-BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH-

In the Matter of the Complaint of: SBS TELECOMMUNICATIONS, INC, and SILVER CREEK COMMUNICATIONS, INC., Complainants, vs. QWEST CORPORATION, Respondent.	))))))))	DOCKET NO. 02-049-66 REPORT AND ORDER

ISSUED: July 15, 2003

By The Commission:

This matter was initiated by a complaint by SBS Telecommunications, Inc. and Silver Creek Communications, Inc. ("Complainants") against Qwest Corporation ("Qwest") regarding the interpretation and implementation of Section 4.4 of Qwest's Exchange and Network Services Tariff. Specifically Complainants seek a determination as to whether "townhomes" fall within the scope of that tariff provision, and if the option of a Land Development Agreement as set forth in that provision is available to developers of townhome developments. The parties agreed to address the issue through briefs and affidavits, and the parties have accordingly briefed this issue extensively. Qwest also filed a Motion to Enlarge Scope of Proceedings seeking to expand this proceeding to address "all relevant LDA tariff issues." Complainants objected to any expansion of these proceedings beyond those raised in their Complaint.

DISCUSSION

Previous Commission decisions: This is not the first time this tariff provision has come before this Commission and a review of our previous orders regarding this tariff provision is appropriate. In *Silver Creek Communications v. Mountain States Tel. & Tel. Co.*, Docket No. 98-049-33, issues similar to some of the issues raised in this proceeding were identified by the parties. In its decision in that matter, the Commission stated:

> We believe the only interpretation fair to both parties and consistent with the public interest is as follows:
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> Section 4.4(B)(6) requires that costs be agreed upon at the inception of the agreement and incorporated in the LDA. In that regard, by implication, both developer and Respondent are required to furnish in good faith detailed, *verifiable* cost estimates on the request of the other party. It will not do for Respondent to hide behind alleged proprietary concerns to avoid such disclosure. Respondent itself has created the need for this 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, Respondent's liability for reimbursement may not be escalated thereafter.

The LDA tariff came before the Commission again in Docket 99-049-T28. In that matter, Qwest proposed replacing the LDA tariff with tariff provisions referred to as the "Provisioning Agreement for Housing Developments" or "PAHD". The Complainants herein were parties to the proceedings in that docket. In the original Report and Order in that proceeding, the Administrative Law Judge recognized that some of his assumptions regarding the reasons for implementation of the LDA, and how the LDA process was being used and interpreted by the parties were erroneous. Viewing the LDA arrangement as "irretrievably broken" the ALJ recommended, and the Commission initially approved, replacing the LDA tariff with the PAHD tariff. On reconsideration of the original order in that docket, however, this Commission rejected the PAHD, and reinstituted the LDA. In its order the Commission stated:

> 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. Rather than replacing the LDA with a new process, we decide to retain the LDA process for the placement of facilities in new developments. We continue to believe, as we did in our 1997 approval of the current LDA process, that the LDA provides appropriate alternatives for the timely deployment of facilities necessary to meet demand for telecommunications services in new developments. We conclude that the difficulties Qwest attributes to the LDA come from the failure of Qwest, developers, and/or developers' agents performing the activities under the existing tariff, to comply with the terms of the LDA. Reasonable conduct under the LDA would permit the placement of equipment/facilities, properly designed, and properly installed for the benefit of telecommunications service consumers locating in new developments. If poorly designed facilities, deficient equipment, or improperly installed equipment occur under the LDA, it is because parties have failed to comply with the LDA and expectations of appropriate conduct under the LDA.

Those words provide an appropriate starting point for addressing the issues raised in this docket.

Permanent single family dwelling interpretation: The only issue Complainants' seek a decision on in this matter is the question of whether "townhome" developments should be included in the definition of "single family dwellings" under the LDA tariff. In addition to that issue Qwest seeks to raise additional issues regarding costs, its right to control the design and specifications of materials used in placing facilities, and time-frames to be followed under the LDA. We will first address the issue raised in the Complaint, then Qwest's request to raise additional issues.

