Robert C. Brown
Qwest Services Corporation
1801 California Street, 49th Floor
Denver, CO 80202
(303) 672-5839
(303) 296-3132 (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 CLEAR WAVE COMMUNICATIONS, L.C., et al., Complainants, vs. QWEST CORPORATION, Respondent.	:	Docket No. 04-049-06 **QWEST'S RESPONSE TO THE COMPLAINT OF SBS TELECOMMUNICATIONS, INC.**

Pursuant to Utah Code Ann. § 63-46b-6 and Utah Administrative Code R746-100-3(I), Qwest Corporation ("Qwest") hereby responds to the Request for Agency Action ("Complaint") of intervenor SBS Telecommunications, Inc. ("SBS"), as follows:

I. STATEMENT OF RELIEF REQUESTED

For the reasons stated below, as well as the reasons set forth in Qwest's answer to the complaint filed by Clear Wave Communications, L.C., et al. and in Qwest's initial briefing in Docket No. 03-049-62,[1] Qwest respectfully requests that the Commission determine Qwest's actions to have been lawful and consistent with the requirements of Commission orders and Qwest's tariff, that SBS be denied any relief against Qwest, and that the Complaint be dismissed with prejudice.

II. STATEMENT OF FACTS AND REASONS FOR GRANTING REQUESTED RELIEF

A. General Background Of The LDA, Of Commission Orders Interpreting Option 2 Costs, And Of SBS's Refusal To Comply With Those Orders.

Pursuant to the Land Development Agreements section of Qwest's current tariff ("LDA tariff"),[2] Qwest offers an option ("Option 2") for developers and builders of single-family home subdivisions to use self-help in placing facilities for Qwest's telecommunications network, rather than having Qwest place the facilities itself. This self-help option was added to the tariff in 1997 to provide greater flexibility for developers in placing Qwest's facilities, and has been one long, expensive headache to Qwest ever since.[3] SBS, a key contributor to the difficulties associated with Option 2, is among a number of companies that formed in response to the inclusion of a

[1] *See* Brief of Qwest Corporation on Cost Policy Issues (Feb. 9, 2004); Reply Brief of Qwet Corporation on Cost Policy Issues (Mar. 26, 2004); Surreply of Qwest Corporation on Cost Policy Issues (Apr. 19, 2004).

[2] *See* Utah Exchange and Network Services Tariff § 4.4.

[3] For a more detailed background on Option 2 of the LDA tariff, including the problems Qwest has faced since its adoption, *see generally* Amended Direct Testimony of Laura L. Scholl ("Scholl Direct"), Docket No. 03-049-62 (October 4, 2004); *see also* Affidavit of James Farr ("Farr Affidavit"), Docket No. 02-049-66 (Jan 31, 2003), attached as Exhibit 1 to Qwest's May 5, 2004 answer to the Clear Wave, et al., complaint in this matter.

self-help option in the tariff. These companies contract with developers to implement Option 2—placing, on the developers' behalf, the facilities that will become part of Qwest's network.

Option 2 contractors such as SBS do not have any contractual relationship with Qwest. Having no contractual relationship, they rely wholly upon the terms of the LDA tariff for any claim to a right to place Qwest's facilities. Likewise, the terms of the LDA tariff and the LDA between Qwest and a developer (entered pursuant to the tariff) control how much Qwest is obligated to pay for facilities placed under Option 2. The tariff requires that Qwest's costs be agreed upon and identified in the LDA with the developer,[4] but that in no event are those costs to exceed "the distribution portion of the average exchange loop investment, times 125%, times the number of lots in the development."[5] The tariff's maximum price formula, or "cap" on Qwest's costs, was estimated in a 1996 cost study to equal $436.13 per lot.[6]

SBS stubbornly maintains that the LDA tariff requires the cap amount as the default price for <u>every</u> Option 2 job—or, perhaps more precisely, SBS maintains that the tariff requires Qwest to pay whatever the developer's costs happen to be, up to the cap; the developer's costs happen to be whatever SBS charges for the Option 2 job; and SBS happens to always charge the cap.[7] SBS's interpretation was always erroneous, and never reflected Qwest's intent in drafting the tariff.[8] The interpretation became wholly unfounded and directly contrary to Commission order, however, after multiple statements by the Commission in recent years, including most recently in

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[4] Developers typically sign a power of attorney allowing Option 2 contractors to enter the LDA on their behalf.

