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Julie Orchard
Commission Secretary
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; XO Proposed Rule R746-349-X

Dear Ms. Orchard:

XO Communications Services, Inc., f/k/a XO Utah, Inc. ("XO") provides the following explanation of its proposed R746-349-X, including its revisions to the modifications proposed by Qwest Corporation ("Qwest"), in the form of a response to Qwest's April 21, 2005, letter to the Commission in this proceeding.

XO's proposed rule, like Qwest's proposed rule revisions, results directly from the changes in law resulting from 1st Substitute Senate Bill 108 ("SB 108") enacted on March 7, 2005. That legislation gave Qwest pricing flexibility for all of its services throughout its service territory in Utah, without any Commission proceeding to determine the extent to which competition can effectively substitute for more stringent regulatory oversight. Recognizing that this legislative determination was based on the current level of competition in Utah, SB 108 provides that Qwest's pricing flexibility not only can be revoked but can be subject to conditions or restrictions if "there has been or there is an imminent threat of a material and substantial diminution in the level of competition." Utah Code Ann. 54-8b-2.3(8)(a)(i)(B). This safeguard is critically important to the Commission's ability to ensure that pricing flexibility does not permit Qwest to exercise monopoly market power to the detriment of Utah consumers.

Such a proceeding is not hypothetical or unlikely to be needed for some time, as Qwest contends. The Federal Communications Commission's ("FCC's") Triennial Review Remand Order

("TRRO"),[1] for example, provides that as soon as March 11, 2006, ILECs no longer will be required to provide dark fiber loops and most dark fiber transport, or to offer DS1 and DS3 loops and transport served out of wire centers with as few as three fiber-based collocators or 24,000 business lines in some cases. Even where high capacity UNEs must continue to be available, Qwest may refuse to provide more than 10 DS1 dedicated transport circuits between wire centers and 10 DS1 loops and one DS3 loop per CLEC to any one building. Accordingly, the Commission very soon may be requested to initiate a proceeding to determine the effect that this substantial reduction in the availability of UNEs will have on local competition in Utah and whether restrictions or conditions on Qwest's pricing flexibility are necessary.[2] Consideration of XO's proposed rule thus is at least as time-sensitive as the rule changes Qwest has proposed.

XO certainly is amenable to working with Qwest and other interested parties on the language and location of the proposed rule. The primary substantive disagreement with the proposed rule concerns XO's proposal that a party that intends to file a request to initiate a proceeding under the rule be able to review confidential information retained by the Division or the Commission prior to making such a request. Qwest mischaracterizes XO's proposal as an improper "fishing expedition" that "offends concepts of due process and notice and could lead to unnecessary disclosure of confidential competitive information and waste of resources."

Qwest is making a mountain out of a molehill. XO does not propose that any discovery be conducted prior to initiation of a proceeding to examine Qwest's pricing flexibility. Rather, XO proposes that a party certify that it intends to file a request to initiate such a proceeding, which may include a request for existing records retained by the Commission or the Division. Such a request essentially is a public records request that any citizen could make, except that the Commission will have established ground rules for protecting the confidentiality of that information, rather than being involved in a court battle over whether and under what conditions the information should be disclosed. Nothing in the rule allows or should allow discovery or information requests directed to any non-governmental party, as Qwest alleges.

XO also fails to see how this procedure "offends concepts of due process and notice." A request for government records does not trigger any right to receive notice or respond except, as provided in the rule, to any party whose individual confidential information would be included in the Commission's or Division's disclosure. Qwest fails to identify any purpose that would be served by being provided notice that a party intends to bring – but has not yet brought – an action against Qwest. As a practical matter, moreover, Qwest will receive notice to the extent that any Qwest confidential information is included in the relevant Commission or Division records. Nor

[1] *In re Unbundled Access to Network Elements*, FCC 04-290, WC Docket No. 04-313 & CC Docket No. 01-338, Order on Remand (rel. Feb. 4, 2005).

[2] Qwest and other incumbent local exchange companies (" ILECs"), moreover, have appealed the TRRO, contending that they should have *no* obligation to unbundle *any* high capacity transport or loops. No one would be surprised if the D.C. Circuit, for the third time, overturns the FCC's latest unbundling rules. If Qwest prevails in its advocacy before the federal court and the FCC, therefore, the Commission unquestionably will need to initiate a proceeding to evaluate the impact of this development on competition in Utah.

has Qwest suggested how Qwest could make any response when there is no open docket, much less what it could say in response to a certification of intent to file a proceeding and a request for public records.

A party's potential need for public records prior to filing a case should be obvious. The grounds for revocation of, or conditions or restrictions on, a company's pricing flexibility concern the development or level of *competition*. The Commission annually reports to the legislature on this issue based on information it receives from all telecommunications service providers in Utah. An individual carrier has knowledge of its own operations, but with the exception of Qwest, no carrier has such information for any other carriers. Requiring a carrier to file a case based on the level of competition before being able to determine the level of competition would be a waste of party and Commission resources. Indeed, one can easily imagine Qwest filing a motion to dismiss such a case for lack of substantial factual basis, leaving anyone who may have a legitimate basis for challenging Qwest's pricing flexibility without the ability to do so.

Qwest disagrees, contending, "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." Such a statement simply ignores reality. It also is very different than the position that Qwest has taken in past proceedings. Qwest, through its provision of unbundled network elements and other services to competing providers, possesses a significant amount of information about the level of competition. Indeed, Qwest is relying solely on such information to obtain additional pricing flexibility in Washington. Qwest nevertheless consistently maintains that the Commission should consider additional carrier-specific information. In the Commission's Triennial Review Order proceeding, for example, Qwest advocated that to determine the level of facilities-based competition that Qwest faced, the Commission undertake discovery of *all* competing providers to gather "granular, state-specific information that can only be obtained from other providers in the market." Docket No. 03-999-04, Comments of Qwest Corporation at 3-4 (Sept. 19, 2003). The proposed rule stops well short of such a requirement, even though no other carrier possesses anywhere near the amount of information that Qwest maintains.

Qwest also proposes a novel procedure by which the Commission, in response to a request to initiate a proceeding, would review the information it possesses and make an independent determination of whether to grant that request. "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." That procedure unquestionably contravenes due process by providing to affected parties only a portion of the information on which the Commission bases a decision and only *after* the Commission has made that decision. Qwest cannot seriously believe that such a procedure is appropriate, and XO would be very surprised if Qwest did not challenge any such procedure if the resulting decision is adverse to Qwest.

There is no reason to reject or delay consideration of XO's proposed rule, as Qwest contends. The rule derives from the same legislation that is the basis of Qwest's proposed rule modifications. The difference, of course, is that Qwest does not stand to benefit from XO's proposed rule, as opposed to the rule changes that Qwest advocates. Nor should the Commission consider these rules piecemeal, giving Qwest what it wants now as well as the opportunity to engage in a protracted fight over the procedures that should apply should an affected party challenge Qwest's pricing flexibility. Rather, the Commission should finalize all rule changes and additions necessitated by SB 108 and publish all such rules simultaneously.

Very truly yours,

Davis Wright Tremaine LLP

Gregory J. Kopta