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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

**PETITION OF SBS
TELECOMMUNICATIONS, INC, CLEAR
WAVE COMMUNICATIONS, L.C., EAST
WIND ENTERPRISES, LLC and PROHILL,
INC. dba MERIDIAN COMMUNICATIONS
OF UTAH FOR A DECLARATORY
RULING**

Pursuant to Utah Admin. R.746-101 and Utah Code Annotated § 63-46b-21, SBS Telecommunications, Inc. ("SBS"), Clear Wave Communications, L.C. ("Clear Wave"), East Wind Enterprises, L.L.C. ("East Wind") and Prohill, Inc. dba Meridian Communications of Utah ("Prohill"), by and through their legal counsel of record, Kevin M. McDonough and Nancy A. Mismash of MISMASH & MCDONOUGH, LLC, respectfully petition the Public Service Commission of Utah ("Commission") for a Declaratory Ruling interpreting and explaining the rights, duties and obligations associated with the enactment of Senate Bill 108 which has been codified in Title 54 of the Utah Code; and more specifically, defining the scope of applicability of Utah Code Annotated § 54-8b-2.3 as related to pricing flexibility concerning Qwest's "public telecommunications services". Petitioners, through their legal counsel of MISMASH & McDONOUGH, LLC, yesterday filed a petition to intervene and request for a declaratory ruling

in each of three (3) other dockets, i.e., Docket No's. 05-049-T09, 05-049-T11 and 05-049-36. The filing in the 05-049-36 Docket is consistent with the Commission's "desire to meet with interested persons to review the impact of [Senate Bill 108]... and any other related issues associated with implementation of the provisions of Senate Bill 108." (See Docket No. 05-049-36, Notice of Technical Conference, issued April 7, 2005.) The several filings were accomplished as a precautionary measure; and if the Commission deems is most prudent and appropriate to address the issue in this Docket only (or one of the other dockets), then Petitioners could withdraw their petitions in the remaining dockets, if necessary.

In support of their petition to intervene and request for declaratory ruling, Petitioners state as follows:

1. Petitioners are private companies engaged in the business of, inter-alia, providing developers/builders with "telecommunications network development services" for new housing development projects. These development services include, but are not limited to:

- a. Engineering and designing the telecommunications network (the "network");
- b. Procuring, delivering and/or arranging the delivery of all materials for the network;
- c. Placing, splicing, and otherwise constructing the network;
- d. Testing, maintaining and repairing the network; and
- e. Coordinating all activities with Qwest Corporation ("Qwest") to ensure that inspection and acceptance of the completed network is accomplished.

2. Prior to May 2, 2005, Qwest Corporation's Exchange and Network Services Tariff for Utah ("Tariff") on file with the Commission required Qwest to enter into a Land

Development Agreement (“LDA”) with developers/builders that addressed the provisioning of telephone distribution facilities within new areas of land development, for permanent single family dwellings.

3. 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 and services were performed for no charge so long as Qwest’s costs did not exceed the specified formula amount of “the distribution portion of the average exchange loop investment times 125%, times the number of lots in the development”.

4. Under the second option (“Option 2”), Qwest was obligated to pay the developer/builder to perform the engineering, design, placement and splicing of the facilities for an amount that did not exceed the formula set forth in the preceding paragraph.

5. Petitioners herein are Option 2 contractors; and prior to performing any Option 2 work for a developer/builder, Petitioners herein would routinely and necessarily enter into an agreement with the developer/builder whereby the developer/builder gave the respective Option 2 contractor Power of Attorney to act for and on behalf of the respective developer/builder for the provisioning of telecommunications network development services for new housing development projects.

6. In the 2005 General Session of the Utah Legislature, 1st Substitute Senate Bill 108 (“SB108”) was enacted and signed by the Governor and Lieutenant Governor to become effective May 2, 2005. SB108 has been codified in Title 54 of the Utah Code.

7. SB108 enacted sweeping changes to telecommunications law in this state, including granting Qwest specified pricing flexibility concerning certain services.

8. In Docket No. 03-049-62 Qwest has proposed to revise the aforementioned LDA Tariff to remove Option 2 from its Tariff. Proceedings in Docket 03-049-62 are ongoing.

