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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

CLEAR WAVE COMMUNICATIONS, L.C.,
a Utah limited liability company, EAST WIND
ENTERPRISES, LLC, a Utah limited liability
company, PROHILL, INC., a Utah corporation
dba MERIDIAN COMMUNICATIONS OF
UTAH, and SBS TELECOMMUNICATIONS,
INC., a Utah corporation,

Complainants,

vs.

QWEST CORPORATION, a Colorado
corporation,

Respondent.

DOCKET NO. 04-049-06

**OPENING BRIEF OF
SBS TELECOMMUNICATIONS, INC.**

SBS Telecommunications, Inc. (“SBS”), by and through its legal counsel of Mismash & McDonough, LLC and pursuant to the Public Service Commission’s Revised Scheduling Order, respectfully submits its opening brief in this matter.

INTRODUCTION

SBS is a private company engaged in the business of providing developers/builders with telecommunications network development services and facilities for new housing development

projects (“Option 2 Contractors”) pursuant to a land development agreement (“LDA”) entered into under Option 2, Section 4.4.C.2 of Qwest’s Utah Exchange and Network Services Tariff (the “LDA Tariff” or “the Tariff”).¹

The Tariff requires Qwest to enter into an LDA with developers/builders that addresses the provisioning of telephone distribution facilities within new areas of land development. The Tariff requires Qwest to offer two options for entering into the LDA. Under the first option (“Option 1”), Qwest performs the engineering, design, placement and splicing of the facilities. These tasks and services are performed for no charge so long as Qwest’s costs do not exceed the specified formula amount of “the distribution portion of the average exchange loop investment times 125%, times the number of lots in the development”. Ostensibly based upon its own cost studies, Qwest claims that this value equals \$436.13 per lot.

Under the second option (“Option 2”), Qwest is obligated to pay the developer/builder their costs in performing the engineering, design, placement and splicing of the facilities in an amount that “does not exceed” the formula set forth above.

In this Docket, SBS’s Request for Agency Action identifies seventeen different projects undertaken by SBS as an Option 2 contractor; and upon which Qwest has failed to adhere to the Tariff requirements that Qwest reimburse the developer/builder their costs. In this regard, SBS seeks an order from the Commission declaring the developer/builder costs reasonable; and requiring Qwest to pay SBS the reasonable amounts due and owing consistent with the LDA Tariff presently in effect; rather than allowing Qwest to compensate (reimburse) SBS in an amount that Qwest would be entitled to had Option 1 been elected.

¹ Inasmuch as the Commission is intimately familiar with the services that Option 2 Contractors provide, as well as the general nature of the dispute between the parties hereto, SBS will refrain from going into undue detail regarding the relationship between Qwest and Option 2 contractors.

ARGUMENT²

POINT ONE

Qwest Has Failed to Comply With The Plain Language of The LDA Tariff In Its Dealings With SBS.

Section 4.4 of the LDA Tariff sets forth in pertinent part as follows:

4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES

4.4 LAND DEVELOPMENT AGREEMENTS

. . .

B.6. All charges to be borne by the Company will be an amount that does not exceed, or is lesser than, the distribution portion of the average exchange loop investment, times 125%, times the number of lots in the development.

. . .

C. Options

. . .

2. Option 2 – Facilities Engineered, Designed, Placed and Spliced by the Developer/Builder

. . .

e. Once the Company has accepted the facilities, the Company will reimburse the Developer/Builder their costs, as identified in the LDA, not to exceed the distribution portion of the average exchange loop investment. See B.6. (*emphasis added*).

These provisions of the LDA Tariff, approved in 1997 by the Commission, are in effect until the Commission approves a new LDA Tariff. *See American Telephone and Telegraph Company vs. Central Office, Inc.*, 524 U. S. 214 (1998). Accordingly, the extent of Qwest’s obligation to reimburse SBS may easily be determined from the plain language of the Tariff, together with the previous reports and orders of the Commission.

