

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

**In the Matter of Qwest Corporation's
Land Development Agreements (LDA)
Tariff Provisions**

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Docket No. 03-049-62

REBUTTAL TESTIMONY

OF

LAURA L. SCHOLL

FOR

QWEST CORPORATION

JANUARY 28, 2005

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1

I. INTRODUCTION AND PURPOSE

2

Q. PLEASE STATE YOUR NAME, TITLE AND ADDRESS.

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A. My name is Laura L. Scholl. I am employed by Qwest Services Corporation as the Utah Director of Regulatory Affairs for Qwest Corporation (Qwest).

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Q. ARE YOU THE SAME LAURA SCHOLL WHO FILED DIRECT TESTIMONY IN THIS DOCKET?

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A. Yes, I am.

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Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

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A. My rebuttal testimony responds to testimony filed by Stephan Allen on behalf of Clear Wave Communications, L.C., East Wind Enterprises, LLC, and Prohill, Inc. dba Meridian Communications of Utah (sometimes Clear Wave) and the testimony of William Bodine filed on behalf of SBS Telecommunications, Inc. (SBS). Neither witness's testimony presented any rational public policy or other justification to support the forced continuation of Option 2 of the Land Development Agreement portion of the Utah Exchange and Network Services Tariff. Much to the contrary, both pieces of testimony served to highlight the ongoing problems associated with the Option 2 process.

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Once again, Qwest would like to reiterate that it can identify no customer benefit, no legal obligation and certainly no shareholder interest served by Option 2. The testimony of other parties offers no evidence to counter that conclusion.

21 Therefore, Qwest asks that it be allowed to remove Option 2 from its tariff
22 immediately.

23 **Q. PLEASE IDENTIFY THE OTHER QWEST WITNESSES AND THE**
24 **PURPOSES OF THEIR TESTIMONY**

25 A. Additional rebuttal testimony will be presented by Dennis Pappas, Director,
26 Public Policy, responding to Stephan Allen of Clear Wave and William Bodine
27 and Jay Bodine of SBS. Richard Buckley, Director, Policy & Law, responds to
28 the testimony of Polly Gaye Row submitted on behalf of SBS.

29 **II. GENERAL BACKGROUND ISSUES**

30 **Q. WHAT ARE QWEST'S FUNDAMENTAL CONCERNS IN THIS**
31 **DOCKET?**

32 A. Qwest has a number of concerns that need to be addressed in this docket. First, in
33 several ways, and certainly with respect to several Option 2 contractors, Qwest
34 has simply found the Option 2 process to be unworkable. Through their
35 gamesmanship, some contractors have substantially driven up the costs associated
36 with the placement of Qwest's network. They have done so by demanding the
37 cap amount set forth in the tariff, or an amount very near the cap amount, on
38 **every** Option 2 job they have performed regardless of their actual costs to
39 complete the job. Some of these Option 2 contractors have also ignored the
40 specifications and/or time frames found in the tariff or associated with the Option
41 2 process. In doing so, these Option 2 contractors have substantially limited
42 Qwest's ability to manage its own business and decide how to best serve its

43 customers. Although not all Option 2 contractors act this way, the current tariff
44 situation leaves Qwest with little ability to control the behavior of Option 2
45 contractors other than through refusing to accept facilities, which unduly harms
46 Qwest's customers and damages Qwest's relationship with developers, so it is
47 basically up to the Option 2 contractors to decide how cooperative they wish to
48 be. The bottom line is that Qwest, the party with the best incentive to protect its
49 interests and those of its customers, has no power to control the Option 2
50 contractors (even though it ultimately pays for their services); while developers,
51 with the power to control Option 2 contractors, have little incentive to look-out
52 for Qwest's interests or restrain Option 2 costs. It is a formula destined to
53 continue to cause serious problems.

54 Qwest should simply not be required to allow its facilities to be installed by
55 contractors with whom it has no contractual relationship, whose services are
56 contracted by developers who do not have to pay for them. In the dynamic and
57 competitive telecommunications environment in which Qwest operates, it must be
58 free to serve its customers and to make timely changes to its policies, procedures
59 and business practices in order to effectively compete in the marketplace without
60 having to endure the time-consuming, expensive legal and business wrangling
61 that it has continuously encountered in its attempts to offer an additional option to
62 developers.

63 **Q. IN HIS TESTIMONY (PAGE 15, LINES 1-3), MR. ALLEN STATES THAT**
64 **THE FACT THAT APPROXIMATELY 60 DEVELOPERS HAVE**
65 **INTERVENED IN THIS PROCEEDING SHOWS THE NEED FOR**
66 **OPTION 2. MR. BODINE ALSO TESTIFIES (PAGE 14, LINES 3-5)**
67 **THAT DEVELOPERS NEED OPTION 2. IS IT THE DEVELOPERS**
68 **WHO APPEAR TO HAVE BEEN MOST CONCERNED ABOUT**
69 **OPTION 2 OVER THE YEARS?**

70 A. No. It is interesting that in the eight years since Option 2 was added to the LDA
71 tariff, Qwest has never had any complaint or other proceeding initiated by a
72 developer, the party to whom the tariff and Option 2 applies. All such
73 proceedings have been initiated by Option 2 contractors with whom Qwest has no
74 contractual or tariff relationship. Time and effort speak much louder than a
75 boiler-plate petition to intervene that the developers do not even appear to have
76 drafted themselves. It is clear that the profits of Option 2 contractors have been,
77 and continue to be, the principal motivating factor in pushing for the continuance
78 of Option 2.

79 **Q. WHAT ROLE HAVE DEVELOPERS PLAYED IN THIS PROCEEDING?**

80 A. Other than filing petitions for intervention, almost no role. The Public Service
81 Commission received petitions for intervention from (purportedly) 59 developers,
82 all of which the Commission granted. However, no developer has filed any
83 testimony nor has any appeared at any of the meetings or hearings in the last year.
84 In fact developers really have not participated in any of the previous Option 2-

85 related meetings, including previous meetings that the Division of Public Utilities
86 set up during 2000. This is the reverse of the situation in Colorado, where
87 developers have been involved, and the Option 2 contractors have been given
88 only a limited voice.

