- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of Revised Pages of the U.S. West Communications, Inc., Exchange and Network Services Tariff, Re: The Provisioning Agreement for Housing Developments (PAHD) as a Replacement to the Land Development Agreement (LDA) Tariff	)	DOCKET NO. 99-049-T28 REPORT AND ORDER

ISSUED: May 26, 2000

SYNOPSIS

Having concluded that approval of the proposed tariff is unlikely to adversely impact the Proponent's ability to timely fill new service orders, and that the proposal appears otherwise not to contravene the public interest, the Commission approved the tariff.

Appearances:

John M. Eriksson Attorney	For	U.S. West Communications, Inc.
Joseph E. Tesch and Sara A. Henry Attorneys	"	Silver Creek Communications
Michael Ginsberg Assistant Attorney General	"	Division of Public Utilities, Utah Department of Commerce

By The Commission:

PROCEDURAL HISTORY

Pursuant to notice duly served, the above-captioned matter came on regularly for hearing the twenty-second day of March, 2000, at the Commission offices, Heber M. Wells Building, Salt Lake City, Utah. Evidence was offered and received, and the Administrative Law Judge, having been fully advised in the matter, now enters the following Report, containing proposed findings of fact, conclusions of law, and the Order based thereon.

FINDINGS OF FACT

1. U.S. West Communications, Inc. (USWC), applicant and proponent of the proposed tariff herein, is a certificated telephone corporation. Silver Creek Communications (SCC), intervenor herein, is a contractor whose primary business is installing telephone distribution facilities for land developers under provisions of USWC's existing tariff.

2. By way of line extension opportunities, USWC's current tariff offers land developers (of four or more lots) the opportunity to install telephone distribution facilities within their developments under the terms of a Land Development Agreement (LDA). A developer is supposed to enter into an LDA before construction of facilities begins. Under a valid

LDA, a developer may have USWC perform the construction and installation or the developer may perform such work itself (the "self-help" option). In the latter case, the developer can be reimbursed by USWC up to 125% of USWC's own estimated cost. In all events, USWC has the right of final approval of work and materials and takes ownership of the facilities once completed.

3. SCC was organized to take advantage of the self-help option. SCC approaches developers and offers to provide the distribution facilities within their projects.(1) SCC offers to provide all services including engineering and all necessary contact with USWC. In the process, SCC so blurs the lines of USWC's tariff requirements, that at least one developer is unaware that an LDA is required before construction starts, or even what an LDA is.(2)

4. SCC's practice has turned on its head the manner in which the LDA tariff was supposed to operate. A developer was supposed to contract with USWC, get USWC approval of its plans and materials, and hold the trenches open for USWC inspection of work and materials before closing. While it is true that SCC has enabled land developers to shorten their construction time, it has been at the cost of short-circuiting the tariff process and leaving USWC the owner of, and the ongoing responsibility for, facilities placed by an entity with which USWC has no contractual relationship and imperfect ability to oversee. As an example, SCC has begun construction within days of contracting with a developer, long before USWC could possibly approve of SCC's engineering work.(3)

5. The LDA tariff was the subject of a previous Commission proceeding in which the Commission set forth its intent regarding interpretation of the 125% reimbursement provision.(4) In the course of discussing the legal issues presented (there were no factual issues), the Administrative Law Judge mentioned in passing his understanding that the LDA tariff, and in particular the self-help option, was adopted by USWC as a means of alleviating the backlog of held orders.(5) The Administrative Law Judge's understanding is apparently erroneous. The impetus for the LDA tariff's adoption was an ongoing series of disputes with developers over the financing of new infrastructure,(6) not held orders. In fact, at the time the LDA tariff was adopted, the held order situation was already improving.(7) Moreover, USWC attributes most of its held order problems to other delays in providing trunk lines to developments, not secondary lines within subdivisions.(8)

6. In contrast to the LDA tariff, the proposed tariff provides for a "Provisioning Agreement for Housing Development" (PAHD) as a prerequisite for extending distribution facilities into new subdivisions. The PAHD differs from the LDA in that there is no provision for reimbursement beyond USWC's cost; the developer is responsible for providing trenching; all material is to be furnished by USWC; and all work is to be performed by USWC with the exception that at USWC's discretion, the developer may place USWC's materials in the opened trenches.(9) The developer would be further responsible for costs above a cap tied to USWC's average investment per loop. A letter dated August 23, 1999, signed by L. Iasman Biesinger on behalf of the Home Builders Association of Utah, asserts that the organization does not oppose the proposed tariff. However, no one from the organization testified.

