- 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 ORDER ON CLEAR WAVE PETITION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND QWEST REQUEST FOR EXPEDITED RELIEF

ISSUED: August 3, 2005

By The Commission:

In this Order, we rule on a Petition for Temporary Restraining Order and Preliminary Injunction submitted by Clear Wave Communications, L.C., East Wind Enterprises, L.L.C., and Prohill, Inc., dba Meridian Communications of Utah (collectively Clear Wave) and a Request for Expedited Relief submitted by Qwest Corporation (Qwest).

Clear Wave's Petition

Clear Wave seeks a temporary restraining order and injunction precluding Qwest from enforcing a July 31, 2005, cut-off date (included in Qwest's price list filing of May 2, 2005) which could prevent Clear Wave from completing the installation of utility plant in various residential subdivisions. Qwest opposes the issuance of a temporary restraining order or injunction. The dispute arises from our previous Report and Order (June 6 R&O) wherein we concluded that the record did not permit us to require Qwest to continue to offer an Option 2 type of arrangement for the installation of utility plant. An Option 2 installation allows utility plant to be installed by the developer of a residential subdivision, with transfer of the installed plant to Qwest after completion and reimbursement of the developer's reasonable costs incurred to install the utility plant. Qwest's terms and conditions contained in its May price list filing accepts pre-existing Option 2 installation arrangements, but only if installation is completed prior to July 31, 2005. Clear Wave alleges that a number of its pending projects have been delayed such that installation can not be completed prior to July 31, 2005.

Qwest argues that Clear Wave has not responded to Qwest's inquiries to negotiate a mutual resolution of the process by which the parties could transition from the preceding Option 2 regime to that contemplated by the May price list. Qwest argues that it has reached mutually agreeable arrangements with other Option 2 contractors whereby there is agreement to permit the Option 2 contractor to complete the installation, have Qwest complete the installation (compensating the Option 2 contractor for the work already completed), or have Qwest take over the commitment to install facilities. Qwest argues that the parties should make efforts to reach similar agreement prior to intervention by the Commission. Qwest argues that, on the merits of a request for restraining order or injunction, Clear Wave's efforts fail as Clear Wave has no prospect of ultimately prevailing as the Commission's June 6 R&O concluded that no Option 2 type of arrangements are required. Qwest further argues that Clear Wave has not shown

irreparable harm warranting extraordinary relief, only possible loss of anticipated compensation under construction agreements.

While the Commission agrees with Qwest that no restraining order or injunction should issue, the Commission also agrees with Clear Wave that additional time should be allowed for completion of facility installation for those projects where Clear Wave and Qwest have taken steps to have an Option 2 type of arrangement. The record developed in this docket reconfirms the understanding that Qwest, the developer and the Option 2 contractor do not always execute a written Land Development Agreement prior to their activities to undertake and complete the installation of facilities in a subdivision. The parties' activities or conduct may evidence an agreement. The developer may give notice to Qwest that it plans to install facilities under an Option 2 arrangement, the developer/Option 2 contractor may prepare the engineering design for the facilities, Qwest may approve the design, the developer/Option 2 contractor may install, Qwest may test and accept the transfer of facilities and actually begin providing telecommunications services over the facilities prior to any executed agreement being made. Indeed we have learned that execution of a comprehensive, written Land Development Agreement may never occur between the parties.

The notion of a cut-off date is based upon the terms of the May price list. In addition, however, Qwest and Clear Wave also entered into a Joint Stipulation submitted to the Commission on March 9, 2004 (March 9 Stipulation), in PSC Docket 04-049-06. In the March 9 Stipulation, they mutually agreed to terms not only for the specified Option 2 project disputes identified therein, but also to future Option 2 projects which Clear Wave may undertake. The March 9 Stipulation clearly provides that it would apply to additional Option 2 projects Clear Wave may undertake through the effective date of a final Commission order. The March 9 Stipulation provides for the compensation amounts to be paid upon completion for new or additional Option 2 projects which Clear Wave may initiate (with developers and Qwest), but makes no provision for the time period in which such projects should be completed or what is to occur if a project's facility installation is delayed.

