2005

SBS Telecommunications, Inc v. Public Service Commission of Utah and Qwest Corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SBS TELECOMMUNICATIONS, INC., a Utah corporation, Petitioner, vs. PUBLIC SERVICE COMMISSION OF UTAH and QWEST CORPORATION, Respondents.	Appeal No. 20050692-CA Agency Decision: Public Service Commission of Utah, Docket No. 04-049-06

BRIEF OF PETITIONER SBS TELECOMMUNICATIONS, INC.

APPEAL FROM FINAL ORDER OF PUBLIC SERVICE COMMISSION IN DOCKET NO. 04-049-06

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PARTIES TO DOCKET NO. 04-049-06 BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Public Service Commission of Utah

SBS Telecommunications, Inc.

Qwest Corporation

Clear Wave Communications LC

East Wind Enterprises LLC

Prohill Inc., dba Meridian Communications of Utah

Utah Division of Public Utilities

Utah Committee of Consumer Services

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STATEMENT OF JURISDICTION

Pursuant to Rule 18 of the Utah Rules of Appellate Procedure, in conjunction with Rule 1 of the Utah Rules of Appellate Procedure, a final order of a Utah Administrative Agency may be appealed. This Court has jurisdiction pursuant to Section 78-2a-3(2)(j), Utah Code Annotated, 1953, as amended.

STATEMENT OF ISSUES

1. Did the Public Service Commission of Utah have constitutional authority to act upon the proceedings below?

2. Did the Public Service Commission of Utah violate Article V Section 1 of the Utah Constitution by issuing an Order in the proceedings below?

3. Did the Public Service Commission of Utah violate Articles I, II and III of the United States Constitution by issuing an Order in the proceedings below?

4. Is Utah Code Section 54-1-1 establishing the Public Service Commission of Utah as an independent agency, with "legislative, adjudicative, and rule-making powers" an unconstitutional law?

5. Did the Public Service Commission of Utah wrongfully reject the contractual obligations of Land Developers to SBS as the amount Qwest is obligated to pay?

STANDARD OF REVIEW

Constitutional challenges to statutes present questions of law which are reviewed for correctness. *Midvale City Corporation v. Haltom, 73 P3d 334 (Utah 2003); I.M.L. v. State, 61P3d 1038 (Utah 2003).*

CITATION TO THE RECORD BELOW

The Record on Appeal in this matter appears to be incomplete to the extent that the Record does not include a complete transcript of the hearing conducted before the Public Service Commission of Utah on January 15, 2004. That portion of the Record is designated (paginated) "000048", however, it contains only the first five (5) pages of the hearing transcript. While Petitioner believes that this Court can entertain the issues addressed in this brief without the benefit of having a complete transcript of the January 15th, 2004 hearing, it is noteworthy that the omitted portion of the Record contains a statement of this Petitioner objecting to the jurisdiction of the Public Service Commission of Utah relative to the proceedings below. Significantly, in the Petition for Review that SBS filed with the Public Service Commission of Utah on July 11th, 2005, SBS again raised the issue of the Commission acting beyond its authority and erroneously exercising jurisdiction. (R. at 233.)

CONSTITUTIONAL PROVISIONS AND STATUTES

A. Constitution of Utah

Article V.

DISTRIBUTION OF POWERS

Section 1. [Three departments of government.] The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

B. Constitution of the United States of America

Article I [LEGISLATIVE DEPARTMENT] See addendum.

Article II [EXECUTIVE DEPARTMENT] See addendum.

Article III [JUDICIAL DEPARTMENT] See addendum.

STATEMENT OF THE CASE

A. Nature of the Case

This is a petition for review of a final Order entered by the Public Service Commission of Utah on or about July 29, 2005. Specifically, this petition seeks a ruling from this Appellate Court that the consolidation of legislative, executive, and judicial powers into one governmental organization or department—even for regulatory purposes—is unconstitutional and that Section 54-1-1, Utah Code Annotated, 1953, as amended, establishing the Public Service Commission of Utah is unconstitutional. Additionally, this petition seeks recognition of the SBS/Developer contract as the device that defines the Developer's cost obligation and thus Qwest's cost obligation, as defined by Qwest Corporation's Exchange and Network Services Tariff for Utah ("the Tariff").

B. Course of the Proceedings & Disposition of the Case

1. On or about January 8, 2004, SBS Telecommunications, Inc. ("SBS") filed a Complaint against Qwest Communications Corporation in the Third Judicial District Court in and for Salt Lake County, State of Utah (Civil Case No. 040900339) (R. at 233 et. seq.) The lawsuit arose out of telecommunications network development services that SBS provided to various land developers and builders pursuant to the Tariff.

