"). (*Id.*)

4. Qwest's concerns regarding the relationship between Broadweave and Mountain Home, including the effect of that relationship on Broadweave's ability and

(...continued)
Qwest, this Response addresses the both Qwest's and the Division's filings. Broadweave nevertheless reserves the right to file a separate response to the Division's filing.

willingness to interconnect with other carriers and provide access to its essential facilities, were subsequently raised and fully briefed by the Division in a memorandum submitted on September 5, 2003.[2]

5. By Report and Order issued in this docket on September 29, 2003 ("Order"), the Commission granted Broadweave's Application. The Commission ruled that Broadweave had sufficient financial, technical and managerial resources, and that issuance of the certificate would be in the public interest, as required by Utah Code Ann. § 54-8b-2.1(2). (Order at 3-4.) Because Qwest's and the Division's concerns regarding potential interconnection and access disputes did not bear on Broadweave's right to issuance of a CPCN under the applicable statute, the Commission ruled that their concerns were not appropriately addressed in these proceedings:

> Applicant has responded to the DPU's concerns and asserts that requiring a greater showing from Applicant greater than the statutory identified criteria and greater than past Commission practice, would be unwarranted and discriminatory. We recognize the DPU is attempting to preemptively address potential interconnection issues that may arise in one, limited, geographic area. We agree, however, with Applicant that such issues need not be addressed in proceedings concerning the issuance of a certificate. Utah law is clear that all telecommunications corporations are required to interconnect and make their essential facilities available. Utah Code 54-8b-2.2. A certificate holder is expected to comply with Utah law. The retention of its certificate is affected by its conformity with Utah law. Future disputes on interconnection issues, if they actually arise, may be resolved by the Commission. E.g., Utah Code 54-8b17.

(Order at 2.)

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[2] *See* the Division's Memorandum to the Utah Public Service Commission, dated September 5, 2003 ("Division Memo"), ¶ 7.

6. The Order is a final order, not a tentative order issued in an unopposed matter. The Order itself reflects that Broadweave's Application was opposed by Qwest and the Division, and that Broadweave responded to Qwest's and the Division's concerns. (Order at 2; *see also* Qwest Petition for Reconsideration dated October 30, 2003, at 2 ("Further, Qwest's intervention put the Commission and parties on notice that this could be a contested proceeding.")) The Order was not filed in "tentative form not to be effective for a minimum of 20 days after its issuance" and does not provide "that any person may file a protest thereto prior to its effective date." Utah Admin. Code R746-110-2. Even assuming, *arguendo*, this matter was unopposed, the Commission had good cause to waive the 20-day tentative period and issue a final order. Accordingly, Broadweave's CPCN was effective as the date the Order was issued, September 29, 2003.

7. On October 20, 2003, Qwest filed a Petition for Reconsideration in this docket, requesting reconsideration of the Order so that Qwest's alleged concerns regarding competitive access at Traverse Mountain could be heard. (*See* Qwest's Petition for Reconsideration at 2-6.)

8. Broadweave opposed Qwest's Petition for Reconsideration in a Response filed on October 31, 2003.

9. The Commission granted Qwest's Petition for Reconsideration of the Order on November 5, 2003. Subsequently, on November 12, 2003, the Commission entered a Procedural Order ("Procedural Order") expressly stating that "[w]hile reconsideration has been granted, no stay of our September 29, 2003 [Order], has been entered or requested to stop Broadweave from preparing to and offering services in the Traverse Mountain area." (Procedural Order at 1.) The Commission further ordered that Qwest may not raise competitive

access issues at Traverse Mountain in this CPCN docket, which would be re-opened solely to address Broadweave's managerial, technical and financial qualifications to obtain a CPCN:

> **The Commission believes that issues associated with the placement of facilities and potential interconnection disputes in the Traverse Mountain Area should be addressed separately from issues associated with the managerial, technical and financial capabilities usually considered in granting a certificate to a telecommunications service provider. A separate docket . . . has been opened to address Qwest's disputes associated with the provision of service in the Traverse Mountain area.** To the extent Qwest, or other interested individuals, believe that [this docket], dealing with Broadweave's qualifications to obtain a certificate, should remain open for further deliberations by the Commission on reconsideration a filing must be made on or before December 5, 2003, identifying the specific issues, with supporting argument, which are alleged to require further deliberations on reconsideration of the order granting Broadweave a certificate.

