

Kevin M. McDonough (#5109)
Nancy A. Mismash (#6615)
MISMASH & McDONOUGH, LLC
136 South Main Street
Suite 404, Kearns Building
Salt Lake City, Utah 84101
Ph: 801-531-6088
Fax: 801-531-6093

Attorneys for Complainant/Petitioner,
SBS Telecommunications, Inc.

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

PETITION FOR REVIEW

SBS Telecommunications, Inc. (“SBS”), by and through its legal counsel of record, and pursuant to and consistent with §§ 63-46b-12 and 54-7-15 of the Utah Code, and Utah Administrative Rule 746-100-11, respectfully submits this Petition for Review concerning the above referenced Docket.

Petitioner requests that the Public Service Commission of Utah (“the Commission”) review the Order issued on June 10, 2005 (“the Order”), and grant the relief requested herein.

This request for agency review is based on the Commission's (1) failure to follow appropriate procedure; (2) acting beyond its scope of authority and jurisdiction by erroneously exercising jurisdiction over a matter in which the Commission cannot grant appropriate relief; (3) failure to appropriately apply the clear and unambiguous language of the LDA Tariff to the facts in issue; and (4) inappropriately re-writing contracts between parties.

INTRODUCTION

As stated by the Commission in the first page of the Order, this Docket is a consolidation of several complaints regarding the interpretation and application of certain provisions of Qwest's Utah Exchange and Network Services Tariff ("the Tariff" or "LDA Tariff") dealing with Land Development Agreements ("LDA"s) and placement of network communication facilities in new subdivisions. In essence, the purpose of this Docket is to determine the costs that Qwest is obligated to reimburse developers/builders pursuant to the LDA Tariff.

BACKGROUND

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 pursuant to an LDA entered into under Option 2, Section 4.4.C.2 of 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.

¹ Inasmuch as issues concerning Option 2 of the LDA Tariff have been before the Commission numerous times over the past several years, the Commission should be intimately familiar with the services that Option 2 Contractors provide, as well as the general nature of the dispute between the parties hereto. As such, SBS will refrain from going into undue detail regarding the relationship between Qwest and Option 2 contractors.

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.

PROCEDURAL HISTORY

1. On January 9, 2004, SBS filed a Complaint in the Third Judicial District Court, Salt Lake County (Civil No. 040900339), alleging causes of action premised on theories of Tortious Interference with Economic Relationships, Quantum Meruit, Unjust Enrichment and Conversion.

2. On or about January 14, 2004, several Option 2 contractors (not parties to this Petition for Review) filed a Request for Agency Action, seeking, among other things, an Order "[r]equiring Qwest to comply with the LDA Tariff and to reimburse land developers in accordance therewith."

3. On March 15, 2004, Qwest filed a Motion to Dismiss the Third District Court action.

4. On July 21, 2004, Third District Court Judge L.A. Dever, while refusing to dismiss the action filed in Third District Court, ordered that the Third District Court proceedings be stayed, pending resolution of certain issues before the Commission in multiple dockets.

5. On or about September 2, 2004, SBS filed a Petition to Intervene in the instant Docket; and on September 28, 2004, the Order Granting Intervention was issued.

6. Consistent with the Order Granting Intervention, SBS filed a Request for Agency Action, therein identifying sixteen (16) different projects undertaken by SBS as an Option 2

contractor; and upon which Qwest failed to adhere to the Tariff requirements whereby Qwest is obligated to reimburse the developer/builder their costs (as established by contract between SBS and its client builder/developer).

7. On or about October 7, 2004, Qwest filed a Response to SBS's Request for Agency Action, therein requesting that SBS be denied any relief and that the Complaint be dismissed with prejudice.

8. On November 4, 2004, the Commission issued a Second Amended Scheduling Order, therein establishing dates by which parties to this Docket could submit "Briefs" in support of their respective positions.

9. On or about December, 21, 2004, the final Briefs in this Docket were filed with the Commission.

10. The matter was submitted to the Commission without discovery or oral argument.

11. On June 10, 2005, the Commission issued its Order, determining, in part, that:

A developer is to be reimbursed his reasonable costs incurred in making a reasonable installation of reasonable facilities in the subdivision where the developer has elected to install facilities under Option 2.

Where the parties are unable to agree upon what the developer's reasonable costs may be for a particular subdivision, the parties will be required to provide adequate evidence upon which the Commission can determine what reasonable costs might be for the particular subdivision.

If the parties are unable to reach agreement on what a developer's reasonable installation cost may be in these consolidated disputes, further proceedings before the Commission may be conducted to resolve each disputed case.

GROUNDS FOR REVIEW

SBS respectfully requests review of the Commission's Order based upon the following grounds:

1. THE COMMISSION'S FAILURE TO FOLLOW APPROPRIATE PROCEDURE.

To the extent that the Administrative Law Judge failed to comply with the mandates of Utah Administrative Code R. 746-100-11, the Commission's Order is defective. That is, pursuant to Utah Administrative Code R 746-100-11.B, "If a case has been heard by less than the full Commission, or by an Administrative Law Judge, the official hearing the case shall submit to the Commission a recommended report containing proposed Findings of Fact, Conclusions of Law and an Order based thereon.

This matter was heard by Administrative Law Judge, Sandy Mooy. Therefore, it was required of Mr. Mooy to submit to the Commission such a recommended report.

2. THE COMMISSION ACTED BEYOND THE SCOPE OF ITS AUTHORITY AND JURISDICTION BY ERRONEOUSLY EXERCISING JURISDICTION OVER A MATTER IN WHICH THE COMMISSION CANNOT GRANT APPROPRIATE RELIEF.

In this Docket, SBS is seeking monetary relief. This Commission is without authority to award such damages. Rather, the Commission is limited to affording "reparations," i.e. a refund of overcharges.

