

Robert C. Brown  
Qwest Services Corporation  
1801 California Street, 10th Floor  
Denver, CO 80202  
(720) 270-5988  
(303) 296-3132 (fax)  
robert.brown@qwest.com

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

*Attorneys for Qwest Corporation*

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

<p>In the Matter of CLEAR WAVE COMMUNICATIONS, L.C., <i>et al.</i>,</p> <p>Complainants,</p> <p>vs.</p> <p>QWEST CORPORATION,</p> <p>Respondent.</p>	<p>Docket No. 04-049-06</p> <p><b>QWEST'S RESPONSE TO PETITION FOR REVIEW</b></p>
--	---

Qwest Corporation ("Qwest") hereby briefly responds to the petition for review ("Petition") filed in this matter on July 11, 2005 SBS Telecommunications, Inc. ("SBS" or "Petitioner").

## I. INTRODUCTION

The Petition fails to identify any legitimate grounds for granting review, rehearing, or reconsideration of the Commission's Report and Order ("Order") issued June 10, 2005 in this matter. The Commission neither followed inappropriate procedure in issuing the Order, nor was SBS prejudiced by the procedure employed. The Commission did not act beyond the scope of its authority nor should SBS be heard to complain that it did, given that it was SBS that invoked the Commission's jurisdiction and sought relief. The Commission did not misapply the relevant tariff language. And, finally, the Commission certainly did not inappropriately rewrite contracts between private parties. The Petition lacks merit and should be disregarded.

## II. ARGUMENT

### **A. The Commission Followed Appropriate Procedure In Issuing The Order; And SBS Was Not Prejudiced By The Procedure The Commission Employed.**

In its first ground for review, SBS echoes the argument raised by Clear Wave Communications, L.C., East Wind Enterprises, L.L.C., and Prohill, Inc. (collectively, "Clear Wave") in their petition for review of the final order in Docket No. 03-049-62, arguing that the Order was not prepared in accordance with Utah Admin. Code R746-100-11.B. The argument is baseless. Rather than fully restate its response, Qwest hereby incorporates the response it made to Clear Wave's petition. The Commission followed appropriate procedure and SBS was not prejudiced by the procedure employed. The Commission should reject this ground for review just as it rejected Clear Wave's identical claim.

### **B. The Commission Did Not Act Beyond The Scope Of Its Authority.**

Strangely, SBS faults the Commission for exercising jurisdiction over a matter brought (or joined) by SBS in the first place. SBS characterizes its request for agency action as "seeking monetary relief" and argues that since the Commission cannot award damages it should have

refused to exercise jurisdiction.<sup>1</sup> It then holds-up the Commission's order from the *Silver Creek* complaint, Docket No. 98-049-33, as the example of what the Commission should have done in this case.

Perhaps SBS's seemingly contradictory role as both petitioner for relief from the Commission and critic of Commission jurisdiction can be explained by the fact that SBS would have preferred that the Third District Court, rather than the Commission, interpret Qwest's LDA tariff; but even so, the court could not have been more clear when it ordered a stay of SBS's case and found: "Accordingly, under the doctrine of primary jurisdiction, the Court grants a stay until the Commission is able to offer its interpretation of the disputed provisions of Qwest's LDA tariff. Such stay will avoid the potential of inconsistent interpretations and allow for all remaining unresolved state law issues to proceed before this Court."<sup>2</sup> That is all the Commission has done—interpret Qwest's LDA tariff as its legislative mandate (recognized by the Third District Court) requires.

It is also strange for SBS to complain that the Commission should have acted here as it did in the *Silver Creek* complaint proceeding, because in substance that is exactly what the Commission has done. In *Silver Creek*, the Commission did go to the further formality of dismissing the complaint's request for damages; but it nevertheless provided a tariff interpretation. The Commission found that Qwest's costs for Option 2 jobs were not necessarily limited to the amount Qwest would have paid for facilities under Option 1; however, Qwest was also not to be held hostage to the price whims of Option 2 contractors.<sup>3</sup> Instead, the Commission

---

<sup>1</sup> See Petition at 5.

<sup>2</sup> Order, Case No. 0409003399 (July 21, 2004).

