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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

Pursuant to the Commission's Procedural Order issued in this docket on November 12, 2003, Qwest Corporation ("Qwest") respectfully requests that the Commission keep this docket open pending the completion of the Commission's review to be conducted pursuant to the Order Granting Petition for Reconsideration ("Reconsideration Order"), issued on November 5, 2003. Qwest also provisionally

moves, to the extent necessary, for a stay of the Commission's Report and Order issued on September 29, 2003 ("Certificate Order"), granting a Certificate of Public Convenience and Necessity ("Certificate") to Broadweave Networks of Utah, LLC ("Broadweave").

I. INTRODUCTION

Under normal circumstances, a real estate developer has the right to choose with whom it does business. Under normal circumstances, certification proceedings for competitive local exchange carriers ("CLECs") are routine matters handled in routine ways. The circumstances presented in this docket are not normal.

Based upon the facts as they appear today, the developer in this case not only chose (indeed, created) the entity with whom it wants to deal—Broadweave—but also seeks to choose with whom the public telecommunications customers at Traverse Mountain will deal, whether they like it or not. Broadweave and its developer-owners appear to have deliberately structured their business in such a way as to attempt to do together what they could not do individually: assert that their CLEC is merely providing telecommunications service, and that any acts they commit that may be against the public interest are not being committed by that regulated entity, but by the developer, whom they would no doubt assert to be beyond the reach of this Commission. This situation should not be permitted to stand. The Commission should send a clear signal that developers cannot circumvent the policies of public telecommunications law merely through cleverly structured business arrangements. Broadweave should not be granted a Certificate until the barriers to competitive choice that it and its developer-owners have erected have been removed.

II. ARGUMENT

A. THE CERTIFICATE ORDER SHOULD NOT BECOME EFFECTIVE PENDING THE CONCLUSION OF THE COMMISSION'S RECONSIDERATION PROCESS. IF THE COMMISSION DEEMS IT NECESSARY IN ORDER TO PREVENT THE CERTIFICATE ORDER FROM BECOMING EFFECTIVE, THE COMMISSION SHOULD GRANT QWEST'S PROVISIONAL MOTION TO STAY.

In its Procedural Order, the Commission noted that "no stay of our [Certificate Order] has been entered or requested to stop Broadweave from preparing to and offering services in the Traverse Ridge area"[1] and seemed to direct that barring such a stay the Certificate Order would take effect. Because the Certificate Order was issued in an informal proceeding, the effective date of the Certificate Order has already been suspended even in the absence of a Commission-ordered stay.[2] Therefore, no stay is currently necessary to prevent the Certificate Order from taking effect. Nevertheless, to provide clarity on the effectiveness of the Certificate Order and because Qwest believes it appropriate for the Commission to re-convert this matter to a formal proceeding,[3] to the

[1] Procedural Order at 1.

[2] *See* Utah Admin. Code R746-110-2 (noting that unless good cause is shown for waiving the 20-day tentative period, an order issued in an informal proceeding is "not to be effective for a minimum of 20 days after its issuance" and that if a protest is filed prior to the effective date "and ... the Commission finds such protest to be meritorious, the effective date shall be suspended pending further proceedings."). The Certificate Order did not contain any discussion of a delayed effective date or a protest period as contemplated in Rule 746-110-2. It also, however, did not contain any discussion of whether good cause was shown to waive the 20-day period and did not identify any particular effective date. Qwest filed its Petition for Reconsideration ("Petition") within 20 days of the issuance of the Certificate Order (*i.e.,* within the protest period under the Rule). The Petition would fit the Rule's definition of a "protest" under the Rule—it's entire purpose being to protest the Certificate Order. The Commission's grant of reconsideration would likewise fit the definition of "find[ing] such protest to be meritorious" under the Rule. Therefore, in the absence of any contrary language in the Certificate Order, Qwest believes the effective date of the Order has—by default under the Rule—been "suspended pending further proceedings."

[3] Re-converting this matter to a formal proceeding is appropriate in order to protect Qwest's statutory right for an opportunity to meaningfully participate in Broadweave's certificate proceeding and would provide the added benefit of removing the prospect of de novo review at the district court, in the event of an appeal. *See* Utah Code Ann. §§ 54-8b-2.1(3)(b), 63-46b-15 and 63-46b-16.

extent necessary[4] Qwest hereby provisionally moves for a stay of the effective date of the Certificate Order pending the outcome of the Commission's reconsideration of that Order.

The grounds for this request for a stay, which are the same grounds identified below in Qwest's request to keep this docket open, are that the serious telecommunications policy and public interest concerns surrounding the way that Broadweave and its developer-owners apparently intend to provide public telecommunications service need to be addressed before the Commission can properly find it to be in the public interest to grant Broadweave a Certificate. For these public interest reasons, as set forth in greater detail below, whether or not a stay is necessary to accomplish it, the Commission should not allow the Certificate Order to become effective until the Commission concludes the process of reconsideration.

