- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of Qwest Corporation's Land Development Agreements (LDA) Tariff Provisions	)))	DOCKET NO. 03-049-62 ERRATUM REPORT AND ORDER

ISSUED: June 6, 2005

By The Commission:

The Commission conducted hearings in this docket April 14, May 23 and May 24, 2005. Participating in these proceedings were SBS Telecommunications Inc., represented by Kevin M. McDonough, of Mismash and McDonough; ClearWave Communications LC, East Wind Enterprises LLC, and Prohill Inc, dba Meridian Communications of Utah, originally represented by Jerold Oldroyd, Jennifer Rigby and Sharon Bertelsen, of Ballard Spahr Andrews & Ingersoll, and subsequently represented by Kevin M. McDonough; Qwest Corporation, represented by Robert C. Brown, Qwest Corporation, and Gregory B. Monson and David L. Elmont, of Stoel Rives LLP; the Committee of Consumer Services, represented by Reed Warnick and Paul Proctor, Utah Attorney General's Office; and the Division of Public Utilities, represented by Michael L. Ginsberg and Patricia Schmid, Utah Attorney General's Office.

Intervention was sought and granted to Mainstreet Development Inc.; Salt Lake Home Builders Association; Eaglepoint Development; McMullin Homes Inc.; Omni Homes Inc.; Liberty Homes Inc.; Peterson Development Company; Shron Inc.; Horizon Enterprises,Inc.; Deseret Purchasing & Marketing LLC; Wasatch Pacific Inc.; Envison Development; Sundance Homes LLC; G&G Investments; DR Horton Inc.; Patterson Construction; Balk Mountain Development; CH Jenkins and Sons; Rainey Homes; Development Associates Inc.; Celebrity Builders; Elk Ridge Development; Georgetown Development; Richmond American Homes; Ivory Homes; Suncrest Development; Craythorne Construction; Ensign Development; Continental Homes; Hawkins Company; Majestic Homes; J&B Development; Horman Construction; Great American Homes; Fieldstone Homes; A&A Wiser Construction; Cove at Corner Canyons LLC; Gough Construction; Elite Development; Blackburn-Jones Development; Aspen Homes; Prince Development; Oakridge Homes; Zions Development; MCM Engineering Inc.; US Development; Symphony Homes; Woodbridge Construction and Development; Quail Hollow LLC; Mike Schultz Construction; Marriott Construction; Highland Investment LLC; NBD Development; J&H Development; LM Harris Company; Hall Engineering & Construction; Main Street Development; Dennis and Patricia Murray; and Landrock Development. Subsequent to their intervention, some of these developers stated that their intervention was in error and that they would not participate. Additional intervening developers informally indicated that they would no longer participate (in statements declining to provide or participate in discovery). Ultimately, the Salt Lake Home Builders Association, Marriot Construction, Zions Development, US Development, Landrock Development, K Pearson Development, Bald Mountain Development, Grant Bangerter and Salisbury Homes had representatives who did appear and provide testimony at the hearings.

Proceedings in this docket were commenced to address contentions concerning Qwest's plans to modify its tariff provisions relating to placement of new facilities in new developments. Qwest proposed modifying its processes and terms and conditions; various individuals contended that the result would not be in the public interest. The chief dispute relates to the elimination of what is known as Option 2. At the time this docket was opened, Qwest's tariff contained Land Development Agreement (LDA) provisions which Qwest had proposed in December, 1996, and which were approved by the Commission in January, 1997. Section 4 of Qwest's tariff deals with construction charges and Section 4.4 specifically deals with LDAs. The 1997 provisions set forth the process by which Qwest will place facilities in new land developments (specifically applicable to residential developments of four or more lots). There are two means, or options, by which distribution and loop facilities can be provided: Option 1 has facilities engineered, designed, placed and spliced by Qwest; Option 2 has facilities engineered, designed, placed and spliced by the developer. Under Option 2, the developer places the facilities and is to follow Qwest's specifications in engineering and designing the facilities; have Qwest approve the developer's proposed design and placement prior to installation; have Qwest inspect the installed facilities, and, if passing inspection, transfer the facilities to Qwest for use in providing telephone service to persons who may ultimately move into the subdivision. Qwest is to reimburse the developer for the costs of designing and placing the facilities after they have been transferred to Qwest.

