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Submitted November 9, 2004

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

CLEAR WAVE COMMUNICATIONS, L.C., a Utah Limited Liability Company, EAST WIND ENTERPRISES, LLC, a Utah Limited Liability Company, PROHILL, INC., a Utah Corporation dba MERIDIAN COMMUNICATIONS OF UTAH, Complainants, vs. QWEST CORPORATION, a Colorado Corporation, Respondent.	**Docket No. 04-049-06** **OPENING BRIEF OF CLEAR WAVE COMMUNICATIONS, L.C., EAST WIND ENTERPRISES, LLC, PROHILL, INC. DBA MERIDIAN COMMUNICATIONS OF UTAH AND AMENDMENT TO REQUEST FOR AGENCY ACTION**

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I. BACKGROUND AND INTRODUCTION

On January 14, 2004, Clear Wave Communications, L.C. ("Clear Wave"), East Wind Enterprises, LLC ("East Wind"), and Prohill, Inc., doing business as Meridian Communications of Utah ("Meridian" and together with Clear Wave and East Wind, "Complainants"), filed the above-captioned Request for Agency Action, Docket No. 04-049-06, with the Utah Public Service Commission (the "Commission") after payment disputes arose between Complainants and Qwest Corporation ("Qwest") concerning land development agreements ("LDAs") under Option 2 of Section 4.4(C) of Qwest's Utah Exchange and Network Services Tariff (the "LDA Tariff").

Pursuant to the LDA Tariff, Qwest is to enter into a written agreement with a developer/builder for the provision of telephone distribution facilities within new areas of land development for permanent single family dwellings. The LDA Tariff provides that Qwest is to offer two agreement options. Under Option 1, Qwest will engineer, design, secure materials and provide labor to place and test the facilities, and Qwest retains ownership of the plant.

Under Option 2, the developer will engineer, design, secure all materials and provide the labor to place and test the facilities. The developer may employ a contractor ("Option 2 Contractor") for the timely deployment of the facilities. Qwest must be given the opportunity to approve job prints and material lists, and Qwest must be given the opportunity to inspect and test facilities after installation. Once the work is complete and Qwest has inspected the facilities, the developer transfers ownership of the facilities to Qwest and Qwest reimburses the developer their costs, 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" (or $436.13 per lot,

the "Tariff Cap").[1] In establishing the per-lot cap, Qwest, at the recommendation of the Commission, met with the Home Builders' Association and agreed to the cap, based on the amount of risk that Qwest was willing to assume.[2]

To elect Option 2 of the LDA Tariff, Qwest requires that the developer and the Option 2 Contractor comply with Qwest's Option 2 Process (the "Procedures"). Qwest mails the Procedures to developers and Option 2 Contractors, but does not file the Procedures with the Commission. The Procedures provide a protocol for the approval of engineering designs, material lists, and construction commencement, among other things.

Normally, the developer reimburses the Option 2 Contractor after it receives payment from Qwest. The Commission has stated that the reimbursement costs are to be agreed upon by the land developer or its agent and Qwest "at the inception of the agreement and incorporated into the LDA."[3] Qwest prepares and furnishes the LDA to the developer. Once costs are identified, agreed upon, and incorporated into the LDA, limited by the Tariff Cap, Qwest's liability for reimbursement may not be increased.[4]

Shortly after the Commission's 1997 approval of Option 2, Qwest took the position that the developer is entitled to reimbursement only up to Qwest's own estimated costs, and the Commission held that the language of the LDA Tariff did not support Qwest's position:

> [Qwest's] argument is that a developer is entitled to reimbursement only up to [Qwest's] estimate of [Qwest's] costs to do the work if [Qwest] undertook the work itself. Under [Qwest's] argument, the . . .[Tariff Cap], brought in by the reference to Section 4.4(B)(6), is an absolute limit applicable in particularly high construction cost

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1 *See* LDA Tariff, Section 4.4(B)(6).

2 *See* Affidavit of James Farr for Qwest (January 31, 2003), filed in *SBS Telecommunications, Inc., et al. v. Qwest Corporation*; Docket No. 02-049-66.

3 *SBS Telecommunication, supra, Report and Order* (July 15, 2003) at 2, 7; *Silver Creek Communications v. Mountain States Telephone & Telegraph Company*, Docket No. 98-049-33, *Report and Order* (April 30, 1999) at 4.