B. THE COMMISSION SHOULD KEEP THIS DOCKET OPEN UNTIL IT HAS ADDRESSED THE PUBLIC INTEREST ISSUES IDENTIFIED IN QWEST'S PETITION FOR RECONSIDERATION.

The Commission should keep this docket open pending its decision on reconsideration because if it is not in the public interest for Broadweave to provide service under the circumstances it and its developer-owners contemplate, then it is also not in the public interest for the Commission to grant Broadweave a Certificate.

[4] Conversion from informal to formal proceedings may only happen prior to the issuance of the final order. *See* Utah Code Ann. § 63-46b-4(3). Therefore, if the Commission does re-convert to a formal proceeding, the Certificate Order will not constitute final agency action requiring a stay to prevent it from becoming effective. Thus, in addition to the fact that the Certificate Order does not currently require a stay because it was issued in an informal proceeding and its effectiveness has automatically been suspended (*see supra* note 2), if the Commission re-converts this matter to a formal proceeding the Certificate Order will not require a stay because it will no longer constitute final agency action, but rather will require replacement by a new final order. This is why Qwest doubts the need for the Commission to order a stay and only provisionally seeks a stay, to the extent the Commission deems it necessary in order to prevent the Certificate Order from becoming effective.

1. The Arrangements for Telephone Service Apparently in Place at Traverse Mountain Are Not in the Public Interest and Are Likely in Violation of Law.

Broadweave's provision of telecommunications service under the circumstances apparently contemplated for Traverse Mountain is not in the public interest and is likely in violation of law. It is Qwest's understanding that these circumstances have been carefully designed to allow only Broadweave to install facilities in the development and to prevent customers from selecting any other telecommunications provider. Specifically, public telecommunications customers at Traverse Mountain pay for (as a portion of a mandatory homeowner's association fee)[5] and receive service from Broadweave whether or not they want it. In addition, there is a two-foot easement on every lot in Traverse Mountain use of which is reserved to the public utilities approved by the developer. This exclusive easement operates as an effectual fence to prevent anyone but Broadweave from connecting with customers in the development. Broadweave has admitted that it has no right under the terms of its arrangement with its developer-owners to allow any other provider to use its conduit.[6] Finally, Broadweave asserts that its developer should not be required to allow Qwest to "tear up its streets and right of way" to install "inferior" technology.[7]

These plainly anti-competitive arrangements violate the policies behind multiple provisions of law. They violate the overall purposes of the Utah Public Telecommunications Law because they do not "encourage the development of

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[5] *See* Affidavit of Lynn Davis, attached as Exhibit A to Qwest's Petition (October 20, 2003) at ¶ 6.

[6] *See* Broadweave Networks of Utah, LLC's Response to Qwest's Petition for Reconsideration ("Broadweave Response") at 5, n.5.

[7] Broadweave Response at 6.

competition" and in fact take away competitive choice in telephone service.[8] They violate the purposes of the cramming and slamming statutes because the customers of Traverse Mountain will not be receiving public telecommunications service from a provider they have had any meaningful choice in selecting and will be charged for services they neither willingly ordered nor authorized.[9] They violate the requirement that public telecommunications services may be sold in packages with other services "so long as they are also offered on a separate, unbundled basis."[10] They prevent competitors from accessing customers in violation of the purposes of 47 U.S.C. § 253(a) because they "may prohibit[] or have the effect of prohibiting the ability of other carriers to provide interstate and intrastate telecommunications service."[11] They are inconsistent with the technology neutral policies underlying the state and federal telecommunications acts.[12]

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[8] *See* Utah Code Ann. § 54-8b-1.1.

[9] *See* Utah Code Ann. §§ 54-8b-18; 54-4-37(3). Qwest has already had requests for service from individuals and businesses located in Traverse Mountain. To these entities, and any other customers who request service from Qwest, Qwest is the chosen provider, but—unless the Commission intervenes—Broadweave will be the actual provider. While Broadweave will no doubt technically obtain "orders" and "authorization" from customers before providing service, such will be obtained from customers who had no other choice except to forgo local exchange service altogether.

[10] *See* Utah Code Ann. § 54-8b-3.3(2)(c).

[11] While, in allowing Broadweave's developer-owners to place private easements on every Traverse Mountain lot, which public utilities cannot cross without their consent, the violation of Section 253(a) may technically have been committed by Lehi City rather than Broadweave's owners, Broadweave and its owners certainly requested and concurred in that violation. Discovery would be necessary to determine if any financial inducement was offered by Broadweave's owners to get Lehi to permit the recording of these private, exclusive easements; but it can certainly be surmised that regardless of whether they paid for the ability to record the private easements, Broadweave's owners at least asked for them. Further, they obviously did so with the express purpose of preventing competition, in violation of the purpose of Section 253(a).

