

Kevin M. McDonough (#5109)
136 South Main Street
Suite 404, Kearns Building
Salt Lake City, Utah 84101
Ph: 801-531-6088
Fax: 801-531-6093

Attorneys for SBS Telecommunications, Inc.

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 OPPOSITION TO
QWEST'S NOTICE OF VIOLATION OF
ORDER AND STATUTE AND REQUEST
FOR EXPEDITED RELIEF**

SBS Telecommunications, Inc. ("SBS"), by and through its legal counsel of record, and pursuant to and consistent with § 63-46b-12 of the Utah Code, and Utah Administrative Rule 746-100-11, respectfully submits this Memorandum in Opposition to Qwest's Notice of Violation of Order and Statute and Request for Expedited Relief ("Qwest Notice") concerning the above referenced Docket.

INTRODUCTION

SBS is a private company which prior to June 6, 2005, engaged in the business of providing developers/builders with telecommunications network development facilities for new

housing development projects pursuant to an LDA entered into under Option 2, Section 4.4.C.2 of Qwest's Tariff. ("the Tariff")¹

The Tariff required Qwest to enter into an LDA with developers/builders that addressed the provisioning of telephone distribution facilities within new areas of land development. The Tariff required Qwest to offer two options for entering into the LDA. Under the first option ("Option 1"), Qwest performed the engineering, design, placement and splicing of the facilities. These tasks were performed for no charge so long as Qwest's costs did not exceed a specified formula.

Under the second option ("Option 2"), Qwest was obligated to pay the developer/builder their costs in performing the engineering, design, placement and splicing of the facilities.

There has been protracted litigation regarding the meaning and application of Option 2 of the LDA tariff in this Docket, as well as in other Dockets. The most recent hearings in this Docket before the Commission concluded on May 3, 2005; and on June 6, 2005, the Commission issued an Erratum Order ("the Order") in this Docket, therein eliminating Option 2 of the LDA tariff.

As a result of the Commission's Order, and in an attempt abide by the Order and to earn a livelihood, SBS implemented a business plan for the provisioning of telecommunications product whereby SBS would enter into a contract with the Developer. The contract between SBS and the Developer gives SBS the exclusive right to provide telecommunication product to the developer for use by any LEC, not just Qwest.

¹ Inasmuch as issues concerning Option 2 of the LDA Tariff have been before the Commission numerous times over the past several years, the Commission is familiar with the services that Option 2 Contractors provided, as well as the general nature of the disputes between the parties hereto. As such, SBS will refrain from going into undue detail regarding the historic relationship between Qwest and Option 2 contractors.

On July 15, 2005, Qwest filed its “Notice of Violation of Order and Statute in Request for Expedited Relief”, therein claiming that SBS has circumvented or otherwise violated the Commission’s June 6th Order and Utah Code § 54-4-25.

POINT ONE

SBS IS NOT WITHIN THE CLASS OF PERSONS REQUIRED TO OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY .

A. SBS is not a “telephone corporation”.

The gravaman of Qwest’s argument is that SBS has violated this Commission’s June 6, 2005 Order and Utah Code Ann. §54-4-25 by failing to obtain a certificate of public convenience and necessity. However, SBS does not fall under the statutory definition of a “telephone corporation” and therefore is not within the scope of persons required to obtain a certificate of public convenience and necessity.

Section 54-4-25 of the Utah Code provides:

a ... **telephone corporation**... may not establish, or begin construction or operation of a line, route, plant or system or of any extension of a line, route, plant, or system, without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require the construction. (*bold added*)

The Code defines a “telephone corporation” as an entity that “owns, controls, operates, manages or resells a **public telecommunications service.**” Section 54-8b-2 (bold added.)

Finally, “public telecommunications service” is defined as;

the two-way transmission of signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, lightwaves, or other electromagnetic means offered to the public generally.

Accordingly, the Utah Code requires that a certificate of public convenience and necessity be obtained by a “telephone corporation” engaging in certain activity. If an entity does not fall within the definitional scope a “telephone corporation” it is not necessary to first obtain a certificate of public convenience and necessity prior to engaging in its work.

Additionally, SBS is not a “telephone company” because it does not provide a dial tone or engage in “two-way transmissions of . . . signals”; and therefore does not provide “public telecommunications services,” which requires the preauthorization of a certificate of public convenience and necessity. Rather, SBS only provides trenching and telecommunications products. This work is simply not addressed in the provisions of the Code relied upon by Qwest.

