- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH-

In the Matter of the Complaint of: Clear Wave Communications LC, East Wind Enterprises LLC and Prohill Inc., dba Meridian Communications of Utah Complainants, vs. QWEST CORPORATION, Respondent.	DOCKET NO. 04-049-06 ORDER

ISSUED: June 10, 2005

By The Commission:

Proceedings were undertaken by the Commission on the complaints of Clear Wave Communications, L.C.; East Wind Enterprises, LLC; Prohill, Inc., dba Meridian Communications of Utah; and SBS Telecommunications, Inc., against Qwest Corporation. Clear Wave Communications, East Wind Enterprises, and Prohill are represented by Jerold G. Oldroyd and Sharon M. Bertelsen, of Ballard Spahr Andrews & Ingersoll. LLP. SBS Telecommunications is represented by Kevin M. McDonough, of Mishmash & McDonough. Qwest Corporation is represented by Robert C. Brown, of Qwest Corporation, and Gregory B. Monson and David L. Elmont, of Stoel Rives, LLP.

This docket is a consolidation of various complaints regarding the interpretation and application of certain provisions of Qwest's applicable tariff dealing with Land Development Agreements (LDAs) and placement of facilities in new subdivisions. An LDA is an integral part of the process by which facilities will be placed in areas where no utility plant/facilities exist, in order to ultimately provide telephone service to customers who will move into the homes built in the area. By prior Commission order interpreting the tariff provisions, an LDA is expected for developments of detached single family residential developments and, by the tariff's unambiguous terms, for developments of four or more lots. The relevant parts of the tariff at issue are set out in Attachment 1 to this Order. A short summary of the history of facility placement in new subdivisions is beneficial to better understand the disputes and the resolution made through this order.

For some period of time, Qwest's tariff required a LDA through which a subdivision developer would pay an up-front charge, equal to the entire expected costs of the facilities to be placed in the subdivision, in order for utility facilities to be installed by Qwest in conjunction with development of the subdivision. Over a subsequent five year period, the developer could receive an annual refund of part of the up-front charge paid, based on the number customers initiating telephone service in the development during the corresponding year. The developer was responsible for the facilities' trenching and backfill within the development or could pay a non-refundable charge for Qwest to perform the trenching and backfill. In 1985, Qwest altered its tariff to provide an additional option, in lieu of the traditional LDA, by which a developer could choose to pay a non-refundable flat charge of $100 per lot for Qwest's placement of facilities within the subdivision; Qwest would bear all additional expenses beyond the $100 per lot charge. This option was made available for developments located within what was called "the Base Rate Area," defined as a prescribed geographic area within a certain proximity to the utility's cental office(s) which served the local exchange area. Beyond the Base Rate Area, the traditional LDA was the only means available for the installation of new facilities. In 1991, an additional tariff modification was introduced, by which an option was made available for developments located outside the Base Rate Area. Through this option, developers could choose, in lieu of a traditional LDA, to pay a non-refundable charge equal to 50% of the expected costs to place facilities in the subdivision. Again, Qwest would bear all expenses beyond the developer's payment of 50% of the expected costs if this second option was chosen for developments outside the Base Rate Area.

In 1996, Qwest broached the subject of making a significant change in placing facilities in new developments, notably changing the cost recovery and cost allocation between developers and Qwest and changing how facilities could actually be placed. In a presentation given to the regulatory agencies (the Commission, the Division of Public Utilities and the Committee of Consumer Services), in June of 1996, Qwest outlined a proposal that would no longer require that developers be charged for any portion of the costs of placing facilities within a new subdivision, as long as the costs were equal to or less than Qwest's average distribution portion of its exchange loop investment. A developer would only be asked to pay a charge/make a contribution for the expenses for facility placement in the subdivision if they exceeded the average distribution loop investment; and then, the developer would only pay the portion that exceeded that amount.

Qwest also indicated that it was considering making two options available for the actual placement of the facilities: one where Qwest would continue to place the facilities, as it had done in the past (Option 1), and a second where the developer could place the facilities and subsequently be reimbursed for placement costs (Option 2). The regulatory agencies indicated that, conceptually, the approach appeared reasonable.

After its presentation to the regulatory agencies, Qwest conferred with developers to explain the approach Qwest was contemplating and gain their support if the tariff were to be changed. On December 17, 1996, Qwest filed with the Commission a tariff revision formally seeking approval of the change. Along with a proposed tariff and tariff filing cover letter, Qwest also provided a November 22, 1996, letter from the Home Builders Association of Utah (which indicated the Association thought the proposal reasonable and would not oppose its approval) and a December 17, 1996, memorandum (from Jim Farr, a Qwest employee, to Dave Coombs, a Division of Public Utilities employee, which provided summary information about the change and examples of how the new provisions would be applied; to assist in the regulatory review of the proposed tariff change). The December 17, 1996, tariff modification followed the June presentation with one exception: the developer's payment ceiling increased from the June 100% of distribution portion of average exchange loop investment to a cap set at 125%. Hence, Qwest would bear the full burden of expenses associated with placing facilities in new developments as long as the development's costs did not exceed an amount equal to 125% of Qwest's average times the number of lots in the development. The tariff modification proposal was approved by the Commission January 10, 1997, and it provisions have been in force since that date.