2. On or about March 15, 2004, Qwest Corporation filed a Motion to Dismiss the Third Judicial District Court case filed by SBS, therein asserting the SBS's claims fell within the primary exclusive jurisdiction of the Public Service Commission of Utah. (R. at 233 et. seq.)

3. Qwest Corporation's motion to dismiss the Complaint filed in the Third District Court was fully briefed and argued before the Honorable Leon A. Dever.

4. On or about July 24, 2004, Judge Dever entered an Order, staying the proceedings pending resolution of Tariff cost/price issues to be determined by the Public Service Commission of Utah. (R. at 133.)

5. On or about September 2, 2004, SBS filed a Petition to Intervene in Docket No. 04-049-06 that was at that time pending before the Public Service Commission of Utah. (R. at 88.)

6. On or about November 9, 2004, SBS filed with the Public Service Commission of Utah its Opening Brief in Docket No. 04-049-06. (R. at 233.)

7. All parties to Docket No. 04-049-06 filed Briefs concerning the issues relative to the Tariff.

8. The issuance of a Report and Order for Docket No. 04-049-06 was not provided until after a related proceeding, Docket No. 03-049-62, was fully briefed with a Report and Order issued.

9. The Public Service Commission of Utah issued a Report and Order on June 10, 2005. (R. at 299.)

10. On July 11, 2005, SBS sought review of the June 10, 2005 Order pursuant to Sections 54-7-15 and 63-36b-12 of the Utah Code. (R. at 233.)

11. On July 29, 2005, the Public Service Commission of Utah issued its Order on Petition for Review, therein denying a hearing, review or reconsideration of its June 10, 2005, Report and Order. (R. at 235 et. seq.)

12. On August 16, 2005, SBS filed a Petition for Review, seeking review by the Utah Supreme Court of the Public Service Commission's Reports and Orders mentioned herein.

C. Statement of the Facts

1. SBS is a private company engaged in the business of installing telephone distribution facilities in new housing developments for land developers. (R. at 89 et. seq.; 133 et. seq.)

2. Qwest Corporation is a party to the proceedings below; and in or about January of 1997, filed a tariff with the State of Utah, known as "Qwest Corporation's Exchange and Network Services Tariff for Utah" ("the Tariff" or "LDA Tariff"), therein requiring Qwest to enter into a land development agreement ("LDA") with developers/builders that addresses the provisioning of telephone distribution facilities within new areas of land development. (R. at 89 et. seq.; 133 et. seq.)

3. The Tariff requires Qwest to offer two options for entering into an 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 a specified formula. (R. at 89 et. seq.; 133 et. seq.)

4. Under the second option ("Option 2"), Qwest is obligated to pay the developer/builder to perform the engineering, design, placement and splicing of the facilities for an amount that "does not exceed" a specified formula price. (R. at 89 et. seq.; 133 et. seq.)

5. Under Option 2, Qwest is obligated to purchase the network from the developer/builder. The Tariff provides that "once [Qwest] has accepted the facilities, [Qwest] will reimburse the developer/builder their costs, as identified in the LDA, not to exceed the distribution portion of the average exchange loop investment, times 125%, times the number of lots in the development."

6. Option 2 of the Tariff is not viable without the services of SBS and other similarly situated businesses ("Option 2 contractors"). SBS, at all times pertinent to these proceedings, acted as an Option 2 contractor, consistent with Section 4.4 (C)(2) of the LDA Tariff. (R. at 89 et. seq.)

7. SBS has entered into a contract with each of its client developers/builders whereby SBS acts for and in the stead of the developer/builder in conjunction with the provisioning of telecommunications network facilities, and whereby SBS is to receive the compensation or reimbursement from Qwest for the work provided. (R. at 89 et. seq.)

8. The Tariff provides for a tariff cap on the amount that Qwest must pay the developer (the "Tariff Cap") for the installation of the facilities. More specifically, the LDA portion of the Tariff provides, in part:

> All charges to be borne by [Qwest] 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. LDA Tariff, § 4.4(B)(6). (R. at 89 et. seq.)

9. Qwest has taken the position that it is "unnecessary" to reimburse Option 2 Contractors any amount in excess of its (Qwest's) own estimate of what it would cost Qwest to install facilities. (R. at 89 et. seq.)

10. Qwest has taken the position that the Tariff Cap is unreasonable because it exceeds its own estimate of what it would cost Qwest to install facilities. (R. at 89 et. seq.)

11. SBS has taken the position that pursuant to the terms of the LDA Tariff, Qwest is obligated to reimburse SBS the costs that it's (SBS's) client developer/builder has incurred with regard to the installation of telecommunication network facilities.