4 *See SBS Telecommunications, supra,* at 2, 7; *Silver Creek, supra,* at 4.

> areas. **Unfortunately for [Qwest's] position, that isn't how the language reads**." (Emphasis added.)[5]

In 1999, Qwest proposed tariff revisions to replace the existing LDA Tariff with a Provisioning Agreement for Housing Developments Tariff (the "PAHD Tariff"), which would require Qwest to reimburse developers no more than Qwest's own costs. The Commission, in an order on reconsideration, rejected the PAHD Tariff 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.[6]

In 2003, Qwest filed a motion in the *SBS Telecommunications* docket, requesting that the Commission revisit Qwest's costs under Option 2. The Commission determined that Qwest's request was not within the scope of the *SBS Telecommunications* action, and that a new docket would be opened to address the problems with the LDA Tariff, including the issue of whether Qwest must pay more than its own costs under the LDA Tariff.[7] Consistent with that ruling, on July 15, 2003, the Commission opened a docket, *In the Matter of Qwest Corporation's Land Development Agreements (LDA) Tariff Provisions*, Docket No. 03-049-62 (the "LDA Tariff Docket").

II. CHRONOLOGY OF THIS CASE

Complainants Clear Wave, East Wind and Meridian are contractors whose primary business is installing telephone distribution facilities in new housing developments for land developers under Option 2 of the LDA Tariff. On January 14, 2004, Complainants filed this

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[5] *Silver Creek, supra*, at 3.

[6] *In re U.S. West Communications, Inc.'s Exchange and Network Services Tariff*, Docket No. 99-049-T28, *Order on Reconsideration* (October 2, 2000) at 1.

[7] *SBS Telecommunications, supra*, at 8.

Request for Agency Action, Docket No. 04-049-06.[8] This case revolves around the reimbursement costs that Qwest must pay for Option 2. Qwest refuses to pay Complainants in accordance with the LDA Tariff, and instead has taken the position that it is unnecessary to reimburse Option 2 Contractors any amount in excess of its own estimate of what it would cost Qwest to install the facilities.

Complainants Clear Wave, East Wind and Meridian, in their Request for Agency Action, complain of Qwest's conduct with respect to three projects in which land developers engaged Complainants as Option 2 Contractors: (1) Country View PUD Phase 2, located in Riverton, Utah ("Country View Project"); (2) West Jordan Meadows Phase 3, located in West Jordan, Utah ("West Jordan Meadows Project"); and (3) Oquirrh Park Phase 3, located in South Jordan, Utah ("Oquirrh Park Project").

On February 13, 2004, Qwest filed a Motion for Stay, requesting that the Commission stay the proceeding pending a determination in the LDA Tariff Docket on whether Qwest must pay more for facilities placed by Option 2 Contractors than it would pay for facilities under Option 1 of the LDA Tariff *currently* in effect. On April 12, 2004, the Commission denied Qwest's Motion for Stay, and stated:

> We intend to explore the policies and issues associated with facility placements in the 03-049-62 docket and could use those proceedings to consider future alterations to existing tariff provisions and future tariffs. We view that docket as a 'going forward' examination of potential, alternative terms to replace the existing tariff provisions. In this docket, the issues arise from past conduct and the application of the existing tariff.

[8] On September 7, 2004, SBS Telecommunications, Inc. filed a Petition to Intervene and a Request for Agency Action and on October 7, 2004, Qwest filed its Answer.

In light of this April 12, 2004 order denying Qwest's motion, the Commission should review the past conduct of the parties, determine what is just and reasonable under the existing LDA Tariff, and apply those principles in analyzing Complainants' Request for Agency Action.

Qwest, in its Answer, contends that Complainants "imply that the tariff cap is the appropriate measure of costs Qwest should pay for every Option 2 job."[9] This contention is not true with Complainants Clear Wave, East Wind and Meridian, as will be demonstrated below by their bid estimates.

III. ARGUMENTS

A. The LDA Tariff is in Place, with a Process Designed to Protect Qwest from Unreasonable Costs. It Should be Applied to Complainants in this Case.