These consolidated disputes deal with the parties' disagreements on the amount of reimbursement Qwest is to make for specific installations which have been made in various subdivisions where the developer has elected to use Option 2 and an Option 2 contractor, rather than Qwest, has made the installation. The parties' need to resort to Commission resolution of their dispute is driven by the failure to have executed a written LDA, which included the installation costs that were expected, as contemplated by the tariff and as expressed in prior Commission orders.

Under the applicable tariff provisions, once the Option 2 contractor has finished the installation, Qwest is to inspect the installation, and if it passes inspection, the developer is to transfer ownership of the facilities to Qwest, free and clear of any and all liens and encumbrances with indemnification to Qwest from all claims arising from the purchase and placement of the facilities. See, Section 4.4 C .2.d. “Once the Company [Qwest] has accepted the facilities, the Company will reimburse the Developer/Builder their costs, as identified in the LDA, not to exceed the distribution portion of the average exchange loop investment. See B.6.” Section 4.4 C.2.e. It is this latter provision, of reimbursing the developer’s costs, which is the genesis of the disputes. Section 4.4B.6. provides, “All charges to be borne by the Company will be an amount that does not exceed, or is lesser than, the distribution portion of the average exchange loop investment, times 125%, times the number of lots in the development.”

The developers/Option 2 contractors argue that Section 4.4 C.2.e means that Qwest is to make a reimbursement for the total costs a developer may have incurred in placing facilities under Option 2 for the lots involved, up to the referenced cap of 125% of the average distribution and loop investment . Qwest argues that the reimbursement is to be the amount that Qwest would have expended had it made the installation. In other words, the dispute is over what is to occur when the developer/Option 2 contractor’s installation costs vary from Qwest’s calculation of what Qwest’s installation costs would be, but the total amount is still below the 125 % cap. The expected application of the tariff provision cannot be applied as the parties have not identified the installation costs in an LDA as required by the tariff; no LDA has been executed by the parties. We suspect that no LDA has been executed because the parties could not agree on what reimbursement amount is required under Section 4.4 of the tariff. We conclude that the failure to execute a LDA (which would include agreement on the reimbursement amount) does not have an impact on the interpretation and application of the tariff provisions.

We start our analysis by applying what the plain wording of Section 4.4 C.2.e. would seem to require - “the Company will reimburse the Developer/Builder their costs.” One stumbles in the literal wording, as both “the Company” and “the Developer/Builder” are singular whereas the possessive adjective “their” is plural. Review of Qwest’s other tariff provisions, however, shows that Qwest consistently refers to itself in the singular; it is only when addressing other participants or referencing others that Qwest’s tariff uses the plural. Most of Qwest’s referencing in Section 4 is to singular “Developer/Builder,” but it does use the plural in 4.4 B.1. and also uses the plural form in its

December 17, 1996, memorandum accompanying the tariff modification. This leads to the conclusion that the tariff language of "their" as intended to refer to developers, in the plural, rather than to Qwest; otherwise the tariff would require use of the singular "its" to be grammatically correct. Within the context of Qwest's tariff, accompanying support documents, and earlier presentations prior to the December, 1996, filing, the language makes sense if it is viewed as having been properly worded as 'the Company will reimburse the Developer<u>s</u>/Builder<u>s</u> their costs.'

While Qwest argues that Section 4.4 C.2.e. tariff language should be construed to include an additional limitation (so that it would effectively include the parenthetical: 'the Company will reimburse the Developers/Builders their costs (which reimbursement amount will not be more than Qwest's estimate of costs), as identified in the LDA, not to exceed the distribution portion of the average exchange loop investment. See B.6.'), it is not appropriate to do so. Qwest broached the 1997 tariff change as a modification from an installation approach which had obtained cost recovery contributions from the developers to one where the developers would not make any contribution, as long as Qwest's total facility costs/plant investment costs, for a particular subdivision, did not exceed 125 % of Qwest's network average distribution and loop investment. It is reasonable to construe the tariff language from the perspective argued by the developers (using 125% of the average distribution and loop investment cap as the reimbursement amount limitation), not from Qwest's argued perspective (using Qwest's estimated installation costs as the reimbursement amount limitation). *Josephson v. Mountain Bell*, 576 P. 2d 850, 852 (Utah 1978) ("[Tariffs] should be construed strictly against the utility . . . they must be fair, reasonable and lawful.") (hereafter *Josephson)* That is, under either Option 1 or Option 2, the developer makes no contribution to the facilities installation as long as the reasonable costs for installation are less than 125% of Qwest's average distribution and loop investment. With Qwest's proposed application, a developer would still make contributions to reasonable facility installation costs if his reasonable costs did not mirror precisely the estimated Qwest costs, even though the total amount still remained under the 125 % cap. We do not apply *Josephson*'s rationale to require a tariff construction that would include an additional limitation or qualification beyond the one that was actually included in the tariff's wording.