89 **Q. HAS QWEST ATTEMPTED TO DETERMINE THE INTERESTS OF**
90 **DEVELOPERS IN THIS DOCKET?**

91 A. Yes. Qwest served data requests on all the developers granted intervention. The
92 discovery consisted of 17 questions designed to determine how the developer had
93 learned about the proceeding and intervened, what projects the developer had
94 completed under the LDA tariff, whether the developer had obtained verifiable
95 cost estimates from Qwest and Option 2 contractors, what other procedures had
96 been followed in the development, including in conjunction with installation of
97 other public utility facilities, what caused the developer to choose Option 2, and
98 to elicit the developer's views on matters related to installation of public utility
99 facilities in its developments.

100 **Q. DID QWEST RECEIVE RESPONSES TO ITS DISCOVERY REQUESTS**
101 **TO DEVELOPERS?**

102 A. Yes, in a few cases it did. In addition, when it had not received any response
103 from most developers by many days after responses were due, Qwest sent a letter
104 to all developers who had not responded. This prompted a few more responses.

105 There were basically four types of responses received. These are tabulated for
106 each developer on the table which is attached as Exhibit Qwest 1R.1 and are
107 summarized by the following:

- 108 1. To date, 16 developers have contacted Qwest and informed Qwest that they
109 were unaware that they had intervened in the proceeding.¹ Many of these
110 developers did not even know that there was a proceeding pending and did not
111 sign or authorize anyone else to sign a petition to intervene on their behalf.
112 Although some of these developers also expressed support for the
113 continuation of Option 2, they did not wish to participate as parties in a
114 proceeding they hadn't intended to be involved with in the first place.
- 115 2. To date, 7 additional developers have contacted Qwest and informed Qwest
116 that they did not intend to participate in the docket in any way. Some of these
117 developers stated that they understood they had intervened, while others did
118 not state whether they had intervened or not.
- 119 3. To date, 12 developers have provided partial responses to the data requests.
120 Of these, it appears that all but two were prepared by Option 2 contractors for
121 signature by the developer. It is also interesting that the two developers that
122 provided their own responses to data requests stated in their responses that

¹ This number (16) does not include the two additional developers mentioned in item 3 that responded to data requests, but in their responses indicated that they had not intended to intervene. The number also does not include an additional developer that originally reported orally that it did not believe it had intervened, but later recanted in its data response.

123 they had not intended to intervene in the proceeding, in response to Qwest's
124 questions about intervention.

125 4. To date, 2 developers have sent letters to Qwest stating that they support the
126 availability of having options other than Qwest to install telecommunications
127 facilities, but not otherwise responding to the data requests.

128 Of the 59 developers that purportedly intervened, to date 22 have not contacted
129 Qwest or responded to the data requests at all despite follow-up by Qwest.

130 **Q. WHAT DO YOU CONCLUDE FROM THE FOREGOING?**

131 A. I conclude that very few of the developers found the issue of sufficient import to
132 their business operations to expend any significant effort to retain Option 2. In
133 fairness, a handful of developers provided some very specific comments about
134 problems, real or perceived, associated with the Option 1 process over the years
135 and statements of support for having an option to use a contractor to place
136 facilities. Those comments are being reviewed by our network operations
137 personnel to see what we may be able to glean to improve our processes for
138 Option 1. Many of the problems raised by developers were older issues related to
139 the time frame when U S WEST centralized all its engineers in Denver. There
140 were indeed problems caused by that move. Qwest has addressed those problems
141 by bringing all engineers back into the field and adding headcount to make sure
142 the problems don't recur.

143 Qwest faces competition for placement of telecommunications facilities in new
144 developments from other telecommunications service providers and is anxious to
145 work out problems with developers so that it can place facilities and have a
146 reasonable opportunity to serve the customers in new developments.

147 In addition, some developers have told us that they have had no problems in
148 dealing with Qwest under Option 1, but had on one or more occasions used an
149 Option 2 contractor after being solicited to do so. They did not understand what
150 this proceeding was about and did not state any strong desire to have Option 2
151 remain available.

152 Finally, I conclude that there has been some impropriety in connection with this
153 proceeding. Petitions for intervention have apparently been filed without
154 authorization and with phony signatures. I understand that the Commission and
155 Division of Public Utilities have been looking into this matter and trust that the
156 Commission can draw its own conclusions regarding these facts. I would only
157 note that even if at the conclusion of this matter Qwest is required to maintain
158 Option 2, if any Option 2 contractor is found to have been responsible for
159 submitting unauthorized petitions, in complete disregard for the integrity of a
160 Commission proceeding, Qwest ought not be forced to accept facilities from such
161 an unscrupulous contractor.

162 **Q. THEN WHO ARE THE PARTIES PUTTING FORTH SIGNIFICANT**
163 **EFFORTS FOR THE CONTINUATION OF OPTION 2?**

164 A. It is evident that a few Option 2 contractors, who are apparently realizing
165 significant profits from Option 2, are the only parties that are willing to expend
166 significant resources to keep the Option in place.

167 **Q. WHAT DO YOU BELIEVE IS THE REAL ISSUE FOR DEVELOPERS?**

168 Based on responses to data requests and on comments made by other developers
169 who contacted Qwest but did not answer the data requests, it appears that Option
170 2 contractors are providing a project management service to developers at
171 Qwest's expense. Qwest understands why it may be convenient for a developer to
172 simply leave the issue of utility placement to a third-party whom the developer
173 does not have to pay. However, if developers want that service, they should pay
174 for it and not expect Qwest to pay for it through charges from Option 2
175 contractors that exceed the costs Qwest would incur in installing the facilities
176 itself under Option 1.

177 **Q. MR. ALLEN ALSO TESTIFIES (PAGE 14, LINES 5-6) THAT**
178 **DEVELOPERS LIKE TO USE OPTION 2 CONTRACTORS BECAUSE**
179 **THEY PROVIDE CABLE MORE QUICKLY. PLEASE COMMENT.**

180 A. In the first place, Qwest is, and has been, willing to reasonably shorten the time-
181 frames for facilities placement identified in the tariff. As Mr. Pappas's testimony
182 will address, Qwest is also willing to give developers an additional means of
183 flexibility to shorten the required notice of open trenches, through the placement

184 of conduit that would allow the trenches to be closed even if the facilities have not
185 yet been placed. However, if developers need expedited treatment and/or conduit
186 placement because they have not sufficiently planned ahead to follow reasonable
187 timelines, developers should bear the additional costs associated with the
188 expedited treatment.