The 1997 tariff provisions anticipate that Qwest and the developer will execute a written LDA which, in conjunction to the terms contained in the tariff , would be used by the two parties to set the terms and conditions by which facilities will be placed in the new developments. Since the introduction of the Option 2 facility placement method, a number of individuals or companies (Option 2 contractors) have specialized in providing design, engineering and placement services for developers to facilitate the exercise of Option 2. Developers have the opportunity of essentially turning over all of the developer's responsibilities to these Option 2 contractors. The Option 2 contractors will act as the developer's agent/representative in dealing with Qwest in the process of placing the telephone plant/facilities. While the concept underlying Qwest's tariff's Option 2 seemed rather straight forward at its 1997 introduction, its execution has not been without difficulty. Since its introduction, Option 2 has engendered various frustrations and disputes; from both the perspective of Qwest and from the developer/Option 2 contractor. These have included failure to reach agreements on appropriate design, failure to reach agreements on appropriate costs and reimbursement, disagreements on appropriate materials and plant location/placement, disputes on the testing process and consequences/result of testing, and disputes on scheduling the various steps or tasks which are required under Option 2. Allegations of bad faith conduct have been volleyed between parties. Some of these disputes have reached the point where complaints have been brought before the Commission and where parties have brought actions in courts to address their vexatious impasses.

Along with the inter-party problems associated with using Option 2, Qwest's desire to modify its subdivision facility placement construction terms has also been spurred by other developments. Utah and federal telecommunications law have changed; they now approach the telecommunications market with intent to foster multiple service providers. They place greater reliance upon market operations, where customers have varied choice in how and from whom they obtain their telecommunications services. Since the 1997 introduction of Option 2, Qwest has seen more and more telecommunications service providers enter its service territory and offer competing services. The manner by which Qwest's telephone services are to be priced is also different from when Option 2 was introduced. Originally, Qwest's prices, terms and conditions were set by the Commission in the context of traditional ratemaking, through which Qwest's services, including placement of new facilities, were subject to examination and review by the Commission and the prices, terms and conditions were set by the Commission. Subsequent to Option 2 availability, Qwest's prices were no longer subject to the traditional ratemaking approach to match the reasonable costs of providing services to the revenues obtained from the services, rather a price indexing regime was applied. See, Utah Code 54-8b-2.4 (prior to its 2005 repeal). Qwest's prices were set pursuant to an index, without reference to the specific costs Qwest incurred to provide the services, nor with consideration to the revenues Qwest received in charging such prices or rates. This attenuation of the relationship between the costs of providing services with the prices to be paid for telecommunications services has been further exacerbated through recent statutory amendments which are now in effect. Pursuant to legislation passed in the 2005 legislative session, Qwest is to flexibly price its telecommunications services through a price list; Qwest may price its services in response to market operations, evidenced through customers' demands and willingness to obtain Qwest's services at Qwest's prices in competition to other carriers services at the prices demanded by these competing carriers. The Commission no longer has authority to review the costs associated with the provision of Qwest's services, nor to set the prices of Qwest's telecommunications services. See, Utah Code 54-8b-2.3 (2005).

Qwest proposed modifying the 1997 terms regarding placement of facilities through elimination of Option 2 and inclusion of additional terms to place new facilities in new residential developments. Qwest's new terms have Qwest alone placing all new facilities and developers would no longer have the authority to place facilities, except in specified circumstances. Installation will proceed pursuant to the parties' LDA. If Qwest is unable to install its plant in accordance with the terms of the LDA, the developer has the option of requiring Qwest to install, at Qwest's expense, conduit, through which cable will subsequently be pulled, or the developer himself may place conduit, conforming to Qwest's specifications, and Qwest will reimburse the developer's reasonable costs of placing the conduit. These provisions are said to permit the developer to rely upon the LDA, have trenches opened and closed, with facilities in place, and limiting developer liability (from open trenches) within a reasonable time period. If a developer requests deployment of facilities in a shorter time period than provided for in the LDA, Qwest is to provide the developer with available options to expedite installation, but the developer may be required to pay additional charges related to expediting the installation. Qwest has created a new position, "Utah New Development Manager," who will be responsible to assist developers and facilitate placement of facilities pursuant to Qwest's new terms.

