



201 S. Main Street, Suite 1100
Salt Lake City, Utah 84111
phone 801.328.3131
fax 801.578.6999
www.stoel.com

GREGORY B. MONSON
Direct (801) 578-6946
gbmonson@stoel.com

April 21, 2005

HAND DELIVERED

Public Service Commission of Utah
400 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111

Re: Docket No. 05-049-36, Qwest's Preliminary Response to XO's Proposed Rule R746-349-X

Dear Commissioners:

Qwest Corporation ("Qwest") has briefly reviewed the revised version of R746-349-X submitted by XO Utah, Inc. ("XO") on April 20, 2005 and provides this preliminary response.

Qwest proposed changes to several rules that are inconsistent with changes in law resulting from 1st Substitute Senate Bill 108 ("SB108") in the 2005 General Session of the Utah Legislature on March 7, 2005. The Division of Public Utilities ("Division") reviewed Qwest's proposed changes and recommended adoption of them, with two exceptions, on April 4, 2005. On April 7, 2005, the Commission noticed a technical conference for April 18, 2005, to review the impact of SB108, suggested rules changes by Qwest and any other related issues associated with implementation of SB108. At the technical conference, Qwest stated that the Division's exceptions were acceptable, and no party objected to the rules changes with the exceptions. Because SB 108 is effective on May 2, 2005, and because Qwest's proposed changes address requirements in existing rules that will no longer be appropriate given SB108, it is appropriate that the Commission address these changes prior to May 2.

On April 13, 2005, XO proposed a rule intended to establish procedures associated with a proceeding to consider revocation or the imposition of conditions or restrictions on the pricing flexibility of a telecommunications corporation under Utah Code Ann. § 54-8b-2.3(8) as amended by SB108. Qwest quickly prepared draft proposed revisions to XO's proposed rule, which were not fully aired within Qwest, for review at the technical conference on April 18. XO

Oregon
Washington
California
Utah
Idaho



Public Service Commission of Utah

April 21, 2005

Page 2

has now proposed revisions to Qwest's draft.

At the outset, Qwest notes that the process on XO's proposed rule is moving extremely fast. Qwest is not certain that the rule proposed by XO should or needs to be on the same track as the rules changes proposed by Qwest on March 7. XO's proposed rule is a new rule that would establish procedures which may not even be necessary given the Utah Administrative Procedures Act and which, in any event, will not likely be used for some time.

In the event the Commission wishes to act quickly on XO's proposed rule, Qwest preliminarily views many of XO's suggested revisions to Qwest's revisions to XO's original proposed rule as stylistic and believes the Commission should determine how it wishes to draft such provisions. However, Qwest suggests that if the Commission elects to publish the proposed rule that it be included in a portion of the rules other than R746-349. The R746-349 series of rules deal with "Competitive Entry and Reporting Requirements." The proposed rule does not appear to fall under that heading. Perhaps the rule might appear as part of R746-351, Pricing Flexibility, or might have a completely separate number.

Qwest objects to XO's suggested revisions to part A.4 of the proposed rule. XO's suggested revision would allow a party to conduct pre-filing discovery, including being apprised of confidential information regarding competitors. As Qwest stated during the technical conference, Qwest believes that this type of "fishing expedition" is improper. Under Qwest's suggested revisions to XO's proposed rule, a party would be required to file a request for the Commission to initiate a proceeding to consider whether the pricing flexibility of a telecommunications corporation should be revoked, conditioned or restricted and in the request provide the basis for the request. The party whose pricing flexibility was at issue ("target") and any other interested party would then respond. The Commission would then make a determination whether a sufficient basis for putting the parties and the regulatory agencies through such a proceeding had been established. As revised by XO, the party intending to submit a request could do discovery before ever stating the basis for a belief that revocation, conditions or restrictions should be imposed. At least initially, this would be done without notice to the target and an opportunity for the target and other potentially interested parties to respond. This procedure is inappropriate and offends concepts of due process and notice and could lead to unnecessary disclosure of confidential competitive information and waste of resources.

The only reasons XO offered for this pre-filing discovery during the technical conference were that it may not have information to determine whether a proceeding should be commenced and that it would not be able to determine whether a Commission decision not to initiate a proceeding was appropriate. Qwest does not believe either of these reasons justifies this unusual



Public Service Commission of Utah

April 21, 2005

Page 3

procedure. If XO or another party does not have sufficient information to provide a basis for initiation of a proceeding, it is likely that no proceeding should be initiated. With regard to the second reason, Qwest assumes the Commission would provide some basis for its decision not to initiate a proceeding in its decision which would provide all interested parties with sufficient information (provided on an aggregated or non-confidential basis) to make a judgment whether to pursue the matter further.

Qwest is still reviewing XO's proposed changes and requests the opportunity to provide a further response when that review is completed.

If the Commission believes a rule addressing this issue is necessary, Qwest is willing to continue to work with the Commission and interested parties in developing an appropriate rule. In the meantime, Qwest believes the Commission should publish rules changes consistent with Qwest's suggestions as modified by the Division's recommendation.

Sincerely,

Gregory B. Monson

Attorney for Qwest Corporation

cc: All Persons on Service List
from Technical Conference
(by email)