189 The issue of developers wanting to use Option 2 to shorten their time-frames
190 again reflects a key problem with Option 2. In such a situation, Qwest has to pay
191 the extra costs for expedited service (even though it cannot control the contractor
192 and isn't the party benefiting from the expedited treatment) while the developer
193 controls the contractor and gets the benefit of expedited treatment (even though it
194 doesn't pay for the additional costs incurred and has no incentive to protect
195 Qwest). Qwest could place cable more quickly if it was willing to pay a premium
196 for it from a local supplier or to pay inventory holding costs associated with
197 maintaining large inventories, but in an effort to be efficient and cost-effective in
198 the interests of maintaining competitive viability, Qwest does not wish to incur
199 these costs. Rather, it expects the developer to provide reasonable notice of the
200 trench-open date so that it can order the materials from the manufacturer on
201 favorable cost terms. Some developers find it more convenient to provide short
202 notice (sometimes only a few days) of trench opening and have an Option 2
203 contractor buy the cable from a local supplier at Qwest's expense. Again, if the
204 developer wants this flexibility and service, the developer, not Qwest, should pay
205 for it. The reasonable compromise of conduit being placed, discussed in Mr.

206 Pappas's rebuttal testimony, would allow developers to have expedited schedules
207 without Qwest having to continue to suffer through the hassles and increased
208 costs associated with Option 2.

209 **III. SPECIFIC REBUTTAL TO STEPHAN ALLEN**

210 **Q. MR. ALLEN STATES (PAGE 2, LINES 13-14) THAT "THE TARIFF**
211 **SHOULD BE MODIFIED TO CLEARLY STATE THE . . .**
212 **CONSEQUENCES FOR A VIOLATION BY EITHER QWEST OR THE**
213 **OPTION 2 CONTRACTOR." WOULD THIS RESOLVE PROBLEMS**
214 **WITH OPTION 2?**

215 A. No. The Commission has no jurisdiction over Option 2 contractors and therefore
216 has little ability to enforce any consequence for misconduct by them. In fact, the
217 tariff does not even apply to Option 2 contractors, it applies to developers. Thus,
218 Option 2 contractors such as SBS feel emboldened to make statements like the
219 following: "As to your ridiculous assertion that something in a 'Qwest tariff' may
220 in any way 'govern' G & G's contractual relations with its contractors is [sic]
221 beyond absurd!"²

² Although this statement was made by G&G Investments in a response to a data request asking developers whether they were aware of any tariff provision governing the order of payment for Option 2 facilities (*i.e.*, whether Option 2 contractors should be paid by developers before or after Qwest pays the developers) (*see* G&G Investments, L.C. Answers to Qwest's First Set of Data Request (December 13, 2004)), the response stated: "ALL ANSWERS BELOW HAVE BEEN OUTLINED BY WILLIAM R. BODINE, PRESIDENT OF SBS TELECOMMUNICATIONS, INC. AND COMPLETED AND CONFIRMED BY GRANT BANGERTER, OF G&G INVESTMENTS, L.C." While Qwest cannot, therefore, state with certainty that SBS is originally responsible for the quoted language, identical statements made in

222 They also apparently feel they can ignore with impunity Commission directives
223 on providing verifiable cost estimates. The only apparent meaningful recourse
224 against such actions, allowing Qwest to refuse to accept facilities, has an
225 enormous cost associated with it—the potential for significant delays in
226 establishing customer service and damaging Qwest’s relationship with
227 developers. This illustrates a fundamental structural flaw with Option 2 as it
228 applies to Option 2 contractors that would not be remedied by a statement in the
229 tariff setting out consequences for violations of the tariff.

230 **Q. MR. ALLEN STATES (PAGE 5, LINES 6-7) THAT THE ONLY**
231 **PROBLEMS WITH OPTION 2 THAT HAVE NOT BEEN FULLY**
232 **RESOLVED ARE COST ISSUES WHICH ARE BEING ADDRESSED IN**
233 **ANOTHER DOCKET. DO YOU AGREE?**

234 A. No. I assume that Mr. Allen’s statement is in reference to past Option 2 projects
235 and that it is in this context that he refers to cost issues being addressed in another
236 docket, presumably Docket No. 04-049-06. While it is true that cost issues with
237 respect to some past projects are being addressed in that docket, if Mr. Allen’s
238 companies obtain the tariff interpretation they seek in that docket, Qwest will
239 continue to be held hostage (under the current tariff) to the price whims of Option
240 2 contractors.

other responses “outlined” by SBS make it appear very likely that SBS is the source of the statement. *See, e.g.*, Horizon Enterprises Inc. Answers to Qwest’s First Set of Data Requests (December 13, 2004) at 3 (“As to your ridiculous assertion that something in a ‘Qwest tariff’ may in any way ‘govern’ Horizon’s contractual relations with its contractors is [sic] beyond absurd!”).

241 Moreover, Mr. Allen’s statement ignores the fact that there have been ongoing
242 disputes about costs and other issues in a variety of projects for nearly the entire
243 life of Option 2 in Utah. These issues include review of engineering plans by
244 Qwest, inspection of facilities by Qwest before trenches are closed, compliance
245 testing by Qwest, handling of “betterments,” Qwest’s ability to change its
246 engineering and materials specifications when necessary, and responsibility for
247 short term failures after facilities are paid for by Qwest. Few if any of those
248 issues are pending in Docket No. 04-049-06. The fundamental flaw in Option
249 2—that Qwest must accept facilities from parties with whom it does not have a
250 contractual relationship and whom it cannot control—must be resolved.

251 Qwest’s position is that Option 2 simply doesn’t work and should be abandoned.
252 However, to the extent the Commission disagrees, cost issues going forward are
253 paramount. There is simply no rational basis to require Qwest to pay more for
254 facilities installed under Option 2 than the facilities would cost if installed under
255 Option 1. Option 2 was implemented to allow developers an option to place
256 facilities themselves in accordance with terms and conditions in the tariff. It was
257 never intended to increase the cost of the network for Qwest.