[5] *See* Utah Exchange and Network Services Tariff at §§ 4.4.B.6, 4.4.C.2.e.

[6] *See, e.g.*, Direct Testimony of Dick Buckley ("Buckley Direct"), Docket No. 03-049-62 (October 4, 2004) at 2-3.

[7] *See, e.g.*, Complaint at 31; Correspondence between Qwest and SBS (Exhibit 1 to Qwest's initial brief on cost policy), attached hereto as Exhibit 1.

[8] *See, e.g.*, Scholl Direct at 6-7; Farr Affidavit at 4-6.

a complaint filed by SBS and another contractor, in Docket 02-049-66. In the final order rejecting SBS's claims, the Commission found:

> Much has been said in this docket regarding problems with the LDA tariff. Many of those problems center on costs. **Qwest argues that the cap incorporated into the LDA tariff has been interpreted by [SBS] as the default price Qwest is to pay for every development. That was not the intent of the tariff. The cap was just that, a cap, and if costs exceeded that amount a developer is responsible for the additional costs. It was not designed to be the default price.** Most, if not all of these disputes, it seems, would not occur if the parties were complying with the terms of the LDA tariff. As was stated in this Commission's order in 1999:
>
> > We believe the only interpretation fair to both parties and consistent with the public interest is as follows:
> >
> > - **Section 4.4(B)(6) requires that costs be agreed upon at the inception of the agreement and incorporated in the LDA**. In that regard, by implication, both developer and Respondent are required to furnish in good faith detailed, *verifiable* cost estimates on the request of the other party. . . .
> >
> > - **Once costs**, limited by the formula in Section 4.4(B)(6), **have been identified, agreed upon, and incorporated into the LDA**, Respondent's liability for reimbursement may not be escalated thereafter.
>
> If Qwest and developers complied with this directive, before the LDA was entered into, and provided up-front, good faith detailed, verifiable costs estimates, then a developer could make an informed decision as to whether to have Qwest, or another party such as [SBS], install the facilities. **To be good faith and verifiable the cost estimates must be more than a quote from [SBS] or a similar company to do the job for the amount of the cap under the LDA tariff**. With such estimates, costs would be agreed to up front and incorporated into an LDA between Qwest and the developer.[9]

Notwithstanding such clear direction by the Commission that payment of the cap as a default price was "not the intent of the tariff," that costs for Option 2 jobs should be "agreed upon" and incorporated in an LDA, and that verifiable cost estimates "must be more than a quote

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[9] *See* Report and Order*, In the Matter of the Complaint of SBS Telecommunications, Inc., and Silver Creek Communications, Inc., vs. Qwest Corporation*, Docket No. 02-049-66. (July 15, 2003) ("2003 Order") at 7-8 (bold emphasis added).

from [SBS] . . . to do the job for the amount of the cap," SBS continues to seek the tariff cap amount for every job. Moreover, for its "verifiable cost estimates" SBS simply submits a reference to its contract with the developer to do the job for the cap amount.[10] Thus, in its Complaint, SBS identifies the "base value"[11] of the jobs at issue as being the cap amount ($436.13 times the number of lots in the development), and stunningly asserts both that the cap amount is what is "contractually and lawfully due for a project" and that Qwest should pay the cap because it reflects "the developers' legitimately and obligatory costs accrued for the installation of facilities."[12] This same hubris, or at least serious misconception of the source of Qwest's obligations under Option 2, led SBS to assert in a scheduling conference this year that the Commission has no jurisdiction over the amount of money Qwest must pay for facilities placed by SBS.[13]

B. SBS Has Willfully Refused To Comply With Commission Orders And To Act In Good Faith.

SBS's disregard for the Commission's directions on Option 2 costs is part of a broader pattern of contempt for the regulatory process, and a broader unwillingness to act in good faith to

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[10] *See* Exhibit 1 at 1.

[11] SBS uses the term "base value" to denote that it also seeks payment for "betterments" (cable upsizing to accommodate future development), in addition to getting $436.13 per lot on every job. Qwest does pay for cable upsizing as part of a reasonable payment for the job, which is to say that Qwest does not claim that the tariff cap is so absolute as to preclude any additional payment for facilities placed to accommodate future growth; but Qwest rejects SBS's unreasonable interpretation where the costs associated with appropriate cable sizing are factored in only after the maximum tariff amount has already been paid as the "base" price.

[12] *See* Complaint at ¶¶ 178, 182.

