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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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In the Matter of QWEST CORPORATION'S Land Development Agreements (LDA) Tariff Provisions	Docket No. 03-049-62
	<b>PETITION FOR REVIEW</b>

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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 legal counsel of record, and pursuant to and consistent with §§ 63-46b-12 and 54-7-15 of the Utah Code, and Utah Administrative Rule 746-100-11, respectfully submit this Petition for Review concerning the above referenced matter.

Petitioners request that the Public Service Commission of Utah ("the Commission") review the Erratum Report and Order issued on June 6, 2005 ("the Order").

This request for agency review is based on the Commission's (1) failure to follow appropriate procedure; (2) acting beyond its scope of authority and jurisdiction in erroneously interpreting provisions contained within Senate Bill 108 (which has been codified in Chapter 8b of Title 54, Utah Code); and (3) reliance upon facts and evidence not contained within the record; and (4) otherwise failing to act in accordance with due process standards.

## PROCEDURAL HISTORY

1. On August 5, 2002, two Option 2 contractors, not parties to this Petition for Review, initiated a formal proceeding (Docket No. 02-049-66; (“`02 Docket”)) against Qwest Corporation (“Qwest”) to determine the definitional scope of the phrase “permanent single family dwelling,” as that term is used in Section 4.4 of Qwest’s Exchange and Networking Service Tariff. (“LDA Tariff” or “the tariff”)

2. On January 31, 2003, Qwest filed a Motion to Enlarge Scope of Proceedings in the `02 Docket, requesting the Commission to entertain additional issues concerning the tariff, including certain “cost” issues.

3. On July 15, 2003, the Public Service Commission issued a Report and Order in the `02 Docket, therein determining that “the phrase ‘permanent single family dwellings’ is to include only detached homes.” Additionally, the Commission ruled that “Qwest’s Motion to Enlarge Scope of Proceedings is denied, but a new docket will be opened to address the issue raised in that Motion.”

4. Consistent with the Commission’s July 15, 2003, final order in Docket No. 02-049-66, the instant Docket was opened for the purpose of determining whether Qwest should be required to pay more for installation of facilities under Option 2 of the LDA Tariff than it would be required to pay under Option 1 of the LDA Tariff.<sup>1</sup>

5. A Scheduling Conference was held in the instant Docket on January 15, 2004. At that time, Qwest sought and received approval to bifurcate the cost issue from all other issues, with the instant Docket addressing issues on a “going forward” basis. More specifically, and as set forth in the Scheduling Order dated January 23, 2004, “it was decided that the parties would

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<sup>1</sup> Indeed, in its initial brief filed in this Docket on February 9, 2004, Qwest asserts that “[t]he Commission must determine whether Qwest should be required to pay more for Option 2 LDAs going forward, separate and apart from how the current tariff is appropriately understood.”

address, in briefs, a foundational issue regarding this tariff: Whether Qwest can or should be required to pay more than its cost would be under Option 1 of the LDA tariff for facilities placed under Option 2 of the tariff, assuming the same specifications and timing.” A Briefing Schedule was ordered by Administrative Law Judge, Doug Tingey.<sup>2</sup>

6. Another Scheduling Conference was held in this Docket on July 21, 2004. A Scheduling Order was entered on July 21, 2004, by Hearing Officer, Sandy Mooy, wherein it was set forth that a Technical Conference would be conducted on August 9, 2004.

7. Consistent with the Scheduling Order entered on July 21, 2004, on August 9, 2004, the Commission hosted a Technical Conference regarding the negotiation of revised tariff provisions. The only revision seriously discussed by Qwest at that conference was the removal of Option 2. That conference ended with the parties at an impasse.

8. The Scheduling Order of July 21, 2004, also set forth that Qwest shall file and serve upon the other parties a proposed tariff and supporting testimony by September 13, 2004. The Scheduling Order further set forth that “discovery may be conducted [by the parties to the Docket].”

9. A “Second Scheduling Order” was issued on November 1, 2004, wherein the Hearing Officer, Sandy Mooy, set a cut-off date for intervention of interested parties; and further established a schedule for the filing of “pre-filed written testimony”. Finally, the Scheduling Order established that “hearings will be conducted Thursday and Friday, January 20 and 21, 2005, at 9:00 a.m....”.

10. As a result of conflicts with the calendar of the Public Service Commission, the hearings scheduled for January 20 and 21, 2005 were continued.

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<sup>2</sup> Briefs were subsequently submitted by Qwest, Clear Wave, SBS Telecommunications, Inc., The Division of Public Utilities (“Division”) and the Utah Committee of Consumer Services (“Committee”).

11. The Commission conducted hearings in this Docket on April 14, 15, May 23 and May 24, 2005.

12. In addition to the pre-filed written testimony submitted by the parties to the instant Docket, live testimony was given during the hearings; and the parties who submitted pre-filed written testimony were subject to cross examination.