The Commission has broad authority to regulate every public utility within the state, including the authority to determine the reasonableness of rates.[10] As a result, where a regulated company has a tariff on file with the Commission, the tariff must be followed.[11] This preserves the authority of the Commission to determine the reasonableness of rates, to ensure that the regulated company charges the tariff rates that the Commission has approved or the Commission is aware of, and to prevent discrimination. By addressing proposed modifications to the tariff in the LDA Tariff Docket, the Commission will preserve its authority and ensure that any revisions to the tariff are properly submitted for Commission review and approval.[12]

The LDA Tariff is in place, with a designed process to protect Qwest from unreasonable costs. Consistent with the LDA Tariff and the Commission's holding in *SBS Telecommunications*, both developer and Qwest are required to furnish in good faith, detailed, verifiable cost estimates.

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[9] *See* Qwest's Answer at 4.
[10] *See* Utah Code Ann. §§ 54-1-2, 54-4-1, and 63-46b-1, *et. seq*
[11] *See AT&T v. Central Office*, 524 U.S. 214 (1998).
[12] *See* Utah Code Ann. §§ 54-3-1, 54-3-2 and 54-3-3.

> 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 [Qwest] are required to furnish in good faith detailed, *verifiable* cost estimates on the request of the other party. It will not do for [Qwest] to hide behind alleged proprietary concerns to avoid such disclosure. [Qwest] 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.[13]

In addition to the requirement that both sides act in good faith to provide detailed, verifiable cost estimates, there is a cap on the cost that Qwest must pay for Option 2. This per-lot cap was negotiated between Qwest and the Home Builders' Association, on behalf of the developers, and reviewed and approved by the Commission. The cap allocates the risk between Qwest and the developer, and the parties concluded that the cap was the proper allocation of risk. Now, it appears that Qwest is asking the Commission to ignore the prior proceedings. If the parties cannot reach an agreement, the Tariff Cap is in place, and Qwest would have to pay no more than the cap.[14]

B. Complainants Have Entered into Contracts to Install Telephone Distribution Facilities in New Housing Developments in Reliance on the Existing LDA Tariff and on the Conduct of Qwest in the Past.

The decision regarding whether to employ an Option 2 Contractor and enter into an LDA is a business decision for the developer to make.[15] Since the developer likely does not have the expertise and the equipment necessary to perform the work required, Option 2 allows the developer to contract the services of an Option 2 Contractor for the timely deployment of the telephone distribution facilities in new housing developments. Over the past two and a half years, the Option 2 process has operated smoothly and has been successful. Option 2

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[13] *SBS Telecommunications, supra,* at 2, 7; *see also Silver Creek Communications, supra,* at 4.
[14] The parties may also file a Request for Agency Action pursuant to Utah Code Ann. 63-46b-3.
[15] *In re U.S. West Communications, supra,* at 1.

Contractors install facilities, in a timely manner, and according to Qwest's specifications. As a result, Qwest has received numerous error-free networks while reducing its staff which affects its costs of doing business.

Complainants, in reliance on the LDA Tariff, have entered into contracts to perform this work. Since the developer does not pay the Option 2 Contractor until the developer receives payment from Qwest, Option 2 Contractors rely on the LDA Tariff and the good faith processing of the LDA in order to receive compensation. Qwest is insisting on paying no more that its own estimated costs for each project, and the developers, and more likely the Option 2 Contractors, are assuming the additional costs of providing materials and labor under Option 2. Qwest has an unreasonable amount of leverage in the process, an unfairness resulting from disparate bargaining positions that should be taken into consideration by the Commission.[16]

C. Qwest's Suggested Interpretation of the Current LDA Tariff Would be a Modification to the Tariff, One That Cannot be Done Without Proper Notice and Approval From the Commission.

Qwest insists on paying no more than its own estimated costs for each project. By doing so, Qwest's interpretation would be a modification of the existing LDA Tariff without the proper notice and approval by the Commission. The LDA Tariff approved in 1997 by the Commission is in effect until the Commission approves a new or modified LDA Tariff.[17] Accordingly, the existing tariff must be applied in this case.

Shortly after the Commission approved Option 2, Qwest took the position that the developer is entitled to reimbursement only up to Qwest's own estimated costs, and the Commission held that the language of the LDA Tariff does not support Qwest's position.[18] The

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[16] *See generally Robbins v. Finlay*, 645 P.2d 623, 626-27 (Utah 1982).
[17] *See AT&T v. Central Office, supra*.
[18] *Silver Creek, supra*, at 3.