[13] *See* Tr. 1/15/04, Docket No. 03-049-62, at 43 ("MR. MCDONOUGH: Your Honor, and I'll make a, if we're going to bifurcate that I'm going to move to dismiss this docket. I don't think the Public Service Commission has jurisdiction to determine what an unregulated entity such as SBS can charge for its services. MS. SCHMID: And I beg to differ. I think that on the issue before the Commission is what Qwest, a regulated entity, is required to pay. And so it's clearly within the purview of the Commission's jurisdiction. MR. MCDONOUGH: We're here, I made the motion. THE COURT: Okay, denied . . . .").

comply with that process. For example, in Docket 02-049-66, SBS sought a Commission order interpreting Option 2 of the LDA tariff as applying to town-homes and certain other multi-unit dwellings.[14] Before the Commission eventually denied SBS's requested relief, SBS pulled a stunt that typifies its behavior as an Option 2 contractor. Notwithstanding its certain knowledge that Qwest strongly objected to any interpretation that would apply Option 2 to multi-unit dwellings and that Qwest had no intention of agreeing to a multi-unit Option 2 LDA without a Commission order requiring such, SBS nonetheless worked in private with a developer and one day showed-up at a job site fully intending to take-over the job and place facilities, allegedly pursuant to Option 2 of the tariff.[15] SBS had no Commission permission to undertake its action. It knew Qwest would not willingly agree to enter an LDA on the job. Yet it sought to unilaterally place facilities, to be foisted upon Qwest for incorporation into the network.

SBS undertook its unilateral action understanding and relying upon the dilemma Qwest would have faced had SBS succeeded in placing the facilities. Since SBS's contracts are with developers rather than with Qwest, Qwest cannot contractually prevent SBS from placing facilities. Once SBS places facilities, Qwest must either (a) accept SBS's terms (i.e., $436.13 per lot, plus cable upsizing costs—no negotiation of price and no verifiable cost estimate from SBS); (b) reject SBS's terms but use the facilities as the only means of serving customers (and be subject to allegations of conversion);[16] or (c) reject the facilities. If Qwest rejects the facilities it must either seek to place duplicate facilities itself or make customers wait for service until the

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[14] This interpretation would have allowed SBS to seek to increase its profits by continuing to charge the same flat, per-lot rate (the tariff cap amount of $436.13) it has always charged for detached homes, but do so on multi-unit dwellings where actual placement costs would typically be significantly lower.

[15] The job in question was Phase D of the Pioneer Plat Subdivision, in Provo. By the time SBS showed-up at the job site Qwest had already placed cable. Thus, the attempt to force this Option 2 job on Qwest only failed by virtue of SBS being too late.

[16] *See, e.g., SBS v. Qwest*, Civ. No. 040900339 (Utah 3d. Dist.).

dispute can be resolved. Placing duplicate facilities is both inefficient and would require either consent from the developer (a difficult task when the developer has already had SBS place facilities), or Commission approval to proceed to place facilities without an LDA in place—leaving the developer to make takings arguments, jurisdictional arguments, etc.

None of these options is acceptable, but least acceptable is the prospect of making customers wait for service. SBS knows as much, so it has routinely done the equivalent, on single-family projects, of what it tried to do in the egregious multi-family example provided above—place facilities without agreement from Qwest, knowing that Qwest will likely have to accept the facilities. Thus, historically, virtually all SBS projects get placed without Qwest's agreement to an LDA in advance and in violation of the tariff's timing requirements.[17]

SBS's ability to successfully engage in such actions results in large part from a structural flaw in Option 2 of the current tariff, where Qwest does not have contractual control over the parties placing its facilities—an important part of why Qwest seeks the elimination of Option 2.

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[17] *See* Utah Exchange and Network Services Tariff at § 4.4.B.2, requiring, for example, 90 days notice prior to trenches being opened. SBS alleges that LDAs are not entered earlier in the process because Qwest refuses to do so. This is simply false and Qwest categorically denies the allegation. In general, timing problems with the entry of LDAs arise because developers and Option 2 contractors do not comply with the tariff's notice requirements. Beyond that, however, in the case of SBS it is impossible to negotiate an LDA (at any point in the process) when SBS will agree to nothing less than the tariff cap for pricing. With appropriate notice, Qwest would essentially always be able to enter the LDA prior to construction being undertaken.

