David W. McGann
Qwest Services Corporation
1801 California Street, 47th Floor
Denver, CO 80202
(303) 896-3892
(303) 896-8120 (fax)
dwmcgan@qwest.com

Gregory B. Monson (2294)
Ted D. Smith (3017)
David L. Elmont (9640)
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
(801) 328-3131
(801) 578-6999 (fax)
gbmonson@stoel.com
tsmith@stoel.com
dlelmont@stoel.com

Attorneys for Qwest Corporation

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of BROADWEAVE NETWORKS OF UTAH, LLC for a Certificate of Public Convenience and Necessity to Provide Local Exchange and Facilities-Based Interexchange Services within the State of Utah	:	Docket No. 03-2410-01 **QWEST'S PETITION FOR RECONSIDERATION**

Pursuant to Utah Code Ann. §§ 54-7-15 and 63-46b-13, Qwest Corporation ("Qwest") hereby respectfully petitions the Commission for reconsideration of the Report and Order issued in this docket on September 29, 2003 ("Order"), granting the request of Broadweave Networks of Utah, LLC (**"**Broadweave") for a Certificate of Public Convenience and Necessity (**"**Certificate").

ARGUMENT

The Order should be reconsidered for several reasons. First, the Commission erred in converting this docket into an informal proceeding pursuant to Utah Code Ann. § 63-46b-4(3). Qwest is entitled by statute to intervene as a matter of right in Certificate proceedings such as this one, in which a competitive local exchange carrier ("CLEC") seeks certification in an area where Qwest is certificated to serve.[1] Qwest filed notice of its intervention on July 18, 2003. Because intervention is not allowed in informal adjudicative proceedings,[2] it was improper for the Commission to convert this proceeding to an informal proceeding. Further, Qwest's intervention put the Commission and parties on notice that this could be a contested proceeding. The Commission's rules do not contemplate informal adjudications in matters that may reasonably be expected to be contested.[3]

Second, as an intervenor, Qwest should have been given notice of all filings, hearings and conferences in the proceeding and been given an opportunity to participate in the proceeding. Subsequent to its intervention, Qwest was not given notice of any activity in this docket until it received the Order. Qwest was not served with any of the filings between the Division of Public Utilities ("Division") and Broadweave alluded to in the Order—which filings apparently touched on the very issue about which Qwest was concerned, the likelihood that Broadweave and its affiliate, the developer of the Traverse Mountain Master Planned Community ("Traverse Mountain"), intended to deny

[1] *See* Utah Code Ann. § 54-8b-2.1(3)(b).

[2] *See id*. at § 63-46b-5(1)(g).

[3] *See* Utah Admin. Code R746-110-1 (matters may be adjudicated informally "when the Commission determines that the matter can reasonably be expected to be unopposed and uncontested").

competitive access to customers in the Traverse Mountain development.[4] In sum, Qwest was denied any meaningful participation in this docket contrary to its right to intervene and its consequent right to due process of law.

Third, notwithstanding Qwest's lack of participation, the Division apparently raised concerns about competitive access similar to those that motivated Qwest to intervene in this docket and similar to those Qwest would have raised had it participated.[5] Qwest does not have direct knowledge of representations Broadweave or its related developer made with regard to competitive access. However, it understands that representations were made that competitive access would be available. If so, the current state of affairs demonstrates that the Commission cannot credibly rely on such representations as the basis for a decision to grant a Certificate.

Since late August, Qwest has made at least eight attempts to communicate with the developer and obtain access to rights of way to place Qwest facilities.[6] These attempts have included leaving multiple phone messages for representatives of the developer, as well as sending a certified letter (a copy of which is attached hereto as Exhibit B) explaining Qwest's intent to serve and the need to secure rights of way. To the best of Qwest's knowledge, the developer has not responded to any of these

[4] *See* Order at 2. As noted in Qwest's Notice of Intervention, due to the relationship between Broadweave and the developer of Traverse Mountain, Qwest was concerned about "appropriate competitive access to residential and business customers" in the area where Broadweave intended to provide service. Qwest's Notice of Intervention (July 18, 2002) at 2.

[5] *See supra* note 4.

[6] See Affidavit of Lynn Davis for Qwest Corporation (October 20, 2003), attached hereto as Exhibit A ("Davis Affidavit") at ¶¶ 3-4.

communications[7]—it certainly has not actually provided competitive access. If Broadweave misled the Commission and Division regarding competitive access, this would amount to utility misconduct, which separately justifies reconsideration of the grant of a Certificate.[8]

Finally, the Commission's determination in the Order that "such issues [i.e., competitive access] need not be addressed in proceedings concerning the issuance of the certificate"[9] apparently arose out of a concern that it would be unfair to require Broadweave to make a demonstration that had not been required of CLECs applying for Certificates in the past.[10] This concern with consistency should not, however, preclude the Commission from taking proper account of changed factual circumstances that bear on the public interest,[11] and that therefore may warrant additional analysis in certification proceedings that was perhaps not necessary in the past.[12] Once there is good reason for the Commission to scrutinize Certificate applicants more carefully, the only legitimate concern with consistency is whether the Commission is consistent going forward.

