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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of CLEAR WAVE COMMUNICATIONS, L.C., et al.,	:	Docket No. 04-049-06
Complainants,	:	**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR STAY**
vs.	:	
QWEST CORPORATION,	:	
Respondent.	÷	

Qwest Corporation ("Qwest") hereby replies to Complaints' Memorandum in Opposition to Qwest's Motion for Stay ("Opposition") served by Complainants, by mail, on March 4, 2004. The Opposition identifies no legitimate basis to deny Qwest's Motion for Stay ("Motion"), and the Motion should be granted.

ARGUMENT

The sole issue raised by Qwest's Motion is this: whether the question of how much Qwest should pay for Option 2 jobs, under the tariff language currently in effect, is more appropriately answered in the broader LDA docket (Docket No. 03-049-62) than in this proceeding.[1] If so, it makes no sense to pursue the general Option 2 cost question in multiple dockets, and this proceeding should be stayed long enough for that question to be resolved in the LDA docket. Qwest's Motion demonstrated good cause for staying this proceeding. The Opposition's procedural and substantive arguments offer nothing of merit to undermine that good cause. The Motion should therefore be granted.

A. The Opposition's Procedural Argument Lacks Merit.

The Opposition begins with a novel procedural argument that Qwest's Motion should be denied because it lacks the requisite elements of a responsive pleading submitted pursuant to Utah Code Ann. § 63-46b-6.[2] By this, the Opposition seems to imply that the Commission does not have the authority to manage the scheduling of its own dockets, and cannot alter the

[1] Of course, a broader cost policy decision must also be implemented on a job-by-job basis to the individual Option 2 projects identified by Complainants. That implementation necessarily belongs in this complaint proceeding. However, it cannot be determined how much, if anything, Qwest is required to pay on a specific job-by-job basis until it is determined how Option 2 is appropriately interpreted generally. That general interpretation is what Qwest seeks to have accomplished in the broader LDA docket.

[2] Opposition ¶¶ 5-7.

requirement (by granting a stay) that responsive pleadings be submitted within 30 days of a complaint being filed.[3]

The reason Qwest's Motion does not include the necessary elements of a responsive pleading is that it is not a responsive pleading. Rather, it is a motion submitted pursuant to Utah Admin. Code R746-100-3.H. As such, it is differentiated by Commission rule from a pleading submitted pursuant to Utah Admin. Code R746-100-3.A.[4] If the Motion is found to be meritorious, it will make no sense for Qwest to submit a responsive pleading at this time—a large part of which would involve disputing Complainants' alleged entitlement to certain payment amounts for the various Option 2 jobs at issue in this case—when the whole point of the Motion is to stay the case until the dispositive Option 2 cost question is resolved in the broader LDA docket.

The practice of submitting motions prior to responsive pleadings is neither unusual nor inappropriate,[5] nor is the practice of staying an action while an issue of law is resolved in another action.[6] Further, the Commission clearly has the authority to manage its own calendar by

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[3] *See* Utah Code Ann. § 63-46b-6(1). It is interesting that the Opposition invokes Section 63-46b-6, when the only Commission rule expressly invoked by the Complaint was Utah Admin. Code R746-101-4 (the Commission's declaratory relief rule, which does not implicate a 30-day response time). *See, e.g.*, Utah Code Ann. § 63-46b-1(5)(a) ("Declaratory proceedings authorized by Section 63-46b-21 are not governed by this chapter, except as explicitly provided in that section."). Notwithstanding Complainants' invocation of Rule 746-101-4, however, it is clear from the scope of relief sought in the Complaint that this proceeding is not merely one for declaratory relief.

[4] *See* Utah Admin. Code R746-100-3.A.1. ("The following filings are not requests for agency action or responses, pursuant to Sections 63-46b-3 and 63-46b-6: a. motions . . . .").

[5] *See, e.g.*, Utah R. Civ. P. 12(a)(1) ("If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action.").

[6] *See, e.g., Lewis v. Moultree*, 627 P.2d 94, 96 (Utah 1981) ("It lies within the inherent powers of the courts to grant a stay of proceedings. It is a discretionary power, and the grounds therefor necessarily vary according to the requirements of each individual case. **A common ground for a stay is the pendency of another action involving identical parties and issues and where a decision in one action settles the issues in another**, or when the decision in an action is essential to the decision in another.")

staying this proceeding. The Administrative Procedures Act, the very statute Complainants rely upon to claim that a responsive pleading must be submitted within 30 days, provides that "Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, except those time periods established for judicial review."[7]

Thus, the Opposition's procedural argument—with its attendant talk of default judgments—is meritless. The Commission needs to decide the merits of Qwest's Motion. If the Motion is granted, a responsive pleading is premature at this time. If the Motion is denied, Qwest will submit a responsive pleading within whatever time the Commission directs.

B. The Opposition's Substantive Arguments Lack Merit.

The Opposition's substantive arguments are that addressing the Option 2 cost issue in the broader LDA docket would violate the filed rate doctrine and that a stay would be prejudicial to Complainants. Neither argument has merit.

1. Addressing in the broader LDA docket the proper interpretation of the current tariff language would not violate the filed rate doctrine.

