

Stephen F. Mecham (4089)  
CALLISTER NEBEKER & McCULLOUGH  
Gateway Tower East Suite 900  
10 East South Temple  
Salt Lake City, Utah 84133  
Telephone: (801) 530-7300  
Facsimile: (801) 364-9127  
Email: [sfmecham@cnmlaw.com](mailto:sfmecham@cnmlaw.com)

*Attorneys for All West Communications, Inc.*

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In Regard to the Request of ALL WEST COMMUNICATIONS, INC. for Revision to Exchange Boundaries	DOCKET NO. 02-2270-01  <b>Notice of Appearance of Counsel, Notice of Resumption of Proceeding, Petition for Scheduling Conference, and Supplement to Request for Agency Action</b>
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Stephen F. Mecham hereby gives notice of his appearance as counsel for All West Communications, Inc., (“All West”) in this matter. All West originally filed its Request for Agency Action February 1, 2002 requesting that the Commission revise existing service territory boundaries between All West and Qwest Communications, Inc. (“Qwest”) to permit All West to serve the Promontory Development (“Promontory”) as the incumbent local exchange carrier. Promontory is a new community that straddles the two companies’ service territories. To date, the development in Promontory has occurred in All West’s territory. Qwest’s nearest facilities to Promontory are approximately .8 miles from the development and the nearest home within the development is an additional 1.2 miles away. The Promontory developer has asked that All West serve the entire development.

On April 5, 2002, the Division of Public Utilities (“Division”) filed a memorandum with the Commission placing this matter “on hold” pursuant to a request from All West to delay its submission of responses to data requests the Division had sent to All West. All West believed a delay would allow the parties to negotiate to resolve this matter, but negotiations have been fruitless. As a result, All West, by and through its counsel, hereby gives notice of its intent to resume this proceeding and petitions the Commission for a Scheduling Conference to establish a schedule to proceed.

Finally, All West incorporates by reference its original Request of Agency Action in this matter and supplements the Request with the following:

1. The Commission and the Utah Supreme Court have already addressed issues similar to those presented by All West’s request. In *Empire Electric Association, Inc. v. Public Service Commission*, 604 P.2d 930 (Utah 1979), the Court affirmed a Commission decision permitting Utah Power to provide electric service to Atlas Minerals’ Dunn Mine even though the mine was entirely in Empire Electric’s service territory. The mine was just one mile outside Utah Power’s certificated area and Utah Power had facilities within one mile of the mine portal. Empire Electric’s closest facilities were more than six miles away and Atlas did not want to pay the costs to extend Empire Electric’s facilities to the mine. The Commission found, and the Court affirmed that, “A certificate of convenience and necessity does not in and of itself confer exclusive rights. Nor is a prior decision as to the issuance of a certificate res judicata and thereafter binding on the Commission.” *Id.* at 933. The Court determined that there can be conditions where the public interest calls for an outcome different than strict adherence to certificated boundary lines. In *Empire Electric*, one such condition arose where Utah

Power's facilities were closer to the customer than those of Empire Electric's, the certificated provider.

In this case, All West's and Qwest's territories were established long before there were any plans of development in the affected area. Promontory now straddles the two providers' territories. All West has placed facilities to and in Promontory at a cost of over \$1 million and is already serving customers in Promontory. The Promontory developer has requested that All West serve the entire development and All West is willing to assume the responsibilities of carrier of last resort for the entire development. Qwest has no facilities in the immediate area and would therefore have to extend its network at least .8 miles to reach Promontory and another 1.2 miles to reach the closest home, the expense of which the Promontory customers outside All West's current territory would have to pay. There would be no such costs of extension to customers if the Commission grants All West's Request for Agency Action and customers throughout Promontory would be assured access to the same services at the same prices.

Qwest maintains that it is willing to serve customers in Promontory, but the Court in *Empire Electric* held that "it is not necessary to make findings that the present certificate holder is not performing its utility obligations when another applicant is awarded the right to serve an area." *Id.* Based on the facts presented by this case, the public interest calls for an outcome different than leaving service territory boundaries as they were established long before there was any development in the affected area. Today if the Commission were setting boundaries, it would not divide a neighborhood and create service difficulties that upset customers. Customers in Promontory should be

treated equally and granting All West's Request for Agency Action will ensure that result.