258 The issue of how Option 2 could work on a practical basis with a limitation on the
259 amount a developer will be reimbursed equal to Qwest’s costs raises a host of
260 difficult issues. The difficulty of resolving these issues argues in favor of
261 elimination of Option 2. For example, if Qwest and an Option 2 contractor are
262 both required to provide verifiable cost estimates for a project, they will both be

263 required to incur engineering costs. Thus, for Qwest to be made whole if a
264 developer elects Option 2, it will be required to deduct its engineering costs from
265 the amount it is willing to reimburse a developer. This is likely unacceptable to
266 Option 2 contractors, because they also are required to incur at least some of these
267 costs. There are several other similar issues, such as how to fairly determine what
268 Qwest's costs would have been under Option 1, without undue administration on
269 the one hand or an inaccurate flat rate on the other. These problems again
270 illustrate the inordinate problems with Option 2, all of which could be removed by
271 removing the Option (and still allowing developers to choose expedited service,
272 as explained by Mr. Pappas).

273 **Q. MR. ALLEN STATES (PAGE 5, LINES 13-14) THAT WHEN EVERYONE**
274 **ADHERES TO THE RULES, THE PROCESS WORKS VERY**
275 **SMOOTHLY. DO YOU AGREE?**

276 A. This statement reminds me of the observation from the Federalist Papers that if
277 men were angels no government would be necessary. While Mr. Allen's
278 statement may have superficial appeal, he ignores the fact that not all Option 2
279 contractors are cooperative and that (short of refusing to accept facilities, with the
280 problems that entails) Qwest has no leverage to require Option 2 contractors to be
281 governed by the rules. That is a fundamental problem with Option 2.
282 Furthermore, Mr. Allen ignores the fact that over the past eight years Qwest has
283 been in an almost constant process of attempting to establish or rework rules that
284 would make Option 2 work and that such process has done little to improve the

285 process. No matter what rules are established, even in consultation with Option 2
286 contractors, problems continue to arise. The problem is not one of rules, it is a
287 fundamental problem of the structure of the Option.

288 **Q. MR. ALLEN STATES (PAGE 7, LINES 11-12) THAT QWEST DOES**
289 **HAVE RECOURSE AGAINST OPTION 2 CONTRACTORS WHO FAIL**
290 **TO COMPLY WITH THE TARIFF BECAUSE IT CAN JUST REFUSE TO**
291 **ACCEPT A PROJECT. DOESN'T THIS SATISFY YOUR CONCERN?**

292 A. Not at all, as I stated previously. Qwest's first and foremost concern is in
293 providing excellent service to its customers. Therefore, the option of rejecting
294 facilities already in place when customers are ordering phone service is no option
295 at all. In a competitive market, Qwest must be responsive to its customers or it
296 will lose them. In addition, Qwest must maintain a good working relationship
297 with developers in a market in which developers have the choice of multiple
298 facilities-based providers for telecommunications services. Rejection of facilities
299 already installed, with its consequent impact on customers and developers, is not a
300 practical solution.

301 **Q. STARTING ON PAGE 5 OF HIS TESTIMONY, MR. ALLEN SUGGESTS**
302 **CHANGES TO THE TARIFF THAT HE SAYS WILL ESSENTIALLY**
303 **ELIMINATE ANY PROBLEMS UNDER OPTION 2. WILL THE**
304 **CHANGES PROPOSED ELIMINATE PROBLEMS WITH OPTION 2?**

305 A. No. Rather than eliminating problems, Mr. Allen's proposals will complicate the
306 process further. For example, making the placement procedures a part of the

307 tariff would have the effect of making a set of operational procedures law, which
308 could only be changed on thirty days notice and then only if no one protested the
309 change. Thus, a simple change in procedure that might be suggested or agreed
310 upon by a majority of Option 2 contractors could become the source of litigation
311 if one contractor chooses to protest it. This involves the Commission in managing
312 the details of Qwest's business to a far greater extent than is normal in other
313 circumstances. Tariffs dealing with provision of other services do not even start
314 to attempt to specify transactional and operational flow issues. The Commission
315 should deal with these issues at the public policy level providing general guidance
316 as it does in other contexts.

317 Furthermore, although Mr. Allen's suggestions refer to establishment of unit
318 rates, he fails to address Qwest's fundamental concern, which is that it should not
319 be required to pay more for facilities installed under Option 2 than it would pay
320 for facilities installed under Option 1. While the establishment of unit rates might
321 avoid some disputes, it would involve the parties in tariff change proceedings
322 every time a material or labor rate changes and would not address the issue of
323 betterments, which has been extremely controversial. More fundamentally, it
324 would not assure that Qwest would not incur greater costs under Option 2 than
325 under Option 1. The only way to do that is to limit the reimbursement on Option
326 2 jobs to the amount it would cost Qwest to complete the job under Option 1 less
327 the costs Qwest incurs in administering Option 2.

328 **Q. PLEASE SUMMARIZE YOUR RESPONSE TO MR. ALLEN'S**
329 **TESTIMONY?**

330 A. Although Mr. Allen takes the position that the Option 2 process is working fine
331 and should be retained, his own testimony undermines that position by suggesting
332 numerous tariff changes that he says will make the process work smoothly and
333 avoid disputes. Mr. Allen's testimony fails to address the fundamental structural
334 flaws with Option 2 and fails to provide any public policy reason why the
335 Commission should require Qwest to retain it, particularly when no Qwest
336 competitor is required to operate under a similar burden.

337 **IV. SPECIFIC REBUTTAL TO WILLIAM BODINE**

338 **Q. MR. BODINE TESTIFIES (PAGE 9, LINES 13-21) THAT QWEST'S**
339 **POSITION THAT IT SHOULD NOT HAVE TO PAY THE PRICE CAP**
340 **ON EVERY JOB IS BASED ON SUPERFLUOUS WORDS IN THE**
341 **COMMISSION'S JULY 15, 2003 ORDER IN DOCKET NO. 02-049-66 AND**
342 **DOES NOT EFFECT QWEST'S OBLIGATION TO "REIMBURSE THE**
343 **DEVELOPER/BUILDER THEIR COSTS." PLEASE RESPOND.**

344 A. This testimony is not strictly relevant to this proceeding because it goes toward
345 interpreting the current tariff language (being addressed in Docket No. 04-049-06)
346 rather than addressing forward-looking policy. However, the testimony gets to
347 the heart of a major problem with SBS and some other Option 2 contractors.
348 They believe that Qwest is responsible to reimburse the developer whatever
349 amount the developer has agreed to pay the Option 2 contractor, that the Option 2

350 contractor's costs are none of Qwest's business and that Qwest's estimated costs
351 are irrelevant. In manifesting this belief, they show their complete disregard for
352 prior Commission directives. They demonstrate a recalcitrance that there is no
353 reason to believe will change.

