

**PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE COMPLAINT)	
FILED BY ROGER L. HALL, RAPID)	MOTION FOR SUMMARY
CITY, SOUTH DAKOTA, AGAINST)	DISPOSITION OF COMPLAINT
QWEST CORPORATION REGARDING)	
THE COST OF TELEPHONE LINE)	CT08-002
EXTENSIONS)	
)	
)	
)	

Qwest Corporation (“Qwest”), respectfully requests that the Public Utilities Commission (“Commission”) dismiss the complaint that resulted in this proceeding. As grounds therefore, Qwest states:

INTRODUCTION

Roger Hall owns a mobile home park in Hill City. In April of 2007, he contacted Qwest to discuss his intent to increase the number of rental mobile homes within the park. Mr. Hall wanted his potential tenants to have access to Qwest products and services. Qwest engineers examined available facilities and developed three construction options to serve the new rental mobile homes, ranging in cost estimates from a high of \$5125.25 for conduit-enclosed distribution cable, to a medium cost option of an open trench and backfill cable placement priced at \$4972.22, and finally a lowest cost option of \$2425.01 for simply splicing cable purchased and provided by Mr. Hall into the Qwest network. A diagram of these options and the three price estimates were provided to Mr. Hall and he included a copy of that document with his November 20, 2007 letter to the Commission. After those options were discussed with Mr. Hall, he was apparently dissatisfied with Qwest’s position that, in accordance with the Qwest Exchange and Network Services Catalog No. 1, he was responsible for the costs necessary to provide

service extended from the Qwest Minimum Point of Presence (MPOP) to the new rental mobile homes he was installing on his property. Mr. Hall rejected all three options. On November 20, 2007, Mr. Hall wrote to the Commission complaining that Qwest had not fulfilled its obligation to provide service to the new rental mobile homes “as required by law”. Mr. Hall went on to demand that, contrary to the rates, terms, and conditions in Qwest’s published Catalog, Qwest install the facilities requested at the Company’s cost. Notably, in his November 20, 2007 letter, Mr. Hall never specified which statute or case he relied on to support his contention that Qwest is required by law to provide facilities at its cost. After discussions with Staff, Mr. Hall indicated on April 14, 2008 that he wanted to have his November 2007 letter considered a formal complaint. In response, the Commission docketed the complaint.

QWEST’S CATALOG AND THE FILED RATE DOCTRINE

South Dakota has law applicable to this complaint. SDCL § 49-2-10 states: “Compensation of carrier. A common carrier is entitled to a reasonable compensation and no more. He may require payment in advance. If payment is refused, he may refuse to carry.” In broad terms, Qwest is simply demanding payment in advance for constructing facilities necessary to serve Mr. Hall’s mobile home park.

Like all other carriers in South Dakota, Qwest is required by statute to notify the public of its current rates, terms or conditions of telecommunications service offerings or any changes to those offerings:

“49-31-12.8. Availability of telecommunications services information-- Notification of adverse change in rates, terms, or conditions. A telecommunications company shall make available to any person, in at least one location, during regular business hours, information concerning its current rates, terms, and conditions for all of its telecommunications services. The information shall be made available in an easy to understand format and in a timely manner. Following an inquiry or complaint from a

person concerning a rate, term, or condition for a telecommunications service, a telecommunications company shall specify that such information is available and the manner in which the person may obtain the information. A telecommunications company shall notify a customer of any materially adverse change to any rate, term, or condition of any telecommunications service being provided to the customer. The notification shall be made at least thirty days in advance of the change.”

Qwest does so, since the Commission reclassified the Company’s local exchange services as fully competitive in Docket TC03-057, in the form of a Catalog posted for public inspection at Qwest’s website¹, instead of the pre-2004 filed Tariffs. The content and layout of the current Catalog and the historical Exchange and Network Services Tariff are virtually identical. Among other things, Qwest sets out customer responsibility and Company responsibility for particular types of construction in the Qwest Exchange and Network Service Catalog No. 1.