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[7] *See* Davis Affidavit at ¶ 5. Qwest understands that representatives of the Division have been similarly unsuccessful in attempts to obtain cooperation from Broadweave or the developer regarding competitive access for telecommunications providers.

[8] *See MCI Telecommunications Corp. v. Public Service Comm'n*, 840 P.2d 765 (Utah 1992).

[9] Order at 2.

[10] *See id.*

[11] *See* Utah Code Ann. § 54-8b-2.1(1)(b).

[12] *See, e.g., Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1253 (Utah 1992) ("Administrative agencies must, and do, have the power to overrule a prior decision when there is a reasonable basis for doing so."); Utah Code Ann. § 63-46b-16(4)(h)(iii) (appellate relief appropriate when agency action is "contrary to prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency.") (emphasis added).

There are in fact such changed circumstances warranting increased scrutiny before Broadweave, or similarly situated CLECs, receive Certificates. The changed circumstances involve the relatively recent and increasing tendency of developers and LECs to establish mini-monopolies in areas of new development. Broadweave may well be participating in the attempted establishment of such a monopoly. When Qwest determined to intervene in this proceeding it suspected that such was the case. Facts now available support Qwest's suspicion.

The developer's lack of cooperation with Qwest, noted above, appears to be part of a broader goal to deny competitive telecommunications service to the residents of Traverse Mountain. Qwest personnel have recently heard radio advertisements from Traverse Mountain touting the fact that residents of Traverse Mountain will obtain telephone, Internet, and television service for a flat rate as part of their homeowners' association fee.[13] Conversations between Qwest personnel and residents of Traverse Mountain confirm the existence of such an arrangement.[14] Qwest does not know whether residents can opt out of this homeowner's association fee, or the portion thereof pertaining to telephone service. If residents cannot opt out, however, the developer will have effectively established a monopoly, since it would be unreasonable to expect residents to be willing to pay for service from a local exchange carrier other than Broadweave when they would have to continue to pay for Broadweave's service anyway as part of their required homeowners' fee.

These facts raise sufficient questions about how Broadweave intends to provide service to warrant reconsideration of the Order, for the Commission to obtain answers

[13] *See* Davis Affidavit at ¶ 6.

[14] *Id*.

about whether adequate opportunities for competition will exist at Traverse Mountain if Broadweave and its affiliate are allowed to proceed with their apparent plan.

Qwest recognizes that there are jurisdictional concerns vis à vis Broadweave's affiliated developer. Those concerns, however, merely illuminate the need to use certification proceedings as the vehicle for the Commission to consider the anti-competitive effects of mini-monopolies. Waiting until later—when the CLEC is ostensibly only providing service pursuant to its Certificate and any ongoing competitive concerns are caused by the unregulated developer (who, in this case, is presumably the party that receives the homeowners' association fee), may be too late. Waiting may eliminate the Commission's best chance to appropriately regulate competitive access for the provision of telecommunications service in such circumstances.[15]

CONCLUSION

For all these reasons, the Commission should grant reconsideration of the Order. The Commission should make a determination as to what the actual circumstances are surrounding Broadweave's intended service and whether the public interest is served by granting a Certificate in those circumstances. If Broadweave is seeking to collude with its affiliated developer in the creation of a monopoly and thereby benefit from being a

[15] Statutory interconnection requirements are not an effective alternative for ensuring facilities-based competition, the type of competition which is the ultimate goal of the Telecommunications Act of 1996. *See, e.g.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advance Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147 (F.C.C. August 21, 2003) ("Triennial Review Order") at ¶ 70 ("We reaffirm the conclusion . . . that facilities-based competition serves the Act's overall goals.). Qwest is willing to provide facilities-based competition, but cannot do so unless it is allowed the opportunity to obtain rights of way on reasonable terms and conditions before improvements and the construction of homes and installation of landscaping are complete.

monopoly provider, the Commission should deny Broadweave's application for a Certificate as not being in the public interest. In so doing, the Commission would be acting consistently with the Public Telecommunications Law, and its attendant policy goals of facilitating affordable service; encouraging the development of competition; and endeavoring to protect customers who would otherwise not have competitive choice.[16]

Respectfully submitted: October 20, 2003.

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Gregory B. Monson
Ted D. Smith
David L. Elmont
STOEL RIVES LLP

David W. McGann
Qwest Services Corporation

Attorneys for Qwest Corporation

[16] *See* Utah Code Ann. § 54-8b-1.1.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **QWEST'S PETITION FOR RECONSIDERATION** was served by U.S. mail on the following on October 20, 2003:

Jerold G. Oldroyd
Yvonne R. Hogle, Esq.
Ballard Spahr Andrews & Ingersoll, LLP
201 South Main Street, Suite 600
Salt Lake City, UT 84111

Stephen T. Christensen
Broadweave Networks of Utah, LLC
1520 West 3600 North
Lehi, UT 84043

Michael Ginsberg
Assistant Attorney General
Heber M. Wells Building
160 East 300 South, Suite 500
Salt Lake City, UT 84111

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