The LDA tariff, Section 4.4 of Qwest's Exchange and Network Services Tariff, states:

> A. A Land Development Agreement (LDA) is a written agreement entered into between the Company and the Developer/Builder for the provision of distribution facilities, within new areas of land development, for permanent single family dwellings. The Company offers two Agreement options. Option 1, Company Engineered/Designed; Option 2, Developer Engineered/Designed.

Pursuant to the tariff, an LDA is required between the Company and the Developer/Builder for every development of four or more lots. The tariff sets forth some required elements of the LDA including: trench and backfill plans, specifications, schedules, and the rights, responsibilities and liabilities associated with the trench and backfill work; and notification requirements regarding dates of trenching and completion of the units.

Costs are addressed in subsection (B)(6) of the LDA tariff as follows:

> 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.

According to Qwest's testimony, the 125% cap was the result of negotiations with the Home Builders Association before this tariff provision was first implemented. *Affidavit of James Farr,* January 31, 2003. According to Qwest the cap was put in place to establish the maximum risk Qwest was willing to assume for the placement of facilities in new developments that would fall under this tariff provision, with any costs exceeding the cap paid by the developer. *Id*. Those facts appear undisputed, and we accept them.

What is in dispute is the meaning of the phrase "permanent single family dwelling." All parties argue that the tariff is ambiguous because it does not contain a definition of that term. Nor does it specifically include or exclude townhomes from the category of single family dwellings. Therefore, Commission interpretation is appropriate and necessary.

Party Positions: The Division of Public Utilities ("DPU") provided the analysis of one of its Technical Consultants, Peggy Egbert, stating that the costs of providing facilities to a single family dwelling is much higher than for townhomes, cluster homes, or rowhomes. For that reason the DPU recommended that the cost of placing facilities to townhouse units be considered in interpreting the LDA tariff. The DPU also argued that the tariff should be read as

applying only to detached permanent single family dwellings.

Qwest argues that townhomes should be excluded from the provisions of the LDA because they are not "single family dwellings." Qwest cites zoning ordinances of five Utah counties as defining single family dwellings as "detached" homes. Qwest also cites the National Electric Code as supporting its position. Qwest also argues that its tariff provisions regarding "cluster homes" are applicable to townhomes. Qwest also argues that public policy and equity lie on the side of excluding townhomes from the LDA tariff. Mr. Farr's affidavit also addresses the Utah Land Development Investment Study used to develop the average loop investment incorporated into the LDA tariff. According to Mr. Farr, the dollar amount for the average loop investment per lot for placing distribution facilities was derived using Density Groups 3 and 4. Mr. Farr stated: "Density Groups 3 and 4 are subdivisions of single family residential detached dwellings. Therefore, the cap per lot is based on detached single family dwellings." *Id*.

Complainants argue that the term "permanent single family dwellings" should be interpreted to include any structure that is "conveyed to the owner together with the lot (or footprint) upon which it is built." Memorandum of Points and Authorities, Jan. 22, 2003, p. 4. Complainants also argues that International Building Code provision support this interpretation. In support of this argument, Complainants filed an affidavit from a Wasatch County planner. In its reply, Complainants also contested the assertion of Mr. Farr that the cost study used to develop the figures used in the LDA did not include townhomes. The Affidavit of William R. Bodine states that at a meeting with Mr. Farr, Mr. Farr specifically stated that the study did include townhomes, and that Mr. Farr reiterated that at least one other time during the meeting. Affidavit of William R. Bodine, p. 3. Mr. Bodine also states that there is not necessarily a difference in the cost of placing facilities for townhomes as compared to detached residences. Complainants also argue, in their response memorandum, that numerous county zoning ordinances support its proposed interpretation.

In response to Mr. Bodine's affidavit, Mr. Farr provided an affidavit dated February 21, 2003. In that affidavit Mr. Farr stated, in essence, that he had not read the cost study used in arriving at the numbers for the LDA tariff prior to his meeting with Mr. Bodine, and did not remember that it only included Density Groups 3 and 4. Mr. Farr reiterated that the cost study does include only Density Groups 3 and 4.