Of course, while Qwest's biggest timing concern is with customer service, SBS's concern (understandably) is with getting paid. But SBS looks to the wrong party when it seeks to hold Qwest responsible for "increased . . . administrative, legal, and carrying costs" (*see* Complaint ¶ 189) allegedly due to LDA delays. The legal costs are principally due to SBS's own litigiousness, but aside from that the core timing-of-payment allegation is also baseless. SBS claims that LDA delays cause payment delays because SBS doesn't get paid by the developer until the developer gets paid by Qwest. (*See id.* at ¶ 21). If so, the problem lies between SBS and the developer, not with Qwest. 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 <u>reimburse</u> developers' costs. *See* Exchange and Network Services Tariff §§ 4.4.C.2.d, 4.4.C.2.e. If SBS is negotiating with developers such that it does not get paid until <u>after</u> 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.

Moreover, all Option 2 contractors can make the plausible claim that in violating the tariff by placing facilities without reasonable notice they are merely acting on the requests of developers—another important reason to eliminate Option 2, as Qwest has no way to force developers to comply with the tariff other than to reject the facilities, which is untenable for the reasons identified above.

However, other Option 2 contractors have not sought to exploit the tariff to the same degree SBS has. For example, when in September 2003 Qwest attempted to enforce the Commission's direction that costs be "agreed to up front and incorporated into an LDA between Qwest and the developer"[18] some Option 2 contractors willingly began negotiating a final price for LDAs. These Option 2 contractors have been able to proceed to place facilities under Option 2, at a reasonable price tied to the actual estimated costs for placement, and without significant difficulty.[19] Other Option 2 contractors submitted what appeared to be good-faith cost estimates and at least attempted to reach agreement with Qwest on a final price.[20] One Option 2 contractor initially ignored correspondence from Qwest seeking negotiation and cost estimates, but eventually cooperated. Only SBS had the obstinately complete package of continuing to demand the tariff cap amount; continuing to refer to its contract with the developer to do the job for the cap amount as its "verifiable cost estimate;" refusing to negotiate any other price; and going ahead with facility placement knowing that Qwest had not agreed to accept the facilities—

[18] 2003 Order at 8.

[19] Even in these cases Qwest has typically ended-up paying more for the Option 2 jobs than it would have expected to pay under Option 1, and has still had problems dealing with cable upsizing and other engineering issues. Still, compared to jobs involving SBS, these jobs have gone extremely smoothly.

[20] These contractors included Clear Wave, East Wind, and Prohill—the initial complainants in this docket. As Qwest noted in its answer to these complainants, the absence of direction on what to do when Qwest and Option 2 contractors such as these fail to agree upon a price to be included in an LDA will need to be resolved by the Commission in this docket.

leaving Qwest with the above-described Hobson's choice of either delaying service to customers or accepting SBS's facilities. These actions by SBS have been in willful disregard of the Commission's prior orders, and could not have been based on any good-faith interpretation of those orders.

Further, when Qwest sought agreement from those Option 2 contractors with whom it had not been able to negotiate final LDA pricing, that the parties would stipulate to interim pricing for LDAs (based on Qwest's estimated costs, while the Commission resolved the tariff-interpretation issue of what to do when the parties could not agree on a price), SBS refused to even consider such a stipulation. SBS finally did relent and agree to the terms of the stipulation, more than four months after they were proposed and after all other Option 2 contractors had done so. Before agreeing, however, SBS continued to place facilities without Qwest's consent. On one such project, when Qwest finally refused to accept the facilities placed by SBS without an LDA in place (having been sued by SBS for conversion under similar alleged facts), Qwest had the very service concerns from the developer and customers that SBS has always been able to rely on in the past as the trump that would cause Qwest to accept its facilities.[21] Upon information and belief, SBS blamed the service delays on Qwest, causing harm to Qwest's customer and developer relationships.

These problems are illustrative, not exhaustive. In fact, they are just the tip of the iceberg of Qwest's difficulties with SBS. SBS has been the most obstructive Option 2 contractor and perhaps the biggest single problem associated with Option 2. It has filed and threatened meritless cases against Qwest (and filed frivolous motions within the cases) repeatedly. It has refused to comply with Qwest's Option 2 processes, engineering requests, and materials

[21] This development was the Valley Crest Plat A project identified in the Complaint.

requirements. And it has, as noted above, flouted Commission orders on pricing and verifiable cost estimates. The difficulties such a recalcitrant Option 2 contractor can cause, without effective recourse, offer strong support for the elimination of Option 2. They also ought to form a compelling basis for the Commission to reject any relief SBS seeks in this proceeding. Regardless of how the Commission otherwise interprets the pricing provisions of the tariff, SBS should not receive a reward for its bad acts.