<sup>3</sup> See Report and Order, Docket No. 98-049-33 (April 30, 1999) ("*Silver Creek Order*") at 5 (rejecting the situation where "Developers and/or their contractors have no incentive to restrain their

held that the tariff’s reference to the cap amount only “makes sense if it is assumed that the costs have been identified, agreed upon, and incorporated in the LDA.”<sup>4</sup> Such agreement on costs was “the only interpretation fair to both parties and consistent with the public interest . . . .”<sup>5</sup> Thus, Qwest and the developers were instructed to provide verifiable cost estimates upon the request of the other party so that they could reach agreement on cost and incorporate that agreement in the LDA.<sup>6</sup>

In issuing a tariff interpretation, the Commission has acted squarely within the confines of its statutory jurisdiction. It should disregard this ground for review.

**C. The Commission Did Not Fail To Appropriately Apply Tariff Language.**

Although SBS cites the Commission’s action in the *Silver Creek* complaint proceeding as exemplary, it has never come to grips with the fact that beginning with that proceeding the Commission has consistently rejected SBS’s preferred tariff interpretation whereby Option 2 contractors could simply charge the tariff cap amount for every job. Qwest cites portions of the *Silver Creek Order* to this effect in section B above. The Commission reiterated this view in Docket No. 02-049-66, stating among other things that “with [verifiable cost] estimates, costs would be agreed to up front and incorporated into an LDA between Qwest and the developer.”<sup>7</sup> In finding that Option 2 costs must be reasonable, the Order is consistent with prior Commission

---

extravagance unless and until the [tariff cap] is approached, and thus the maximum bids fair to become the minimum.”).

<sup>4</sup> *Silver Creek Order* at 5.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.*

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

statements interpreting the LDA tariff. It is also consistent with the relevant tariff language that Qwest would reimburse costs “as identified in the LDA.”<sup>8</sup>

Utah courts accord “considerable deference” to the Commission’s tariff interpretations “and review them for mere reasonableness or rationality.”<sup>9</sup> The Commission’s tariff interpretation in the Order was not what Qwest hoped it would be. Nonetheless, it was clearly reasonable—and insofar as it rejected SBS’s preferred interpretation it was unassailable. The Commission should disregard this ground for review.

#### **D. The Commission Did Not Re-Write Private Contracts.**

The Commission has a statutory responsibility to interpret utility tariffs when disputes arise. Private contracts not involving the affected utility cannot alter a tariff’s terms. Yet that is exactly how SBS wishes to use its contracts with developers, claiming that “the reimbursement obligations of Qwest are inextricably intertwined with the developers/builders [sic] costs.”<sup>10</sup>

SBS argued that a proper interpretation of the tariff required Qwest to reimburse whatever costs the developer happened to incur, up to the tariff cap amount (and developers using SBS just happened to always incur costs equal to the tariff cap amount). It lost that argument. SBS’s private contracts with developers add no separate basis for urging the Commission to alter its tariff interpretation, and the Commission would be acting contrary to its legislative mandate if it were to alter its interpretation of a tariff provision merely because Option 2 contractors have entered into private agreements with land developers. The Commission should reject this ground for review.

---

<sup>8</sup> See Qwest Exchange and Network Services Tariff (2004) at § 4.4.C.2.e.

<sup>9</sup> *McCune & McCune v. Mountain Bell Tel.*, 758 P.2d 914, 918 (Utah 1988).

<sup>10</sup> See Petition at 8.

### III. CONCLUSION

For all the aforementioned reasons, the Petition fails to identify any legitimate grounds for granting review, rehearing, or reconsideration of the Commission's Order. The Petition should be rejected and the Order allowed to stand.

RESPECTFULLY SUBMITTED: July 26, 2005

---

Gregory B. Monson  
David L. Elmont  
STOEL RIVES LLP

Robert C. Brown  
Qwest Services Corporation

*Attorneys for Qwest Corporation*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **QWEST'S RESPONSE TO PETITION FOR REVIEW** was served upon the following by electronic mail, on July 26, 2005:

Patricia E. Schmid  
Assistant Attorney General  
pschmid@utah.gov

Paul H. Proctor  
Assistant Attorney General  
pproctor@utah.gov

Kevin M. McDonough  
Mismash & McDonough  
kevin@mmcdlaw.com

---