12. There are numerous projects undertaken by SBS as an Option 2 contractor upon which Qwest has failed to adhere to the Tariff requirements that Qwest reimburse the developer/builder their costs. In this regard, SBS sought an Order from the Public Service Commission declaring that the contract between SBS and its client Developers define the developer/builders costs obligations to be reimbursed; and require Qwest to pay SBS the amounts due and owing consistent with the LDA Tariff then in effect. (R. at 89 et. seq.)

13. In essence, these disputes deal with the parties' disagreements on the amount of reimbursement Qwest is to make for specific installations which have been made in various subdivisions where the builder/developer has elected to use SBS as an Option 2 contractor. (R. at 89 et. seq.)

14 In its Order, the Public Service Commission of Utah has recognized that Qwest has wrongfully limited its payments to its own cost estimates, but has denied SBS the recognition of the lawfully binding contractual agreement between SBS and Developers as the instrument that defines those developer/builder's cost obligations.

SUMMARY OF THE ARGUMENT

SBS waives and releases all claims except that the Public Service Commission of Utah is an unconstitutional entity and is thus a hindrance to the proper exercise of government and the attainment of justice.

ARGUMENT

A. Waiver and Release of Claims against Qwest Corporation

With consideration for confidential terms of a settlement agreement entered into between SBS and Qwest Corporation and specifically excluding the claim that the Public Service Commission is an unconstitutional entity, SBS hereby expressly relinquishes and waives all claims against Qwest Corporation raised within the PSC Docket No. 04-049-06.

B. Unconstitutionality of PSC

SBS hereby asserts the sole remaining claim to be determined by the proceedings of this appeal, which is that the Public Service Commission of Utah ("PSC") is an unconstitutional entity and is thus a hindrance to the proper exercise of government and the attainment of justice.

The wording of Utah Code Section 54-1-1 states: "The Public Service Commission of Utah is established as an independent agency. The Public Service Commission is charged with discharging the duties and exercising the **legislative, adjudicative, and rule-making powers** committed to it by law and may sue and be sued in its own name." (Emphasis added). The independent agency status of the PSC is in direct contravention to Article V, Section 1 of the Utah State Constitution, which states: "The powers of the government of the State of Utah shall be divided into three distinct departments, ***the Legislative, the Executive, and the Judicial***; and **no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.**" (Emphasis added).

Establishing the PSC as an "independent agency", the Legislature has essentially created a fourth, illegitimate branch or "department" of government—which exercises the powers of all three legitimate departments of government, without the requisite constitutional "expressly

directed or permitted" authority to combine the exercise of such powers. This fourth branch of government is also a violation of The United States Constitution, which in Articles I, II and III, clearly delineates all governmental powers to reside within the Legislative, the Executive and the Judicial branches of government (respectively).

While the "independent agency" reference, by itself, may be explained away as merely being an agency "independent" from all other agencies, the fact that the law contains reference to this agency exercising "legislative, adjudicative, and rule-making powers" indicates an intentional deviation from the limits of governmental authority prescribed by the Utah State Constitution. If, due to the fact that Commissioners that are appointed and may be removed by the Governor or by some other determination, this agency is found to be a legitimate organization within the Executive department of government, it is still a violation of the Utah State Constitution. No person within the Executive department may rightfully exercise Legislative or Judicial powers—for which Utah Code Section 54-1-1 grants both.

This entire structure of creating rulemaking bodies, such as the PSC—that write or approve rules (that carry the full force and effect of law), that have the responsibility of enforcing such rules, and that adjudicates proceedings relating to such rules—is contrary to the plain wording and intent of both the Utah State Constitution and the United States Constitution. Organizations, such as the PSC, are the seedlings of tyranny. The Utah State Constitution and the United States Constitution separated powers in order to insure a government responsible to the people—with the appropriate checks and balances. This consolidation of power under individuals so far removed from any accountability to the people governed is tyranny.

Further, there is no legitimate reason for **any** "independent" governmental agency to exist. If the legislature believes it needs assistance in exercising legislative powers, a

subordinate organization should be created which requires the legislature to approve or disapprove of the subordinate organization's actions on a periodic basis. The enforcement of legislative actions should be legitimately carried out by an Executive branch organization and the adjudication process should be left to the Judicial branch.

The perversion of our lawful government structure that has taken place with the creation of this illegitimate branch of government has required extensive and costly governmental support systems to be developed in order to make it **appear** to work. It is time that the legislative error creating this illegitimate branch of government (or wrongfully giving other branch powers to an existing branch) is recognized and corrected.