Commission also rejected Qwest's proposed PAHD Tariff which would have required Qwest to reimburse developers no more than its own costs for installation of distribution facilities.[19] Then in 2003, the Commission stated that Qwest's attempt to raise the issue in the *SBS Telecommunications* Docket was inappropriate and opened the LDA Tariff Docket to address that and other related issues.[20] The Commission should determine that Qwest's attempt to reimburse developers only up to Qwest's own estimated cost for installation is more appropriate for the LDA Tariff Docket and inappropriate for this Docket.

The holding in *SBS Telecommunications* is inconsistent with Qwest's position in another aspect. If the Commission intended that Qwest only pay their cost equal to Option 1, then there would be no need for the developer or the Option 2 Contractor to provide a cost estimate to Qwest. In application, Qwest's position does not make sense because only Qwest's cost estimate would be provided and the developer's costs would not be considered. The Commission's holding in *SBS Telecommunications*, that both parties furnish cost estimates, supports an interpretation different from Qwest's position.[21]

D. Complainants have Acted in Good Faith, have Reasonably Complied with the LDA Tariff and Qwest's Procedures, and are Entitled to the Relief Requested.

To use Qwest's own words, "Qwest does not expect perfection from [an] Option 2 contractor or developer. Nor is Qwest perfect. Reasonableness, not perfection, is what the law and tariff requires."[22] Complainants have acted in good faith, and have reasonably complied

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[19] *In re U.S. West Communications, supra,* at 1.
[20] *SBS Telecommunications, supra,* at 8.
[21] *Id.* at 2, 7.
[22] Qwest's Answer to the Complaint of SBS Telecommunications, Inc. in this Docket (October 7, 2004) at 10, citing, *e.g.*, to Utah Code Ann. § 54-3-1.

with the LDA Tariff and Qwest's Procedures. Moreover, many of their project bids were below the Tariff Cap and in some instances, Complainants accepted Qwest's own cost estimates.[23]

Complainants are aware of the Commission's ruling that the costs are to be agreed upon "at the inception of the agreement and incorporated in the LDA."[24] However, as a practical matter, construction schedules and the existence of open trenches due to the placement of utility lines by other public utilities, have typically required that facilities be placed prior to incorporation of the price terms in the LDA. Complainant East Wind was operating under Qwest's Procedures document dated "6-24-2003" which stated that "Upon approval of job prints, construction may commence." East Wind was unaware, until Qwest filed its Answer in this Docket, that Qwest revised its Procedures document with one dated "8-15-03," and the new Procedures provide that "Upon approval of job prints and *cost estimate* construction may commence." East Wind has at all times acted in good faith and is entitled to proper reimbursement in accordance with the existing LDA Tariff.

Qwest, on the other hand, has failed to disclose in good faith, detailed verifiable cost estimates, and has failed to disclose material costs based upon confidential agreements with suppliers. Complainants cannot verify Qwest's claimed costs and cannot determine how Qwest is computing its cost estimates and what methodology is used. Qwest has refused to pay developers for costs that exceed Qwest's own estimate of what it would cost for Qwest to install the facilities. It should be noted that Qwest, as recently as January of this year, acknowledged that payment of the Tariff Cap is appropriate in some situations. Qwest acknowledged that

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[23] *See, e.g.*, Project bids from Complainant East Wind below the Tariff Cap include Oquirrh Park Project, Request for Agency Action at p. 14, Santaquin Meadows Phases C and D, *infra* at p. 13, Liberty Villages, *infra* at p. 14, Kings Court Estates, *infra* at 15; and Manila Springs Plat B. Complainant East Wind accepted Qwest's own cost estimates for the following projects: Rancho Tooele Phase 6C Project, and Evans Meadows.

[24] *SBS Telecommunications, supra,* at 2, 7; *Silver Creek, supra,* at 4.

payment of the cap amount is appropriate if the verifiable cost estimate of the project is at or above the tariff cap amount.[25]

The best hope for a reasonable resolution of this dispute is for the Commission to apply the existing LDA Tariff to the specific facts of this case and to require all parties to move forward in good faith. Qwest argues that when the parties cannot come to an agreement, Qwest should simply reimburse up to its own costs. Instead, Complainants urge the Commission to, pursuant to the existing tariff, require the parties to provide detailed, verifiable cost estimates for each of the projects in question.