The tariff construction and application we employ is consistent with the "just and reasonable result" underlying utility regulation. At the time the tariff change was submitted and approved by us, we understood (and continue so to this day) there was to be no disparity (for either Qwest or developers) in treatment under the new terms. Under Option 1, Qwest has the opportunity to recover the reasonable costs of facility installation through inclusion of its directly incurred costs into rate base totals. Under Option 2, Qwest has the opportunity to recover the reasonable costs of facility installation through inclusion of the developers' reimbursement amounts into rate base totals. In either case, Qwest's opportunity to recover the costs of facility installation would be the same. Similarly, in each circumstance, the developers are not asked to make a contribution to facility costs (subject to the 125% cap) consistent with the actual wording of the tariff provisions.

Josephson's reasoning, however, does lead us to reject one contention made by some of the developers/Option 2 contractors. An argument is made that an appropriate construction of the tariff provisions would permit developers to be reimbursed whatever amount their installation costs might be, as long as the total amount is less than the 125 % cap. In construing tariff provisions, we do not abandon regulatory principles and policies. While we have concluded that a developer's reimbursable facility installation costs may be higher or lower than Qwest's calculation of what its costs would be, we do not construe the tariff such that the developer is to be reimbursed any costs incurred below the 125% cap. The costs must still be reasonable for the particular installation in the subject subdivision. The developer/Option 2 contractor is installing utility plant. We have consistently allowed recovery for only reasonable utility plant and only reasonable costs incurred in building utility plant. As with many regulatory decisions, we recognize that "a reasonable amount" is likely not a single point on a continuum of possible costs, but will fall within a range. Still, there are bounds to reasonableness and costs outside the range are not recoverable. It makes no difference whether the installation is made by the utility itself or through a third party, the tariff's application should be consistent with regulatory policy establishing a reasonable rate base of utility plant and permitting the recovery of reasonable costs associated with such plant, not the recovery of unreasonable costs. *C.f., e.g., Utah Power and Light v. Public Service Commission of Utah,* 152 P. 2d 542 (Utah 1944).

Hence, if the developer has incurred unreasonable expenses while installing utility facilities in a subdivision, or installed unreasonable plant, his reimbursement amount will be less than his actual costs, even if the total costs are less than the 125% cap. A developer's costs for installation are subject to challenge (that they are not reasonable), just as the utility's costs would be challengeable for reasonableness. The developer's substantiation of the reasonable costs associated with his installation would be similar to the utility's effort to justify the reasonableness of its costs. We note that some of the developer's claims for reimbursement lack much, if any, substance or detail when compared to the support provided by other developers for their reimbursement; or compared to Qwest's support for its calculations of costs. Adequate detail and justification is needed to support a contested reimbursement claim where the parties have failed to include the installation cost amount in their LDA or failed to execute a LDA prior to installation. When the parties cannot reach agreement on the proper amount to be paid for installation costs, and we are called upon to resolve the dispute, we will need a sufficient evidentiary basis and explanation upon which we determine that the plant installation is reasonable and what the reasonable installation costs may be. At this stage of these proceedings, we do not have such a record, since our and the parties' focus has been on the singular issue of whether the tariff allows recovery of the developer's costs different than Qwest's calculation of costs.

Wherefore, we issue this Report and Order, determining that:

1. Section 4.4 C.2.e. and 4.4 B.6. of Qwest's tariff do not limit a developer's reimbursement amount to the amount Qwest's calculates it would expend to install facilities in a particular subdivision. A developer's reimbursable amount may differ from Qwest's calculation of costs.

2. A developer is to be reimbursed his reasonable costs incurred in making a reasonable installation of reasonable utility facilities in a subdivision where the developer has elected to install facilities under Option 2.

3. Where the parties are unable to agree upon what the developer's reasonable costs may be for a particular subdivision, the parties will be required to provide adequate evidence upon which the Commission can determine what reasonable costs might be for the particular subdivision.

4. If the parties are unable to reach agreement on what a developer's reasonable installation cost may be in these consolidated disputes, further proceedings before the Commission may be conducted to resolve each disputed case.

Pursuant to Utah Code 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 10th day of June, 2005.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
GW#44566