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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of CLEAR WAVE COMMUNICATIONS, L.C., et al.,

Complainants,

vs.

QWEST CORPORATION,

Respondent.

Docket No. 04-049-06

BRIEF OF THE DIVISION
OF PUBLIC UTILITIES

The following is a response by the Division of Public Utilities (DPU) to Briefs filed by Complainants, Clear Wave Communications L.C. East Wind Enterprises L.L.C., Prohill I., Meridian Communications of Utah, hereinafter referred to collectively as “Clear Wave” and SBS Telecommunications Inc. (SBS) and SBS and Clear Wave are occasionally referred to as the Complainants or Option 2 Contractors.

INTRODUCTION

Both Clear Wave and SBS are Option 2 contractors who install facilities for developers under Section 4.4 of Qwest's Exchange and Network Tariff. For the Commission's convenience, the entire Section 4 entitled Construction Charges and Other Special charges is attached. The essential issue in each Complaint is the amount of money Qwest is obligated to pay these contractors for installing facilities for developers. For Clear Wave there appears to be nine projects in dispute. SBS presented 16 disputed projects in its Complaint. No summary of the disputed amount was presented by SBS. Each complaint provides some details of the projects and correspondence with Qwest for each of the disputed projects. Both Complaints allege significant problems with the LDA process and general lack of compliance by Qwest.

The relief requested by Complainants can be summarized as follows: (1) an Order declaring that Qwest must issue good faith verifiable cost estimates; (2) an order requiring that Qwest not be able to exclude the Option 2 contractors' profit margin when their costs are below the cap; (3) an order requiring Qwest to comply with the time frames for pricing approval; and (4) an Order determining that the costs for the various projects outlined are reasonable and awarding the requested monetary relief to the complainants.

Qwest's response, particularly its response to SBS, points out significant failures to follow the LDA process by the Option 2 contractors including timing intervals and pricing.

Both the Option 2 contractors' complaints and Qwest's answers are just a continuation of disputes over interpretation of the LDA tariff that have been relatively constant since the LDA tariff went into effect. In order to address what should happen in this docket, a review of past Commission orders is necessary.

REVIEW OF THE PAST

A Land Development Agreement ("LDA") is a written agreement entered into between Qwest and the developer/builder where four or more single family lots are being developed. Qwest offers two agreement options: for the first, Qwest engineers, designs, and acquires all materials, and installs the facilities in the development. Under Option 2 the Developer engineers, designs and installs all facilities to Qwest's specifications and approval. In either case, the developer is responsible for the trench and backfill. Also in either case the developer must enter into an LDA with Qwest. Included in the tariff are provisions for notifications between the developer and Qwest such as 90 days prior to the backbone trench date and 21 days prior to the completion date of the living unit. These notification intervals appear to be rarely followed.

The LDA creates a maximum amount of cost coverage Qwest will provide before the developer needs to make a payment. Under both Option 1 and 2, Qwest's obligations will not exceed the distribution portion of the average exchange loop investment times 125% times the number of lots in the development. If the costs are above this level under either option 1 or 2, the developer will be responsible for the additional costs.

The tariff provides additional information relevant to this inquiry. Under Option 2, the tariff requires the developer to provide job prints and a material list to Qwest prior to construction. Once inspection and acceptance of the facilities by Qwest has occurred ownership is transfered free and clear to Qwest. Qwest makes payment to the developer of the developers'/Option 2 contractors' cost not to exceed the 125% limit. The costs to Qwest that it will reimburse the developer are to be specified in the LDA.

In theory both Qwest and the developer know their obligations at the time the LDA is signed. The developer should know if it is obligated to pay any costs above the cap and Qwest should know what amount of the developer's costs Qwest will have to pay up to the cap. In theory Qwest has approved the prints and material lists prior to construction.

In reality the developer hires an option 2 contractor, such as these complainants, to perform the work for the developer. The developer's only interest is when the facilities will be installed and what, if any, costs will the developer bear. From the amount of disputes that have arisen under this tariff, the system has not worked well. Some of the Option 2 contractors expect to be paid and amount equivalent to the cap and do not provide their actual costs which limit Qwest's liability. Furthermore, the time intervals in the tariff are routinely not met and facilities are typically placed prior to Qwest's approval of the job prints and materials list. The LDA is often not negotiated or agreed to prior to construction and result in disputes like this docket.

Facilities are installed, no contract exists and Qwest believes that the Option 2 contractors costs are inflated and often well above what it would cost Qwest to do the work itself under Option 1.