B. In Contrast To SBS, Qwest Has Complied With Commission Rules And Qwest's Tariff.

Qwest does not expect perfection from SBS or any other Option 2 contractor or developer. Nor is Qwest perfect. Reasonableness, not perfection, is what the law and tariff require.[22] Yet, while Qwest has made accommodation after accommodation, when Option 2 contractors and developers never comply with the timeline in Qwest's tariff, SBS makes the baseless allegation that Qwest has "engaged in a course of conduct which has hindered, delayed and otherwise obstructed" the completion of SBS's projects,[23] and that Qwest has a "scheme of refusing to execute an LDA at the front end of the project."[24] In an allegation as hypocritical as it is false, SBS further accuses Qwest of failing "to disclose in good faith, detailed verifiable cost estimates to Option 2 Contractors in violation of the Commission's Order in *Silver Creek and SBS Telecommunications*."[25]

The truth of the matter, contrary to SBS's assertions, is that Qwest has always (since refusing in September 2003 to any longer simply pay the cap on every project) provided verifiable cost estimates upon request. These estimates include listings for itemized materials

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[22] *See, e.g.*, Utah Code Ann. § 54-3-1.

[23] Complaint ¶ 173.

[24] *Id.* at ¶ 175.

[25] *Id.* at ¶ 185.

expenses, miscellaneous materials expenses, and labor expenses broken out into engineering, placing and splicing,[26] and comfortably provide sufficient detail for Option 2 contractors to verify the reasonableness of the estimate. Anyone with experience placing a telecommunications network ought to be able to review these estimates and identify with significant precision any part of the job that they think is priced too low. Yet rather than challenge the reasonableness of Qwest's estimates, SBS seeks to play a game of "gotcha" by essentially claiming that since Qwest doesn't provide invoicing or vendor-specific pricing, its estimates are somehow insufficiently detailed and verifiable.[27] The reason Qwest does not casually identify its vendor-specific pricing and invoicing is that doing so would violate confidentiality agreements with its vendors. This is not "hiding" behind confidentiality, however, as Qwest has consistently been open to having Option 2 contractors, including SBS, view its invoices pursuant to the terms of a Commission protective order. Neither SBS nor any other Option 2 contractor has sought to do so.

In truth, while Qwest does provide detailed, good-faith, verifiable cost estimates, SBS provides no estimate at all—detailed, verifiable, or otherwise. And the reason SBS refuses to agree to pricing below the tariff cap has nothing to do with whether it has received Qwest's invoices to prove the cost for a piece of cable. It has everything to do with SBS's stubborn refusal to comply with the Commission's directives on the interpretation of the tariff cap.

As for SBS's allegations of obstruction and delay by Qwest in the LDA process, these allegations are likewise baseless. A simple sampling of the jobs identified in the Complaint paints a more accurate picture.

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[26] *See* Exhibit 2 to the Direct Testimony of Dennis Pappas, Docket No. 03-049-62 (Oct. 4, 2004), for a sample of Qwest's verifiable cost estimates.

[27] *See, e.g.*, Complaint ¶¶ 185-86.

The tariff calls for 90-days notice prior to trench opening, and the Option 2 Process Flow calls for further detail in the timing and sequence of the LDA process.[28] Even before Qwest began in September 2003 to insist on verifiable cost estimates and price negotiation, it was necessary that Qwest receive the engineering prints, and that the parties coordinate other planning aspects of the job, before the job plan could be approved and construction could commence. SBS has consistently failed to comply with these requirements.

On the Brookhaven project, for example, SBS sent the engineering prints for the job on the same day it placed cable, giving Qwest no opportunity to approve the job prior to construction. On the Canterbury Plat F Project, upon receipt of the engineering prints, Qwest forwarded an LDA for signature within less than three weeks. However, it never heard back from SBS until SBS requested trench inspection on already-placed cable. SBS never did enter the LDA until nine months later, when it sought pricing for this project under the terms of the stipulation (which had been entered by then) providing for interim pricing. Qwest finally received a signed LDA from SBS almost a year after SBS placed facilities and many months after customer service was necessary. On the North Lake Project, Qwest received engineering prints one day before SBS placed cable. Again, SBS failed to comply with the tariff timing and construction requirements. An LDA was sent by Qwest within three weeks of the notification of the job (of course, after the job was completed), but SBS would not sign it because of pricing disputes—SBS inappropriately demanding the cap.

