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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of QWEST
CORPORATION'S Land Development
Agreements (LDA) Tariff Provisions

Docket No. 03-049-62

**MEMORANDUM IN SUPPORT OF
PETITION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

Petitioners, Clear Wave Communications, L.C. ("Clear Wave"), East Wind Enterprises, L.L.C. ("East Wind") and Prohill, Inc. dba Meridian Communications of Utah ("Prohill") (collectively "Petitioners" or "Clear Wave"), by and through their counsel of record, Kevin M. McDonough, and pursuant to and consistent with Rule 65A, Utah Rules of Civil Procedure and § 63-46b-20 of the Utah Code hereby submit this Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction.

I. INTRODUCTION

Option 2 of Qwest's LDA tariff has been a focal point of numerous hearings before the Public Service Commission ("Commission") over the course of the last several years. In this particular Docket, the Commission issued an Erratum Report and Order on June 6, 2005 ("Order") therein finding and concluding that Qwest's process for placement of telecommunications facilities and new residential developments as set forth in its Price List filed May, 2005, was reasonable. The effect of the Order is to ostensibly abolish Option 2 as an

alternative for the provisioning of telecommunications facilities new residential developments. That is, under Option 2, developers were previously permitted to place telecommunications facilities for Qwest, and Qwest was obligated to purchase the facilities subject to the terms and conditions set forth in Section 4.4 of Qwest's Utah Exchange and Network Services Tariff ("LDA tariff"). Clear Wave filed a Petition for Review of the Order, therein requesting a reversal of the Order and stay of the Order pending review by the Commission as a whole. On or about July 15, 2005, Qwest filed a response to Clear Wave's Petition for Review. The time period for the Commission to rule upon the Petition for Review has not yet elapsed.

The Order issued on June 6, 2005, concluded that "Qwest's new facility installation process for new residential developments, as outlined in Qwest's filed testimony in this Docket and as recently included in Qwest's Price List filing made in May, 2005 is reasonable. We are unable to find a 1997 tariff Option 2 type of alternative must be made available, in addition to the installation terms and conditions Qwest has voluntarily included."

In Qwest's LDA Price List, it is provided:

An Option 2 Land Development Agreement entered into pursuant to the Company's Exchange and Network Services [Tariff] prior to the effective date of this Price List will be honored if placement of telecommunications facilities pursuant to the Agreement is completed prior to July 31, 2005.

Ostensibly consistent with the LDA Price List, together with the Order, Qwest has indicated that it fully intends to enforce the moratorium that is placed upon Option 2 contractors, including Clear Wave, mandating they cease the provisioning of telecommunications facilities on Option 2 contracts as of July 31, 2005. That is, it is Qwest's position that any and all Option 2 work presently in progress under the terms of the LDA Tariff must be concluded by July 31, 2005.

It is these Petitioners' position that such a cut-off date is unreasonable and will cause such harm that a Temporary Restraining Order and Preliminary Injunction is justified.

II. LAW AND ANALYSIS

POINT A

The Purpose of a Temporary Restraining Order and Preliminary Injunction is to Maintain the Status Quo Pending Resolution of the Issues by a Proper Tribunal Which can Exercise Jurisdiction Over the Matter.

Utah Rule of Civil Procedures 65A. Injunctions, sets forth in pertinent part as follows:

(a) *Preliminary injunctions.*

(a)(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(a)(2) *Consolidation of hearing.* Before or after the commencement of the hearing of an application for preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible at the trial on the merits becomes part of the trial record and need not be repeated at the trial. The subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) *Temporary restraining orders.*

(b)(1) *Notice.* No temporary restraining order shall be granted without notice to the adverse party or that party's attorney unless (A) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party's attorney can be heard in opposition and (B) the applicant or the applicant's attorney certifies to the court in writing as to the efforts, if any, that have been made to give notice and the reasons supporting the claim that notice should not be required.

(e) *Grounds.* A restraining order or preliminary injunction may issue only upon a showing by the applicant that:

(e)(1) The applicant will suffer irreparable harm unless the order or injunction issues;

(e)(2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;

(e)(3) The order or injunction, if issued, would not be adverse to the public interest; and

(e)(4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

The main purpose of a Preliminary Injunction is simply to preserve the status quo pending the outcome of the [Docket]. In issuing a Preliminary Injunction, [the Commission] is primarily attempting to preserve the power to render a meaningful decision on the merits. Thus the [Commission] must determine whether, in the interest of effective justice, a Preliminary Injunction should issue in the present [Docket].

Tri State Generation & Transmission Association, Inc v. Shoshone River Power, Inc., 805

F2d 351,255 (10th CIR 1986) (citations omitted.)

POINT B

All of the Necessary Grounds for Issuance of a Temporary Restraining Order and Preliminary Injunction Exist in this Docket.

The Order of the Commission permitting Qwest to absolutely forbid all Option 2 contractors from continuing with the provisioning of telecommunications network service (which they are presently working) after July 31, 2005, imposes a substantial hardship upon Petitioners herein to the extent that they have expended considerable time, effort, labor and monetary resources for the purpose of completing the several Option 2 projects which were commenced and/or under contract prior to or during the proceedings in this Docket. (See Affidavit of Stephan G. Allen, attached hereto and filed simultaneously herewith)

In particular, Petitioners believe that, based upon the inordinate and unexpected course of events that have occurred in this matter, i.e., the substantial wet construction season that the Intermountain Area of Utah has experienced this year, developers and builders have not been able

to adequately prepare the ground for construction, thereby in turn delaying the work that the Option 2 contractors could perform. The Option 2 contractors have been unable to devote the necessary time, man power and resources necessary to complete the Option 2 projects that were either underway or under contract during the pendency of this Docket, simply because the preliminary work to be perform by the developer was hampered and delayed because of an act of God, i.e., the weather.