Indeed, the Public Service Commission has, on at least one prior occasion, been presented with an almost identical issue, and has determined that it did not have jurisdiction to entertain the matter. More specifically, in the matter of Silver Creek Communications v. Mountain States Telephone and Telegraph Co. dba U.S. West Communications, Docket No. 98-049-33, the Public Service Commission refused to exercise jurisdiction over a Complaint filed

with the Commission which sought monetary compensation for services performed under the Tariff.

Just as in the case at bar, in Silver Creek Communications Complainant was a third-party beneficiary under a telephone facilities extension agreement entered into between a builder/developer and U.S. West Communications, a telephone corporation certificated by the Public Service Commission. The Complainant in that matter, Silver Creek, was the Option 2 contractor who actually installed the telephone distribution system in a subdivision under contract with the developer. (This is precisely the scenario that is presented to this Commission.) In Silver Creek Communications, the Commission articulated that under Silver Creek's contract with the real estate developer, Silver Creek was to be paid the amount of money that U.S. West Communications was to reimburse the developer under the terms of the applicable Tariff. (The Tariff at that time read the same as it does today.) The developer was paid in accordance with U.S. West Communications interpretation of the Tariff. Silver Creek however, asserted that the reimbursement was inadequate; and that Silver Creek would encounter the same issue in future projects it undertook, and therefore Silver Creek sought relief from the Commission.

In refusing to exercise jurisdiction over that Docket, the Commission reasoned:

This case presents threshold issues of 1) Commission jurisdiction and 2) Complainant's standing. Concerning threshold issue 1, the only monetary disputes the Commission is explicitly authorized to resolve are those concerning service charges beyond those set out in a utility's tariffs or discriminatory application of the tariff. The instant controversy involving the utility's liability under contract does not fit in that category, particularly since the only remedy, in a case like this, the Commission is authorized to afford is reparations, i.e., refund of overcharges. . . Complainant's real remedy, if any, would appear to be a claim through the Courts...for unjust enrichment.

The Commission's refusal to take jurisdiction over Silver Creek Communications is wholly consistent with Denver & Rio Grande Railroad Company v. Public Utilities Commission of Utah, 272 P. 939 (Utah 1928).

3. THE COMMISSION FAILED TO APPROPRIATELY APPLY THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE LDA TARIFF TO THE FACTS IN ISSUE.

The Commission's Order fails to recognize the clear and unambiguous language of the LDA Tariff.

The relevant portions of the LDA Tariff at issue in this Docket are Sections 4.4B.6 and Sections 4.4C.2.e. Respectively, these provisions set forth as follows:

4.4B.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.

4.4C.2.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.

Despite the contentious history between and among the parties to this Docket concerning the Tariff, the pertinent provisions of the LDA Tariff clearly and unequivocally obligates Qwest to "reimburse the developer/builder their costs . . . [not to exceed \$436.16]".

While Qwest might believe that it is being taken advantage of and/or cheated by Option 2 Contractors, the plain language of the LDA Tariff is controlling. Accordingly, while Qwest might be dissatisfied with its own tariff, it is the author of the same, and must abide by the provisions thereof. State v. Huntington/Cleveland Irrigation Co., 2002 UT 7, ¶13 52P.3d125, 1261 is instructive, standing for the well settled proposition that the legislature uses "each word advisedly and give[s] effect to the term according to its ordinary and accepted meaning, and... seek[s] to render all parts of the statute relevant and meaningful."

Pursuant to the Tariff, Qwest must reimburse the developer/builder the amount of money (up to \$436.13 per lot) that the developer/builder has become obligated to pay SBS.

4. THE COMMISSION'S ORDER INAPPROPRIATELY REWRITES CONTRACTS BETWEEN PARTIES.

In essence, the Commission's Order voids the contracts entered into between SBS and its client developers; and rewrites a new contract, thereby changing the rights, duties and obligations of the parties, contrary to law. The reimbursement obligations of Qwest are inextricably intertwined with the developers/builders costs.

SBS has **always** provided Qwest with a copy of the actual contract setting forth the amount for which the developer has become obligated. Any ruling contrary to this reimbursement schedule, is in essence, contrary to contract law. Further, any interpretation of the Tariff and the Commission's Order that goes beyond discovering the actual amount of money the developer is obligated by contract to pay SBS, is well outside the scope of the Tariff and the authority of the Commission.

CONCLUSION

The LDA Tariff specifies that it is the developers/builders cost that are to be reimbursed. Therefore, Qwest's cost estimates are irrelevant. SBS respectfully requests the following relief:

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.

DATED the _____ day of July, 2005.

Kevin M. McDonough
Attorney for SBS Telecommunications, Inc.

CERTIFICATE OF MAILING

I hereby certify that on this the ____ day of July, 2005, I caused to be delivered by U.S.

Mail, postage prepaid, and by electronic mail, a true and correct copy of the foregoing

PETITION FOR REVIEW to the following individuals:

David L. Elmont
Stoel Rives, LLP
201 S MAIN ST STE 1100
SALT LAKE CITY, UT, 84111
dlelmont@stoel.com

Patricia E. Schmid
Assistant Attorney General
160 E 300 S
POB 140847
SALT LAKE CITY, UT, 84114
pschmid@utah.gov

Reed Warnick
Assistant Attorney General
160 East 300 South
Salt Lake City, Utah 84111
rwarnick@utah.gov

Olivia Smith
Committee of Consumer Service
160 East 300 South, 2nd Floor
Salt Lake City, Utah 84111
osmith@utah.gov

Julie Orchard
Lindsay Mathie
Public Service Commission
160 East 300 South
PO Box 45585
Salt Lake City, Utah 84145-0585
jorchard@utah.gov
lmathie@utah.gov