The terms and conditions of Qwest’s construction services applicable in this case are found in Section 4 of the Qwest Exchange and Network Service Catalog No. 1, specifically at Section 4.2, entitled “General”, and Section 4.7 E., entitled “Buried and/or Underground Communication facilities Serving Cluster and Mobile Homes”. The complete language for both referenced Catalog sections is set forth below:

“4.2 GENERAL

A. Descriptions Where facilities are not available, the following provisions apply to all services found in this Catalog unless otherwise stated or implied.

1. Reasonable rates and charges involve consideration of costs and the degree or risk associated with furnishing telephone service. Certain situations involve substantial extra cost or risk, e.g., (1) the facilities required will be temporary; (2) facilities are ordered in advance of actual customer demand for service; (3) excessive costs are involved in furnishing the service or facilities.

2. Where the facilities required to provide a requested service are not available, and in the opinion of the Company, the cost to provision service to a customer does not constitute a prudent investment, the customer may be required to pay: construction charges; carrying

¹ http://tariffs.qwest.com:8000/Q_Tariffs/SD/index.htm

charges; termination charges; or agree to longer than normal initial service periods; or any combination(s) thereof. These charges or conditions would be in addition to regularly applicable rates, charges, and normal initial service periods stated in this Catalog, for the part of the equipment and facility costs that would not constitute a prudent investment.

3. Charges for service and facilities as provided for in Section 2 of this Catalog, shall be paid at the time agreement is made between the applicant and the Company to provide such service or when the bill is rendered. Any other payment arrangement must be mutually agreeable between the applicant and the Company.

4. Except as otherwise provided herein, the regulations in the Catalog are based on the premise that the type of construction required to provide the quantity and grade of telephone service involved will be determined by the Company. The applicant will be required to pay the added costs involved when a different type of construction than that proposed by the Company desired.

5. Where the applicant is so located that it is necessary or desirable to use private and/or government right-of-way to furnish service, such applicant may be required to provide or pay the cost of providing such right-of-way in addition to any other applicable charges.

6. A developer must provide a legally sufficient easement to accommodate the placing and maintenance of the facilities throughout the development subdivisions (e.g., distribution cables plus terminal pedestals or like devices and access point cabinets). The surface of the easements area must be brought to final grade prior to the installation of buried or underground facilities.

7. Applicants, who have executed contracts with the Company for placement of facilities but the construction had not yet begun by the effective date of this Catalog, will have the option of negotiating a mutually agreeable contract with the Company that may be a continuation of their contract or executing a new contract based on the provisions of this Catalog.

8. The customer may request an engineering quote to be performed to establish an estimated construction charge. The Company will provide an engineering quote of the construction charges to the applicant at no fee for the first quote. All quotes are valid for three (3) months from the date they are presented to the customer. If subsequent quotes are requested, there will be a \$300.00 fee for each subsequent quote. The fee will be applied as a credit to the construction charge bill when the applicant notifies Qwest to begin construction within the three (3) month window described above. If the applicant does not accept the quotation, then the \$300.00 fee is retained by the Company.

9. All necessary construction will be undertaken at the discretion of the Company consistent with budgetary responsibilities and consideration for the impact on the general body of subscribers.

10. The Company may, at its discretion, modify its requirements and reduce or waive charges to allow the Company to respond to competition.”

“4.7 OTHER CONSTRUCTION OR CONDITIONS

E. Buried and/or Underground Communication facilities Serving Cluster and Mobile Homes

1. The provision of buried or underground communication facilities to serve cluster and mobile home complexes (single or multi-dwelling units which share in the ownership or use of common property) shall be dependent upon the following being made available to the Company.

a. A legally sufficient easement to accommodate the placing and maintaining of the common communication serving facilities (e.g. feeder and distribution cable, plus terminal pedestals or like device and access point cabinets). The surface of the easement area must be within six inches of final grade prior to the installation of buried or underground communication facilities.

b. Reusable raceways or conduit(s) for the exclusive use of the Company facilities between the pedestal terminal or like device located in the easement and the entrance location of the unit or, in the case of a multi-dwelling building, units in which service is to be provided, or termination locations of the network interface for each mobile home location.

c. Where in the opinion of the Company it is necessary, the provision of adequate trenches and backfill suitable for the Company facilities, including trenches and backfill for the facilities located between the pedestal terminal or like device in the easement and protectors or network interface located on or near the customer premises.