Additionally, this matter is before the Commission on these Petitioners Petition for Review of the Erratum Order issued by the Commission on June 6, 2005.

(1) Appropriate standard of proof and balancing of four stated factors.

The Advisory Committee Note to Rule 65A of the Utah Rules of Civil Procedure provides:

The standards set forth in paragraph (e) are derived from Tri-State Generation & Transmission Ass'n. v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986), and Otero Savings & Loan Ass'n. v. Federal Reserve Bank, 665 F.2d 275, 278 (10th Cir. 1981). Federal courts require proof of compliance with each of the four standards, *but the weight given to each standard may vary*. The substantial body of federal case authority in this area should assist the Utah courts in developing the law under paragraph (e).

Utah Rules of Civil Procedure 65A advisory committee's note (emphasis added.)

In Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986), the Tenth Circuit held that no one factor is determinative, and all factors must be considered.. The Advisory Committee Note itself points out that the weight given to each of the four factors may vary depending on the facts and circumstances. In fact, the balancing of the various competing factors is, in part, expressly provided for in the second factor, namely whether the threatened injury to the applicant outweighs the potential harm to the party

restrained. Further, the fourth factor itself states that only a "substantial likelihood" of prevailing on the merits of the underlying claim must be shown.

A party "is not required to prove his case in full at a preliminary injunction hearing." University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). Rather, in "hearings upon motions for temporary or preliminary injunctive relief, the burden is upon the one requesting such relief to make a prima facie case showing a reasonable probability that he will ultimately be entitled to the relief sought." Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980); See also, West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 235 (4th Cir. 1971) ("It is sufficient if the court is satisfied that there is a probable right and a probable danger and that the right may be defeated, unless the injunction is issued."); Williams v. San Francisco Unified School District., 340 F. Supp. 438, 450 (N.D. Cal. 1972); ("The movant need only establish a reasonable probability or possibility of eventual success on the merits.") West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 235 (4th Cir. 1971) ("It is sufficient if the court is satisfied that there is a probable right and a probable danger and that the right may be defeated, unless the injunction is issued.");

(2) Clear Wave will suffer irreparable harm absent the requested relief.

As noted above, the weight to be given to each of the four factors set forth in Rule 65A of the Utah Rules of Civil Procedure may vary depending upon the particular facts and circumstances of this Docket. In this Docket, the Petitioners have justifiably relied upon Qwest's approval and issuance of numerous Option 2 projects.

It would be a grave injustice to allow Qwest to enforce such moratorium relative to the cessation of all Option 2 contractors providing telecommunications network services by July 31, 2005. Such a moratorium and cessation of completing these projects would severely and

negatively impact Petitioners herein; and very probably the timely completion of network distribution facilities in new land development. This would be adverse to the public interest in general.

In this situation, Petitioners will suffer irreparable harm should Qwest's July 31st deadline not be lifted, or alternatively, extended for a reasonable period of time such that Petitioners' may complete the projects upon which they have begun and which have been delayed as a result of the shortened construction season due to the unexpectedly wet construction season the Intermountain Area has experienced this year.

(3) Threatened injury to Petitioners outweighs threatened injury to Qwest.

If Petitioners' are not permitted to complete the Option 2 work that they are presently providing on projects which are currently in progress, the risk is run that Clear Wave will not be adequately compensated for the work that it has thus far performed. This threatened injury far outweighs any injury that Qwest might incur by allowing Clear Wave to complete the work that it commenced began prior to Qwest making it known that it intended to abolish Option 2 in total.

(4) Requested relief is not adverse to the public interest.

The requested relief would uphold the sanctity of established legal process and the right of Option 2 contractors to complete the projects upon which they commenced and had been working prior to the Order issued in this Docket on June 10, 2005. Accordingly, the granting of a Preliminary Injunction and Temporary Restraining Order would promote rather than adversely effect the public interest. Additionally, inasmuch as Clear Wave has been working these various projects for the purpose of provisioning telecommunications services, it is in the public's best interest to allow Clear Wave to complete the Option 2 jobs which it has commenced. In any

event, there are certainly no adverse effects that will occur to the public if Clear Wave, rather than Qwest, completes the projects.

(5) Substantial likelihood that Petitioners will prevail on the merit.

Given the equities of this case, together with the likelihood of an appeal, there is indeed a substantial likelihood that Clear Wave will prevail on the merits of this action.

DATED this the _____ day of July, 2005

Kevin M. McDonough
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of July, 2005 a true and correct copy of **MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** was served upon the person named below, at the address set out below their name, either by mailing postage prepaid, hand-delivery, Federal Express, Email, or by telecopying to them a true and correct copy of said document.

Julie Orchard Lindsay Mathie Public Service Commission 160 East 300 South P. O. Box 45585 Salt Lake City, Utah 84145-0585 jorchard@utah.gov lmathie@utah.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Hand-Delivery <input checked="" type="checkbox"/> Email <input type="checkbox"/> Facsimile <input type="checkbox"/> Other:
Gregory B. Monson David L. Elmont Stoel Rives LLP 201 South Main, #1100 Salt Lake City, Utah 84111 gmonson@stoel.com dlelmont@stoel.com	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input checked="" type="checkbox"/> Email <input type="checkbox"/> Facsimile <input type="checkbox"/> Other:

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