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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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	)	<b>Docket No. 03-049-62</b>
	)	
IN THE MATTER OF QWEST	)	<b>BRIEF OF CLEAR WAVE</b>
CORPORATION’S LAND DEVELOPMENT	)	<b>COMMUNICATIONS, L.C., EAST</b>
AGREEMENTS (LDA) TARIFF	)	<b>WIND ENTERPRISES, LLC, AND</b>
PROVISIONS	)	<b>PROHILL, INC., DBA MERIDIAN</b>
	)	<b>COMMUNICATIONS OF UTAH ON</b>
	)	<b>COST POLICY ISSUES</b>

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Clear Wave Communications, L.C. (“Clear Wave”), East Wind Enterprises, LLC (“East Wind”), Prohill, Inc., dba Meridian Communications of Utah (“Meridian”), by and through their undersigned counsel, submit this brief on whether Qwest Corporation (“Qwest”) should be required to pay more for facilities under Option 2 of Qwest’s Utah Exchange and Network Services Tariff (“LDA Tariff”) than it would be required to pay for facilities placed under Option 1 of the LDA Tariff.

**BACKGROUND**

Clear Wave, East Wind and Meridian are contractors whose primary business is installing telephone distribution facilities in new housing developments for land developers

pursuant to land development agreements (“LDAs”) entered into under Option 2 of the LDA Tariff. Option 2 was implemented by Qwest in 1997, under mounting pressure from the Commission, developers, and the general public over Qwest’s inability to timely install and deliver service at new residential developments. *See Silver Creek Communications v. Mountain States Telephone and Telegraph Company*, (“*Silver Creek*”) Docket No. 98-049-33, Report and Order (April 30, 1999) at 3. To resolve the problem of “held orders,” the Commission approved Option 2, which bases the formula for the amount Qwest must pay when distribution facilities are not installed by Qwest on the *average* loop investment thereby establishing a cap:

[a]ll 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 in the development.

LDA Tariff § 4.4(B)(6). Shortly after the Commission approved Option 2, Qwest took the position that the “developer is entitled to reimbursement only up to [Qwest’s] estimate of [Qwest’s] cost to do the work if [Qwest] undertook the work itself.” *Silver Creek* at 3.

Thereafter, in 1999, Qwest urged the Commission to adopt a Provisioning Agreement for Housing Developments (the “PAHD”) Tariff. *In re U.S. West Communications, Inc.’s, Exchange and Network Services Tariff* (“*In re U.S. West*”) Docket No. 99-049-T28, Order on Reconsideration (October 2, 2000) at 1. Under the proposed PAHD tariff, Qwest would have been required to reimburse developers nothing more than its own costs for installation of distribution facilities. *Id.* The Commission soundly rejected the PAHD tariff upon reconsideration stating:

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.

*Id.* Then, in 2003, in a docket opened to address wholly unrelated LDA Tariff issues, Qwest filed a motion requesting, yet again, that its costs under Option 2 be revisited. *SBS Telecommunications, Inc., et al., v. Qwest Corporation*, (“SBS”) Docket No. 02-049-66, Report and Order (July 15, 2003) at 8. In support of its motion, Qwest submitted an illustrative tariff containing terms similar to those that had been rejected by the Commission in the PAHD tariff docket. *SBS* at 8.<sup>1</sup> The Commission determined that it was inappropriate to deal with that issue within the scope of the action and restated that:

Section 4.4(B)(6) requires that costs be agreed upon. . . . In that regard, by implication, both developer and [Qwest] are required to furnish in good faith, detailed, *verifiable* cost estimates on the request of the other party.

*Id.* at 2, 7.<sup>2</sup>

From the many challenges to the LDA Tariff by Qwest, it is apparent that the wording of the LDA Tariff creates ambiguity. Clear Wave, East Wind and Meridian are generally in favor of refining the wording of the Option 2 Tariff to eliminate the ambiguity. Limiting the amount Option 2 contractors are reimbursed to Qwest’s own costs as presently calculated by Qwest, however, would eliminate Option 2 as a viable option. The evidence suggests that Option 2 is still an essential component of Qwest’s ability to meet its demands for service.