354 Thus, true to form, in response to a data request from Qwest regarding SBS's
355 labor rates and costs, SBS responded that the costs were not relevant to this
356 proceeding. They continue to assert that the only cost estimate that matters is the
357 developer's cost estimate, and that the developer's cost is whatever SBS chooses
358 to charge, up to the tariff cap.

359 SBS's positions on these issues are remarkable in light of Commission orders not
360 only in Docket No. 02-049-66, but in earlier proceedings dealing with Option 2.
361 While the Commission concluded in Docket No. 98-049-33, that under the
362 existing tariff language Qwest's costs were not necessarily limited to its own
363 estimates, the Commission also stated it was inappropriate to take the position
364 that "Developers and/or their contractors have no incentive to restrain their
365 extravagance unless and until the [tariff cap] is approached, and thus the
366 maximum bids fair to become the minimum."³ In this context, the Commission
367 stated that the cap in the tariff "makes sense if it is assumed that the costs have
368 been identified, agreed upon, and incorporated in the LDA."⁴ These statements
369 went to the heart of the matters at issue in Docket No. 98-049-33 and were

³ Report and Order, Docket No. 98-049-33 (April 30, 1999) at 5.

⁴ *Id.* at 5-6.

370 certainly not superfluous. Then in the statement in Docket No. 02-049-66 that
371 SBS also considers superfluous, the Commission said,

372 Qwest argues that the cap incorporated into the LDA tariff has been
373 interpreted by [SBS] as the default price Qwest is to pay for every
374 development. **That was not the intent of the tariff. The cap was just**
375 **that, a cap, and if costs exceeded that amount a developer is**
376 **responsible for the additional costs. It was not designed to be the**
377 **default price. . . .**⁵

378 I fail to see how, in light of these statements, SBS can still attempt to defend its
379 position that if the developer agrees to pay it the cap on every job, the tariff
380 requires Qwest to pay that cap. This is particularly the case where, according to
381 SBS, its contract with developers provides that the developer does not have to pay
382 SBS unless the developer is paid by Qwest.⁶ It is obvious that if the developer
383 has no independent obligation to pay the Option 2 contractor, then it also has no
384 incentive to minimize the costs of installation of telecommunications facilities.
385 This lack of incentive on the part of the developer to protect Qwest's interests is
386 exacerbated by the fact that the developer is actually receiving benefits for which
387 it does not have to pay in using an Option 2 contractor. The fact that SBS and
388 other Option 2 contractors such as Silver Creek Communications continue to
389 ignore the Commission's clear statements illustrates why Option 2 should be
390 eliminated.

⁵ See Report and Order, Docket No. 02-049-66 (July 15, 2003) at 7-8 (emphasis added).

⁶ See, e.g., G&G and Horizon data responses (drafted by, or with, SBS) at 2-3.

391 **Q. MR. BODINE STATES (PAGE 10, LINES 5-7) THAT IT MADE NO**
392 **SENSE TO ENTER INTO A STIPULATION WITH QWEST BECAUSE**
393 **THE CONTRACTUAL OBLIGATION IS BETWEEN QWEST AND THE**
394 **DEVELOPER. WHAT DOES THIS INDICATE TO YOU?**

395 A. It underscores the fundamental structural problem with Option 2. Qwest has no
396 contractual relationship with the Option 2 contractor, yet it is the Option 2
397 contractor that is placing facilities for Qwest at Qwest's expense.

398 In addition, it demonstrates that SBS wishes to have it both ways. It wishes to file
399 complaints against Qwest in this Commission and in court, it wishes to contest
400 tariff modifications and it wishes to negotiate terms of the LDA as if it were the
401 real party in interest, yet it refuses to sign a stipulation to allow Option 2 projects
402 to proceed or to provide verifiable cost estimates—hiding behind the fact that it
403 has no contractual relationship with Qwest. These two positions are inconsistent.

404 Qwest agrees with SBS that it has no contractual or tariff relationship with SBS.
405 Therefore, it is Qwest's position that SBS and other Option 2 contractors should
406 stop litigating Option 2 issues and stop attempting to dictate the terms of Qwest's
407 tariff.

408 **Q. MR. BODINE PRESENTS THE VIEW (PAGES 11-13) THAT THE**
409 **TROUBLE WITH THE OPTION 2 PROCESS IS THAT QWEST DOES**
410 **NOT USE THE LDA ITSELF. DO YOU AGREE?**

411 A. No. Mr. Bodine points to a few clerical-type corrections that he says should be
412 made to the LDA. Qwest would have no problem making these corrections.

413 However, doing so would not address the fundamental issues.

414 Mr. Bodine acknowledges that it would be a difficult process to manage if Qwest
415 were required to modify the LDA for every project. That is why the LDA
416 essentially has to be a standard agreement, which, except for negotiation on price
417 and other items intentionally left blank in the standard contract, should not change
418 from project to project.

419 Mr. Bodine also states that Qwest could control the Option 2 process through the
420 LDA. Does this statement mean to suggest that SBS would accept any changes
421 Qwest wishes to make to the LDA? That seems unlikely given the fact that SBS
422 has opposed every effort made by Qwest to change the tariff or to specify more
423 standards.

424 Finally, Mr. Bodine claims that Qwest will not negotiate or provide the contract
425 until much of the work is already complete. Again, this illustrates a fundamental
426 problem with how Option 2 operates. Option 2, as originally proposed,
427 envisioned that a developer would contact Qwest, provide plans and provide a
428 firm open trench date. If Qwest was unable to comply with the reasonable

429 schedule of the developer or if the developer would incur a charge in excess of the
430 cap, the developer would inform Qwest that it wished to use Option 2 and an
431 LDA would be signed so providing. However, in practice, Qwest is sometimes
432 not even informed that Option 2 is selected until facilities are placed. No wonder
433 Qwest normally cannot have an LDA signed and in place before much of the
434 work is already complete.

