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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 NETWORKS OF UTAH, LLC RESPONSE TO THE MEMORANDUM FROM THE DIVISION OF PUBLIC UTILITIES TO THE PUBLIC SERVICE COMMISSION, DATED SEPTEMBER 5, 2003

I. INTRODUCTION

This brief is in response to a memorandum ("Memorandum") from the Division of Public Utilities ("Division") to the Commission regarding its recommendation in the application ("Application") of Broadweave Networks of Utah, LLC ("Broadweave") for a Certificate of Public Convenience and Necessity ("CPCN"), dated September 5, 2003. Departing from the standard practice of recommending approval or denial of a CPCN based entirely on a written application, the Division is recommending to the Commission that it hold a hearing to determine if it is in the public interest to approve the Application. A hearing is not necessary because neither state nor Federal law requires Broadweave to open its network to other carriers, it would be discriminatory to require a hearing, and existing arrangements between the

owner of Traverse Mountain and Broadweave prohibit Broadweave from granting access to Traverse Mountain to other carriers.

II.
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. R.746-349-3, 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 ("1995 Act") was 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. However, in Broadweave's case, the Division is recommending that the Commission hold a hearing to determine whether it is in the public interest to approve the Application.

Contrary to the Division's assertion that the "unique issues that surround Broadweave's Application" necessitate the holding a hearing,[1] the issues are neither new nor unique. In prior discussions, the Division admitted that one of the reasons why it is

[1] *See* the Division's Memorandum to the Utah Public Service Commission, dated September 5, 2003, ¶ 8.

recommending a hearing in Broadweave's case is to avoid some of the problems that Qwest has encountered with other companies with similar networks. Companies whose CPCN applications were very similar to Broadweave's application and which satisfied the Division sufficiently to recommend the granting of a CPCN without holding a hearing.

Treating Broadweave differently from other similarly situated companies by requiring it to go through a hearing as the Division recommends would violate Article I, § 24 of the Utah Constitution and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Article I, § 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, § 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 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 follow the Division's recommendation.

III.
The Arrangements Between The Owner of Traverse Mountain and Broadweave Grant Broadweave Limited Access to Traverse Mountain That Prohibits Broadweave From Granting Anything Other Than Interconnection to Other Carriers

Broadweave has the authority under certain arrangements with Mountain Home Development Corporation, the developer and owner of Traverse Mountain ("Owner"), to interconnect with other carriers desiring to have access to residents in Traverse Mountain. However, Broadweave does not have authority under the same arrangements to grant access to private easements, conduit and rights of way owned and controlled by Owner. The Commission

cannot ask Broadweave to grant access that it does not own or control. Carriers must deal directly with Owner to obtain access.

The Federal Communications Commission ("FCC") has stated that utility ownership or control of rights of way and other covered facilities exists only if the utility could voluntarily provide access to a third party and would be entitled to compensation for doing so.[2] The right of access is not intended to override whatever authority or control real property owners may otherwise retain under state law.[3] Under the arrangements in place between Owner and Broadweave, Broadweave does not have the authority to grant access to Traverse Mountain to allow any LEC to install facilities. Hence, it would not be productive to require Broadweave to go through a hearing. The issue should be taken up with Owner, not with Broadweave.

It bears pointing out that in its consideration of a non-discriminatory access requirement, the FCC took note of the types of arrangements between Owner and Broadweave; specifically, their potential to promote the goals of the Telecommunications Act of 1996 by bringing competition and advanced telecommunications services to multiple tenant environments ("MTE").[4] *MTE Order,* 15 FCC Rcd 22983, ¶¶ 154-155.

> 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

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2 *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), ¶ 87 ("MTE Order").

3 *See* MTE Order, ¶ 87.

4 While the community of Traverse Mountain is not a MTE per se, Traverse Mountain is like a MTE in that Owner owns and controls all the private easements, rights of way, and conduit within the community and it has a financial interest in Broadweave. In addition, like a MTE, Traverse Mountain has common areas for residents that are also owned and controlled by Owner.

> 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 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.
>
> 155. Building LECs may promote the goals of the 1996 Act by bringing competition and advanced services to MTEs that otherwise might not see competitive providers for quite some time.

Id.

Moreover, the current federal regulatory environment does not prohibit developers and owners of real property from entering into exclusive arrangements with communications carriers to serve residential environments.[5] The FCC specifically took the question under advisement in the MTE Order and has yet to make a ruling prohibiting such arrangements.