CONCLUSION

Petitioner requests the Court to rule that the consolidation of legislative, executive, and judicial powers into one governmental organization or department—even for regulatory purposes—is unconstitutional. Petitioner further requests the Court to rule that Utah Code Section 54-1-1 is unconstitutional and that the PSC is an unconstitutional government entity and therefore has no governmental authority.

William R. Bodine
Pro Se

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of December, 2005, I caused to be delivered by U.S. Mail, postage prepaid, a true and correct copy of the foregoing BRIEF OF PETITIONER SBS TELECOMMUNICATION, INC. to the following individuals:

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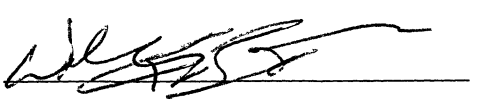

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CERTIFICATION

APPEAL FROM FINAL ORDER OF PUBLIC SERVICE COMMISSION IN DOCKET NO. 04-049-06

I, Kevin M. McDonough, do hereby certify that I am the attorney of record for Petitioner, SBS Telecommunications, Inc. ("SBS"); that I have reviewed the Brief filed by SBS on or about December 15, 2005; and that I submit the same as attorney of record for SBS.

DATED this 21st day of December, 2005.

Kevin M. McDonough

CERTIFICATE OF MAILING

I hereby certify that on this 21st day of December, 2005, I caused to be delivered by U.S. Mail, postage prepaid, a true and correct copy of the foregoing CERTIFICATION to the following individuals:

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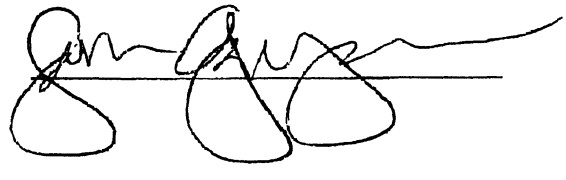

ADDENDUM

EXHIBIT A:

Constitution of the United States of America, Article I

United States Code Annotated Currentness
Constitution of the United States
Annotated
Article I. The Congress (Refs & Annos)

Section 1. Legislative Power Vested in Congress

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2, Clause 1. House of Representatives; Composition and Election of Members

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Section 2, Clause 2. Qualifications of Members

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Section 2, Clause 3. Apportionment of Representatives and Taxes

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Section 2, Clause 4. Vacancies

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

Section 2, Clause 5. Speaker and Other Officers; Impeachment Power

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3, Clause 1. Senate; Composition; Election of Senators

[The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.]

Section 3, Clause 2. Classification of Senators; Vacancies

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies].

Section 3, Clause 3. Qualifications of Senators

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Section 3, Clause 4. Vice President as President of Senate; Voting Power

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

Section 3, Clause 5. President Pro Tempore and Other Officers

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

Section 3, Clause 6. Trial of Impeachments

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Section 3, Clause 7. Judgment in Cases of Impeachment; Punishment on Conviction

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4, Clause 1. Congressional Elections; Time, Place, and Manner of Holding

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Section 4, Clause 2. Sessions of Congress

The Congress shall assemble at least once in every Year, and such Meeting shall be on the [first Monday in December], unless they shall by Law appoint a different Day.

Section 5, Clause 1. Legislative Proceedings; Each House as Judge of Qualifications and Election of Its Members; Quorum; Adjournments; Compelling Attendance of Members

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Section 5, Clause 2. Rules; Punishment and Expulsion of Members

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Section 5, Clause 3. Journal; Publication; Recording of Yeas and Nays

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the

Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Section 5, Clause 4. Consent of Each House to Adjournment

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6, Clause 1. Compensation of Members; Privilege from Arrest

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Section 6, Clause 2. Holding Other Offices

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7, Clause 1. Revenue Bills to Originate in House; Amendments by Senate

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Section 7, Clause 2. Approval or Veto of Bills; Repassage Over Veto

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Section 7, Clause 3. Approval or Veto of Orders, Resolutions, or Votes; Repassage Over Veto

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8, Clause 1. Powers of Congress; Levy of Taxes for Common Defense and General Welfare; Uniformity of Taxation

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Section 8, Clause 2. Borrowing Money

To borrow Money on the credit of the United States;

Section 8, Clause 3. Regulation of Commerce

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Section 8, Clause 3. Regulation of Commerce

<Notes of Decisions for Constitution Art. I, § 8, cl. 3, Regulation of Commerce, are displayed in two separate documents. Notes of Decisions for subdivisions XVI to end are contained in this document. For text of section, references, and Notes of Decisions for subdivisions I to XV, see first ranked document for Constitution Art. I, § 8, cl. 3, Regulation of Commerce.>