13. During the pendency of the Docket, Ms. Laura Scholl of Qwest Corporation, inquired of Hearing Officer, Sandy Mooy, as to when he believed a Report and Order would be issued in the instant Docket. Mr. Mooy's response was that the timing and issuance of a Report and Order would be contingent upon when a transcript of the hearings would be made available, such that the individual members of the Commission could review the same.

14. On June 2, 2005, a Report and Order was issued by the Commission.

15. On June 6, 2005, an Erratum Report and Order was issued by the Commission.

16. On or about June 7, 2005, the Court Reporter who was present during the hearings in this matter advised the undersigned that the testimony given at the hearings had not at that time been transcribed, let alone submitted to the Hearing Officer, Sandy Mooy or the Commission.

17. The Erratum Report and 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 the docket and as recently included in Qwest's price list filing made in May, 2005, is reasonable. We are unable to find that a 1997 tariff Option 2 type of alternative must be made available, in addition to the installation terms and conditions Qwest has voluntarily included."

## GROUNDS FOR REVIEW

Petitioners herein respectfully request review of the Commission's Report and Order based upon the following grounds:

### 1. THE REPORT AND ORDER ENTERED IN THIS DOCKET DOES NOT COMPLY WITH UTAH ADMINISTRATIVE CODE R. 746-100-11.

It is appropriate, and indeed necessary to have the Erratum Report and Order in this matter reviewed by the Commission inasmuch as the Report and Order fails to comply with the mandates of Utah Administrative Code R. 746-100-11. Because the form of the Report and Order is deficient, questions are raised as to whether or not appropriate and mandated procedures were followed.

Utah Administrative Code R. 746-100-11.B sets forth in full as follows:

Recommended Orders-If a case has been heard by less than the full Commission, or by an Administrative Law Judge, the official hearing the case shall submit to the Commission a recommended report containing proposed Findings of Fact, Conclusions of Law, and an Order based thereon.

The hearings that took place in this Docket were heard by an Administrative Law Judge, Sandy Mooy. Pursuant to R. 746-100-11.B, it was incumbent upon Mr. Mooy to submit to the Commission a Recommended Report containing proposed Findings of Fact, Conclusions of Law, and an Order based thereon. It is questionable whether this procedure was adhered to in the Docket. More specifically, the Erratum Report and Order issued on June 6, 2005, makes absolutely no mention of this matter being submitted to the Commission upon a Recommended Report containing any proposed Findings of Fact or Conclusions of Law. To the extent that there are no such proposed Findings of Fact or Conclusion of Law submitted by Mr. Mooy to the Commission, the Report and Order issued in this matter is deficient for failure to comply with

the mandatory language establishing the procedure for matters heard by “less than the full Commission, or by an Administrative Law Judge”.

Additionally, the Erratum Report and Order fails to comply with R. 746-100-11.A which sets forth that “[a] short synopsis of the order, placed at the beginning of the order shall describe the final resolutions made in the order.” A cursory inspection of the Erratum Report and Order issued in this case clearly shows that such a “short synopsis” is absent.

While the form of the Erratum Report and Order might be considered insignificant by Qwest (and/or the Commission), Petitioners herein beg to differ. The Utah Administrative Code, and the mandates contained therein, were obviously set forth for a purpose. One such purpose is to make clear the basis for the Commission’s Order, and to ensure that the Commission, as a whole, considered the matter.

2. THE ADMINISTRATIVE LAW JUDGE IN THIS MATTER, AND IN TURN THE COMMISSION, HAS ACTED BEYOND THE SCOPE OF ITS AUTHORITY.

While Clear Wave does not dispute the Commission’s authority to render a decision in this matter, to the extent the Report and Order relies upon Senate Bill 108 (which has been codified in Chapter 8b of Title 54, Utah Code) in support of its decision, said reliance is misplaced and the Report and Order should be reviewed. That is, this Commission is without authority or jurisdiction to interpret the application of Senate Bill 108 as related to issues in this Docket, especially when the parties hereto have not had ample opportunity to fully present their respective positions to the Commission concerning the same. The process the Commission employed (or failed to employ) to interpret the provision is significant.

3. THE REPORT AND ORDER ISSUED IN THIS DOCKET RELIES UPON FACTS AND EVIDENCE NOT CONTAINED WITHIN THE RECORD.

Utah Administrative Code R. 746-100-11.A requires that “[f]inal orders shall have a concise summary of the case containing the salient facts, the issues considered by the Commission and the Commission’s disposition of them.”

The Report and Order issued in this Docket fails to contain many “salient facts”; and moreover, sets forth evidence and facts which are not contained within the record.<sup>3</sup>

One example of the Commission’s misapplication of facts is related to a mixed question of fact and law. More specifically, at page six (6) of its Erratum Report and Order, the Commission states as follows:

Pursuant to legislation passed in the 2005 legislative session, Qwest is to flexibly price its communication services through a price list; Qwest may price its services in response to market operations, evidenced through customers’ demands and willingness to obtain Qwest’s services at Qwest’s prices in competition to other carriers services at the prices demanded by these competing carriers. The Commission no longer has authority to review the costs associated with the provision of Qwest’s services, or to set the prices of Qwest’s telecommunications services.