(Procedural Order at 1-2 (emphasis added).) The Commission has, therefore, already ruled that Qwest's opposition to the issuance of a CPCN, to the extent it is premised upon competitive access issues relating to Traverse Mountain, lacks merit. Thus, even assuming the Order did not become effective for 20 days, it did become effective as of the date of the Procedural Order. *See* Utah Admin. Code R746-110-2 ("The order shall provide that any person may file a protest thereto prior to its effective date and that if the Commission finds such protest to be meritorious, the effective date shall be suspended pending further proceedings.").

10. Despite the Commission's ruling that competitive access issues not be addressed on reconsideration in this docket, in its Statement of Issues, the only issues Qwest has raised, yet again, are competitive access issues. (*See* Statement of Issues at 2-12.) Qwest's Statement of Issues is, therefore, a second petition for reconsideration, in violation of Utah Code Ann. §§ 54-7-15 or 63-46b-13, which allow only one written request for reconsideration of a final order.

11. In its Statement of Issues, Qwest alleges, erroneously, that Broadweave is owned by Mountain Home. (*See, e.g.,* Statement of Issues at 2 ("Broadweave and its developer-owners appear to have deliberately structured their business in such a way as to attempt to do together what they cannot do individually . . . .").) Despite Qwest's allegations, Mountain Home does not directly or indirectly own or control Broadweave; nor does Broadweave directly or indirectly own or control Mountain Home.

12. The "relationship" between Broadweave and Mountain Home is as follows: Mountain Home has requested that Broadweave provide telecommunications services to individual homeowners at Traverse Mountain. Mountain Home has not entered into an exclusive access arrangement with Broadweave at any time, and whether Mountain Home chooses to allow Qwest or other competitive local exchange carrier's ("CLEC") access to customers at Traverse Mountain is, at least for the present, up to Mountain Home, which owns or has easements or rights of way in the real property on which it has caused conduit and fiber to be installed. Such facilities, which form the backbone of a fiber-to-the-home ("FTTH") network, have been installed at Mountain Home's expense to enhance Traverse Mountain's marketability. Broadweave does not own the fiber or conduit at Traverse Mountain, but has simply obtained from Mountain Home the right to connect its facilities to such conduit and fiber.

13. Broadweave intends to provide customers at Traverse Mountain services that will include, without limitation, local telephone, voicemail, long distance, broadband Internet services, email and messaging, digital television, movies on demand, storage, back-up recovery and desktop management.

14. Broadweave will offer public telecommunications services to customers at Traverse Mountain on a separate and unbundled basis, as required by Utah Code Ann. § 54-8b-3.3(2)(c).

15. While Broadweave proposes to offer these advanced broadband and multimedia services over a FTTH network, Qwest continues to offer new residential developments, such as Mountain Home, copper loops. Prior to soliciting a bid from Broadweave, Mountain Home solicited a proposal for facilities from Qwest. In response, Qwest proposed to install copper loops. Qwest would not commit to the installation of DSL equipment until Traverse Mountain reached an unspecified number of homes. Mountain Home's decision to go with a FTTH loop installed by Broadweave will better serve the interests of residents at Traverse Mountain.

16. Broadweave's entrance into the market should improve competition by giving competitors, including Qwest, the incentive to deploy their own FTTH loops at new residential developments. Competition of this sort, which fosters investment in Utah's telecommunications infrastructure, is in the public interest because it will generate substantial, long-term benefits for consumers of residential communications services in Utah.