Discussion: The tariff lacks a definition of "permanent single family dwelling." The tariff must be interpreted consistent with its purpose and intent, and with the public interest. In doing so, the history and assumptions behind the LDA tariff are important. And an important element of the LDA tariff are the cost provisions. While there was some confusion as to the nature of the cost study used to derive the cost numbers used in the LDA tariff, the study itself is clear that it only applied to Density Groups 3 and 4 - and those groups do not include townhome developments. It would therefore not be appropriate to interpret the LDA tariff as presently written, including its cost provisions, to include townhome developments. We interpret the phrase "permanent single family dwellings" to include only detached homes.

While that decides the main issue raised in the Complaint in this matter, it does not end our inquiry. Much has been said in this docket regarding problems with the LDA tariff. Many of those problems center on costs. Qwest argues that the cap incorporated into the LDA tariff has been interpreted by Complainants as the default price Qwest is to pay for every development. That was not the intent of the tariff. The cap was just that, a cap, and if costs exceeded that amount a developer is responsible for the additional costs. It was not designed to be the default price. Most, if not all of these disputes, it seems, would not occur if the parties were complying with the terms of the LDA tariff. As was stated in this Commission's order in 1999:

> We believe the only interpretation fair to both parties and consistent with the public interest is as follows:
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> Section 4.4(B)(6) requires that costs be agreed upon at the inception of the agreement and incorporated in the LDA. In that regard, by implication, both developer and Respondent are required to furnish in good faith detailed, *verifiable* cost estimates on the request of the other party. It will not do for Respondent to hide behind alleged proprietary concerns to avoid such disclosure. Respondent itself has created the need for this tariff provision, and it now must act in good faith to see that it is implemented fairly and effectively.
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> Once costs, limited by the formula in Section 4.4(B)(6), have been identified, agreed upon, and incorporated into the LDA, Respondent's liability for reimbursement may not be escalated thereafter.

If Qwest and developers complied with this directive, before the LDA was entered into, and provided up-front, good faith detailed, verifiable costs estimates, then a developer could make an informed decision as to whether to have Qwest, or another party such as one of the Complainants, install the facilities. To be good faith and verifiable the cost estimates must be more than a quote from one of the Complainants or a similar company to do the job for the amount of the cap under the LDA tariff. With such estimates, costs would be agreed to up front and incorporated into an LDA between Qwest and the developer.

Motion to Enlarge Scope of Proceeding: Qwest has moved to expand this proceeding to address additional issues related to the LDA tariff, and submitted an illustrative tariff that it claims would provide the needed clarification of how the LDA process should work. Qwest argues that the Commission needs to address at least four issues regarding the LDA tariff: (1) the costs Qwest should pay; (2) whether townhomes should be included; (3) Qwest's right to control the design and materials used for facilities under the LDA tariff; and (4) time-frames to be followed under the LDA by Qwest, developers, and contractors.

This matter was filed as a customer complaint case seeking interpretation of a tariff provision. We have provided that interpretation. It would not be appropriate to address the other issues raised by Qwest in this proceeding. Those issues are more appropriate for a more general docket in which all interested parties could participate. We will, therefore, deny the motion in this matter. The issues raised by Qwest, however, need to be addressed, and we will open a docket to do that. Documents filed in this docket that are germane to the new docket will be incorporated into that new docket.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Qwest's LDA tariff is interpreted as stated above.

2. Qwest's Motion to Enlarge Scope of Proceedings is denied, but a new docket will be opened to address the issues raised in that Motion.

3. Any person aggrieved by this Order may petition the Commission for review/rehearing pursuant to the *Utah Administrative Procedures Act, Utah Code Ann.* §63-46b-1 *et seq.* Failure so to do will preclude judicial review of the grounds not identified for review. *Utah Code Ann.* §54-7-15.