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[28] *See* Utah Exchange and Network Services Tariff at § 4.4.B.2; Option 2 Process Flow (Exhibit 2 to Qwest's Answer to the Clear Wave complaint). The Process Flow, for example, provides that "Developer will allow Qwest adequate time (tariff specifies 90 days) to complete work prints, after delivery of the power drawings, prior to opening the trenches. . . . 2-3 weeks prior to trench work beginning please contact the Qwest representative to coordinate trenching and placing." It goes on to further specify that costs be agreed upon before construction commences.

The Valley Crest Plat A project was an early one after Qwest began, in September 2003, to demand that verifiable cost estimate and LDA price negotiation. SBS wanted approximately $8,300 (which was, of course, the cap amount—with no verifiable cost estimate beyond the boilerplate assertion that the developer had agreed to do the job for the cap) as the "base amount" plus $6,000 above the cap for cable upsizing, for a total of approximately $14,300. Qwest's own cost estimate for the job was approximately $10,400 (i.e., an amount above the tariff cap, given that Qwest does pay for cable upsizing). SBS went ahead and placed facilities without an agreement, and upon information and belief, led the developer to believe that the delays in establishing service (caused by the lack of agreement, and Qwest's concern about the threat of litigation) were attributable to Qwest. On the Virginia Ridge project, Qwest received the engineering prints after the cable was placed. SBS provided no verifiable cost estimate and there was no agreement on pricing. In an attempt to avoid the conundrum of either providing service over facilities Qwest had not yet purchased or delaying customer service, Qwest placed temporary above-ground facilities to service the first home in the development. On the Old Farm project, Qwest received the engineering prints on the same day SBS requested trench inspection for a job already placed.

The consistent theme of Qwest's dealings with SBS is that Qwest receives no reasonable notice and no reasonable opportunity to negotiate pricing prior to construction. In fairness to SBS, this timing problem is nearly universal on Option 2 jobs and Qwest has no idea how to correct it beyond removing Option 2. Regardless of what the Commission orders or the tariff requires, parties such as SBS do not seem troubled to comply. And as long as Option 2 remains in place, they will be able to put Qwest in the dilemma identified above—they can simply install the facilities without an agreement in place, realizing that Qwest's obligations to provide timely

customer service will likely cause Qwest to go along, tariff requirements and Commission orders be damned.

D. Aside From The Problems Unique To The Bad Acts Of SBS, The Commission Should Continue To Interpret The Tariff As It Has In The Past And Deny The Relief SBS Seeks.

The only appropriate issue raised by SBS's Complaint in this matter is the general tariff-interpretation question of how much Qwest must pay for facilities placed under Option 2.[29] As noted above, the Commission has issued previous orders regarding appropriate costs for Option 2 LDAs and those orders bar the interpretation SBS seeks. In addition to Docket No. 02-049-66 quoted in Section A above, in Docket No. 98-049-33 the Commission addressed appropriate costs for Option 2 jobs and found:

> We believe the only interpretation fair to both parties and consistent with the public interest is as follows:
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> - **Section 4.4(B)(6) requires that costs be agreed upon at the inception of the agreement and incorporated in the LDA**. In that regard, by implication, both developer and [Qwest] are required to furnish in good faith detailed, verifiable cost estimates on the request of the other party. …
>
> - **Once costs**, limited by the formula in Section 4.4(B(6), **have been** identified, **agreed upon**, and incorporated into the LDA, [Qwest's] liability for reimbursement may not be escalated thereafter.[30]

In the same order, the Commission rejected SBS's current cap interpretation, because under that interpretation "Developers and/or their contractors have no incentive to restrain their

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[29] SBS's claims for damages (*see* Complaint at 31-31), requesting that the Commission "Requir[e] Qwest to pay SBS Telecommunications the developer costs" on the projects identified in the Complaint) are barred by the limits of the Commission's jurisdiction. *See, e.g., Atkin, Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 334 (Utah 1985).