The Opposition argues that the broader LDA docket was established only to address Option 2 policy questions on a going-forward basis.[8] Therefore, if the Commission were to apply decisions reached in the LDA docket to outstanding Option 2 jobs it would be to violating the filed rate doctrine.[9] The factual premise for this argument is erroneous, however; thus, the argument fails. The Commission has not limited the scope of the LDA docket so as to exclude

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(emphasis added) (citations omitted). Qwest notes in this regard that Complainants are parties to the LDA docket. *See* Transcript (January 15, 2004) at 4, attached hereto as Exhibit 1.

[7] Utah Code Ann. § 63-46b-1(9).

[8] Opposition ¶¶ 8-9.

[9] *Id*. at ¶ 11.

interpretation of the current tariff language, and the filed rate doctrine need not be implicated by Commission decisions reached in the LDA docket.

It is true that in the broader LDA docket the Commission must determine, as a matter of policy, how Option 2 should be implemented going forward (regardless of the tariff language currently in effect). It is also true that the answer regarding Option 2 policy going forward may be different than the answer derived under the current tariff language in effect. In other words, the pure policy question may have a different answer than the tariff-interpretation question. But that is no reason for the Commission to ignore the tariff-interpretation question, and nothing prohibits the Commission from addressing current tariff interpretation in the LDA docket while it also addresses forward-looking policy issues.

As Exhibit 1 demonstrates, Complainants are not the only Option 2 contractors that will be affected by a Commission decision on Option 2 costs. There are many Option 2 jobs that have been and will be completed prior to any Commission decision in the LDA docket that may authorize a forward-looking tariff change. Complainants' position would require other Option 2 contractors with outstanding jobs to either file their own complaints or forgo any opportunity to participate in the discussion of how the current tariff language should be interpreted. This position makes no sense. In order for the Commission to determine what amounts, if any, Complainants are entitled to for the jobs at issue in this proceeding, it will have to interpret Option 2 of the LDA tariff. If it is going to perform such a tariff interpretation, there is no reason not to involve all interested parties; and a docket is already pending—the LDA docket—with broad Option 2 contractor participation (along with the Division of Public Utilities and Committee of Consumer Services), wherein the current Option 2 tariff language can be interpreted. Such broad party participation was a key reason the Commission opened the LDA

docket in the first place, rather than simply addressing the issues in the SBS complaint proceeding.[10] And the Commission order establishing the LDA docket contained no language that would preclude the Commission from using its broad investigative power to address current tariff-interpretation issues (in addition to forward-looking policy issues).

As long as the Commission remains clear about what Option 2 mandates under the existing tariff, and distinguishes this to the extent necessary[11] from what Option 2 should mandate going forward, there is no filed rate doctrine issue raised by addressing the general Option 2 cost question in the LDA docket. Addressing current tariff interpretation in the LDA docket would preserve Commission and party resources by avoiding the unnecessary duplication of argument in multiple proceedings.

2. Complainants will not be harmed by a stay.

The Opposition's final argument is that a stay would adversely affect Complainants.[12] The theory for this is that Complainants have completed, and expect to continue to complete, Option 2 jobs prior to the time the Commission takes action in the LDA docket, and that economic harm will result from any delay.[13]

This final argument is not only meritless, it is disingenuous. At the time Complaints filed the Opposition, they had in their possession a stipulation signed by Qwest pursuant to which Qwest and Complainants agreed that for all unresolved projects identified in the Complaint, as

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[10] *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) at 8 ("It would not be appropriate to address the other issues raised by Qwest in this proceeding. Those issues are more appropriate for a more general docket in which all interested parties could participate.").

[11] As Qwest has argued in the LDA docket, no distinction is truly necessary, as Qwest should not have to pay more for facilities placed pursuant to Option 2, either under the tariff language currently in effect or as a policy matter going forward.

[12] Opposition ¶ 10.

[13] *Id.*

well as any projects done prior to a final Commission determination on appropriate Option 2 costs, Qwest would pay its own estimated cost for the project, plus any additional payment later ordered by the Commission (with interest).[14] Complainants' rights are therefore fully preserved pending resolution of the Option 2 cost issue.

Further, it is not at all clear that a stay of this proceeding will actually lead to a delay in the resolution of Complainants' case. The purpose of the stay would be to resolve the Option 2 tariff-interpretation issue in the broader LDA docket. There is no assurance that the tariff-interpretation issue would be resolved any faster in the absence of a stay. The Commission is undoubtedly concerned with consistency in the interpretation of Option 2. If the Commission wishes to hear all interested parties' views on Option 2, it will wait to interpret the tariff until all briefing on Option 2 costs is completed in the LDA docket. Thus, this proceeding may need to wait for resolution even in the absence of a stay. In such circumstances, the grant of a stay will clearly not harm Complainants and the Opposition's argument to the contrary is meritless.

CONCLUSION

For the foregoing reasons and the reasons set forth in Qwest's Motion, Qwest respectfully requests a Commission order staying this proceeding pending a decision in the LDA docket on whether Qwest must pay more for facilities placed under Option 2 of Qwest's LDA tariff than it would pay for facilities placed under Option 1 of the tariff.

RESPECTFULLY SUBMITTED: March 15, 2004.

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[14] *See* Joint Stipulation ¶¶ 1-5 (signed by Qwest and provided to Complainants on February 27, 2004), attached hereto as Exhibit 2.

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Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR STAY** was served upon the following by U.S. mail, postage pre-paid, on March 15, 2004:

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