The plain language of the statute does not support Qwest’s position and should not be mangled to give Qwest its desired relief. SBS is a construction and telecommunications development company and does not require a certificate of public convenience and necessity to operate.

B. SBS does not offer “free trenching” to any of its clients.

Qwest falsely asserts that “SBS has induced developers to enter into the exclusive assignments by offering them free trenching.”² Therefore, Qwest’s arguments based on this erroneous contention must be disregarded.

Moreover, it is important to recognize that the developer is fully aware of the fact that Qwest is not obligated to purchase the facilities from SBS; and therefore that it runs risk of having telecommunications facilities in place and an inability to have dial tone if Qwest or some

² To the extent that Qwest disseminates and otherwise publishes its statement that Qwest “offers free trenching”, such statements are potentially if not probably extremely harmful for SBS’s reputation. That is, if a client developer hears that Qwest is offering “free trenching”, that developer might get the impression that Qwest has been cheating them out of a “free” service.

Accordingly, and to the extent that an offer of “free trenching” has any relevants on this issue, the same is a false statement.

other provider of public telecommunications services declines to purchase the product. The agreements reached between the developer and SBS is an arms-length transaction and there is no duress or undue influence being imposed upon the developer to sign the contract. For the same reason, these agreements do not create a risk of untimely customer services. If SBS's work is inadequate, Qwest should not purchase the facilities.

C. SBS is not acting as a public utility.

Having failed in their statutory arguments, Qwest also asserted that “the very fact that SBS is placing facilities in public utilities easements” indicates that SBS is acting as a public utility in doing so.³ This argument is specious. The statute simply does not make SBS a public utility.

As set forth by Qwest, § 54-3-27 sets forth, in part, as follows:

- (1) As used in this section, “public utility easement” means the area on a recorded plat map or other recorded documents that is dedicated to the use and installation of public utility facilities.
- (2)(a) A public utility easement provides a public utility with:
 - (i) the right to install, maintain, operate, repair remove, replace, or relocate public utility facilities; and
 - (ii) the rights of ingress and egress within the public utility easement for public utility employees, contractors, and agents.

This section of the code defines “public utility easement” as being an area of a development which is designated on a plat. A person making use of a “public utility easement”, does not equate to that person being a public utility. The purpose of establishing a public utility easement is so that public utilities may have access to its utilities which are located upon the property owned by the developer or subsequent homeowner.

This section of the Utah Code gives public utilities certain easements when providing certain services. The statute does not however, preclude a person who is not a public utility,

³ See page 6 of Qwests Notice.

such as SBS, from entering upon the land of a developer (or subsequent homeowner) and provide trenching and telecommunications product.

This section of the Utah Code is somewhat remedial in nature to the extent that “a public utility shall restore or repair, at the expense of the public utility, any fence, grass,...bushes, flowers,...or asphalt damaged or displaced from the exercise of easements rights described in subsection (2)(a).

Accordingly, SBS is not a public utility; and it may tread upon a developer owned land for the purpose of placing product in a “public utility easement” wherein the developer still owns the real estate.

CONCLUSION

Ironically, after aggressively seeking deregulation via the elimination of Option 2, Qwest now seeks to exercise monopoly power. Further, rather than engaging in an “unlawful scheme” as alleged by Qwest, SBS is simply implementing a business plan to avail itself of the free market to enable its principals to earn a livelihood.

DATED the _____ day of July, 2005.

Kevin M. McDonough
Attorney for SBS Telecommunications, Inc.

CERTIFICATE OF MAILING

I hereby certify that on this the ____ day of July, 2005, I caused to be delivered by U.S. Mail, postage prepaid, and by electronic mail, a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO QWEST'S NOTICE OF VIOLATION OF ORDER AND STATUTE AND REQUEST FOR EXPEDITED RELIEF to the following individuals:

David L. Elmont
Stoel Rives, LLP
201 S MAIN ST STE 1100
SALT LAKE CITY, UT, 84111
dlelmont@stoel.com

Patricia E. Schmid
Assistant Attorney General
160 E 300 S
POB 140847
SALT LAKE CITY, UT, 84114
pschmid@utah.gov

Reed Warnick
Assistant Attorney General
160 East 300 South
Salt Lake City, Utah 84111
rwarnick@utah.gov

Olivia Smith
Committee of Consumer Service
160 East 300 South, 2nd Floor
Salt Lake City, Utah 84111
osmith@utah.gov

Julie Orchard
Lindsay Mathie
Public Service Commission
160 East 300 South
PO Box 45585
Salt Lake City, Utah 84145-0585
jorchard@utah.gov
lmathie@utah.gov