17. Additionally, and contrary to Qwest's allegations, Broadweave will bill its customers directly for the services they purchase, not indirectly through Traverse Mountain's Home Owners Association ("HOA"). Broadweave is currently negotiating group rates with the HOA (which is currently controlled by Mountain Home), and Broadweave understands that the HOA will, for the present, require homeowners to purchase their communications services from Broadweave. However, no agreements with Mountain Home or the HOA, however, have been finalized, in part due to the uncertainty created by Qwest's intervention in this docket. For the

present, Broadweave is providing residents at Traverse Mountain with free cellular telephone service.[3]

18. Qwest's position in this docket, that private property owners must be required to provide carriers access to their property on a non-discriminatory basis, is contrary not only to law, but to Qwest's own business practices. According to promotional materials for "preferred provider partnerships" between Qwest and property developers, Qwest is, or seeks to be, the "preferred provider" of advanced communications services at many residential and commercial developments throughout its service territory.

19. On information and belief, where Qwest is a preferred provider, Qwest installs advanced communications facilities and allows the developer to share in the revenues generated by those facilities in exchange for, among other things, the developer's exclusive endorsment of Qwest's services. On information and belief, Qwest discourages its developer partners from allowing CLECs to deploy their own facilities, thereby ensuring the costs of Qwest's own deployment will be recouped.

20. Qwest is the "preferred provider" of communications services at the following residential developments:

Development	**Development Company**	**Location**
DC Ranch	DMB Realty	Scottsdale, AZ
Anthem	Del Webb	Phoenix, AZ
Lowry	Lowry Redevelopment Authority	Denver, CO
Civano	Case Enterprises	Tucson, AZ
Harris Ranch	Unknown	Boise, ID

Representatives of DC Ranch have advised Broadweave that homeowners at DC Ranch are required to pay Qwest a $50.12 "Mandatory Telecommunity Fee," which is included in their

[3] Broadweave has not violated Utah's slamming and cramming statutes, as Qwest suggests. *See* Utah Code Ann. § 54-8b-18 and § 54-4-37(3).

mandatory DC Ranch HOA dues. This is precisely the type of arrangement Qwest opposes herein.

21. Qwest is the "preferred provider" of communications services at the following commercial developments in Utah: South Towne Center, Bingham Park, JP Realty/Price Development, and Union Park Center.

22. It is not likely Qwest's "partners" at these developments permit CLECs to install their own facilities. Moreover, to the extent Qwest has deployed FTTH loops at new residential developments, Qwest is not required to provide CLECs access to such loops on an unbundled basis. 47 C.F.R. § 51.319(a)(3)(i).

23. Qwest and the Division have raised no issues requiring further deliberation of the Commission's Order granting Broadweave a CPCN. Qwest's provisional motion to stay the Order should be denied and this docket should be closed.

ARGUMENT

A. The Commission Has Already Ruled That Competitive Access Issues at Traverse Mountain Are Not to Be Considered in These Certification Proceedings.

In its Procedural Order, the Commission ruled that Qwest may not raise competitive access issues at Traverse Mountain in this CPCN docket, which has been re-opened solely to address Broadweave's managerial, technical and financial qualifications to obtain a CPCN. Despite the Commission's ruling, the only issues Qwest has raised, yet again, are competitive access issues. (*See* Statement of Issues at 2-12.) Qwest has, therefore, violated not only the Procedural Order, but also Utah Code Ann. §§ 54-7-15 and 63-46b-13, which allow only one written request for reconsideration of a final order. Because neither Qwest nor the Division (whose filing merely reincorporates by reference the issues raised by Qwest) have

raised any issues appropriate for further deliberation of the Commission's Order granting Broadweave a CPCN, this docket must be closed.