² Preliminarily, SBS takes exception with the fact that Qwest has used this Docket to address issues more appropriately reserved, and indeed dedicated to, another docket. For example, in its Response to the Complaint of SBS Telecommunications, Inc., Qwest repeatedly refers to Qwest’s seeking the elimination of Option 2. (See page 7 of Qwest’s Response.) As Qwest is well aware, the continued viability of Option 2 has been reserved for Docket No. 03-049-62.

Section 4.4B.6 clearly establishes the charges that are to be borne by Qwest. That is, the charges will be an amount that does not exceed \$436.13 per lot. Therefore, regardless of whether Option 1 or Option 2 is selected, the present Tariff in effect puts a “cap” upon the charges that will be borne by Qwest. Moreover, once Qwest has accepted the telecommunications facilities, it has an obligation to reimburse the developer/builder their costs, up to \$436.16 per lot. This reimbursement provision is not discretionary. It is mandatory. Accordingly, for every Option 2 project worked on by SBS, Qwest is obligated to pay reimbursement costs up to \$436.16 per lot. As set forth in SBS’s Request for Agency Action, as well as hereinafter set forth with more particularity, Qwest has clearly violated the LDA Tariff presently in effect.

As the Commission is well aware, the LDA Tariff has been the subject of numerous proceedings before this Commission over the past several years. For example, in Docket No. 98-049-33, *Silver Creek Communications vs. Mountain States Telephone and Telegraph Co., dba U. S. West Communications*, the Commission addressed the issue which is before the Commission in the instant docket. In its Report and Order issued October 30, 1999, the Commission refused to accept Qwest’s position that a developer (Option 2 contractor) is entitled to reimbursement only up to Qwest’s estimate of Qwest’s costs to do the work if Qwest undertook the work itself. Therein the Commission stated that, “[u]nfortunately for [Qwest’s] position, that isn’t how the language reads.” See Report and Order of Commission issued April 30, 1999, Docket No. 98-049-33 at page 5. Elaborating on its refusal to accept Qwest’s position, this Commission set forth as follows:

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 incorporate in the LDA. In that regard, by implication, both developer and [Qwest] are required to furnish in good faith detailed, *verifiable* cost estimates on the request of the other party. It will not do for [Qwest] to hide behind alleged proprietary concerns to avoid such disclosure. [Qwest] itself has created the need for 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, [Qwest's] liability for reimbursement may not be escalated thereafter.

Id. at p. 6.

This Commission again addressed the LDA Tariff in Docket No. 99-049-T (October 2, 2000). At issue in that docket was Qwest's proposal to replace the LDA Tariff with tariff provisions referred to as the "provisioning agreement for housing developments." On reconsideration of the original Order in that docket, the Commission rejected Qwest's proposal and reinstated the LDA (which is in effect today). In its Order, the Commission set forth as follows:

Our review and reconsideration of the record leads us to conclude that the difficulties identified with the LDA result not from the LDA itself, but the lack of compliance with the LDA.

. . .

We conclude that the difficulties that Qwest attributes to the LDA come from the failure of Qwest, developers, and/or developer's agents performing the activities under the existing Tariff to comply with the terms of the LDA.

Accordingly, contrary to Qwest's incessant badmouthing of SBS³, it is apparent that the dispute between the parties hereto is the result of either Qwest's inability to comply with the requirements of the Tariff (and specifically entering into an LDA at the front end of a project); or that the Tariff needs to be revised.

POINT TWO

Qwest Has Failed to Comply With the Tariff By Consistently Refusing to Enter Into An LDA In A Timely Manner.

As indicated in prior Orders of the Commission, a basic flaw within this system is not necessarily related to the LDA, but the failure of the parties to comply with the same.

Significantly, and perhaps the most egregious breach of the Tariff is Qwest's refusal to enter into a contract LDA on a timely basis. That is, although the LDA, pursuant to the Tariff, is to be executed at the front end of a project, in reality this never happens. Moreover, inasmuch as the LDA is the controlling document regarding obligation of Qwest to reimburse costs, the Option 2 contractor is severely hamstrung by not having the benefit of a LDA executed on a timely basis.