7. The LDA tariff was adopted by USWC in Colorado, where it has engendered problems and disputes similar to those in Utah.(10) USWC intends to replace the LDA tariff with the PAHD tariff in that state also.

8. Aside from the reimbursement cost issue, USWC is concerned that the LDA tariff leads to increased inspection costs(11)and loss of control over the integrity of USWC's plant, including its preferred use of pre-encapsulated splices.(12)

9. The Division of Public Utilities, Utah Department of Commerce (DPU), recommends approval of the proposed tariff, or, failing that, the fashioning of a severely-modified LDA tariff with an early review of its workability.(13)

DISCUSSION

In our previous Order concerning the LDA tariff, we envisaged, and indeed our Order was predicated on, the understanding that the parties to the LDA, *i.e.*, the *developer* and USWC, would conduct good faith negotiations regarding costs and other terms *before construction starts*. The Administrative Law Judge assumed, naively as it

appears, that SCC's role in such negotiations would be advisory. Based on the record in this matter, the Administrative Law Judge's assumptions bear little relation to reality. SCC is, in fact, insinuating itself into the LDA arrangement to the point of making itself a *de facto* USWC subcontractor, but without the crucial legal contractual relationship.

We are satisfied on the basis of the present record that under the present practice, the LDA tariff has little impact on the held order problem.

We are likewise satisfied that SCC has, indeed, provided a valuable service to its client developers in shortening their construction schedules. However, the interests of those client developers are not the only ones which we must consider. The ultimate purchasers of homes on those lots are, by law, entitled to service quality equal to other subscribers on the USWC system. We are not persuaded that USWC can shoulder such responsibility, without additional expense, without at least the same degree of contractual control over SCC that USWC enjoys over its own subcontractors.

We are not suggesting that all the fault for failure of the LDA arrangements lies with SCC. Counsel for SCC, with justification, characterized some of USWC's behavior toward SCC as "passive-aggressive." Nevertheless, regardless of how blame is apportioned between USWC and SCC, if there is one thing that has come through loud and clear through these proceedings, it is that the LDA arrangement is irretrievably broken. We simply see no way to fix it.

There is an additional consideration. As correctly pointed out by DPU and USWC, no other utility in the state is under the obligation to accept or use plant not installed by its own personnel or contractors responsible directly to it. It would be anomalous, to put it mildly, to treat USWC differently in the absence of clear proof of benefit to system ratepayers. Such proof is lacking on this record. To conclude differently would be an impermissible encroachment on utility management prerogative. It follows that we should approve the proposed tariff provision.

CONCLUSIONS OF LAW

No detriment to the public interest appearing, we should approve the proposed tariff provisions.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

• USWC's tariff filing dated September 1, 1999, be, and it is, accepted and approved effective the date of this Order.

• Any person aggrieved by this Order may petition the Commission for review within 20 days of the date of this Order. Failure to do so will forfeit the right to appeal to the Utah Supreme Court.

DATED at Salt Lake City, Utah, this 26th day of May, 2000.

/s/ A. Robert Thurman
Administrative Law Judge

Approved and Confirmed this 26th day of May, 2000, as the Report and Order of the Public Service Commission of Utah.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

[1] Testimony of Michael Dufer, Transcript of Proceedings (hereafter "TR") at 169-171.

[2] Id. at 173-174

[3] Id. at 172

[4] Silver Creek Communications v. USWC, Docket No. 98-049-33 (PSCUtah 1999).

[5] Id. at 5.

[6] Testimony of James Farr, Tr. at 216-218

[7] Id. at 222-224; Hearing Exhibit 8

[8] Testimony of Don Green, Tr. at 111.

[9] Proposed USWC PSC Utah Exchange and Network Services Tariff, Section 4, Page 5, Release 3.

[10] Testimony of Anthony J. Gallegher, Tr. at 63, 71-72.

[11] Id. at 17.

[12] Testimony of Don Green, Tr. at 104-105.

[13] Prefiled Testimony of Emily B. Marshall.