B. Broadweave Has Not Entered Into an Unlawful Arrangement With Mountain Home.

Even if there were an arrangement between Broadweave and Mountain Home restricting Mountain Home's right to permit other carriers access to Traverse Mountain – which there is not – current Utah and federal law does not prohibit such arrangements. First, there is no Utah law that addresses exclusive access agreements. Second, the Federal Communications Commission's ("FCC") prohibition on exclusive telecommunications contracts merely prohibits a common carrier from "enter[ing] into any contract, written or oral, that would in any way restrict the right of any *commercial multiunit premises owner* . . . to permit any other common carrier to access and serve commercial tenants on that premises." 47 C.F.R. § 64.2500 (emphasis added). The FCC's prohibition against exclusive access agreements applies to exclusive access agreements with "commercial multiunit premises owner[s]," not the owners of private residential developments. Moreover, the restriction applies to contracts procured by carriers, not the voluntary decisions of private property owners to restrict access.

Mountain Home's reluctance to grant carriers permission to access conduit at Traverse Mountain is voluntary and was not procured by Broadweave's exercise of any market power. In this fashion, Mountain Home has been able to offer its homeowners advanced communications services, in furtherance of goals of the Telecommunications Act of 1996 (the "1996 Act").[4] In addition, by prohibiting unnecessary access to Traverse Mountain, Mountain

[4] *See Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC 00-366 (released October 25, 2000) (hereinafter "MTE Order"), ¶ 154-55.

Home has reduced the amount of space required for telecommunications infrastructure, and has eliminated the confusion, clutter, unnecessary construction, disruption and safety risks that allowing access to multiple providers would engender.

The FCC at one time considered placing a "non-discriminatory access requirement" on multi-tenant environment ("MTE") owners. Specifically, in 1999, the Commission sought comment on whether it should require MTE owners "who allow access to their premises to any provider of telecommunications services [to] make comparable access available to all such providers under nondiscriminatory rates, terms and conditions."[5] (The FCC has never imposed such a requirement on MTE owners, and, for the reasons set forth more fully in section C, *infra*, such a requirement would be unconstitutional.) In doing so, the FCC took note of the emergence of "building LECs" and their potential to "promote the goals of the 1996 Act by bringing competition and advanced services to MTEs that might not see competitive providers for some time." *MTE Order*, 15 FCC Rcd 22983, ¶¶ 154-55. Moreover, the FCC recognized that federal law does not restrict MTE owners from discriminating in favor of CLECs with whom they have entered into profit sharing arrangements:

> 154. [S]ince the *Competitive Networks NPRM* was adopted, a new type of local telecommunications provider has emerged. These carriers, which are often referred to as "building LECs" or "BLECs," typically own telecommunications facilities only within MTEs. A building LEC provides telecommunications services to tenants by interconnecting with another LEC that has facilities outside the building. The nature of the relationship between the building owner and the building LEC is often different, however, from the typical competitive LEC/building

[5] Promotion of Competitive Networks in Local Telecommunications Markets, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 14 FCC Rcd 12637, ¶ 53 (1999) ("*Competitive Networks NPRM*"). In particular, the Commission sought comment on whether it had the statutory authority to promulgate such a requirement, how such a requirement should be structured, and whether such a requirement could be structured so that it would comply with the 5th Amendment Takings Clause of the U.S. Constitution. *Id.* ¶¶ 53-63.

> owner relationship in that the building LEC agrees to give the building owner equity, or has agreed to share a percentage of the telecommunications revenues received in a particular building or group of buildings, in exchange for building access. Indeed, in some instances, consortiums of real estate firms have been the founding members of building LECs.

Id.

In short, the fact that Qwest may not have obtained owner permission to install its own facilities at a private residential development, such as Traverse Mountain, does not establish an illegal arrangement between Mountain Home and Broadweave. What it does establish, however, is Mountain Home's resolve to provide competitive, advanced telecommunications services to its homeowners in order to enhance the marketability of its real estate.

C. The Commission May Not Constitutionally Place a Non-Discriminatory Access Requirement on Mountain Home.

Qwest's request that the Commission require Mountain Home "to allow facilities-based providers desiring to place facilities at Traverse Mountain the opportunity to place their facilities on terms and conditions at least as favorable as those on which Broadweave has been allowed to place facilities" (Statement of Issues at 7) is, essentially, a request that the Commission adopt rule allowing facilities-based carriers forced access to private property. Such a rule, which the FCC has declined to adopt, would violate the Takings Clause of the Fifth and Fourteenth Amendments of the United States Constitution as well as Article I section 22 of the Utah Constitution.[6]

Regulations authorizing a permanent physical occupation of property constitute a *per se* unconstitutional taking without regard to the public interests such regulations may serve.

