

- 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 ON PETITION FOR REVIEW

ISSUED: July 29, 2005

By The Commission:

On July 11, 2005, SBS Telecommunications, Inc. (SBS) filed its Petition for Review (Petition), seeking review of the Commission’s Report and Order issued June 10, 2005, in this docket (June 10 R&O). SBS seeks review pursuant to Utah Code §§54-7-15 and 63-46b-12. Qwest Corporation (Qwest) filed its Response to Petition for Review on July 26, 2005. In its Petition, SBS asks “1. That the Commission recognize the legitimacy of the legally binding contract between SBS and its client developers; 2. That the Commission recognize and rule that Qwest must also recognize the legitimacy of the developers/builders costs that are to be reimbursed; 3. That as to the issue of betterments, Qwest be ordered to reimburse the builder/developer their costs; and 4. That the Commission set aside the Order dated June 10, 2005 and order Qwest to reimburse the developer/builder their costs as set forth in the contracts entered into between SBS and its client developers.” (Petition, pages 8 and 10.) In the Petition, SBS claims four grounds for review. We will deal with each in seriatim.

SBS’s Procedural Error Claim

SBS claims the Commission erred in failing to follow an appropriate procedural process; that a recommended report and order should have been prepared by a hearing officer and submitted to the Commission. As SBS itself

acknowledges (SBS Petition for Review, page 10), there was no evidentiary hearing conducted in this docket; the case was submitted to the Commission on the parties' pleadings and briefs. As there was no hearing officer to whom any evidence or argument was given, no report or recommended order was to be prepared. The Commission properly ruled on the merits and its decision was based upon the pleadings and briefs which the parties submitted to the Commission.

SBS's Ultra-jurisdiction Claim

SBS's Petition for Review notes it sought monetary relief in this docket, but then claims the Commission is without authority to grant this relief. This position conflicts with SBS's specific requests for relief contained in its Request for Agency Action filed in this docket September 8, 2004 (*see*, pages 31 - 34 wherein SBS makes multiple requests for the Commission to order Qwest to pay SBS) and in the Petition for Review itself (wherein it, again, asks the Commission to order Qwest to pay SBS). We disagree with SBS's conclusion. In our June 10 R&O, we concluded that Qwest is required to pay developers' reasonable costs for facility installation in residential subdivisions if the developer placed them under the Option 2 terms of Qwest's then applicable tariff. Qwest is required to comply with that decision. Utah Code §54-3-

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23. We find nothing in SBS' argument that changes our conclusion that we can require Qwest to pay for reasonable costs incurred to install utility plant.

SBS's Tariff Interpretation Claim

SBS claims we failed to apply the "clear and unambiguous language" of Qwest's tariff. SBS reargues its position that the tariff "clearly and unequivocally obligates Qwest to 'reimburse the developer/builder their costs . . . [not to exceed \$436.16].'" (SBS Petition for Review, page 7.) What SBS loses in its ellipsis is the equally clear and unambiguous tariff language that the cost reimbursement is the amount "identified in the LDA." Had SBS (or its

principals/developers) complied with the tariff language and executed LDAs, which identified the appropriate amounts for the subject developments, its post installation disputes with Qwest on the appropriate reimbursement amounts for installed facilities in those developments would not have been brought before the Commission. We continue to disagree with the import of SBS's argument that Qwest is obligated to pay any costs incurred by a developer as long as the amount does not exceed the company's average distribution loop investment. SBS's repetition of the argument in its Petition for Review does not convince us to reconsider and change our conclusion.

SBS's Contract Revision Claim

SBS claims our June 10 R&O rewrites SBS's contracts with subdivision developers. SBS

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errs in this argument. The Commission's order made no interpretation or ruling concerning any contract SBS may have with any developer. Our decision addressed the terms of Qwest's tariff; the obligations which arise from the tariff, the terms and conditions between Qwest and a developer. We have authority to interpret and apply the terms and conditions of a utility's tariff and corresponding party involved under the tariff's provisions' terms (in this case a subdivision developer). We resolved the Qwest-developer relationship dispute on what the tariff requires Qwest to pay developers. Our decision applies to the operation of Qwest's tariff and was not intended in any way to reach or apply any terms of a contract SBS may have entered into with a developer. If SBS's contracts with developers are dependent upon the tariff's application, that is due to SBS's own contracting decisions. If SBS voluntarily agreed to contract terms and conditions with a developer which limited the developer's payment to SBS to the amount the developer is to receive from Qwest under an executed LDA and/or the tariff's terms, that was SBS's choosing, not our rewriting of SBS's contracts with developers. If the compensation outcome from SBS-developer contracts is different from SBS's expectations, it is due to SBS's contracting decision to rely upon the application of the tariff rather than independent compensation terms in SBS's contract with a developer.

Order Denying Petition

Based upon our consideration of and decisions on the arguments made by SBS in its Petition for Review, and the relationship between SBS's review arguments and the specific relief

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requested in the petition, we enter this order and deny all requested relief sought by SBS. Specifically, with respect to a request for review or reconsideration pursuant to Utah Code §§54-7-15 and 63-46b-12, we deny rehearing, review or reconsideration and do not alter any aspect of our June 10, 2005, Report and Order.

Wherefore, based thereon, it is hereby ORDERED that SBS Telecommunications, Inc.'s Petition for Review filed July 11, 2005, is denied.

DATED at Salt Lake City, Utah, this 29th day of July, 2005.

/s/ Richard M. Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
GW#45231