435 In summary, Mr. Bodine's claims about the LDA are nothing more than a straw
436 man intended to divert attention from the fact that Option 2 is structurally flawed
437 and cannot reasonably work.

438 **Q. MR. BODINE COMPLAINS (PAGE 13, LINE 20 – PAGE 14, LINE 2)**
439 **THAT QWEST IS UNWILLING TO CONSIDER OPTIONS TO CHANGE**
440 **THE TARIFF EXCEPT FOR ELIMINATING OPTION 2. IS THAT**
441 **CORRECT?**

442 A. No. As recently as the start of this proceeding, Qwest was willing to consider a
443 change to the tariff that would have allowed Option 2 to continue, but under the
444 clear understanding that Qwest's costs would be limited to the same amount it
445 would pay under Option 1. Qwest also submitted an illustrative tariff in Docket
446 No. 02-049-66 that would have retained Option 2, limited to Qwest's costs.
447 However, given the increasing cost of litigation and the tremendous amount of
448 time and resources being spent on this issue, as well as continuing evidence of the
449 difficulties with Option 2 contractors Qwest could expect if it was required to
450 retain the Option (including difficulties administering the pricing, even if costs

451 were limited to what Qwest would have spent under Option 1), Qwest reexamined
452 this position. Considering the significant development of telecommunications
453 competition since Option 2 was added to the tariff, any public policy support for
454 the Option has been eliminated. Therefore, it seemed to Qwest that the only
455 complete solution to the problem was the elimination of Option 2.

456 **Q. MR. BODINE STATES (PAGE 15, LINES 9-13) THAT OPTION 2**
457 **SHOULD CONTINUE BECAUSE THE NETWORK IS A PUBLIC**
458 **TELECOMMUNICATIONS NETWORK. DOES THE USE OF THE**
459 **WORD “PUBLIC” IN DESCRIBING THE NETWORK SUPPORT MR.**
460 **BODINE’S CONCLUSION?**

461 A. No. The term public telecommunications network is used in contrast to private
462 networks, which might be owned or used by large businesses or governments and
463 which are not available to the public generally. Qwest and other carriers that have
464 received certificates from the Commission are obligated to provide public
465 telecommunications services to any person in accordance with the terms and
466 conditions of their tariffs or price lists. It is in that sense that the network is
467 public. It is not public in ownership or management. There is no more reason to
468 require Qwest to allow a third-party to construct its network than there is to
469 require a CLEC to allow a third-party to construct its network. Both are parts of
470 the public network.

471 Qwest pays for, owns, maintains and operates its portion of the public
472 telecommunications network. Therefore, it should have the same rights as any

473 other provider of public utility services to control the process of constructing that
474 network.

475 **Q. MR. BODINE STATES THAT IT IS APPROPRIATE FOR THE**
476 **COMMISSION TO DETERMINE THE “MARKET” PRICE FOR PUBLIC**
477 **UTILITY FACILITIES AND QUESTIONS THAT THE “MARKET”**
478 **PRICE FOR PLACEMENT OF FACILITIES SHOULD BE TIED TO**
479 **QWEST’S ESTIMATED COSTS (PAGE 16, LINES 3-11). PLEASE**
480 **COMMENT.**

481 A. Mr. Bodine may be confused by the fact that for rate-of-return regulated utilities
482 the Commission determines their rate base. Qwest is no longer rate-of-return
483 regulated and its prices are not set by the Commission in relationship to its costs.
484 Even in the rate-of-return environment, the Commission has never determined the
485 price a public utility must pay a third party to provide utility facilities, it has only
486 determined whether all of the costs incurred by a utility acting on its own volition
487 would be included in rates. There is much less reason for the Commission to be
488 involved in attempting to set a price for the transfer of facilities in the current
489 environment.

490 Mr. Bodine also uses “market price” in a way that is contrary to my
491 understanding. Mr. Bodine’s market price is either the price cap or a price agreed
492 upon between a developer and an Option 2 contractor when the developer has no
493 incentive to achieve the best price available. My understanding of a market price
494 is a price resulting from an arm’s length relationship between a buyer and a seller

495 where each is looking out for its own interests and where the buyer would
496 naturally have an incentive to acquire the product or service at the lowest price
497 available. The developer is not the buyer in the LDA situation, Qwest is. Even if
498 the developer were considered the buyer, the fact that these incentives are missing
499 for the developer under Option 2 creates one of the major problems with the
500 Option.

501 **Q. MR. BODINE FINDS IT INTERESTING THAT QWEST'S PROPOSED**
502 **TARIFF DOES NOT INCLUDE REFERENCES TO BETTERMENTS**
503 **(PAGE 17, LINES 9-15). IS THERE A NEED FOR A REFERENCE TO**
504 **BETTERMENTS IF OPTION 2 IS ELIMINATED?**

505 A. Not really. When Qwest is installing (either directly or through its own
506 contractors) facilities to serve a development, it is free to engineer and install
507 facilities in the most efficient way to serve additional phases of the same
508 development or other adjacent developments. Thus, this has not been an issue
509 under Option 1. In fact, Mr. Bodine acknowledges that "Qwest does not charge
510 developers to place 'betterments' into projects where Qwest does the network
511 development" (page 18, lines 4-6). The principal difficulties with betterments
512 under Option 2 are that (1) Option 2 contractors seek reimbursement for
513 betterments at inordinately high prices because they apparently do not obtain
514 cable at reasonable prices; and (2) Option 2 contractors seek to call it a betterment
515 when they place cable that is appropriately sized to accommodate future phases of
516 the same development (so that through phased development—typically all phases

517 being placed by the same Option 2 contractor, Option 2 contractors can seek to
518 obtain additional payment for cable upsizing, when if the entire project is
519 considered as one development there is no “upsizing” at all. There is merely
520 appropriate sizing. And at the end of all phases, Qwest will have overpaid for the
521 piecemeal project). The problems with betterments under Option 2 essentially do
522 not exist under Option 1.