As the Commission has previously concluded that the terms and conditions of a developer's installation of utility plant (either directly or through the use of an Option 2 contractor) and Qwest's activities under the Option 2 regime are subject to regulation, the Commission concludes that Clear Wave's and Qwest's current dispute is also subject to its jurisdiction and resolution. The Commission concludes that it may apply general concepts of contract law to the March 9 Stipulation to resolve their dispute, as long as this does not conflict with public utility regulatory policies. Hence, where the parties' March 9 Stipulation did not provide specific terms for what is to occur with the additional Option 2 projects which are delayed beyond the anticipated completion date, the Commission may add missing terms as long as they are just and reasonable.

The Commission concludes that it is appropriate to apply the parties' March 9 Stipulation such that an Option 2 agreement exists where both sides (developer and Qwest) have taken affirmative steps, consistent with their past conduct, recognizing the Option 2 arrangement or agreement. It is appropriate to use Qwest's approval of the developer's facility engineering design as the demarcation point. At that point, reasonable minds would agree that there is conduct from both sides evidencing an agreement and an intent that the developer/Option 2 contractor is expected to install the approved facilities and transfer them to Qwest upon completion. Therefore, the Commission concludes that there is an Option 2 agreement between Qwest and the respective developer for each of the projects where Clear Wave received Qwest's approval of the engineering design. Concomitantly, the Commission concludes that where there has been no engineering design approval, there is no Option 2 agreement. Absent the parties' mutual

agreement, the resolution made in this order only has application to the projects identified in Clear Wave's pleading documents. These are Quail Crossing, Maples Plat E, Beacon Hill, Olsen Farms, Vistas 1A and 2, McMillan Farms, and Oquirrh Parck 3C. (Oquirrh Park 3C appears to be a project specifically identified in the March 9 Stipulation, *id*. page 2.)

The March 9 Stipulation does not provide for the specific time period during which Clear Wave is to complete installation of the additional Option 2 projects, nor what extensions should be allowed for delays beyond the parties' control. Under general contract principles, a reasonable time period for installation would be implied by law. Clear Wave has presented evidence showing that the delays are not due to any fault of Clear Wave (or of Qwest). Again, general principles would excuse a party for delays not within the party's control, and allow reasonable time in which to complete a project beyond the originally anticipated completion date. Based on the existing record however, the Commission is unable to make specific determinations of what a reasonable time period may be for completion of each of the individual projects. From the evidence presented, it appears that many can be completed in a matter of weeks from the issuance date of this order. Rather than have the parties use up time and expend their resources in supplementing the record for Commission determination of what the reasonable time periods may be, the Commission encourages the parties to attempt to resolve what may be reasonable completion periods through mutually negotiated agreement. As noted, no discussions have been had between the parties. A productive and efficient result could be anticipated from the parties' mutual negotiation. Should the parties fail, however, the Commission will conduct further evidentiary hearings to resolve disputes concerning the time in which Clear Wave should be permitted to complete facility installation for an affected project.

Qwest's Notice of Violation of Order and Request for Expedited Relief

Qwest filed a Notice of Violation of Order and Statute and Request for Expedited Relief (Request for Expedited Relief) on July 15, 2005. Through the Request for Expedited Relief, Qwest informs the Commission that SBS Telecommunications, Inc. (SBS) (an Option 2 contractor), subsequent to our June 6 R&O, has entered into agreements with some subdivision developers whereby SBS is given exclusive right to place telecommunications facilities in the developer's trenches within a subdivision and street crossings during development. Qwest notes that Qwest has no Land Development Agreement with these developers for the affected developments. Additionally, Qwest asserts that SBS has approached Qwest with offers to sell the telecommunications facilities which SBS has installed or will install in the subdivisions; Qwest indicates it has no intention of ever purchasing the offered facilities.