9. Qwest has taken the position that “[t]he passage of SB108, which replaces Qwest’s tariffs with price lists, is an acknowledgement by the legislature of the competitive nature of the industry and the need for reduced regulation of Qwest.”¹

10. Qwest has also asserted that SB 108 “amounts to legislative confirmation of Qwest’s position ... that it is no longer appropriate to require Qwest to allow its facilities to be placed by [Option 2 contractors]”.²

11. Qwest has concluded that “the issues in [Docket No. 03-049-62] are in a sense moot in light of the passage of SB108”.³

12. On May 4, 2005 Qwest filed “Qwest’s Notice of LDA Price List Filing and Effective Date” (“Notice of Price List”) in Docket 03-049-62, therein providing notice that it filed its LDA Price List on May 2, 2005, and that the price list is effective on May 9, 2005.

13. Within its Notice of a Price List on file with the Commission, Qwest refers to SB108 and quotes the following portions of the same:

(a) . . . beginning on May 2, 2005, an incumbent telephone corporation may offer retail end user public telecommunications services by means of a price list or competitive contract in the same manner a competing telecommunications corporation

...

(b)(i) The incumbent telephone corporation’s pricing flexibility shall be the same as competing corporation’s pricing flexibility for all public telecommunications services except basic residential service.

...

¹ Qwest’s Pre-hearing Brief submitted in Docket No. 03-049-62 on April 5, 2005.

² Id.

³ Id.

- (5) A price list filed with the commission under this section shall take effect five days after it is filed with the commission.

Utah Code Annotated §§ 54-8b-2.3(2)(a), (2)(b)(i) and (5), as amended.

14. Also within the Notice of Price List it is asserted that “the Price List should be effective on at least an interim basis in accordance with the statute...”.

15. Attached to Qwest’s Notice of Price List is Qwest’s LDA Price List; Section 4.4.B.6 provides:

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

16. Further, the Notice of LDA Price List asserts as follows:

Qwest has provided an almost three-month transition period for jobs that are in place prior to the effective date of the Price List. Although the provision states that an LDA must be entered into prior to May 9, 2005, Qwest is willing to have this provision applied to situations where an Option 2 contractor, including Option 2 contractors not parties to this proceeding, has entered into an agreement with a developer and has obtained a signed Power of Attorney prior to May 9, 2005 and completes the work by July 31, 2005. Therefore, Option 2 contractors will have the opportunity to complete work in progress under terms of the LDA Tariff currently in effect while the matter is concluded. At the same time, Option 2 contractors will not be able to enter into new arrangements with developers to place Qwest’s facilities while the matter is concluded. (emphasis added)

Petitioners herein have a different view of the scope and applicability of SB108, and more specifically the portion of SB108 which is codified at Utah Code Annotated § 54-8b-2.3. Pricing flexibility. Specifically, this Section of SB108 and the Utah Code does not even remotely address the provisioning of telecommunications network facilities, nor does Option 2 work come within the scope of retail end user services.

Utah Code Annotated § 54-8b-2.3(2)(a) clearly limits the scope of services that Qwest may offer by means of a price list, i.e., the services subject to the price list must be “end user

public telecommunications services.” Work performed under the Construction Charges portion of the Tariff certainly do not equate to “end user public telecommunications services”; and even if it did so equate, there is excepting language contained in subsection (2)(b) which makes a price list inapplicable. Specifically, subsection (2)(b)(i) states that “[t]he incumbent telephone corporation’s pricing flexibility shall be the same as a competing telecommunications corporation’s pricing flexibility for all public telecommunications services except basic residential service.” (emphasis added)

Therefore, even if the construction of telecommunications network services could be construed as services offered to a “retail end user”, the exception cited clearly takes the pricing flexibility away from the incumbent telephone corporation, i.e., Qwest. As such, Qwest cannot utilize this sort of pricing flexibility by merely filing a price list; rather, it is required to follow the Tariff on file with the Commission, together with the rules and time frames that apply to said Tariff.

Accordingly, Petitioners respectfully request the Commission to enter a Declaratory Ruling declaring that the “Price List” filed by Qwest on May 4, 2005, has no force and effect; and rather, the Tariff previously on file with the Commission shall govern the provisioning of telecommunications network services provided by Option 2 contractors.

DATED this the _____ day of May, 2005.

Kevin M. McDonough
Nancy A Mismash
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of May, 2005 a true and correct copy of **PETITION OF SBS TELECOMMUNICATIONS, INC., CLEAR WAVE COMMUNICATIONS, L.C., EAST WIND ENTERPRISES, LLC and PROHILL, INC., dba MERIDIAN COMMUNICATIONS OF UTAH FOR A DECLARATORY RULING** 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 Public Service Commission 160 East 300 South P. O. Box 45585 Salt Lake City, Utah 84145-0585 jorchard@utah.gov lmathie@utah.gov</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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