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<sup>1</sup> On January 14, 2004, Clear Wave, East Wind, and Meridian filed a Request for Agency Action, Docket No. 04-049-06 to determine in part, whether Qwest must pay more than its own costs under the LDA Tariff currently in effect. As such, consideration of whether Qwest must pay more than its own costs under the LDA Tariff currently in effect should be dealt with in that proceeding.

<sup>2</sup> If it were intended by the Commission that Qwest only pay their cost equal to Option 1, there would be no need for the developer/Option 2 contractor to provide an estimate to Qwest. Section 4.4(B)(6) requires that costs be agreed upon. . . .” The requirement to submit detailed verifiable cost estimates simply means that the costs submitted by the developer have been verified as accurate and then entered into the LDA document.

## DISCUSSION

The Commission has addressed whether Qwest could be required to pay more than its own costs under Option 2 several times, and each time, the Commission has said yes. *See Silver Creek* at 3; *In re U.S. West* at 2. Qwest's position assumes that the Option 2 LDA process is a competitive process to win the installation contracts from developers. In reality, however, Qwest is not competing with Option 2 contractors it is simply attempting to meet its obligations to subscribers. In fact, the Option 2 process, with its ability to meeting demands for timeliness and efficiency, actually enhances Qwest's ability to meet its obligations.

**A. The Public Interest Is Served By Option 2 Under The Current Tariff Structure.**

The current tariff structure serves the public interest. It allows networks to be installed on a timely basis and provide developers an alternative to having Qwest install facilities. While no one other than Qwest, the Division of Public Utilities and the Commission is privy to the actual amount of Qwest's held orders, much has been said about Qwest's dismal held order record prior to Option 2.<sup>3</sup> *See Silver Creek* at 4. Tolerating a large number of held orders is not in the public interest. Since the inception of Option 2, the number of held orders has apparently decreased.<sup>4</sup> Developers have been able to stick to their construction schedules, keeping the price of new homes down. Fewer trenches have been left open awaiting Qwest's installation crews, reducing the risk of accidents and injury. And, most importantly, developers

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<sup>3</sup> Clear Wave, East Wind and Meridian intend to serve data requests requesting additional information, regarding Qwest's held orders, consumer complaints and cost studies. If such information is provided, Clear Wave, East Wind and Meridian reserve the option to file additional policy arguments based upon the information provided.

<sup>4</sup> *See In the Matter of the Revised Pages of the U.S. West Communications, Inc.'s Exchange and Network Services Tariff*, Docket No. 99-049-T28, Direct Testimony of Emily B. Marshall, dated February 4, 2000 at 8.

have experienced fewer complaints from residents regarding their telephone service. One developer reported that using Qwest under Option 1 resulted in a six-week delay in the installation of facilities at his subdivision.<sup>5</sup> At the same time, Qwest has received numerous error-free networks while reducing its staff which affects its cost of doing business. Indeed, over the last two and a half years, the Option 2 process has operated smoothly and has been remarkably successful. In reality, a symbiotic relationship exists between Qwest and Option 2 contractors. Option 2 contractors install facilities, in a timely manner, and according to Qwest's specifications – something that Qwest has historically been unable to accomplish on its own. As a result, Qwest and Qwest's subscribers are the ultimate beneficiaries.

**B. Qwest's Costs Are Not An Appropriate Benchmark.**

The current tariff structure does not advantage Option 2 contractors, it simply levels the playing field. Option 2 contractors are required to use Qwest-approved materials – materials Option 2 contractors cannot possibly acquire at the same prices that Qwest purports to be able to acquire them.<sup>6</sup> Option 2 contractors, which are small, locally owned businesses, do not have Qwest's buying power. Moreover, Option 2 contractors pay sales taxes on their materials, which are purchased from local distributors.<sup>7</sup> Qwest, it is believed, acquires the majority of its materials from out-of-state manufacturers, possibly avoiding distribution costs and

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<sup>5</sup> See letter from Main Street Development, Inc., to Steve Allen, dated January 19, 2004, attached as Exhibit "A."