523 **Q. MR. BODINE COMPLAINS THAT QWEST DOES NOT REFER TO**
524 **STANDARDS IN ITS PROPOSED TARIFF AND STATES THAT**
525 **QUALITY STANDARDS SHOULD NOT BE LEFT IN QWEST’S HANDS**
526 **WHETHER IN OPTION 1 OR OPTION 2 (PAGE 19, LINE 17 – PAGE 20,**
527 **LINE 4). DO YOU AGREE?**

528 A. No. If Option 2 is eliminated, there is no need for the tariff to specify that
529 construction will be in accordance with “standard Company specifications.” If
530 Qwest is doing the construction itself, it will obviously follow standard Company
531 specifications.

532 With regard to whether the Commission should get involved in prescribing those
533 specifications, I have already testified that this level of regulation is inappropriate.
534 The Commission has specified certain end-result service quality specifications. In
535 a non-competitive environment that is the appropriate level of regulation on this
536 issue. How the Company chooses to meet those end-results is beyond the
537 appropriate purview of the Commission. In a competitive environment, it is
538 arguable that the Commission should not even have end-result service quality

539 specifications. Service quality is a component of competition in most markets
540 and should be left to the market to regulate in a competitive telecommunications
541 market as well.

542 **Q. MR. BODINE SUGGESTS THAT THE STANDARD SPECIFICATIONS**
543 **BE MADE PART OF THE TARIFF (PAGE 20, LINES 12-13). DO YOU**
544 **WISH TO COMMENT?**

545 A. Yes. For the same reasons I discussed in responding to Mr. Allen's similar
546 recommendation above, incorporation of the specifications in the tariff would be
547 inappropriate and cumbersome, and would make Option 2 even worse than it is
548 currently.

549 **Q. MR. BODINE REFERS TO THE TARIFF DEFINING A REAL MARKET**
550 **PRICE (PAGE 20, LINES 10-11 AND 14). DO YOU KNOW WHAT HE**
551 **MEANS BY MARKET PRICE?**

552 A. No. As discussed above, Mr. Bodine's use of the term market price has no
553 relationship with my understanding of market price. He provides no definition of
554 the term, but does refer to it as fixed in this portion of his testimony. I am not
555 aware of any market price that is a fixed price. Where Qwest is responsible to
556 install facilities in a development at its own expense, the only way a market price
557 might be established would be through Qwest obtaining proposals from several
558 sources and selecting the least-cost option consistent with its required terms and
559 conditions. Option 2 as now practiced by Option 2 contractors does not involve a

560 process anything like what I have just described.⁷ Therefore, unless Mr. Bodine
561 is referring to the cap price “negotiated” between the developer and the Option 2
562 contractor, which is clearly not a market price, I have no idea to what he is
563 referring.

564 **Q. MR. BODINE STATES THAT PORTIONS OF SECTION 4 OF THE**
565 **TARIFF OTHER THAN THE LDA PROVISIONS SHOULD BE**
566 **REVIEWED AND MODIFIED (PAGE 21, LINES 4-19). DO YOU**
567 **AGREE?**

568 A. No. In the first place, no party has had notice that this proceeding would have
569 anything to do with any portion of the tariff other than the LDA tariff. It would
570 be fundamentally unfair for the Commission to embark on a review of other
571 portions of the tariff in this docket at this time. Second, Mr. Bodine’s first
572 example of the reasons for review of the other portions of the tariff illustrates the
573 fact that Mr. Bodine and SBS apparently cannot take no for an answer. Docket
574 No. 02-049-66 involved the question whether Option 2 applied to multi-unit
575 developments. The Commission concluded that it did not. Yet, SBS apparently
576 continues to seek involvement in these non-Option 2 situations. This illustrates
577 the need to eliminate Option 2 altogether. SBS needs to be prevented from
578 continuing to force itself into Qwest’s business. If SBS can convince developers
579 (or even Qwest) that it has valuable services to offer it should be free to sell those

⁷ Under a correct reading of the current LDA tariff, a developer should make an informed decision between Option 1 and Option 2 and bear the price difference if it chooses Option 2. However, Option 2 contractors do not read the tariff correctly.

580 services in a mutual, voluntary arrangement. It should not, however, continue to
581 have a tariff option available as a means to force Qwest to deal with a party with
582 which Qwest does not wish to deal.

583 **Q. MR. BODINE SAYS THAT THE DO-IT-YOURSELF OPTION IN**
584 **SECTION 4.7.1 OF THE TARIFF APPEARS TO BE MERELY EYE-**
585 **WASH FOR THE BENEFIT OF THE COMMISSION RATHER THAN**
586 **ANY LEGITIMATE OPTION FOR DEVELOPERS (PAGE 21, LINES 13-**
587 **15). PLEASE COMMENT.**

588 A. This issue is addressed by Mr. Pappas in his rebuttal testimony. The only point I
589 wish to make is that the fact Mr. Bodine raises this issue provides another key
590 illustration for why Option 2 should be eliminated. As discussed more fully by
591 Mr. Pappas, this example demonstrates SBS attempting to locate still more ways
592 of inserting itself into Qwest's business, without Qwest's consent. In doing so,
593 SBS is inappropriately interfering with Qwest's relationship with a developer. In
594 saying this, I do not mean to suggest that SBS is not free to contract with
595 developers to provide services such as labor for cable placement (as the self-help
596 option allows, paid for by the developer—not Qwest). However, SBS has sought
597 much more extensive involvement with “self-help” than the tariff contemplates.
598 In short, this is an example of the harm being caused to Qwest's relationship with
599 developers by Option 2 contractors like SBS who desire to expand their
600 construction of Qwest's facilities into other situations beyond the LDA tariff.