2. If the design of the development does not allow for reasonable and safe maintenance, repair, or replacement of facilities, as determined by the Company, the property owner will be required to open the trench(es) necessary for the Company to maintain, repair, or replace its facilities. If the property owner is not willing to open the trench(es), the Company may refuse to work on the property, or the property owner may be required to pay the additional cost for the Company to open the trenches in order to repair, maintain, or replace the facilities.

3. The property owner will be responsible for locating all privately owned facilities in the event the Company is required to repair, maintain, or replace its facilities.

4. When a trench and backfill is provided for other utilities and services, the Company shall use such common trench, to the extent possible consistent with reasonable design criteria, easements or scheduling. In those instances where use of a particular common trench is inconsistent with reasonable design criteria, easements or scheduling, the Company shall make all reasonable efforts to resolve any disputes or difference for the purpose of utilizing said common trench to the maximum extent possible.

5. In the event that the developer or owner of the subdivision or development requests the Company to provide the trench and backfill work or is unable to provide the trench and backfill work reasonably, or meet the agreed upon trench and backfill schedule, the Company

shall provide such work at the developer or owner's expense not to exceed the Company's costs. This amount shall be nonrefundable.

6. If the Company and the property owner are not able to agree on the requirements as stated above, the Company may, at its option, terminate its facilities at one mutually agreeable location on the property (point of demarcation). Facilities on the property owner's side of the point of demarcation to each premise will be the responsibility of the property owner."

Read in conjunction with one another, the two Catalog sections above provide ample authority for Qwest to request contribution to the construction costs from Mr. Hall.

Notwithstanding those Catalog sections, Mr. Hall persists in arguing that he is entitled to receive all required construction to serve his new or anticipated tenants at the Company's expense. If Qwest were to excuse Mr. Hall from complying with the terms and conditions of the Catalog, it would open the Company to adverse civil action in accordance with South Dakota law. Under penalty of a civil fine, Qwest is bound by South Dakota statute to offer its services on the terms and conditions listed in the Catalog to all similarly situated customers:

"49-31-11. Discrimination prohibited--Civil fine. No person or telecommunications company may unjustly or unreasonably discriminate between persons in providing telecommunications services or in the rate or price charged for those services. No telecommunications company may offer a rate or charge, demand, collect or receive from any person a greater or lesser compensation for any telecommunications service offered than it charges, demands, collects or receives from any other person for providing a like telecommunications service. No telecommunications company may make or give any unjust or unreasonable preference or advantage to any person, nor unjustly or unreasonably prejudice or disadvantage any person, in the provision of any telecommunications service. Notwithstanding any prohibitions in this section, upon application to the commission, any telecommunications company may after investigation by the commission, be authorized by the commission to charge special rates or to give certain preferences which are determined by the commission to be fair and reasonable.

Nothing in this section applies to volume discounts or to the provision of telecommunications services at reduced rates for the United States, this state, local governments or governmental subdivisions.

Whoever violates any of the provisions of this section is guilty of unjust discrimination and shall be punished by a civil fine not less than one thousand nor more than five thousand dollars for each violation. Nothing in this section may alter or

eliminate any remedy otherwise available to an injured party, including an injured party's right to initiate a suit against the company guilty of discrimination pursuant to § 49-13-14.1.”

ARGUMENT

Stated simply, Mr. Hall’s complaint is unfounded and the relief he appears to request from the Commission is contrary to South Dakota statutes. Mr. Hall is, in essence, asking the Commission to discriminate in his favor by allowing him to avoid paying construction costs that would be charged to any similarly situated customer. Mr. Hall has refused to pay the construction charges quoted by Qwest on two separate occasions², even after a meeting where Qwest pledged to give Mr. Hall the service required at a price for the Company’s portion of the work not to exceed \$2400, assuming he opened a trench and purchased wire which would extend from the Qwest MPOP to the new mobile home units. There is no doubt that Mr. Hall is the property owner of the mobile home park, so there follows no doubt that he would be the individual responsible for making the construction payments set out in the Catalog. Mr. Hall admits his ownership of the mobile home park in at least two documents contained in the record of this complaint, including his letter of November 20, 2007³, and in Mr. Hall’s response to an earlier Qwest motion⁴. In addition, there is evidence in Exhibits 1 and 2 to this motion (incorporated by reference herein) that Qwest has offered service on terms and conditions consistent with the Catalog. Therefore, Qwest has complied with its responsibilities under what is commonly known as the Filed Rate Doctrine:

² Attached as Exhibits 1 and 2 to this Motion are letters from Sue Cotton, the Qwest Special Construction Billing Manager, to Roger Hall detailing the services the Company was willing to provide, and the cost for the Company’s portion of the construction job.