[30] Report and Order, Docket No. 98-049-33 (April 30, 1999) at 6 ("1999 Order") (emphasis added). The 1999 Order also made statements—not based upon evidence, and later retracted by the Commission—to the effect that the impetus for Option 2 of the LDA tariff was Qwest's held-order record. *See, e.g., id.* at 5. In its briefing of cost policy in Docket No. 03-049-62, Qwest addressed the Commission's retraction, via a May 26, 2000 Report and Order in Docket No. 99-049-T28, of the 1999 Order's erroneous held-order language.

extravagance unless and until the [tariff cap] is approached, and thus the maximum bids fair to become the minimum."[31]

It remains to be decided in this docket, in response to the complaint of Clear Wave, et al., what should be done under the current tariff when the parties fail to "agree[] upon, and incorporate[] into the LDA" the costs for Option 2 jobs.[32] What has already been decided, however, is that SBS cannot simply obtain the tariff cap amount, with no verifiable cost estimate and no agreement on price, as it seeks to do for the projects identified in the Complaint. Yet, a tariff interpretation to that effect is essentially the only relief properly sought in the Complaint.[33] Its Complaint must therefore be dismissed.

Finally, SBS is not entitled to $436.13 per lot because that amount no longer represents "the distribution portion of the average exchange loop investment, times 125%, times the number of lots in the development."[34] Even if SBS were correct (which it is not) in seeking that tariff-cap amount for every job, as shown in the direct testimony of Dick Buckley submitted this week in Docket No. 03-049-62, under the current Commission-approved cost methodology the tariff formula now yields a cost of $311.90 per lot rather than $436.13.[35] SBS has previously argued that the cap amount may not be accurate.[36] If the Commission finds the tariff cap somehow

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[31] *See* 1999 Order at 5.

[32] 1999 Order at 6.

[33] The Complaint also seeks declaratory relief regarding Qwest's verifiable cost estimates, which is baseless for the reasons identified above, and a determination that SBS's "cap" costs are reasonable. *See* Complaint at 31-34. Yet SBS makes no effort to defend the reasonableness of those costs. It merely insists, contrary to Commission order, that the tariff requires the cap to be paid on every Option 2 job. SBS's assertions of reasonableness for the jobs identified in the Complaint are refuted by the large gap between the costs SBS seeks Qwest to pay and Qwest's own estimated costs for those projects.

[34] *See* Utah Exchange and Network Services Tariff at §§ 4.4.B.6, C.2.e.

[35] *See* Buckley Direct at 5.

[36] *See, e.g., Response Memorandum of Complainants*, Docket No. 02-049-66, at 16 (Feb 5, 2003).

instructive on what Qwest should pay for the jobs identified in the Complaint, it should make the cap accurate by updating the amount to $311.90.

III. ANSWER

In addition to rebutting SBS's factual allegations by setting forth its own statement of facts above, Qwest responds to the specific allegations of the Complaint by general denial of any allegation that would support a finding that Qwest has in any way violated a provision of law, Commission rule or order, or Qwest tariff, such that SBS could be entitled to its requested relief.

IV. DEFENSES

First Defense

The Commission lacks subject-matter jurisdiction over some of the elements of relief sought in the Complaint.

Second Defense

SBS lacks standing to assert some of the elements of relief sought in the Complaint.

Third Defense

Qwest has already provided any and all substantive relief to which SBS may be entitled.

Fourth Defense

SBS has failed to state a claim upon which relief can be granted.

Fifth Defense

SBS assumed the risk of placing facilities without an LDA in place, knowing in advance that Qwest would not simply agree to pay the tariff cap amount without agreement on price.

Sixth Defense

SBS's claims are barred by unclean hands.

Seventh Defense

Some or all of SBS's claims are barred by payment and release.

Eighth Defense

Qwest reserves the right to assert any additional affirmative defenses or special defenses that may become known through discovery or further proceedings in this matter or as may be otherwise appropriate.

V. CONCLUSION

For the reasons stated above, as well as the reasons set forth in Qwest's answer to the Clear Wave, et al., complaint and Qwest's initial briefing in Docket No. 03-049-62, Qwest respectfully requests that SBS be denied any relief and that the Complaint be dismissed with prejudice.

RESPECTFULLY SUBMITTED: October 7, 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 **QWEST'S RESPONSE TO THE COMPLAINT OF SBS TELECOMMUNICATIONS, INC.** was served upon the following by electronic mail, on October 7, 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

Sharon M. Bertelsen
Jennifer Rigby
Ballard Spahr Andrews & Ingersoll, LLP
bertelsens@ballardspahr.com
rigbyj@ballardspahr.com

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

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