[6] Article I, section 22 of the Utah Constitution, which provides "[p]rivate property shall not be taken or damaged for public use without just compensation," protects the same property rights protected by the federal constitution and is, indeed, broader in its language than the federal Takings Clause. *Bagford v. Ephraim City*, 904 P.2d 1095, 1097 (Utah 1995).

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). *Loretto* involved a New York statute requiring landlords to allow the installation of cable television facilities upon their property, including cable and switching boxes in exchange for payment of an amount determined reasonable by the state regulatory agency. *Id.* at 423 and n.3. In striking down the statute as a *per se* taking, the Court opined as follows:

> We have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.
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> * * *
>
> [W]hen the "character of the governmental action" is a permanent physical occupation of the property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit of has only minimal economic impact on the owner.
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> *Id.* at 426, 434-35.

Following *Loretto,* a Massachusetts regulation imposing a non-discriminatory access requirement on private landowners – of exactly the sort Qwest proposes the Commission impose on Mountain Home – has also been struck down. *Greater Boston Real Estate Board v. Massachusetts Department of Telecommunications and Energy*, Civil Action No. 00-0409 (Mass Dist. Ct. July 27, 2001). (A copy of the *Greater Boston* case is attached hereto as Exhibit A.) In holding that the imposition of a non-discriminatory access requirement on private property owners constitutes a *per se* taking, the *Great Boston* court observed as follows:

> Perhaps the most serious invasion of an owner's property interests, . . . occurs in the circumstance in which a third party is authorized to use and obtain a profit from the landowner's property without just compensation because "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. . . To require [in addition to dispossession] that the owner permit another to exercise complete dominion literally adds insult to injury" because "such an occupation is qualitatively more

> severe than a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature, of the invasion."

Id. at 10 (citing *Loretto*, 458 U.S. at 435-436). Thus, while Qwest may desire a government license to install its facilities on Mountain Home's private property, this Commission may not grant it one. Broadweave's CPCN may not be withheld to accommodate such an unjustified, overreaching, and unlawful request.[7]

D. Allowing Broadweave to Retain Its CPCN and Provide Requested Services at Traverse Mountain Is in the Public Interest Because It Will Promote Competition in the Telecommunications Industry.

Allowing real property developers in Utah to choose the carriers that will provide service to their properties will promote competition in the telecommunications industry. Real property developers will be encouraged to install state-of-the-art telecommunications facilities, such as FTTH loops, as the high costs of such facilities, or at least a portion thereof, can be

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[7] Qwest suggestion that Broadweave should be denied a CPCN because Mountain Home may have violated right-of-way obligations under 47 U.S.C. § 224 is equally lacking in legal and factual support. (*See* Statement of Issues at n. 15.) To begin with, Broadweave is not Mountain Home's "alter ego," as Qwest alleges. Broadweave and Mountain Home are separate entities with separate ownership and management. Thus, Mountain Home, which is not a "utility," can have no legal obligations under 47 U.S.C. § 224.

In any event, because Qwest is an incumbent LEC, it cannot avail itself of the rights afforded pole attachers under Section 224(f), which applies only to cable television systems and CLECs. *See* 47 U.S.C. § 224(a)(5) ("For purposes of [§ 224,] the term "telecommunications carrier" does not include any incumbent local exchange carrier . . . .") Even assuming Qwest were a CLEC, it would not be entitled to access as a pole attacher under Section 224(f) because Broadweave does not own or control any of the conduit at Traverse Mountain.[7] According to the FCC:

> Utility ownership or control of rights-of-way and other covered facilities [including conduit] exists only if the utility could voluntarily provide access to a third party and would be entitled to compensation for doing so. . . . [T]he forms of access arrangements between utilities and building owners, and the resulting rights and responsibilities of each party, can vary greatly depending on the means by which access was originally achieved and on state law. Thus, state law determines whether, and the extent to which, utility ownership or control of a right-of way in any factual situation within the meaning of Section 224.