With outstanding projects and the anticipation of additional projects, and with Qwest reimbursing Option 2 Contractors only the amount of Qwest's own estimated cost, Complainants reluctantly agreed to a Joint Stipulation, filed with the Commission on March 9, 2004, so that they could stay in business and continue to have some cash flow. The Amendment to the Request for Agency Action, below, summarizes the additional projects in which a land developer engaged one of the Complainants under Option 2 of the LDA Tariff.

IV. AMENDMENT TO REQUEST FOR AGENCY ACTION

With respect to (1) Country View Project, Qwest has made payment and the parties have resolved their dispute. With respect to (2) West Jordan Meadows Project, and (3) Oquirrh Park Project, pursuant to the Joint Stipulation, Complainants agreed to accept payment of Qwest's "own estimated costs, subject to additional payments if the Commission determines that Qwest must pay more than its own costs, plus interest . . . ."

West Jordan Meadows Project. As established in the original Request for Agency Action, Complainant Clear Wave provided Qwest with a good faith, detailed verifiable

[25] *See* Letter from Qwest Senior Design Engineer to SBS Telecommunications (January 8, 2004).

cost estimate for the West Jordan Meadows Project on September 23, 2003, in the amount of $15,947.35, or $469.04 per lot, an amount above the Tariff Cap with the understanding that only the Tariff Cap could be reimbursed. Qwest responded by forwarding its cost estimate in the amount of $12,932, or $380.35 per lot. Pursuant to the Joint Stipulation, Qwest offered to pay $12,932, "subject to true-up plus interest if the [Commission] later decides that Qwest should pay more than its own costs for this project."

Oquirrh Park Phase 3B. As established in the original Request for Agency Action, Complainant East Wind provided Qwest with a good faith, detailed verifiable cost estimate for the installation of facilities at the Oquirrh Park Phase 3B Project in the amount of $17,665.05, or $420.60 per lot, an amount below the Tariff Cap of $436.13 per lot. Qwest responded by forwarding its cost estimate in the amount of $14,262, or $339.57 per lot, and pursuant to the Joint Stipulation, Qwest offered to pay $14,262, "subject to true-up plus interest if the [Commission] later decides that Qwest should pay more than its own costs for this project."

In this Amended Request for Agency Action, Complainants respectfully request that the Commission review the conduct of Complainants and Qwest with respect to seven additional land development projects. After Complainants filed its original Request for Agency Action, land developers continued to employ Complainants and Qwest continued to enter into LDAs. For projects not specifically identified in the Joint Stipulation,[26] Qwest agreed to pay its own estimated cost "subject to true-up plus interest if the [Commission] later decides that Qwest should pay more than its own costs for this project."[27]

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[26] The Joint Stipulation specifically identified Country View, West Jordan Meadows and Oquirrh Park.

[27] Various letters from Qwest to each of the Complainants, e.g., letter from Qwest to Clear Wave dated November 26, 2003, a copy of which was attached as Exhibit "E-6" to the Request for Agency Action.

Of the seven additional projects that are the subject of this Amendment, Qwest has made payment to Complainants on all seven of the LDAs under the Joint Stipulation. In addition to the three projects discussed in Complainant's original Request for Agency Action, by this Amendment, Complainants add the following projects in which the developer engaged an Option 2 Contractor: (A) Eagle Pointe Phase 5, located in North Salt Lake, Davis County, Utah; (B) Santaquin Meadows Phases C and D, located in the city of Santaquin, Utah County, Utah; (C) Liberty Villages, located in Herriman, Salt Lake County, Utah; (D) Sunset Fields, located in the city of West Bountiful, Davis County, Utah; (E) Eagle Pointe Phase 9, located in North Salt Lake, Davis County, Utah; (F) Kings Court Estates, located in Syracuse, Davis County, Utah; and (G) Diamond Summit Phase 4, located in the city of West Valley, Salt Lake County, Utah. For each project, Qwest agreed to pay its own estimated cost in an amount equal to its own estimated costs, "subject to true-up plus interest if the [Commission] later decides that Qwest should pay more than its own costs for this project." Complainants respectfully request that the Commission review the past conduct of the parties, including the conduct with respect to these seven projects, and determine what is just and reasonable under the existing LDA Tariff.