SBS has attempted to act in good faith in its business dealings with Qwest, particularly by putting forth an effort to resolve the very problems that are now being litigated. For example, on January 1, 2003, SBS communicated with Bonnie Anderson, Vice President of Network Operations and Engineering for Qwest. In its letter to Ms. Anderson, SBS identified two areas in which SBS had great concern. First, SBS advised Ms. Anderson that "Qwest **WILL NOT** enter into a contract (i.e., Land Development Agreement) with land developers until **AFTER** most of the actual work is completed."(See January 1, 2003 letter from SBS to Bonnie Anderson, a copy of which is attached hereto as Exhibit 1.)

Despite SBS bringing its concerns to the attention of Qwest, Qwest continues to refuse to furnish an LDA in a timely manner. This smacks of bad faith.

POINT THREE

Qwest Has Unilaterally Attempted to Change the Option 2 Process.

On August 15, 2003 Qwest unilaterally attempted to implement changes into the Option 2 process.⁴ Qwest issued a directive to “All Option 2 LDA Contractors” that was ostensibly the result of a June 25th meeting, as well as the Report and Order issued on July 15, 2003 in Docket No. 02-049-66. Significantly, this directive indicates that there is a change in procedure in the “process flow” such that additional language was implemented by Qwest concerning “verifiable cost estimates.” This procedure is not only misplaced but usurps the authority of the Commission with regards to changing a process.

Additionally, at page thirteen of its “Response to the Complaint of SBS”, Qwest asserts that “in fairness to SBS, this timing problem is nearly universal on Option 2 jobs and Qwest has no idea how to correct it beyond removing Option 2.” Accordingly, despite Qwest’s bemoaning that SBS has failed to comply with Tariff timing and construction requirements, it is readily apparent, and indeed acknowledged by Qwest, that the timing problems are almost universal with all Option 2 jobs. Again, it appears that the problem with the Tariff is not necessarily related to the substance of the Tariff but rather, the parties’ compliance with it. Therefore, the inevitable result of failing to execute an LDA at the front end of a project is that the parties fail to reach agreement as to the amount of compensation Qwest must pay for facilities placed under Option 2.

⁴ See August 15, 2003 letter from Don Green, Manager, Qwest Corporation to “All Option Two LDA Contractors”, a copy of which is attached hereto as Exhibit 2.

POINT FOUR

Qwest has processed numerous requests based upon the cost estimates furnished by SBS.

Historically, Qwest has processed numerous LDA's, and made payment on the same, without requiring SBS to furnish it with detailed itemized cost estimates. For example, on November 18, 2003, SBS forwarded a letter to Qwest identifying SBS's cost estimates as related to the River Wood Project in Logan, Utah. The costs estimates set forth in the SBS letter was expected by Qwest; and an LDA was generated and forwarded to Mr. Jay Bodine, Vice President of SBS. Moreover, consistent with the cost estimate that was furnished by SBS to Qwest regarding the River Wood Project, SBS was reimbursed at the rate of \$436.16 per lot.⁵ As with the River Wood Project, on numerous other projects SBS followed a similar routine in providing Qwest with its cost estimates. (See Affidavit of Jay Bodine.)

Inasmuch as Qwest has on several occasions accepted in the form referred to herein, Qwest cannot now cry foul with regards to other projects that SBS failed to provide verified and detailed cost estimate information.

CONCLUSION

Based upon the forgoing, SBS respectfully requests this Commission to grant it relief consistent with its Request for Agency Action in this Docket.

⁵ See Exhibit 3 hereto for Affidavit of Jay Bodine.

Accordingly, SBS respectfully requests that the Commission grant it relief consistent with its Request for Agency Action.

DATED this the ____ day of November, 2004.

Kevin M. McDonough
Attorney for SBS Telecommunications, Inc.

CERTIFICATE OF MAILING

I hereby certify that on this ___ day of November, 2004, I caused to be delivered by U.S. Mail, postage prepaid, and by electronic mail, a true and correct copy of the foregoing **OPENING BRIEF** to the following individual:

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