[12] It is not for Broadweave or its developer-owners to decide what technology is inferior or superior. (*See contra* Broadweave Response at 6.) The acts contemplate that choice of technology will be left with end-user customers. *See, e.g.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of 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 Service*

Finally, all of the efforts of Broadweave and its developer-owners to eliminate competition in Traverse Mountain violate at least one of the purposes of granting CLEC exemptions to certain regulatory requirements, including exemptions from pricing restrictions.[13] They give Broadweave all of the benefits of providing service in a competitive environment—as the Public Telecommunications Law intended—without actually subjecting Broadweave to competition.[14]

Therefore, the Commission should deny Broadweave's application for a Certificate unless and until Broadweave and its owners take the steps necessary to allow public telecommunications customers at Traverse Mountain the opportunity for competitive choice in their local exchange carrier. To accomplish this, Broadweave and its owners need to: (1) allow facilities-based competitors desiring to place facilities in the Traverse Mountain development 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; and (2) ensure that customers at Traverse Mountain choosing a LEC other than Broadweave are not charged for Broadweave's services that the customers neither want nor use. This would possibly entail an appropriate discount in homeowners association fees to any member of the homeowners association electing to purchase public telecommunications services from a provider other than Broadweave.

Offering Advance Telecommunications Capability, CC Docket Nos. 01-338, 96-98 and 98-147 (August 21, 2003) ¶ 97.

[13] Such as prohibitions on discrimination. *See* Certificate Order at Exhibit B; Utah Admin. Code R746-349-7; Utah Code Ann. § 54-3-8.

[14] At a minimum, if the Commission ultimately determines to issue a Certificate to Broadweave, the exemptions from regulatory requirements traditionally granted to CLECs based on the fact that they will be competing with the incumbent should not be granted to Broadweave.

If Broadweave and its owners will not agree to these things, Broadweave should be denied a Certificate. Developers have no property or other inherent right to provide public telecommunications service, and Broadweave's owners should not be allowed to circumvent the Commission's ability to protect the public interest by merely structuring their business in such a way as to be able to claim that any acts committed that were contrary to the public interest were committed by them when wearing their unregulated developer hats, rather than when wearing their regulated CLEC hats.

Discovery is required to determine whether or not the developer of Traverse Mountain is technically Broadweave's alter-ego.[15] Regardless of that determination, however, if granted a Certificate, Broadweave (and its owners) would certainly benefit from the exclusive arrangements that they have gone to so much trouble to establish, and Broadweave would provide service under conditions that are not in the public interest. Broadweave may not technically be the party receiving the mandatory homeowners association fee and it may not technically be the party that arranged for exclusive, private easements to keep out competitors, but it was apparently created and structured for the purpose of completing the goal for which these measures were taken—to create a monopoly on public telecommunications service at Traverse Mountain. Broadweave's disavowal of any of the acts of the developer is not credible. Both Broadweave and the developer corporation are apparently owned by the same people. It will not do, then, for Broadweave to disingenuously state that it has no control over what transpires at Traverse

[15] Prior to the grant of a Certificate, the Commission should determine whether the developer would appropriately be considered Broadweave's alter-ego. If so, the developer may have its own right-of-way obligations pursuant to 47 U.S.C. § 224, which if violated would provide a separate basis for a Commission refusal to grant a Certificate.

Mountain and that problems with competitive access "should be taken up with [the developer], not with Broadweave."[16]

2. There Is No Constitutional or Other Bar to Reviewing the Public Interest Issues Surrounding Broadweave's *de facto* Status as the Exclusive Provider of Telephone Service in Traverse Mountain Prior to the Issuance of a Certificate.

In responding to Qwest's Petition, Broadweave argued that if the Commission were to assess the public interest issues surrounding Broadweave's exclusive provider arrangement during the certificate process 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."[17] Broadweave claims that it would be discriminatory for the Commission to apply public interest scrutiny to Broadweave's application for a Certificate that has not been applied to other developer-created, exclusive-provider CLECs in the past.[18]

Broadweave's argument should be rejected. This is the first certificate proceeding of which Qwest is aware where the service to be provided by a developer-created CLEC has been challenged before the Commission.[19] Since the issue has never been raised before the Commission, there is no basis to suggest that scrutinizing the public interest issues surrounding Broadweave's situation is somehow a discriminatory departure from prior Commission practice. Rather, this is a matter of first impression for the

[16] Broadweave Response at 5.

[17] *Id.* at 4.

[18] *Id*.