MTE Order, ¶ 87. Broadweave does not have authority to grant access to private easements, conduit and rights of way owned and controlled by Mountain Home. Accordingly, as a matter of law, Broadweave may not grant carriers access to Traverse Mountain to install their own facilities.

recouped over time through revenue sharing arrangements with the carriers chosen to provide the service. Carriers, including Qwest, will be encouraged to compete for business at new real estate developments by offering the developers of those projects competitively priced FTTH networks and services. If Qwest, as the incumbent, were permitted to install its own facilities at every new development in violation of the developer's private property rights, it is unlikely developers would risk the expense of installing advanced networks, leaving residents at new developments with the same, basic facilities Qwest typically installs.

Individual customers at Traverse Mountain have chosen to purchase a home based at least in part on the value added to their property by its connection to a FTTH network, which is unusual in this State. Broadweave is the carrier Mountain Home has selected, initially, to provide telecommunications services at Traverse Mountain. Broadweave understands that residents at Traverse Mountain have purchased their homes with full knowledge that they will be required to purchase service from a provider chosen, at least initially, by Mountain Home, at prices negotiated by Mountain Home. As lots at Traverse Mountain are sold, control of the HOA will be transferred to the homeowners, leaving them with the power, as a group, to renegotiate prices or choose another carrier.

Not surprisingly, the FCC has observed that FTTH deployment at new construction projects, such as Traverse Mountain, promotes investment in telecommunications infrastructure and competition among carriers. In an FCC ruling earlier this year, incumbent local exchange carriers ("ILECs") are not required to provide unbundled access to new FTTH loops for narrow band or broadband services. The FCC observed as follows:

> 264. FTTH loop deployment is still in its infancy. Corning notes, for example, that only 47 communities throughout the nation currently enjoy widespread FTTH deployment. The record demonstrates that mass market FTTH loops are used almost

entirely for providing broadband services (or broadband in conjunction with narrowband services) at this time, and that carriers are not deploying such loops to provide narrowband services alone. The record further indicates that FTTH loops display several economic and operational barriers in common with copper loops – that is, the costs of FTTH loops are both fixed and sunk, and deployment is expensive. The record also shows, however, that the potential rewards from FTTH deployment are significant. Corning notes, for example, that carriers will be able to earn a substantially greater return on the FTTH investment by offering voice, data, video and other services. Thus, we find that the substantial revenue opportunities posed by FTTH deployment help ameliorate many of the entry barriers presented by the costs and scale economics.

275. With respect to new FTTH deployments (*i.e.*, so-called "greenfield" construction projects), we note that the entry barriers appear to be largely the same for both incumbent and competitive LECs – that is, both incumbent and competitive carriers must negotiate rights-of-way, respond to bid requests for new housing developments, obtain fiber optic cabling and other materials, develop deployment plans, and implement construction programs. Indeed, the record indicates that competitive LECs are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation. Competitive LECs' active participation in deploying FTTH loops demonstrates that carriers are not impaired if we refrain from unbundling these loops. Thus, we conclude that incumbent LECs do not have a first-mover advantage that would compound any barriers to entry in this situation. In addition, we conclude that incumbent LECs have no advantages concerning the sunk costs of greenfield FTTH loops – both incumbent LECs and competitive LECs are faced with the same issue in their deployment of such loops. As a result of our analysis, we do not require incumbent LECs to provide unbundled access to new FTTH loops for either narrowband or broadband services.[8]

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[8] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers/ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996/Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-223, 96-98 and 98-147, FCC 03-36, ¶¶ 274-75 (2003) ("Unbundling Order"). The FCC defines "FTTH loop" as "a local loop consisting entirely of fiber optic cable (and the attached electronics), whether lit or dark fiber, that connects a customer's premises with a wire center (i.e., from the demarcation point at the customer's premises to the central office)." *Id.* at n. 802.