601 Option 2 has spawned a monster that is growing. It is time to eliminate it before it
602 causes further problems.

603 **Q. MR. BODINE CLAIMS HE WOULD PREFER AND HAS TRIED TO**
604 **WORK OUT A SOLUTION IN AN INFORMAL SETTING (PAGE 22,**
605 **LINES 1-3). IS THAT A FAIR CHARACTERIZATION OF SBS'S**
606 **PARTICIPATION IN PAST EFFORTS TO RESOLVE PROBLEMS WITH**
607 **OPTION 2?**

608 A. No. Although Qwest has had occasional discussions with SBS regarding issues
609 arising under the tariff, SBS has been one of the most litigious of the Option 2
610 contractors. SBS currently has a complaint in district court and a complaint in
611 Docket No. 04-049-06, and it continually displays the most rancorous tone at
612 meetings and in testimony. SBS's "informal" attempts to reach a solution have
613 included its attempts to force its work on Qwest (such as in the multi-family
614 development, Pioneer Plat Phase D) when such work was neither wanted by
615 Qwest nor appropriate under the tariff.

616 **Q. IN THE CONCLUSION OF HIS TESTIMONY, MR. BODINE STATES**
617 **THAT IT IS APPARENT THAT OPTION 2 WAS NEVER INTENDED TO**
618 **BE USED (PAGE 22, LINES 12-15). PLEASE RESPOND.**

619 A. Qwest proposed Option 2 in good faith assuming that developers would use it
620 themselves or through subcontractors to place facilities in accordance with the
621 terms and conditions of the tariff and at costs less than or equal to those that
622 Qwest would incur under Option 1. Unfortunately, Qwest misapprehended the

623 fact that Option 2 contractors would immediately recognize this as an opportunity
624 to achieve substantial profits by providing a project management service to
625 developers at Qwest's expense.

626 Qwest's experience in Colorado belies Mr. Bodine's point. Although Qwest
627 would like to see its facility placement de-regulated in Colorado, Option 2 works
628 better in Colorado than Utah precisely because costs are limited to Qwest's costs
629 (forcing Option 2 contractors to compete on price) and because Option 2
630 contractors have not been allowed to hijack the tariff for their own purposes.

631 **Q. MR. BODINE MENTIONS THAT SBS WORKED WITH DESERT**
632 **EXCAVATING, INC. IN ARIZONA TO PETITION THE COMMISSION**
633 **THERE FOR A SIMILAR OPTION (PAGE 23, LINE 13-16). WHAT ARE**
634 **THE FACTS WITH REGARD TO THIS CLAIM?**

635 A. In 2001, Desert Excavating and SBS sent a letter to the Arizona Corporation
636 Commission attempting to get an Option 2 in the Arizona tariff similar to Utah.
637 Qwest responded to the complaint, and the Arizona Commission did not even
638 assign a docket number to this issue and has taken no action. There has been no
639 activity on this issue since Qwest's response to the letter. A copy of Qwest's
640 response is attached as Exhibit Qwest 1R.2.

641 The fact that SBS was involved in filing a request for a tariff change in Arizona
642 clearly illustrates how Option 2 contractors, seeking their own interests, work
643 against Qwest and potentially harm Qwest's relationship with developers. It also

644 illustrates that the Option 2 approach is so lucrative to the contractors that it
645 figures in their business expansion plans.

646 **V. SUMMARY**

647 **Q. PLEASE SUMMARIZE YOUR TESTIMONY.**

648 A. The testimony of other parties in this proceeding has provided no public policy
649 reason why Qwest should be forced to offer Option 2 in its tariff. Option 2 is
650 fundamentally flawed. It requires Qwest to allow its facilities to be installed by a
651 party with whom it has no relationship and at a price (if Option 2 contractors have
652 their way) determined by a developer who has no incentive to minimize costs or
653 to otherwise represent Qwest's interests. None of Qwest's competitors and no
654 other public utility is required to comply with such a strange arrangement.
655 Qwest's only ability to control the actions of developers or contractors is through
656 refusal to accept facilities. However, that is not a meaningful option because it
657 would interfere with Qwest's ability to provide excellent service to its customers
658 in an environment where those customers have choices of other providers. It
659 would also damage Qwest's relationship with developers with whom Qwest must
660 work if it wishes to place facilities in new developments.

661 The Option was originally proposed to provide an alternative to developers who
662 did not wish to wait for Qwest to place facilities or were not willing to incur costs
663 in excess of the cap. Today, developers already have another option, choosing
664 another telecommunications provider to place facilities and provide service to
665 customers within their development. Therefore, Qwest has every incentive to

666 work with developers in providing reasonable service under Option 1. Option 2 is
667 not needed to assure that Qwest will be responsive to developers' reasonable
668 needs.

669 In short, Option 2 simply makes no sense in the current competitive environment.
670 Qwest should be free to remove it from its tariff.

671 In the event the Commission believes the Option should continue in some form
672 for some period of time, Qwest has suggested possible alternatives. First, the
673 Option might be phased out over the next six months. This would provide an
674 opportunity for developers and Option 2 contractors to modify their business
675 plans and operations. Second, the tariff might be amended to assure that Qwest's
676 cost under Option 2 are limited to its costs under Option 1 less the costs incurred
677 by Qwest in administering Option 2. Qwest notes that this alternative, while
678 theoretically pure, poses many practical difficulties. Third, the tariff might be
679 amended to assure that Qwest is required to pay no more than the loop investment
680 cost found just and reasonable by the Commission in the UNE loop cost
681 proceeding, Docket No. 01-049-85. This alternative is less theoretically pure, but
682 it eliminates some of the practical problems with the second alternative.

683 However, it creates other significant problems. Fourth, Qwest is aware that the
684 Division is proposing a modification to Option 1 that would allow a developer to
685 select a contractor from a Qwest-approved list of contractors to install facilities
686 under Option 1. Qwest understands that the contractor would contract with and
687 work for Qwest. Qwest believes its proposal to allow installation of conduit

688 already addresses any legitimate needs of developers and is preferable to this
689 option. However, if the Commission concludes that none of the foregoing
690 alternatives is acceptable, the Division's proposal may be worth further
691 exploration because it would apparently eliminate the major structural flaw
692 underlying Option 2. Obviously, careful examination of the details of the
693 Division's proposal, which Qwest has not yet had an opportunity to do, would be
694 required.

695 The foregoing alternatives are offered only as fall back alternatives. Qwest
696 strongly believes that it should be allowed to eliminate Option 2 from its tariff and
697 that the competitive market should regulate its relationship with developers. As
698 noted above and in the testimony of Mr. Pappas, Qwest also remains willing to
699 provide opportunities under Option 1 for developers to obtain expedited service.

700 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

701 **A. Yes.**