³ “I own a small mobile home court in the Southeast corner of Hill City.” Letter from Roger Hall to the Commission, November 20, 2007, page 1.

⁴ “Hall’s complaint is that Qwest has not fulfilled their obligation to provide service to new single-family residences in my mobile home court located in Hill City.” Roger L. Hall’s Response to Qwest Corporation’s Motion to Dismiss, filed in this proceeding June 24, 2008, at paragraph 3.3.

[T]he purpose of the filed rate doctrine is to: (1) preserve the regulating agency's authority to determine the reasonableness of the rates; and (2) insure that regulated entities charge only those rates that the agency has approved or been made aware of as the law may require. ... The filed rate doctrine also prohibits courts from granting relief that would have the effect of changing the rate charged for services rendered pursuant to a valid tariff.

Sancom, Inc. v. Qwest Commc'ns Corp., 2008 U.S. Dist. LEXIS 49491 *8 (D.S.D. June 26, 2008), (internal quotation marks omitted, quoting *inter alia Qwest Corp. v. Scott*, 380 F.3d 367, 375 (8th Cir. 2004); *Marcus*, 138 F.3d at 58).

The Federal Appeals courts have gone further in clarifying the doctrine and the anti-discrimination provisions therein:

“Not only is a carrier forbidden from charging rates other than as set out in its filed tariff, but customers are also charged with notice of the terms and rates set out in that filed tariff and may not bring an action against a carrier that would invalidate, alter or add to the terms of the filed tariff.”

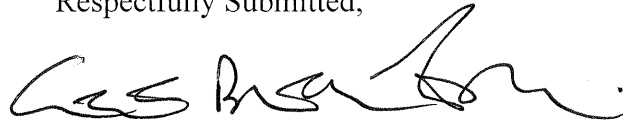
Evanns v. AT & T Corp., 229 F.3d 837, 840 (9th Cir. 2000).

Mr. Hall's attempt to circumvent his responsibilities to pay his portion of the construction charges by arguing that the general goals of Universal Service somehow trump the filed rate doctrine is unavailing. He provides no case law, statute, or Commission rule to support this position.

Qwest, on the other hand, has done no wrong here. Qwest has simply offered service in accordance with its Catalog, which it has made publicly available, and from which it may not stray without statutory or case law justification. Given the facts recited above, which are all a matter of record in this docket, Mr. Hall cannot get the relief he seeks without the Commission ignoring the filed rate doctrine, the South Dakota anti-discrimination statute, and Qwest's Exchange and Network Service Catalog No. 1.

WHEREFORE, Qwest asks the Commission to dismiss the formal complaint made by Roger L. Hall with prejudice, and to grant any other appropriate relief.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "George Baker Thomson, Jr.", written in a cursive style.

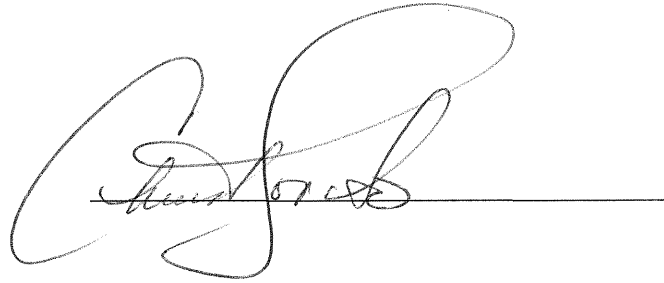
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **QWEST CORPORATION'S MOTION FOR SUMMARY DISPOSITION OF COMPLAINT** has been served to the South Dakota Public Utilities Commission.

A copy was also delivered to the following:

Roger L. Hall
2107 Westgate Place
Rapid City, SD 57702

A handwritten signature in black ink, appearing to read "Roger L. Hall", is written over a horizontal line. The signature is stylized and cursive.