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Section 8, Clause 4. Naturalization and Bankruptcy

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

Section 8, Clause 5. Coining Money; Foreign Coin; Weights and Measures

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

Section 8, Clause 6. Counterfeiting

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

Section 8, Clause 7. Post Offices and Post Roads

To establish Post Offices and post Roads;

Section 8, Clause 8. Patents and Copyrights

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Section 8, Clause 9. Creation of Tribunals Inferior to Supreme Court

To constitute Tribunals inferior to the supreme Court;

Section 8, Clause 10. Piracies and Felonies on the High Seas; Offenses Against the Law of Nations

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Section 8, Clause 11. Declaring War; Letters of Marque and Reprisal; Captures on Land and Water

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

Section 8, Clause 12. Armies; Maintenance; Appropriation for

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

Section 8, Clause 13. Navy, Maintenance of

To provide and maintain a Navy;

Section 8, Clause 14. Rules for Government of Land and Naval Forces

To make Rules for the Government and Regulation of the land and naval Forces;

Section 8, Clause 15. Militia; Calling Forth

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

Section 8, Clause 16. Militia; Organization, Equipment, Discipline, and Government

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

Section 8, Clause 17. Seat of Government; Exclusive Jurisdiction Over Places Purchased

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;--And

Section 8, Clause 18. Enactment of Laws for Execution of Governmental Powers

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9, Clause 1. Powers Prohibited to United States; Migration or Importation of Persons; Head Tax

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Section 9, Clause 2. Suspension of Habeas Corpus

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Section 9, Clause 3. Bills of Attainder and Ex Post Facto Laws

No Bill of Attainder or ex post facto Law shall be passed.

Section 9, Clause 4. Capitation and Other Direct Taxes

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

Section 9, Clause 5. Taxes or Duties on Exports From States

No Tax or Duty shall be laid on Articles exported from any State.

Section 9, Clause 6. Preferences to Ports of One State Over Those of Another; Clearance of Vessels Bound From One State to Another

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

Section 9, Clause 7. Appropriations; Publication of Statements and Accounts

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be

published from time to time.

Section 9, Clause 8. Titles of Nobility; Presents and Emoluments From Foreign States to Officers of United States

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10, Clause 1. Treaties, Letters of Marque and Reprisal; Coinage of Money; Bills of Credit; Gold and Silver as Legal Tender; Bills of Attainder; Ex Post Facto Laws; Impairment of Contracts; Title of Nobility

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility

EXHIBIT B:

Constitution of the United States of America, Article II

United States Code Annotated Currentness
Constitution of the United States
Annotated
Article II. The President (Refs & Annos)

Section 1, Clause 1. Executive Power, Term

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Section 1, Clause 2. Presidential Electors

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Section 1, Clause 3. Time of Election

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

Section 1, Clause 4. Qualifications, Office of President

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

Section 1, Clause 5. Successor

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

Section 1, Clause 6. Salary

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Section 1, Clause 7. Oath

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2, Clause 1. Commander in Chief; Reprieves and Pardons

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

Section 2, Clause 2. Treaty Making Power; Appointing Power

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Section 2, Clause 3. Recess Appointments

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. Messages; Convene and Adjourn Congress; Receive Ambassadors; Execute Laws; Commission Officers

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. Impeachment

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Current through P.L. 109-127 (excluding P.L. 109-115) approved 12-07-05
END OF DOCUMENT

EXHIBIT C:

Constitution of the United States of America, Article III

United States Code Annotated Currentness
Constitution of the United States
Annotated
➡ Article III. The Judiciary (Refs & Annos)

Section 1. Judicial Power, Tenure and Compensation

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 2, Clause 1. Jurisdiction of Courts

<Notes of Decisions for Constitution Art. III, §2, cl. 1, Jurisdiction of Courts, are displayed in two separate documents. Notes of Decisions for subdivisions VIII to end are contained in this document. For text, references, and Notes of Decisions for subdivisions I to VII, see first ranked document for Constitution Art. III, § 2, cl. 1, Jurisdiction of Courts.>

Section 2, Clause 2. Supreme Court, Original and Appellate Jurisdiction

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Section 2, Clause 3. Criminal Trial by Jury

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any

State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3, Clause 1. Treason

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

Section 3, Clause 2. Punishment of Treason

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Current through P.L. 109-127 (excluding P.L. 109-115) approved 12-07-05
END OF DOCUMENT

EXHIBIT D:

Order dated June 10th, 2005

DOCKETED

- 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

ISSUED: June 10, 2005

By The Commission:

Proceedings were undertaken by the Commission on the complaints of Clear Wave Communications, L.C.; East Wind Enterprises, LLC; Prohill, Inc., dba Meridian Communications of Utah; and SBS Telecommunications, Inc., against Qwest Corporation. Clear Wave Communications, East Wind Enterprises, and Prohill are represented by Jerold G. Oldroyd and Sharon M. Bertelsen, of Ballard Spahr Andrews & Ingersoll. LLP. SBS Telecommunications is represented by Kevin M. McDonough, of Mishmash & McDonough. Qwest Corporation is represented by Robert C. Brown, of Qwest Corporation, and Gregory B. Monson and David L. Elmont, of Stoel Rives, LLP.