<sup>6</sup> See letter from Meridian to Qwest, dated September 15, 2003; letter from Qwest to Meridian dated October 6, 2000; letter from Clear Wave to Qwest dated September 23, 2003; letter from Qwest to Clear Wave dated October 29, 2003; letter from East Wind to Qwest, dated November 18, 2003, letter from Qwest to East Wind, dated December 5, 2003, copies of which are attached as Exhibit "B." Qwest's actual cost of materials has never been disclosed to Option 2 contractors, despite direct Commission orders to do so. See *Silver Creek* at 4, *SBS* at 2, 7. One possible resolution of this matter would be to require Qwest to supply Option 2 contractors with materials at cost, if the materials are supplied on a timely basis.

<sup>7</sup> See *id.*

sales taxes.<sup>8</sup> While Qwest may have an incentive to install facilities at cost, those costs have never been fully identified.<sup>9</sup>

Option 2 contractors provide more services. Option 2 contractors are required to deliver an error-free network. This means that prior to delivery the facilities are tested and any functional errors are repaired by the Option 2 contractor. Qwest, on the other hand, absorbs the cost of repairing any networks they install by using a separate division.<sup>10</sup> By not including costs for repairs, Qwest artificially lowers its own costs for installation.

Qwest has disputed Option 2 contractors' ability to include a profit margin in their cost estimates.<sup>11</sup> Not allowing Option 2 contractors a profit margin would leave developers no viable way of implementing Option 2. Qwest can afford to install facilities at a lower cost because when it acquires those facilities, it obtains a revenue-generating asset.<sup>12</sup> Option 2 contractors, on the other hand, simply install facilities, they do not earn profits from telecommunications services that Qwest will later provide over those facilities. Option 2 contractors provide the knowledge and expertise required to design and place the facilities per Qwest specifications to developers. Developers do not have the volume of work to warrant maintaining their own telecommunications staff. Qwest does not include a profit margin in its

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<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> It is impossible for Qwest to submit estimated costs for identical services of Option 2 contractors because costs for repairs are unknown until after installation.

<sup>11</sup> *See supra* footnote 6.

<sup>12</sup> Most residents in new developments become customers of Qwest. While residents, in some cases, may choose a telephone service provider other than Qwest, where Qwest owns the distribution facilities, it is assured of a minimum of provisionary, maintenance and service fees.

cost estimates and refuses to allow Option 2 contractors to do so.<sup>13</sup> To limit reimbursement to Qwest's own costs and exclude a profit margin, therefore, is economically unrealistic and would render Option 2 a nullity. The Commission has already accounted for the differences between Option 2 contractors and Qwest in material costs, services offered and capital structure and approved the Option 2 LDA Tariff affording Qwest with the protection of a tariff cap.

**C. Qwest's Costs Under the Current LDA Tariff Is Not An Issue In This Docket.**

This docket, 03-049-62, is intended to resolve whether Qwest may reimburse developers its own costs upon approval by the Commission of a new LDA Tariff. Judge Tingey stated at the Scheduling Conference on January 15, 2004, and all parties in attendance agreed, that the purpose of the resolution of the issues in Docket 03-049-62 is applicable only upon the approval of a new LDA Tariff in the future. The LDA Tariff approved in 1997 by the Commission is in effect until the Commission approves a new LDA Tariff. *See American Telephone and Telegraph Company v. Central Office, Inc.*, 524 U.S. 214 (1998). Clear Wave, East Wind and Meridian have already brought an action to resolve the issue of the costs that Qwest must reimburse under the current LDA Tariff. As such, this docket should be limited to addressing the costs Qwest must pay in the future.

**CONCLUSION**

For the foregoing reasons, Clear Wave, East Wind and Meridian respectfully request that the Commission determine that as a matter of policy Qwest should be required to pay more for facilities under Option 2 of Qwest's Utah Exchange and Network Services Tariff than it would be required to pay for facilities placed under Option 1 of the LDA Tariff.

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<sup>13</sup> *See supra* footnote 6.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of March, 2004.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 5<sup>th</sup> day of March, 2004, an original, fifteen (15) true and correct copies, and an electronic copy of **BRIEF OF CLEAR WAVE COMMUNICATIONS, L.C., EAST WIND ENTERPRISES, LLC, AND PROHILL, INC., DBA MERIDIAN COMMUNICATIONS OF UTAH ON COST POLICY ISSUES** were hand-delivered to:

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