[19] While Broadweave is correct in asserting that this is not the first developer-created, exclusive-provider CLEC Qwest has had to deal with (*see* Broadweave Response at 3-4), the relevant issue as to whether there are new circumstances warranting additional Commission scrutiny in the certification process is whether the Commission, not Qwest, has previously dealt with such situations in a certificate proceeding. To the best of Qwest's understanding, the Commission has not.

Commission to consider, and the only legitimate concern with consistency is consistency going forward—i.e., if the Commission determines to address in this docket the public interest concerns with developers creating CLECs in order to obtain a monopoly on service, it should continue to address such concerns in future certificate proceedings whenever they appear to be at issue.

Even if public interest scrutiny of Broadweave's situation during certificate proceedings is a departure from prior Commission practice—rather than merely being a matter of first impression—it is a well-established principle of administrative law that such departures are permissible as long as they have a reasonable basis and the Commission explains that basis. *See, e.g., Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1253 (Utah 1992) ("Administrative agencies must, and do, have the power to overrule a prior decision when there is a reasonable basis for doing so."); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored ... ."); *see generally* 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.5 (4th ed. 2002). The Commission needs this authority because it "must be able to resolve interstitial legal issues when they arise in the context of adjudication. In short, an agency must have the power to establish rules of law on a case-by-case basis within the context of its statutory authority." *Salt Lake Citizens Congress*, 846 P.2d at 1252.

If the Commission establishes a new principle of law regarding developer-created, exclusive-provider CLECs in this proceeding and deems a new rule necessary, the Commission can enact a new rule following the issuance of its decision, pursuant to Utah

Code Ann. § 63-46a-3(6). If the Commission agrees with Qwest that there are serious public interest concerns with situations where facilities-based competition is excluded and where no resident can reasonably change telephone providers (because they will continue to be required to pay for Broadweave's service even if they do change),[20] then the Commission already has an obligation to consider those concerns as part of the certificate process, even in the absence of a new rule.[21] It is either in the public interest for Broadweave to be granted a Certificate to provide service under these circumstances or it is not. The Commission has never addressed this issue before and should do so now. As long as the Commission is consistent going forward, Broadweave will have no legitimate basis to complain of discrimination.

3. The Certificate Process Is the Appropriate Time to Consider the Public Interest Concerns Surrounding Developer-Created, Exclusive-Provider CLECs.

For the reasons stated above, the grant of a Certificate to Broadweave is not in the public interest. If the Commission is inclined not to make the certification process more demanding, and if it believes that an appropriate way might already exist, or may be created by rule, to ensure appropriate competitive access after the CLEC begins to provide service, the Commission should bear in mind that if it does not deal with competitive access at the outset roads and improvements will be completed making facility placement more expensive; customers initially without competitive choice will already be receiving service from the exclusive-provider CLEC and less likely to switch

[20] *See* Affidavit of Lynn Davis, attached as Exhibit A to Qwest's Petition (October 20, 2003) at ¶ 6.

[21] *See* Utah Code Ann. § 54-8b-2.1(1)(b).

providers; and as a result the late-arriving LEC will be at a significant competitive disadvantage.

If Qwest is going to be required to serve as a provider of last resort ("POLR") in new developments such as Traverse Mountain, such impediments to competition need to be removed. Such impediments can only effectively be removed by addressing competitive access at the earliest possible opportunity—during the certificate process. If the Commission declines to remove such impediments, it will be unfair to later require Qwest to serve as a POLR.[22] Therefore, if the Commission does not remove barriers to competition during Broadweave's certificate process, Qwest may be required to seek a determination that Broadweave, not Qwest, is the provider of last resort at Traverse Mountain. Furthermore, in the event Broadweave ceases to provide service to customers in Traverse Mountain, the Commission should not anticipate that it would be able to look to Qwest or any other provider to step in.

III. CONCLUSION

Qwest believes that it is not in the public interest for Broadweave to receive a Certificate under the present circumstances. The Commission should keep this docket open to address the public interest concerns created by Broadweave and its owners, and should not grant Broadweave a Certificate until appropriate competitive choice is provided to public telecommunications customers at Traverse Mountain—allowing other providers to place facilities in a timely manner and removing barriers to choice such as the telecommunications portion of the mandatory homeowners association fee. If necessary to keep the Certificate Order from taking effect, the Commission should grant

[22] Assuming arguendo that Qwest would otherwise have that POLR obligation.

Qwest's provisional motion to stay that Order. The Commission should expedite the proceedings to resolve this matter so that customer service can be established quickly.

RESPECTFULLY SUBMITTED: November 21, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **QWEST'S RESPONSE TO PROCEDURAL ORDER AND PROVISIONAL MOTION TO STAY** was served by on the following in the manner indicated on November 21, 2003:

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