This docket is a consolidation of various complaints regarding the interpretation and application of certain provisions of Qwest's applicable tariff dealing with Land Development Agreements (LDAs) and placement of facilities in new subdivisions. An LDA is an integral part of the process by which facilities will be placed in areas where no utility plant/facilities exist, in

order to ultimately provide telephone service to customers who will move into the homes built in the area. By prior Commission order interpreting the tariff provisions, an LDA is expected for developments of detached single family residential developments and, by the tariff's unambiguous terms, for developments of four or more lots. The relevant parts of the tariff at issue are set out in Attachment 1 to this Order. A short summary of the history of facility placement in new subdivisions is beneficial to better understand the disputes and the resolution made through this order.

For some period of time, Qwest's tariff required a LDA through which a subdivision developer would pay an up-front charge, equal to the entire expected costs of the facilities to be placed in the subdivision, in order for utility facilities to be installed by Qwest in conjunction with development of the subdivision. Over a subsequent five year period, the developer could receive an annual refund of part of the up-front charge paid, based on the number customers initiating telephone service in the development during the corresponding year. The developer was responsible for the facilities' trenching and backfill within the development or could pay a non-refundable charge for Qwest to perform the trenching and backfill. In 1985, Qwest altered its tariff to provide an additional option, in lieu of the traditional LDA, by which a developer could choose to pay a non-refundable flat charge of $100 per lot for Qwest's placement of facilities within the subdivision; Qwest would bear all additional expenses beyond the $100 per lot charge. This option was made available for developments located within what was called "the Base Rate Area," defined as a prescribed geographic area within a certain proximity to the utility's central office(s) which served the local exchange area. Beyond the Base Rate Area, the traditional LDA

was the only means available for the installation of new facilities. In 1991, an additional tariff modification was introduced, by which an option was made available for developments located outside the Base Rate Area. Through this option, developers could choose, in lieu of a traditional LDA, to pay a non-refundable charge equal to 50% of the expected costs to place facilities in the subdivision. Again, Qwest would bear all expenses beyond the developer's payment of 50% of the expected costs if this second option was chosen for developments outside the Base Rate Area.

In 1996, Qwest broached the subject of making a significant change in placing facilities in new developments, notably changing the cost recovery and cost allocation between developers and Qwest and changing how facilities could actually be placed. In a presentation given to the regulatory agencies (the Commission, the Division of Public Utilities and the Committee of Consumer Services), in June of 1996, Qwest outlined a proposal that would no longer require that developers be charged for any portion of the costs of placing facilities within a new subdivision, as long as the costs were equal to or less than Qwest's average distribution portion of its exchange loop investment. A developer would only be asked to pay a charge/make a contribution for the expenses for facility placement in the subdivision if they exceeded the average distribution loop investment; and then, the developer would only pay the portion that exceeded that amount. Qwest also indicated that it was considering making two options available for the actual placement of the facilities: one where Qwest would continue to place the facilities, as it had done in the past (Option 1), and a second where the developer could place the facilities and subsequently be reimbursed for placement costs (Option 2). The regulatory agencies indicated that, conceptually, the approach appeared reasonable.

After its presentation to the regulatory agencies, Qwest conferred with developers to explain the approach Qwest was contemplating and gain their support if the tariff were to be changed. On December 17, 1996, Qwest filed with the Commission a tariff revision formally seeking approval of the change. Along with a proposed tariff and tariff filing cover letter, Qwest also provided a November 22, 1996, letter from the Home Builders Association of Utah (which indicated the Association thought the proposal reasonable and would not oppose its approval) and a December 17, 1996, memorandum (from Jim Farr, a Qwest employee, to Dave Coombs, a Division of Public Utilities employee, which provided summary information about the change and examples of how the new provisions would be applied; to assist in the regulatory review of the proposed tariff change). The December 17, 1996, tariff modification followed the June presentation with one exception: the developer's payment ceiling increased from the June 100% of distribution portion of average exchange loop investment to a cap set at 125%. Hence, Qwest would bear the full burden of expenses associated with placing facilities in new developments as long as the development's costs did not exceed an amount equal to 125% of Qwest's average times the number of lots in the development. The tariff modification proposal was approved by the Commission January 10, 1997, and it provisions have been in force since that date.