2. Should Qwest's and All West's boundaries be left as they are currently, next door neighbors in Promontory served by different providers will be required to pay toll charges when they call one another. That is unreasonable, violates the principle of community of interest, and is not in the public interest. Such an outcome will cause customer confusion and anger that the Commission could prevent by adjusting the boundaries between Qwest's and All West's service territories.

In Docket No. 04-2419-01, Qwest stipulated to seek an amendment to its certificate to exclude the area served by the City of Eagle Mountain's municipal telephone system from Qwest's Lehi exchange so that Direct Communications could purchase the Eagle Mountain system and be certificated to serve the excluded territory. As the Commission knows, the City of Eagle Mountain originally insisted on creating a municipal telephone company within Qwest's territory. At the time, the area had never been served and Qwest had no facilities there. The municipal telephone company proved to be a significant detriment to Eagle Mountain customers. The customers ended up with substandard service and their telephone rates were some of the highest in Utah.

In order to solve the problem, Qwest, with approval of the Commission, ceded the Eagle Mountain area to Direct Communications. It was an appropriate solution that ultimately should work to the benefit of the customers in the City of Eagle Mountain. In this case, some customers in Promontory will be treated inequitably if the Commission fails to act. Realignment of the service territory boundaries between Qwest and All West as requested by All West is a good solution to a difficult problem. Realignment will be

considerably less expensive for customers in Promontory and will ensure they will have the same services and be able to call their neighbors toll free.

3. Even though Qwest opposes All West's Request for Agency Action in Utah, last spring Qwest initiated a similar proceeding before the Colorado Public Utilities Commission. In Colorado Docket No. 04A-254T, Qwest filed an amended application seeking permission from the Colorado Commission to serve all of the Front Range Airport and a business development, only part of which is in Qwest's service territory. The other part is in Eastern Slope Rural Telephone Association's certificated territory. Currently, Qwest is providing service to the western part of the airport, but apparently, as with Promontory in Utah, the Front Range Airport asked that Qwest serve the entire airport and business development. Though Qwest is seeking an expansion of its exchange boundaries, it is not offering to become the carrier of last resort for the area.<sup>1</sup> It simply wants to serve the Front Range Airport and the business development within Eastern Slope Rural Telephone Association's certificated territory. The Colorado Commission has not yet decided the case, but it is completely inconsistent for Qwest to take the position it has taken in Colorado and then argue oppositely in Utah that All West's request is somehow not in the public interest. The Promontory developer has asked that All West be able to serve the entire development as the incumbent provider to ensure that all customers within the development can receive the same services at the same prices. That request should not be ignored. Granting All West's petition will have no effect on Qwest's existing service, customers will be better served, and the

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<sup>1</sup> In testimony, Qwest indicated it would accept the designation of provider of last resort if the Colorado Commission required it. *See* Rebuttal testimony of Paul R. McDaniel, p. 10.

Commission will prevent service irregularities and inequities that inevitably will arise if the certificated service territories are left as they are.

Wherefore, based on the foregoing and on the original Request for Agency Action filed in this case, All West renews its request that the Commission expand All West's Jordanelle exchange boundary in accordance with the description in paragraph 4 of the original Request for Agency Action to encompass all of Promontory. All West would then serve all the Promontory customers as an incumbent local exchange carrier and be able to provide them with the same services at the same prices. All West also requests that the Commission hold a Scheduling Conference to establish a schedule to proceed in this matter.

Respectfully submitted this 22nd day of November, 2004

Callister Nebeker & McCullough

Stephen F. Mecham

## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Notice of Appearance of Counsel, Notice of Resumption of Proceeding, Petition for Scheduling Conference, and Supplement to Request for Agency Action** in Docket No. 02-2270-01 to be mailed by first class mail, postage prepaid, this 22<sup>nd</sup> day of November, 2004 to the following:

Michael Ginsberg  
Assistant Attorney General  
P.O. Box 140857  
Salt Lake City, Utah 84114-0857

Gregory B. Monson  
STOEL RIVES  
201 South Main Street, #1100  
Salt Lake City, Utah 84111

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