The first docket where the Commission was asked to provide an interpretation of the tariff arose from a complaint by Silver Creek Communications, an Option 2 contractor, against the then Mountain Bell. Although this Docket was a complaint, it was treated as a request for Declaratory Relief. Mountain Bell argued that under Option 2 the developer is entitled to recover its costs only up to what it would cost Mt. Bell to do the work under Option 1. The 125% limit to Mt. Bell's liability only would come into play in high cost areas where it would cost Mt. Bell that much to do the work. However, it appeared that the Option 2 contractor always charged the cap regardless of what it cost for them to install the facilities. After a discussion of policy considerations, the ALJ determined that:

> We believe the only interpretation fair to both parties and consistent with the public interest is as follows:
>
> Section 4.4(B)(6) requires that costs be agreed upon at the inception of the agreement and incorporated in the LDA. In that regard, by implication, both developer and Respondent are required to furnish in good faith detailed, *verifiable* cost estimates on the request of the other party. It will not do for Respondent to hide behind alleged proprietary concerns to avoid such disclosure. Respondent itself has created the need for this tariff provision, and it now must act in good faith to see that it is implemented fairly and effectively.
>
> Once costs, limited by the formula in Section 4.4(B)(6), have been identified, agreed upon, and incorporated into the LDA, Respondent's liability for reimbursement may not be escalated thereafter.

The DPU believed that a change in the tariff was necessary. It did not seem workable to expect Qwest and the Option 2 contractors to agree up front. Qwest proposed a revision to the Tariff that was Docketed as 99-049-T28. The new tariff was called the Provisioning Agreement for Housing Developments PAHD. This new tariff essentially eliminated Option 2. However, in order to accommodate developers' schedules, a self-help option was provided. The developer, with the approval of Qwest, could place the facilities in its open trench. The difference between this and the LDA is that Qwest provided the materials. Another important difference with the LDA is the ceiling of costs before a developer had to spend its own money was increased.

After reviewing a variety of factors, including finding that the ALJ's original interpretation in Docket 98-049-33 of how the LDA would work was "naive," the ALJ allowed the new PAHD tariff to go into effect.

On July 2, 2000, the PSC granted Silver Creek's Petition for Reconsideration. On October 2, 2000 the PSC reinstated the LDA and rejected the PAHD tariff. The Order asked that parties work together to determine if changes to the LDA are needed. Meetings were held and processes were developed with specific time intervals to move along in a orderly process the flow of information from developers to Qwest and vise versa. Limiting Qwest's cost responsibility to a level that would avoid disputes was the major stumbling block.

On April 10, 2001, Qwest filed Docket 01-049-T12. In this tariff filing Qwest kept Option 2, raised the cap to $519 but limited its costs for option 2 to what it would cost Qwest to do the job under Option 1. Qwest would provide a cost estimate to the developer from its standard pricing program which would then allow the developer to make a decision to use either Qwest under Option 1 or an Option 2 contractor. The contractor would have to choose to do the job at Qwest's estimated cost or to expect the overage from the Developer. On May 9, 2001 the DPU sent a memo to the PSC asking that this Docket be set for hearing to resolve items that could not be agreed. The main unresolved issue was the limitation to recovery to Qwest's costs. For whatever reason, in August 2002 Qwest withdrew this tariff and left in place an unmodified LDA. During this time period and up to August 2003 the DPU understands most Option 2 contractors submitted bills for the cap and Qwest paid that amount. In other words Qwest just found it easier to pay the cap.

In 2002 SBS and Silver Creek again brought the LDA tariff to the Commission for interpretation. In their Complaint, Option 2 contractors were putting in facilities for townhouses. Qwest objected stating that the tariff limited the LDA to single family homes. After briefs and affidavits the Commission found that the LDA was indeed limited to detached single family homes and was not applicable to attached homes and townhouses. Many other issues were raised in the docket -- in particular, the cost recovery issue. Qwest pointed out that the cap is a default price Qwest is expected to pay for each project. The PSC took this opportunity to provide more guidance on how the LDA should be working. Quoting its 1999 Order, the PSC stated that the cap was not intended to be the default price.

> Qwest argues that the cap incorporated into the LDA tariff has been interpreted by Complainants as the default price Qwest is to pay for every development. That was not the intent of the tariff. The cap was just that, a cap, and if costs exceeded that amount a developer is responsible for the additional costs. It was not designed to be the default price. Most, if not all of these disputes, it seems, would not occur if the parties were complying with the terms of the LDA tariff.
> . . .
>
> If Qwest and developers complied with this directive, before the LDA was entered into, and provided up-front, good faith detailed, verifiable costs estimates, then a developer could make an informed decision as to whether to have Qwest, or another party such as one of the Complainants, install the facilities. To be good faith and verifiable, the cost estimates must be more than a quote from one of the Complainants or a similar company to do the job for the amount of the cap under the LDA tariff. With such estimates, costs would be agreed to up front and incorporated into an LDA between Qwest and the developer.

