- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Complaint of)
SILVER CREEK COMMUNICATIONS,)
Complainant) DOCKET NO. 98-049-33
vs.
MOUNTAIN STATES TELEPHONE AND) REPORT AND ORDER
TELEGRAPH COMPANY, dba U.S.)
WEST COMMUNICATIONS,)
Respondent)

ISSUED: April 30, 1999

SYNOPSIS

The Commission held that it lacked jurisdiction to afford Complainant any relief beyond the pronouncement of its interpretation of Respondent's tariff and the announcement of the Commission's intention to hold respondent to the Commission's interpretation.

Appearances:

Joseph E. Teach	For	SILVER CREEK COMMUNICATIONS
Gregory Monson	"	MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, dba U.S. WEST COMMUNICATIONS

By the Commission:

PROCEDURAL HISTORY

Pursuant to notice duly served, the above-captioned matter came on regularly for hearing the Eleventh day of February, 1999, before A. Robert Thurman, Administrative Law Judge, at the Commission offices, Heber Wells Building, Salt Lake City, Utah. Since the controversy involves no factual dispute, the Administrative Law Judge heard oral argument on the legal issues presented. Thereafter, at the request of the Division of Public Utilities, Utah Department of Commerce (DPU), leave was granted to file additional memoranda of law. The Administrative Law Judge, having been fully advised in the premises, enters the following report, consisting of recommended Findings of Fact, Conclusions of Law, and the Order based thereon.

FINDINGS OF FACT

1. Complainant is a third-party beneficiary under a telephone facilities extension agreement between a real estate developer and Respondent, a telephone corporation certificated by this Commission. Complainant is the contractor who actually installed the telephone distribution system in a subdivision under contract with the developer.

2. Under Complainant's contract with the real estate developer, Complainant was to be paid the amount Respondent reimbursed the developer under the terms, here at issue, of Respondent's tariff. The developer has been paid in accordance with Respondent's interpretation of the tariff and is not seeking more. However, Complainant asserts that the reimbursement was inadequate; that Complainant will encounter the same issue in future projects it undertakes; and that Complainant therefore seeks a declaratory judgment from this Commission as to the correct interpretation of the tariff.

DISCUSSION

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.[(1)] 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.[(2)]

Regarding threshold issue 2, since Complainant is not the party Respondent is contractually bound to reimburse, and that party is not disputing the amount owed, Complainant's standing to seek relief from the Commission is problematical; Complainant's real remedy, if any, would appear to be a claim through the courts against the developer for unjust enrichment.

Given these problems, Complainant has wisely limited its prayer for relief to a declaratory pronouncement by the Commission as to the correct interpretation of Respondent's tariff with a view toward future application. There may be some doubt as to the Commission's jurisdiction even to afford declarative relief; however, we perceive no barrier to the Commission's announcing its intentions regarding the exercise of its regulatory powers, and given the time and resources already committed to this matter, we are willing, in the public interest, to disclose our interpretation of the tariff in an attempt to obviate future disputes over its provisions.

The issue presented is the correct interpretation of Section 4.4 of Respondent's Utah Exchange and Network Services Tariff, which reads in pertinent part:

4.4LAND 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

* * *

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

1. Option 1 - Facilities Engineered, Designed, Placed and Spliced by the Company

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.

* * *

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.

Complainant's argument, echoed by DPU, is that under the tariff's Section 4.4(C), either option 1 or option 2, Respondent's maximum liability is 125% of the distribution portion of Respondent's Average Exchange Loop Investment (AELI)--the only difference is that under Option 1, Respondent has direct control of its construction costs, while under Option 2, control of those costs is thrown on the tender mercies of the developer and/or the developer's contractor.

Respondent's argument is that a developer is entitled to reimbursement only up to Respondent's estimate of Respondent's cost to do the work if Respondent undertook the work itself. Under Respondent's argument, the AELI is a semi-absolute limit on Respondent's liability for reimbursement, and the 125% of AELI, brought in by the reference to Section 4.4(B)(6), is an absolute limit applicable in particularly high construction cost areas.

Unfortunately for Respondent's position, that isn't how the language reads.

There are several policy considerations rendering this issue an extremely vexing one. First, we are mindful that Respondent grudgingly accorded developers a self-help option only under pressure emanating from its own dismal held-order record over the past several years. It follows that we do not wish to discourage unnecessarily the use of the self-help option, since we have no confidence at this point that Respondent could or would shoulder the full burden of provisioning plant to serve new development.

On the other hand, we are equally mindful that plant acquired at inflated cost goes into rate base, and that all ratepayers will be paying for return on the inflated cost for years after. It follows that we do not wish to afford developers resorting to the self-help option any incentive to inflate their costs.

Yet taken at face value, and according to Complainant's and DPU's interpretation, that is exactly what Section 4.4 accomplishes. Developers and/or their contractors have no incentive to restrain their extravagance unless and until the 125% of AELI is approached, and thus the maximum bids fair to become the minimum.

Further, this Commission, having no jurisdiction over the developers, would likewise have no good tools, through the rate making process, for reining in such costs.

We have a notion as to what Respondent intended.[(3)] The key, we believe, is in the phrase "costs, *as identified in the LDA* . . ." (Emphasis added.) in Section 4.4(C)(2)(e). The succeeding reference to Section 4.4(B)(6) makes sense if it is assumed that the costs have been identified, agreed upon, and incorporated in the LDA. Unfortunately, although Section 4.4(B)(6) is included in the section listing required elements of the LDA, it does not explicitly require that costs be specified in advance and incorporated in the LDA. Apparently Respondent's practice has been unilaterally to estimate its own costs for the project, *ex post facto,* and reimburse accordingly. That practice, of course, leaves the developer as much at the mercy of Respondent as Complainant's interpretation would leave Respondent at the mercy of developers and their contractors.

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 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.

We hereby serve notice on Respondent that notwithstanding our disposition below, failure to abide by the foregoing

interpretation in the future may subject it to sanctions, and that in considering any proposed tariff amendments, we will expect adherence to the foregoing principles.

CONCLUSIONS OF LAW

The Commission lacks both party and subject-matter jurisdiction. Accordingly, the Commission may not grant Complainant any relief beyond the elucidation incorporated in the discussion section above, and, as a technical matter, we must dismiss the complaint.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:
the complaint of SILVER CREEK COMMUNICATIONS against MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, dba U.S. WEST COMMUNICATIONS, be, and the same hereby is, dismissed, with the proviso that the Commission intends to hold Respondent to the tariff interpretation pronounced above.

If SILVER CREEK COMMUNICATIONS wishes to proceed further, SILVER CREEK COMMUNICATIONS may file a written petition for review within 20 days of the date of this Order. Failure so to do will forfeit the right to appeal to the Utah Supreme Court.

DATED at Salt Lake City, Utah, this 30th day of April, 1999.

/s/ A. Robert Thurman
Administrative Law Judge

Approved and Confirmed this 30th day of April, 1999, as the Report and Order of the Public Service Commission of Utah.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:
/s/ Julie Orchard
Commission Secretary

1. § 54-7-20, UCA 1953, as amended.
2. Id.
3. Or should have intended.