Another erroneous statement of fact is set forth at page 8 of the Erratum Report and Order, wherein it is set forth that “[b]ecause it is the developer (not Qwest) who chooses the particular Option 2 contractor, Qwest is unable to affect the Option 2 contractor whose services may be causing difficulties for Qwest.” This “fact” is not supported by the record; rather, there is significant testimony which has been submitted by the Option 2 contractors that indicates that Qwest is indeed able to affect the Option 2 contractor whose services are provided.<sup>4</sup>

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<sup>3</sup> Inasmuch as the Commission issued this Order without the benefit of a transcribed record, it is difficult, if not impossible to ascertain whether or not all “salient facts” were considered by the Commission and contained within the Report and Order.

<sup>4</sup> The Erratum Report and Order makes it difficult to dichotomize “facts” from “opinion” of the Commission. This difficulty arises, in part, because of the absence of the transcript being prepared prior to the issuance of the Report and Order on June 6, 2005.

Another “fact” contained within the Report and Order at page 9, sets forth that “Qwest’s terms are more specific and detailed than most, if not all, other carriers with whom it competes in providing telecommunications services in Utah.” Despite this “fact” being incorporated into the Order in issue, the record is void of and terms or details of any other carriers.

At page 12 of its Report and Order, the Commission asserts that it “has even less assurance and means available to achieve a just and reasonable result, balancing all interests, where multiple, competing providers are in the market and regulation has departed from the traditional revenue and cost-based regulatory model.” While it is true that there are multiple carriers for telecommunications services, the reference to “competing providers” in relation to the issues at hand are inapposite. That is, the competing carriers of telecommunications services do not necessarily engage in the provisioning of telecommunications network facilities.

At page 13 of its Report and Order, the Commission states that the opposing developers who testified during the hearings in this matter “make no comment on Qwest’s stipulated agreement for review of its performance under the new terms [and] [i]ndeed they are encouraged by the reduced time frames for the various steps in the installation process, the greater clarity provided, the existence of a single point of contact through the Utah New Development Manager, and the option to place conduit if Qwest were to fail in meeting an installation schedule.” In this regard, the Commission appears to have given little consideration to the testimony of the Option 2 contractors and developers opposing the abolition of Option 2. Additionally, there is no mention whatsoever in the Report and Order as to why the Commission disregarded a large part of the Option 2 contractors testimony, or why the Commission was inclined to believe Qwest’s testimony over others who testified in this matter.



## **RELIEF REQUESTED**

This Commission should be solely concerned with what is in the public's best interest in deciding whether Option 2 should be retained or abandoned. It is not in the public's best interest to eliminate the services that Option 2 contractors provide, thus increasing the demand on Qwest's services. Additionally, it is almost never in the public's best interest to eliminate competition. The Report and Order issued in this matter does exactly that. Essentially, the Report and Order is tantamount to deregulating a monopoly. Again, this is not in the public's best interest.

Accordingly, Petitioners respectfully request that the Commission, as a body, review the whole record, which is the basis for its ruling concerning the elimination of Option 2. One primary reason for such review is so that the Commission, as a whole, has an adequate opportunity to review the entire record in this matter. Accordingly, the following relief is requested:

1. That the Report and Order in this matter be reversed and revised so as to accurately reflect the implications and essence of Senate Bill 108, to the extent the Commission may appropriately exercise such jurisdiction.
2. That the Report and Order be reversed based upon the fact that there exists no real competition for Qwest, and as such the Report and Order has effectively deregulated a monopoly.
3. It is further respectfully requested pursuant to § 63-46b-20 that the Commission provide emergency relief to the Option 2 contractors with regards to projects in which they are developing communications network facilities.. In this regard, the Petitioners request the Commission to take

notice of the especially wet year that the intermountain area of Utah has experienced, and regardless of the decision reached upon the review of this matter, that Option 2 contractors be given until the end of this year by which to complete Option 2 projects they are currently working.

DATED this the \_\_\_\_\_ day of July, 2005

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Kevin M. McDonough  
Attorney for Clear Wave et. al.

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_ day of July, 2005 a true and correct copy of **PETITION FOR REVIEW** 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.

<p>Julie Orchard Lindsay Mathie Sandy Mooy Public Service Commission 160 East 300 South P. O. Box 45585 Salt Lake City, Utah 84145-0585 <a href="mailto:jorchard@utah.gov">jorchard@utah.gov</a> <a href="mailto:lmathie@utah.gov">lmathie@utah.gov</a></p>	<p><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:</p>
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