Qwest argues that Option 2 is "irretrievably broken." The disputes associated with facility installation under the present form of Option 2 have no prospect of being eliminated. Parties will continue to have disputes on the reasonable costs of facility installation, whether what constitutes the developer's costs that are to be reimbursed under the 1997 provisions or how competing cost figures are documented or verified. Qwest contends that Qwest is asked to reimburse developers' claimed costs which are higher than what Qwest's costs would be for certain installations. Disputes will continue where "betterment" facilities are needed; their need, design/engineering and costs. Qwest argues that it is an unacceptable relationship to force Qwest, unwillingly, to rely upon the services of Option 2 contractors, with whom it has no direct contractual or business relationship, for the installation of Qwest's equipment or plant facilities.

In addition to the contracting difficulties, Qwest's argues that it is placed in a Hobson's choice with regard to Option 2 installations. It must either accept an installation which it would not otherwise accept or be required to reject the installation, with its concomitant impact upon the relationship with its telephone customers who would receive services over the facilities. Because it is the developer (not Qwest) who chooses the particular Option 2 contractor, Qwest is unable to affect the Option 2 contractor whose services may be causing difficulties for Qwest. Qwest argues that imposing the continuation of Option 2 places it in a unique position with regard to every other utility or telecommunication service provider in Utah. Qwest argues that no other utility or carrier is precluded from making its own choice of how and by whom its facilities are constructed; every other company either uses its own construction or contractors with which the utility has directly contracted for the installation service.

Qwest argues that its new terms are appropriate for the telecommunications market envisioned for Utah. Indeed, Qwest's terms are more specific and detailed than most, if not all, other carriers with whom it competes in providing telecommunication services in Utah. In support of Qwest's position, Qwest presents the written stipulation (Stipulation) and testimony of the Salt Lake Home Builders Association (SLHBA). In the Stipulation, the SLHBA states that it has reviewed Qwest's new terms and has no objection to their adoption. The SLHBA states that its position is based upon Qwest's commitment to create the Utah New Development Manager, shortened installation intervals to expedite facility placement, the possible installation of conduit where Qwest is unable to meet the installation date contemplated, and future, potential, revisions to the cost ceiling, above which developers may be required to advance or pay for new facility costs, along with performance reviews of Qwest's installation service. Both the SLHBA and Qwest testify that the new terms and Qwest's operational commitments will meet developers' needs to install new facilities in an appropriate and timely manner.

Also supporting Qwest's position are the Committee of Consumer Services (CCS) and the Division of Public Utilities (DPU). The CCS initially supported the concept of having multiply choices for the installation of new facilities. Ultimately, however, the CCS concludes that the disputes and difficulties associated with Option 2 make its continuation inappropriate for the operations of the telecommunications market intended for Utah. In light of Qwest's new terms and commitments, with seeming ability to meet developers' goals, the CCS supports the use of the new terms rather than trying to fix a flawed Option 2 alternative. The Division, as well, argues that the 1997 provisions for Option 2 should not continue. The DPU supports the use of Qwest's new terms and concludes that their use will result in appropriate installations of new facilities in new developments. The DPU makes some alternative recommendations, but only if the Commission should determine that developers should have an alternative to Qwest's installation of Qwest's network facilities in new developments. If such an alternative is to be made available, the DPU recommends that it should ensure that Qwest is not asked to pay more than Qwest's own costs for an installation and that Qwest have some direct control of the entity making the installation.