A. Eagle Pointe Phase 5

On May 21, 2004, Meridian provided to Qwest a good faith, detailed verifiable cost estimate for the installation of facilities at Eagle Pointe Phase 5 in the amount of $9,227.14, or $461.36, an amount above the Tariff Cap of $436.13 per lot. (*See* letter from Meridian to Qwest dated May 21, 2004, a copy of which is attached hereto as Exhibit "A-1.") On June 1, 2004, Qwest responded with its "verifiable cost estimate" of $7,485.98, or $374.30 per lot. (*See* letter from Qwest to Meridian dated June 1, 2004, a copy of which is attached hereto as Exhibit "A-2.") Meridian responded to Qwest on June 10, 2004, raising concerns regarding Qwest's estimated cost for the project, and offering to place the project for the cap price identified in the

tariff, or $8,722.60. In the alternative, Meridian stated, "If this is not acceptable to Qwest, please invoke the Joint Stipulation agreed upon within the PSC Docket 04-049-06." (*See* letter from Meridian to Qwest dated June 10, 2004, and supplemental letter dated September 2, 2004, copies of which are attached hereto as Exhibit "A-3.") On September 7, 2004, Qwest offered to pay its estimated cost of $7,485.98 for the placement of facilities pursuant to the Joint Stipulation, "subject to additional payment plus interest if the Commission later determines additional payment to be due." (*See* letter from Qwest to Meridian dated September 7, 2004, a copy of which is attached hereto as Exhibit "A-4.") Qwest has taken the position that a developer is entitled to be reimbursed only up to Qwest's own cost estimates if it undertook the project itself.

B. Santaquin Meadows Phases C and D

On May 13, 2004, Complainant East Wind provided to Qwest a good faith, detailed verifiable cost estimate for the installation of facilities at Santaquin Meadows Phases C and D in the amount of $6,077.01, or $405.13 per lot, an amount below the Tariff Cap of $436.13 per lot. (*See* letter from East Wind to Qwest dated May 13, 2004, a copy of which is attached hereto as Exhibit "B-1.") On May 25, 2004, Qwest responded with its cost estimate of $4,991, or $332.73 per lot. (*See* letter from Qwest to East Wind dated May 25, 2004, a copy of which is attached hereto as Exhibit "B-2.") East Wind responded to Qwest on June 2, 2004, indicating that Qwest's cost statement was unacceptable, and that East Wind would invoke the Joint Stipulation. (*See* letter from East Wind to Qwest dated June 2, 2004, a copy of which is attached hereto as Exhibit "B-3.") On June 3, 2004, Qwest offered to "pay its estimated cost for the project now, subject to additional payment plus interest if the Commission later determines additional payment to be due." (*See* letter from Qwest to East Wind dated June 3, 2004, a copy of which is attached hereto as Exhibit "B-4.")

C. Liberty Villages

On April 12, 2004, Complainant East Wind provided to Qwest a good faith, detailed verifiable cost estimate for the installation of facilities at Liberty Villages in the amount of $23,079.81, or $419.63 per lot, an amount below the Tariff Cap of $436.13 per lot. (*See* letter of April 12, 2004, from East Wind to Qwest, a copy of which is attached hereto as Exhibit "C-1.") On April 23, 2004, Qwest responded with its cost estimate of $17,679, or $321.44 per lot, and did not provide details. The letter simply states, "Qwest's costs are $17,679.00 and we believe this is a fair amount to pay for this subdivision per the current design. If these costs are satisfactory to you I will process the Land Development agreement in the amount refundable to the developer of $17,679." (*See* letter from Qwest to East Wind dated April 23, 2004, a copy of which is attached hereto as Exhibit "C-2.") East Wind responded to Qwest on May 5, 2004, indicating that Qwest's cost statement was unacceptable, and that East Wind would invoke the Joint Stipulation. (*See* letter from East Wind to Qwest dated May 5, 2004, a copy of which is attached hereto as Exhibit "C-3.")

D. Sunset Fields

On August 17, 2004, Complainant East Wind provided to Qwest a good faith, detailed verifiable cost estimate for the installation of facilities at Sunset Fields in the amount of $13,586.69, or $452.89 per lot, an amount above the Tariff Cap of $436.13 per lot. (*See* letter from East Wind to Qwest dated August 17, 2004, a copy of which is attached hereto as Exhibit "D-1.") On August 19, 2004, Qwest responded with its cost estimate of $11,923.46, or $397.45 per lot. Qwest offered to "pay its estimated cost of $11,923.46 for this phase of this project now, subject to additional payment plus interest if the Commission later determines additional payment to be due." (*See* letter from Qwest to East Wind dated August 19, 2004, a copy of which is attached hereto as Exhibit "D-2.")