These consolidated disputes deal with the parties' disagreements on the amount of reimbursement Qwest is to make for specific installations which have been made in various subdivisions where the developer has elected to use Option 2 and an Option 2 contractor, rather than Qwest, has made the installation.[1] The parties' need to resort to Commission resolution of

[1]The developers themselves do not participate in these proceedings. They are represented by their agents,

their dispute is driven by the failure to have executed a written LDA, which included the installation costs that were expected, as contemplated by the tariff and as expressed in prior Commission orders.

Under the applicable tariff provisions, once the Option 2 contractor has finished the installation, Qwest is to inspect the installation, and if it passes inspection, the developer is to transfer ownership of the facilities to Qwest, free and clear of any and all liens and encumbrances with indemnification to Qwest from all claims arising from the purchase and placement of the facilities. See, Section 4.4 C .2.d. "Once the Company [Qwest] 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." Section 4.4 C.2.e. It is this latter provision, of reimbursing the developer's costs, which is the genesis of the disputes. Section 4.4B.6. provides, "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."

The developers/Option 2 contractors argue that Section 4.4 C.2.e means that Qwest is to make a reimbursement for the total costs a developer may have incurred in placing facilities under Option 2 for the lots involved, up to the referenced cap of 125% of the average distribution and loop investment . Qwest argues that the reimbursement is to be the amount that Qwest would have expended had it made the installation. In other words, the dispute is over what is to occur

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the Option 2 contractors, who have an interest in the resolution as, apparently, the Option 2 contractors have agreed to receive Qwest's developer reimbursement amount as their payment for the facility installations they have made in the various developments.

when the developer/Option 2 contractor's installation costs vary from Qwest's calculation of what Qwest's installation costs would be, but the total amount is still below the 125 % cap. The expected application of the tariff provision cannot be applied as the parties have not identified the installation costs in an LDA as required by the tariff; no LDA has been executed by the parties. We suspect that no LDA has been executed because the parties could not agree on what reimbursement amount is required under Section 4.4 of the tariff. We conclude that the failure to execute a LDA (which would include agreement on the reimbursement amount) does not have an impact on the interpretation and application of the tariff provisions.

We start our analysis by applying what the plain wording of Section 4.4 C.2.e. would seem to require – "the Company will reimburse the Developer/Builder their costs." One stumbles in the literal wording, as both "the Company" and "the Developer/Builder" are singular whereas the possessive adjective "their" is plural. Review of Qwest's other tariff provisions, however, shows that Qwest consistently refers to itself in the singular; it is only when addressing other participants or referencing others that Qwest's tariff uses the plural. Most of Qwest's referencing in Section 4 is to singular "Developer/Builder," but it does use the plural in 4.4 B.1. and also uses the plural form in its December 17, 1996, memorandum accompanying the tariff modification. This leads to the conclusion that the tariff language of "their" as intended to refer to developers, in the plural, rather than to Qwest; otherwise the tariff would require use of the singular "its" to be grammatically correct. Within the context of Qwest's tariff, accompanying support documents, and earlier presentations prior to the December, 1996, filing, the language makes sense if it is viewed as having been properly worded as 'the Company will reimburse the

Developers/Builders their costs.

While Qwest argues that Section 4.4 C.2.e. tariff language should be construed to include an additional limitation (so that it would effectively include the parenthetical: 'the Company will reimburse the Developers/Builders their costs (which reimbursement amount will not be more than Qwest's estimate of costs), as identified in the LDA, not to exceed the distribution portion of the average exchange loop investment. See B.6.'), it is not appropriate to do so. Qwest broached the 1997 tariff change as a modification from an installation approach which had obtained cost recovery contributions from the developers to one where the developers would not make any contribution, as long as Qwest's total facility costs/plant investment costs, for a particular subdivision, did not exceed 125 % of Qwest's network average distribution and loop investment. It is reasonable to construe the tariff language from the perspective argued by the developers (using 125% of the average distribution and loop investment cap as the reimbursement amount limitation), not from Qwest's argued perspective (using Qwest's estimated installation costs as the reimbursement amount limitation). *Josephson v. Mountain Bell*, 576 P. 2d 850, 852 (Utah 1978) ("[Tariffs] should be construed strictly against the utility . . . they must be fair, reasonable and lawful.") (hereafter *Josephson)* That is, under either Option 1 or Option 2, the developer makes no contribution to the facilities installation as long as the reasonable costs for installation are less than 125% of Qwest's average distribution and loop investment. With Qwest's proposed application, a developer would still make contributions to reasonable facility installation costs if his reasonable costs did not mirror precisely the estimated Qwest costs, even though the total amount still remained under the 125 % cap. We do not apply

Josephson's rationale to require a tariff construction that would include an additional limitation or qualification beyond the one that was actually included in the tariff's wording.