Encouraging carriers like Broadweave to deploy FTTH loops in Utah, which will stimulate competition in this market segment, will generate substantial long-term benefits for Utah consumers, including the residents of Traverse Mountain. Allowing Broadweave to retain its certificate is therefore in the public interest.

By contrast, imposing a non-discriminatory access requirement on property owners, would be anti-competitive. Because Qwest is not required to provide CLECs unbundled access to its new FTTH loops, permitting Qwest to install its own facilities at greenfield projects without requiring it to negotiate rights-of-way would give Qwest an unfair advantage over CLECs at such projects. If, to protect Qwest's (or its partner's) investment in FTTH loops, CLECs are not permitted unbundled access to those loops, Qwest should not be permitted to undermine CLEC investment in FTTH loops by installing its own facilities where those loops have been deployed. *See* Unbundling Order at ¶ 3 ("The effect of unbundling on investment incentives is particularly critical in the area of broadband deployment, since incumbent LECs are unlikely to make the enormous investment required if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment.")

E. Requiring a Hearing to Determine if Broadweave Satisfies the Public Interest Factor Under Utah Code Ann. § 54-8b-2.1(b) Would Be Discriminatory.

Under Utah Code Ann. § 54-8b-2.1(b), the Commission must issue a CPCN to a telecommunications corporation if (i) the Commission determines that the corporation has sufficient technical, financial, and managerial resources and abilities to provide the telecommunications services applied for; and (ii) the issuance of the CPCN is in the public interest. Companies desiring to obtain a CPCN typically file an extensive application which must show that they meet the foregoing test. The Division reviews the application and

subsequently recommends to the Commission that it either approve or deny it. Pursuant to Utah Admin. Code R746-349-3, the Division may pose additional questions relating to public interest issues and relating to the technical, financial and managerial capabilities of the applicant.

The intent of the foregoing and of the Telecommunications Act of 1995 is to make the certification process simple. Since 1996, the Commission has handled CPCN application proceedings as informal proceedings to allow and encourage competitive entry into the local telecommunications market. Contrary to Qwest's assertion that "changed circumstances" in the market place necessitate holding a hearing, the issues of concern to Qwest are neither new nor unique.[9] Legal impediments in accessing privately owned property, such as The Gateway, have been an issue for Qwest for several years and present regulatory and constitutional questions well beyond the scope of these certificate proceedings. (*See* Statement of Issues at n. 19 (noting "Broadweave is correct in asserting this is not the first developer-created, exclusive provider CLEC Qwest has had to deal with").)

Treating Broadweave differently from other similarly situated companies by requiring a hearing on access issues wholly unrelated to its managerial, technical and financial qualifications would violate Article I, § 24 of the Utah Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Article I, section 24 of the Utah Constitution states, "[a]ll laws of a general nature shall have uniform operation." UTAH CONST., art. I, § 24 (1896). Utah courts interpret Article I, section 24 to mean that a law must apply equally to all persons within a class. *See Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984) (*citing State Tax Commission v. Department of Finance, Utah*, 576 P.2d 1297 (1978)). Because there is no difference between Broadweave and other companies with the same or similarly

[9] *See* Petition at 4-5.

advanced networks, the Commission would violate Article I, § 24 of the Utah Constitution and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution were it to deny Broadweave a CPCN.

F. This Adjudicative Proceeding Is Not the Proper Forum to Determine Whether the Commission Should Adopt a Non-Discriminatory Access Requirement.

As discussed above, Qwest has requested the Commission to enter an order allowing facilities-based carriers non-discriminatory access to Traverse Mountain as a condition of Broadweave's retention of its CPCN. Even assuming a non-discriminatory access mandate could survive constitutional scrutiny, it could not be imposed in this docket because Mountain Home, whose rights would be adversely affected, is not a party to this adjudicative proceeding. Utah Code Ann. § 54-7-15 ("An order of the commission, including a decision on rehearing . . . shall have binding force and effect only with respect to a public utility that is an actual party to the proceeding in which the order is rendered . . . .").