E. Eagle Pointe Phase 9

On August 13, 2004, Complainant East Wind provided to Qwest a good faith, detailed verifiable cost estimate for the installation of facilities at Eagle Pointe Phase 9 in the amount of $11,638.08, or $447.62 per lot, an amount above the Tariff Cap of $436.13 per lot. (*See* letter from East Wind to Qwest dated August 13, 2004, a copy of which is attached hereto as Exhibit "E-1.") On the same day, August 13, 2004, Qwest responded with its cost estimate of $8,798.34, or $338.40 per lot. Qwest offered to "pay its estimated cost of $8,798.34 for this phase of this project now, subject to additional payment plus interest if the Commission later determines additional payment to be due." (*See* letter from Qwest to East Wind dated August 13, 2004, a copy of which is attached hereto as Exhibit "E-2.")

F. Kings Court Estates

On September 30, 2004, Complainant East Wind provided to Qwest a good faith, detailed verifiable cost estimate for the installation of facilities at Kings Court Estates in the amount of $8,901.31, or $404.61 per lot, an amount below the Tariff Cap of $436.13 per lot. (*See* letter from East Wind to Qwest dated September 30, 2004, a copy of which is attached hereto as Exhibit "F-1.") On October 4, 2004, Qwest responded with its cost estimate of $7,018, or $319.00 per lot. Qwest offered to "pay its estimated cost of $7,018.00 for this phase of this project now, subject to additional payment plus interest if the Commission later determines additional payment to be due." (*See* letter from Qwest to East Wind dated October 4, 2004, a copy of which is attached hereto as Exhibit "F-2.")

G. Diamond Summit Phase 4

On September 30, 2004, Complainant East Wind provided to Qwest a good faith, detailed verifiable cost estimate for the installation of facilities at Diamond Summit Phase 4 in the amount of $24,071.08, or $454.17 per lot, an amount above the Tariff Cap of $436.13 per lot.

(*See* letter from East Wind to Qwest dated September 30, 2004, a copy of which is attached hereto as Exhibit "G-1.") On behalf of Qwest, Matt Ivester responded by telephone with a cost estimate of $20,658, or $389.77 per lot. Qwest offered to pay its estimated cost of $20,658 pursuant to the Joint Stipulation, and East Wind accepted the offer by e-mail.

Complainants have restated their request with respect to the two outstanding projects from the original Request for Agency Action, and have added seven new projects, identified in the Amendment to the Request for Agency Action. These projects are summarized in a table attached hereto as Exhibit "H." Complainants believe that Qwest owes an estimated $21,064.59, plus interest, as indicated in the totals reflected at the end of the Exhibit.

V. CONCLUSION

For the reasons set forth herein, and consistent with Complainants' Request for Agency Action and its other submissions in this proceeding, Complainants request the following relief:

> (1) An order declaring that Qwest must issue to developers and Complainants good faith, detailed verifiable cost estimates and cannot hide behind confidentiality agreements it has with its suppliers;
>
> (2) An order declaring that Qwest may not exclude as unreasonable an Option 2 Contractor's profit margin from cost estimates when the cost estimates are at or below the Tariff Cap, regardless of whether Qwest is thereby obligated to pay more than its own costs for a project;
>
> (3) An order requiring Qwest to comply with the timeframes for pricing approval contained in the Procedures;
>
> (4) An order declaring that Complainants' estimated costs are reasonable.
>
> (5) An order requiring Qwest to comply with the LDA Tariff and the Joint Stipulation, and reimburse Complainants in accordance therewith, in an amount estimated to be $21,064.59, plus interest as provided for in the Joint Stipulation;

(6) An order granting such other relief as is just, reasonable and proper.

RESPECTFULLY SUBMITTED this 9th day of November, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2004, an original, five (5) true and correct copies, and an electronic copy of the foregoing **Opening Brief of Clear Wave Communications, L.C., East Wind Enterprises, LLC, Prohill, Inc. dba Meridian Communications of Utah and Amendment to Request for Agency Action** were hand-delivered to:

Ms. Julie Orchard
Commission Secretary
Public Service Commission of Utah
Heber M. Wells Building, Fourth Floor
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