The tariff construction and application we employ is consistent with the "just and reasonable result" underlying utility regulation. At the time the tariff change was submitted and approved by us, we understood (and continue so to this day) there was to be no disparity (for either Qwest or developers) in treatment under the new terms. Under Option 1, Qwest has the opportunity to recover the reasonable costs of facility installation through inclusion of its directly incurred costs into rate base totals. Under Option 2, Qwest has the opportunity to recover the reasonable costs of facility installation through inclusion of the developers' reimbursement amounts into rate base totals. In either case, Qwest's opportunity to recover the costs of facility installation would be the same. Similarly, in each circumstance, the developers are not asked to make a contribution to facility costs (subject to the 125% cap) consistent with the actual wording of the tariff provisions.

Josephson's reasoning, however, does lead us to reject one contention made by some of the developers/Option 2 contractors. An argument is made that an appropriate construction of the tariff provisions would permit developers to be reimbursed whatever amount their installation costs might be, as long as the total amount is less than the 125 % cap. In construing tariff provisions, we do not abandon regulatory principles and policies. While we have concluded that a developer's reimbursable facility installation costs may be higher or lower than Qwest's calculation of what its costs would be, we do not construe the tariff such that the developer is to be reimbursed any costs incurred below the 125% cap. The costs must still be reasonable for the

particular installation in the subject subdivision. The developer/Option 2 contractor is installing utility plant. We have consistently allowed recovery for only reasonable utility plant and only reasonable costs incurred in building utility plant. As with many regulatory decisions, we recognize that "a reasonable amount" is likely not a single point on a continuum of possible costs, but will fall within a range. Still, there are bounds to reasonableness and costs outside the range are not recoverable. It makes no difference whether the installation is made by the utility itself or through a third party, the tariff's application should be consistent with regulatory policy establishing a reasonable rate base of utility plant and permitting the recovery of reasonable costs associated with such plant, not the recovery of unreasonable costs. *C.f., e.g., Utah Power and Light v. Public Service Commission of Utah*, 152 P. 2d 542 (Utah 1944).

Hence, if the developer has incurred unreasonable expenses while installing utility facilities in a subdivision, or installed unreasonable plant, his reimbursement amount will be less than his actual costs, even if the total costs are less than the 125% cap. A developer's costs for installation are subject to challenge (that they are not reasonable), just as the utility's costs would be challengeable for reasonableness. The developer's substantiation of the reasonable costs associated with his installation would be similar to the utility's effort to justify the reasonableness of its costs. We note that some of the developer's claims for reimbursement lack much, if any, substance or detail when compared to the support provided by other developers for their reimbursement; or compared to Qwest's support for its calculations of costs. Adequate detail and justification is needed to support a contested reimbursement claim where the parties have failed to include the installation cost amount in their LDA or failed to execute a LDA prior

to installation. When the parties cannot reach agreement on the proper amount to be paid for installation costs, and we are called upon to resolve the dispute, we will need a sufficient evidentiary basis and explanation upon which we determine that the plant installation is reasonable and what the reasonable installation costs may be. At this stage of these proceedings, we do not have such a record, since our and the parties' focus has been on the singular issue of whether the tariff allows recovery of the developer's costs different than Qwest's calculation of costs.

Wherefore, we issue this Report and Order, determining that:

1. Section 4.4 C.2.e. and 4.4 B.6. of Qwest's tariff do not limit a developer's reimbursement amount to the amount Qwest's calculates it would expend to install facilities in a particular subdivision. A developer's reimbursable amount may differ from Qwest's calculation of costs.

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

3. 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.

4. 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.

Pursuant to Utah Code 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 10th day of June, 2005.

Ric Campbell, Chairman

Ted Boyer, Commissioner

Ron Allen, Commissioner

Attest:

Julie Orchard
Commission Secretary
GW#44566

EXHIBIT E:

Order on Petition for Review dated June 29th, 2005

DOCKETED

- 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-

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

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

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.

Richard M. Campbell, Chairman

Ted Boyer, Commissioner

Ron Allen, Commissioner

Attest:

Julie Orchard
Commission Secretary
GW#45231