The Commission recognized the need to address all of the issues raised by Qwest but stated it would do that in a separate Docket. Docket 03-049-62 was created to address the LDA generally and what should happen to it. That Docket is pending with the request by Qwest to eliminate the LDA Option 2 as being unworkable. DPU testimony is not due in that docket until mid December and hearings are currently scheduled in January.

After the July 15th Order in Docket 02-049-66 came out that made it clear that verifiable costs estimates were to be provided ahead of construction so that the developer could make an informed judgement, Qwest made it clear to Option 2 contractors that they had to produce cost estimates up front and that the cost estimate must be more then just the cap. For a number of projects, Qwest and the developer/Option 2 contractor were unable to reach agreement. The projects went ahead without an LDA probably for a variety of reasons and the disputes that make up this complaint occurred. The issue now appears to be what happens when the parties do not reach a timely agreement and the project goes ahead without a contract.

The issue here is the amount that Qwest should be required to pay. The choices are: (1) Qwest's estimated cost; (2) estimated costs of the Option 2 contractor; (3) another cost determined by the Commission. The DPU has not gone through each project and attempted to provide a project by project resolution. If that is where this case is headed, discovery and a hearing would be required. The DPU believes that if such an effort proves necessary it should wait until after the 03-049-62 proceeding is resolved. A resolution in that Docket may make it easier to resolve this docket.

In Docket 03-049-62 the parties agreed to ask the Commission to determine if Qwest should have to pay more for Option 2 than it would cost them under Option 1. The DPU, as in earlier dockets, took the position that Qwest's out of pocket costs should be limited in Option 2 to what it would cost Qwest under Option 1. If the Developer chose to pay more to an Option 2 contractor for the convenience offered by the contractor, then the developer should absorb the additional cost. The DPU also reiterated that the PSC has stated that a prior written agreement is a necessary prerequisite for payment.

POSSIBLE RESOLUTIONS TO THIS DOCKET BASED ON PAST PSC INTERPRETATIONS OF THE LDA

The DPU believes that the PSC's past interpretations of the LDA and Qwest's practices provide possible solutions both on a going forward basis and as to these historical complaints. The PSC decisions requiring Qwest and the Option 2 contractors to submit bona fide cost estimates so that the developer could make an informed decision are not currently being implemented. Instead the developer is not making an informed choice between Qwest and the Option 2 contractors because the developer believes it has no responsibility to Qwest as long as the project cost is below the 125% limit, even if Qwest could do the work for less. The developer would only be motivated to make an informed judgement if it understood it would be obligated for costs above Qwest's Option 1 costs. Currently Qwest and the Option 2 contractors negotiated an agreement for reimbursement after the fact. The inability to reach an agreement could be due to a variety of reasons including betterments, a significant difference in cost estimates, failure to follow time intervals or other reasons. The fault could be with Qwest or with the Option 2 contractors. It seems impossible to resolve past complaints without making a determination for each project based on a review of each party's good faith cost estimates. If necessary, the DPU could go through each complaint and recommend a resolution. However, this process continues to demonstrate the inherent problem with this tariff when Qwest and the Option 2 contractor do not enter into an LDA before the work is performed. Some general guidelines on possible solution are outlined below.

First, prior to August, 2003 Qwest did not formally require good faith cost estimates from the Option 2 contractors. Therefore, absent betterments prior to that date Qwest should just pay the cost the Option 2 contractor demanded up to the cap.

Second, the PSC made it clear in its July 15, 2003 Order, that a good faith cost estimate had to be provided by both Qwest and the Option 2 contractor. Qwest conveyed the requirement of the PSC in August 2003 letters to Option 2 contractors. The good faith cost estimate had to be more than just requesting payment at the cap, but instead required detailed verifiable cost estimates. Therefore, if the contractors in any of these projects did not provide a verifiable cost estimate then they should be paid Qwest’s estimated good faith costs.

Third, if the Option 2 contractor provided a verifiable good faith cost estimate in a timely way and there is no issue as to betterments, Qwest should just pay the cost of the Option 2 contractor up to the cap.

Fourth, if the Option 2 contractor provided a verifiable cost estimate in good faith but the issue is betterments each project should be reviewed on its merits and a decision made as to any additional compensation owed.

The DPU does not believe any of these solutions are a satisfactory overall resolution to the LDA. Significant changes should be made to the LDA making clear each party’s obligations and expectations as to payment. The DPU sees no reason, assuming adequate service by Qwest why Qwest should be obligated to pay more under Option 2 then it would cost them under Option 1. The Developer should be able to make an informed choice whether to use an Option 2 contractor and avoid these constant disputes over how the LDA should work.

Dated this ________ day of December, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF THE DIVISION OF PUBLIC UTILITIES was served upon the following by electronic mail this 1st day of December, 2004 to:

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