Opposing Qwest's position and advocating the forced retention of Option 2 or a similar alternative are some developers and their Option 2 contractors. The developers who appeared and provided testimony uniformly oppose elimination of Option 2. These developers state that they can benefit in not having to apply their own, limited, resources to address installation in their developments where they elect to use an Option 2 contractor. The development / construction process demands significant attention and resources to coordinate all activities and try to get them accomplished within the time frame desired by the developer. Effectively, by using an Option 2 contractor, the developer has one less responsibility in the litany of steps needed to complete a new subdivision. Through the agency relationship the developer creates with an Option 2 contractor, he may rely on the Option 2 contractor to be his interface with Qwest in efforts to arrange the installation of facilities in his development. The testifying developers are satisfied with the services provided by Option 2 contractors. As noted previously, developers who use Option 2 contractors usually rely upon them to be their interface for interactions with other utilities as well. The developers state that Option 2 contractors are able to deal with the vagaries of the installation of electric power facilities (which, to avoid interference and unsatisfactory telephone service, must be planned and installed prior to telecommunication facilities's installation, whether by Qwest or an Option 2 contractor) and other contingencies that may arise while developing the subdivision while meeting the developers' expectations concerning the installation of telecommunication facilities.

Those opposing Qwest's new installation terms have a very high burden to meet if the Commission is to reject Qwest's chosen, preferred methods and impose an alternative process contrary to Qwest's wishes. Longstanding, precedential case law and public policy gives great deference to utility management in its decisions of what utility plant is to be provided and how it is to be installed. *e.g.*,

> The location and manner of placing . . . the distribution system is essentially a matter of business management of the utility which should not be interfered with by the commission unless it is made to appear that the policy and consequent expenditure is actuated by bad faith, or involves dishonesty, wastefulness, or gross inefficiency. . . . It is well settled that public commissions cannot, under guise of rate regulation, take into their hands the management of utility properties or unreasonably interfere with the right of the management.

Logan City v. Public Utilities Commission of Utah, 77 Utah 442, 447, 296 P. 1006 (Utah 1931). We conclude that those opposing Qwest's position have failed to establish an adequate record upon which we can depart from the decades old presumption favoring Qwest's management's choice and supplant it with one opposed by the company.

We cannot conclude, from the record before us, that Qwest's desired revision for its facility installation process (pointedly, the elimination of Option 2) arises from bad faith, dishonesty, wastefulness or gross inefficiency. We conclude that even greater weight should be accorded to Qwest's chosen process in light of the changes to Utah's regulation of telecommunication service providers. The Commission has even less assurance and means available to achieve a just and reasonable result, balancing all interests, where multiple, competing providers are in the market and regulation has departed from the traditional revenue and cost-based regulatory model.

We recognize that different people may come to different conclusions on what may be the precise definition of the perfect installation process. What is required, however, is a reasonable process; we cannot conclude that Qwest's chosen approach is unreasonable. We note that the difference between those supporting Qwest's position and those opposing it is, essentially, their opinion on Qwest's future success. Qwest, the developers supporting Qwest, the DPU and the CCS believe that Qwest's commitment and application of the new terms will enable Qwest to install facilities within a reasonable time. Those opposing the new terms do not do so in arguing that the timing and process envisioned under the new terms are unreasonable per se. They just do not believe that Qwest can do it. We do note that those opposing developers who did appear and provide testimony, base their opinions on experiences with Qwest from a number of years back. Many have no, or limited, recent experience with Qwest's performance capabilities, they use Option 2 contractors instead. Their review of Qwest's new terms do not identify specific objections to the new terms. They make no comment on Qwest's stipulated agreement for review of its performance under the new terms. Indeed they are encouraged by the reduced time frames for the various steps in the installation process, the greater clarity provided, the existence of a single point of contact through the Utah New Development Manager, and the options to place conduit if Qwest were to fail in meeting an installation schedule. We also note that the project management/coordination services Option 2 contractors may provide to developers is not inextricably tied to Option 2; developers can independently contract for these services irrespective of an Option 2 availability. These developers simply want to have an alternative installation option for what they expect to be Qwest's future failings. Unfortunately, from their perspective, they have not established an adequate basis to foist an unwanted Option 2 alternative upon Qwest.

Wherefore, we conclude that Qwest's new facility installation process for new residential developments, as outlined in Qwest's filed testimony in this docket and as recently included in Qwest's price list filing made in May, 2005, is reasonable. We are unable to find that a 1997 tariff Option 2 type of alternative must be made available, in addition to the installation terms and conditions Qwest has voluntarily included.

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 6th day of June, 2005

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

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