Finally, Owner installed state-of-the-art communications facilities at substantial expense to enhance the marketability of its real estate. It uses the communications facilities to sell the Traverse Mountain community to prospective buyers. With the communications facilities already in place, residents of Traverse Mountain will have services that 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. Qwest has not offered Owner the same types of services for residents of Traverse Mountain that Broadweave is offering. Hence, Owner has no incentive to allow Qwest to tear up

[5] MTE Order, ¶ 33.

its streets and right of way to install facilities that are inferior to the communications facilities that are already in place and to offer services that are inferior to those that are capable of being offered. Nonetheless, if a resident of Traverse Mountain desires to receive communications services from Qwest or from any other carrier, Broadweave would provide access to such resident through interconnection.

IV.
Utah Law Does Not Require Broadweave to Open Its Network To Other Carriers

The Division contends that the parties need direction and guidance from the Commission to clarify issues that it deems to be unclear. Current state law is clear in regard to whether Broadweave has an obligation to open its network to Qwest or other carriers. Utah Code Ann. § 54-8b-2(4) defines "essential facility or service" as any portion, component, or function of the network or service offered by a provider of local exchange services: (a) that is necessary for a competitor to provide a public telecommunications service; (b) that cannot be reasonably duplicated; and (c) for which there is no adequate economic alternative to the competitor in terms of quality, quantity and price. Utah law imposes the burden of demonstrating that Broadweave's network is an essential service or facility on Qwest or any other carrier that desires to access Broadweave's network. The Division's recommendation would require Broadweave to bear that burden. In addition to other factors, Qwest must show that there is no adequate economic alternative to it in terms of quality, quantity and price. First, Qwest has not even made an argument that Broadweave's network is an essential facility or service. The Division is the party that is driving the issue. Second, even if such an argument were made by Qwest, interconnecting to Broadweave's network is a adequate economic alternative.

Before the Commission requires Broadweave or any other similarly situated company to open its network, the Commission must make a final determination that Utah law requires it. If the Commission deems it necessary to address whether fiber optic cable and equipment should be designated "essential facilities" and therefore must be available for purchase by other carriers, it should do so in an open docket or rulemaking proceeding with general applicability so that other companies will have the opportunity to participate. Because the Commission has yet to promulgate any new rules designating such facilities and services as "essential," it must determine whether Broadweave is obligated to open its network under existing laws. Fiber optic cable and equipment are not considered essential facilities or services under current laws, hence, Broadweave is not required to open its network. *See* UTAH ADMIN. CODE R.746-348-7 (1997).[6]

V.
CONCLUSION

The communications facilities in place at Traverse Mountain are highly advanced and sophisticated and are capable of facilitating the offering of advanced services. Had Owner not installed the facilities, residents of Traverse Mountain would not have access to the same types of services from Qwest or from any other carrier. Hindering Broadweave from offering

[6] R746-348-7 designates the following as essential facilities and services: (1) unbundled local loops including 2-wire, 4-wire and digital subscriber line facilities; (2) loop concentration, loop distribution, and loop feeder facilities; (3) network interface devices; (4) switching capability including line-side facilities, trunkside facilities and tandem facilities; (5) 911 and E911 emergency call networks; (6) access to numbering resources; (7) local telephone number portability; (8) inter-office transmission facilities; (9) signaling networks and call-related databases including signaling links, signaling transfer points and databases used for billing and collection, and transmission and routing of public telecommunications services; (10) operations support systems used to pre-order, order, provision, maintain and repair unbundled network elements, or services purchased for resale from an incumbent local exchange carrier by another telecommunications corporation; (11) billing functions; (12) operator services and directory assistance; (13) physical and virtual collocation and; (14) intra-premises cabling and inside wiring owned or controlled by an incumbent local exchange carrier.

advanced services will only stifle innovation and competition, which is contrary to the underlying policy of both the 1995 Act and the Telecommunications Act of 1996.

Moreover, Broadweave has limited rights in Traverse Mountain. The Commission cannot ask Broadweave to grant to other carriers rights that it does not possess. Nor should Broadweave be penalized for not having real property rights that would allow access to Traverse Mountain. Based on the foregoing, Broadweave respectfully requests that the Commission approve the Application or remand the matter to the Division for further review.

DATED this 24th day of September, 2003.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

By:_____
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Yvonne R. Hogle

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2003, I caused an original, 8 copies and an electronic copy of Brief of Broadweave Networks of Utah, LLC Responding to the Memorandum from the Division of Public Utilities to the Public Service Commission, dated September 5, 2003 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

and a true and correct copy to be hand delivered to:

State of Utah
Department of Commerce
Heber M. Wells Building, Fourth Floor
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and a true and correct copy mailed, postage prepaid thereon, to:

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