Moreover, imposing such a requirement on Broadweave and Mountain Home would effect a change in clear law, which (1) does not presently include a non-discriminatory access mandate for private property owners; and (2) does not require that access disputes of this sort be resolved in certificate proceedings. Qwest admits that if the Commission enters such an order, it would "establish a new principle of law." (Statement of Issues at 10.) This "new principle of law" would alter the rights not only of other CPCN applicants, but also the rights of private property owners throughout who are not parties to this proceeding. The Commission may not announce a new principle of law of such broad effect without following the requirements of the Utah Administrative Rulemaking Act, Utah Code Ann. § 63-45a-1 et seq. *See Williams v. Public Service Comm'n*, 720 P.2d 773, 776-77 (Utah 1986) (decision altering rights of certificate holders and changing clear law must be made by formal rulemaking); *see*

also Utah Code Ann. § 63-46a-3(2)(c) ("[E]ach agency shall make rules when agency action . . . authorizes, requires or prohibits an action; . . . provides or prohibits a material benefit; . . applies to a class of persons . . .; and . . .is explicitly or implicitly authorized by statute.").

If Qwest desires a change in the law restricting its access to private property, it should request a rulemaking or seek relief from the Legislature. . It should not hold up Broadweave's entry in the market in an attempt to accomplish this objective, which raises issues well beyond the scope of this proceeding.

G. There Is No Stay of the Order Granting Broadweave Its CPCN and Qwest Has Asserted No Grounds for Imposing a Stay.

Qwest's provisional motion for a stay of the Order granting Broadweave its CPCN must be denied. The telecommunications policy and public interest concerns expressed by Qwest, which are without merit in any event, do not justify entry of a stay. (*See* Statement of Issues at 4.)

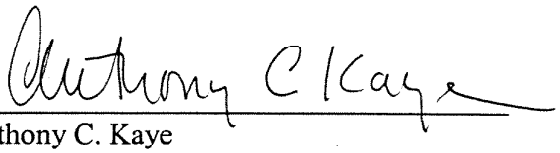
A stay may not be granted unless Qwest can show it will suffer great or irreparable harm if Broadweave continues to provide telecommunications services at Traverse Mountain. *See* Utah Code Ann. § 54-7-17 (stay of Commission order pending appeal requires showing that "great or irreparable damage will result to the petitioner absent suspension or stay of the order"). Qwest can show no such harm. For the reasons set forth above, Qwest has no right or ability at the present time to provide services at Traverse Mountain, regardless of whether Broadweave retains its CPCN. Broadweave, on the other hand, will be irreparably harmed if a stay is entered, because additional delays in providing service at Traverse Mountain will jeopardize customer relationships with approximately 35 residents at Traverse Mountain. Moreover, the entry of a stay would harm Broadweave's customers, who would be left without service (aside from cell phone service) during the pendency of this proceeding.

CONCLUSION

For the foregoing reasons, Broadweave submits there are no issues requiring further deliberation of the Commission's Order granting Broadweave a CPCN, requests that Qwest's provisional motion to stay such Order be denied, and further requests that this docket be closed.

DATED this 18th day of December, 2003.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

By: 

Anthony C. Kaye
Angela W. Adams

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2003, I caused an original, 8 copies and an electronic copy of the foregoing **BROADWEAVE'S RESPONSE TO QWEST'S RESPONSE TO PROCEDURAL ORDER AND PROVISIONAL MOTION TO STAY** to be hand-delivered to the following:

Ms. Julie Orchard
Commission Secretary
Public Service Commission of Utah
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
lmathie@utah.gov

a true and correct copy to be hand delivered to:

State of Utah
Department of Commerce
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114

and a true and correct copy mailed, postage prepaid thereon, to:

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