Qwest argues that SBS's actions are a circumvention of our June 6 R&O. Qwest argues that although we concluded that Qwest is not required to offer an Option 2 arrangement (and its May price list does not), SBS's actions effectively recreate Option 2 as SBS places facilities in the subdivision and Qwest is asked to compensate SBS for the facilities if Qwest were to decide to use them to provide Qwest services. Qwest argues that SBS's activities of placing facilities in the subdivisions makes SBS a telephone corporation under Utah law, that SBS has no certificate to operate as a telephone corporation public utility and that SBS's actions subject SBS to sanction under Utah Code 54-7-27. SBS responds to Qwest's Request for Expedited Relief by arguing that it is not a public utility subject to the Commission's jurisdiction. SBS argues that the placement of telecommunications plant does not make it a telephone corporation. SBS argues that the definition of a telephone corporation is dependent upon the

provision of a public telecommunications service (*see*, Utah Code 54-2-1(23)(a) and 54-8b-2(14)) and SBS does not provide any public telecommunications service.

The Commission agrees with the distinction made by SBS. Construction or installation of telecommunications plant alone does not make one a public utility, the offering of a public telecommunications service is also necessary. The Division of Public Utilities, the Committee of Consumer Services and Qwest argue that permitting developers (or their contractors) to install telecommunications facilities in these new subdivisions exposes homeowners to the potential that there may be no public telecommunications services available when homeowners desire to have them. Qwest has clearly indicated that it will not purchase facilities from SBS. Although SBS is willing to offer the installed facilities to other telecommunications corporations beyond Qwest, there is no certainty that the facilities will be purchased and used to provide service by any telecommunications company. They argue that the equipment may not be engineered or installed to a standard acceptable for use by a telecommunications corporation or that prospective purchasers and SBS may not reach mutual agreement on terms for transfer and use of the facilities.

Although sympathetic to the concerns expressed, the Commission cannot exercise jurisdiction it does not have, even if it is expected to produce a worthy result furthering the public interest. *See, Mountain States Telephone Company v Public Service Commission of Utah*, 754 P.2d 928 (Utah 1988). The result of the limitations of Commission authority over SBS may portend homeowners being greatly disappointed and delayed in receiving public telecommunications service they expect to have when moving into a subdivision. These future customers and their telecommunications companies may be required to resort to alternative line extension policies and procedures because there is no telecommunications company willing to stand behind SBS's installed facilities and use them to provide service. This could be an inefficient and costly outcome for telecommunications customers and telecommunications companies, but one which inevitably can arise due to the limitation of our authority over the developers, SBS and their conduct. While SBS is willing to take this gamble, the Commission is not certain that the affected developers are knowingly accepting such risk. The Commission believes that potential purchasers of lots in the subdivisions will be ignorant of the risk potential and that local governmental entities, approving these subdivisions, are unaware of the risk arising from the subdivision developer's and SBS's agreements and arrangements for the placement and use of telecommunications facilities. At best, the Commission can only provide notice and information concerning this potential. We are not able to grant the relief requested by Qwest. To do so would be an attempt to assert authority over conduct which we believe is beyond our jurisdiction.

Order recommended this 3rd day of August, 2005.

/s/ Sandy Mooy
Hearing Officer

The Hearing Officer's Recommended Order is accepted and adopted by the Commission. It will be issued as the Order of the Public Service Commission of Utah.

ORDER

Wherefore, we issue this Order by which we:

1. Deny Clear Wave's Petition for a Temporary Restraining Order and Preliminary Injunction.

2. Order Qwest and Clear Wave to negotiate and attempt to resolve what may be reasonable completion dates for the additional Option 2 projects anticipated under the March 9, 2004, Joint Stipulation, and which have been identified in this Order.

3. If the parties fail to reach agreement resolving matters pursuant to Ordering Paragraph 2 above, the parties shall inform the Commission of the projects which remain under dispute and the Commission will conduct further hearings to resolve the remaining disputes.

4. Deny Qwest's Request for Expedited Relief.

DATED at Salt Lake City, Utah, this 3rd day of August, 2005.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
GW#45329