Dated at Salt Lake City, Utah, this 15th day of July, 2003.

/s/ Douglas C. Tingey
Administrative Law Judge

Approved and Confirmed this 15th day of July, 2003, as the Report and Order of the Public Service Commission of Utah.

/s/ Richard M. Campbell, Chairman

/s/ Constance B. White, Commissioner

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

G#34563

APPENDIX "A"

4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES
4.4 LAND DEVELOPMENT AGREEMENTS

A. Description

A Land Development Agreement (LDA) is a written agreement entered into between the Company and the Developer/Builder for the provision of distribution facilities, within new areas of land development, for permanent single family dwellings. The Company offers two Agreement options. Option 1, Company Engineered/Designed; Option 2, Developer Engineered/Designed.

B. Terms and Conditions

1. An LDA is required where Developers/Builders plan to develop four or more lots. Less than four lots will be treated according to the terms set forth under Construction Charges.
2. Regardless of the option selected, the Developer/Builder will provide trench and backfill for the facilities. In addition, the Developer/Builder must enter into an LDA with the Company. The LDA will include:
a. Description of the subdivision or development;
b. Trench and backfill plans and specifications;
c. Trench excavation and backfill schedules;
d. Rights, responsibilities and liabilities associated with trench and backfill work;
e. Provision for notification between the Company and Developer/Builder; such as, 90 days prior to the backbone trench date, and 21 days notice of the completion date of the living unit;
f. Coordination of inspection schedules.
3. The Developer/Builder must provide to the Company an addressed, recorded plat in electronic, digitized or written format.
4. All costs associated with trench and backfill will be borne by the Developer/Builder. The surface of the easement area must be brought to within six inches of final grade prior to the installation of communication facilities.
5. If the Developer is not the Builder, the Builder or premises owner will be responsible for the provision of the trench for the service drop to the living unit.
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.
7. The Property Owner/Developer/Builder holding title to the property will grant and convey to the Company all necessary non-exclusive easements (form to be provided by the Company). The easement will provide for the Company to construct, reconstruct, operate, maintain and remove such telecommunications facilities, electrical facilities, gas facilities and appurtenances, from time to time, as the Company may require upon, over, under and across the property.

The width and length of the easement will be determined at the time of the request. In general, all easements will be a standard width of eight feet along the front and rear lot lines and five feet wide along all side lot lines unless otherwise agreed upon. Additional cost associated with the cost of acquiring easements will be paid by the Property Owner/Developer/Builder.

8. In all cases, the Company retains ownership of the installed plant.
9. In areas where the Company has existing trench and backfill agreements with local power utilities, the Developer/Builder shall be responsible for the Company's portion of the trench and backfill costs.
10. Distribution facilities covered by an LDA cannot be used for subsequent developments until they are covered by a new LDA.
11. The LDA may include other terms and conditions as appropriate.

C. Options

1. Option 1 - Facilities Engineered, Designed, Placed and Spliced by the Company
a. Using standard Company specification, the Company will engineer, design, secure all materials and provide the labor to place and test the facilities within the development. There is no charge to the Developer/Builder as long as the cost does not exceed the distribution portion of the average exchange loop investment. See B.6.
2. Option 2 - Facilities Engineered, Designed, Placed and Spliced by the Developer/Builder
a. Using standard Company specifications, the Developer/Builder will engineer, design, secure all material and provide the labor to place the facilities within the development.
b. The Developer's/Builder's job prints and material list must be submitted to the Company for approval prior to the

construction of the facilities.

c. The Developer/Builder must give the Company the opportunity to inspect the placement of the facilities and perform conformance testing.

d. Once work is complete and the Company has inspected the facilities, the Developer/Builder will transfer ownership of all facilities placed to the Company. Prior to the transfer, all costs for the facilities and work shall have been paid in full. The transfer will be free and clear of any and all liens and encumbrances and shall be accompanied by an indemnification holding the Company harmless from all claims arising from the purchase and placement of the facilities.

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.