Robert C. Brown
Qwest Services Corporation
1801 California Street, 49th Floor
Denver, CO 80202
(303) 672-5839
(303) 295-7069 (fax)
robert.brown@qwest.com

Gregory B. Monson (2294)
David L. Elmont (9640)
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111
(801) 328-3131
(801) 578-6999 (fax)
gbmonson@stoel.com
dlelmont@stoel.com

Attorneys for Qwest Corporation

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of CLEAR WAVE COMMUNICATIONS, L.C., et al.,	:	
Complainants,	:	Docket No. 04-049-06
vs.	:	
QWEST CORPORATION,	:	**QWEST'S ANSWER**
Respondent.	:	

Pursuant to Utah Code Ann. § 63-46b-6 and Utah Administrative Code R746-100-3(I), Qwest Corporation ("Qwest") hereby responds to the Complaint of Clear Wave

Communications, L.C. ("Clear Wave"), East Wind Enterprises, LLC ("East Wind"), and Prohill Inc. ("Prohill") (Clear Wave, East Wind, and Prohill, collectively, "Complainants") as follows:

I. STATEMENT OF FACTS

A. The Commission Has Not Finally Resolved How Much Qwest Should Pay For Facilities Placed Under Option 2.

The fundamental issue raised by the Complaint in this matter is how much Qwest must pay for facilities placed under Option 2 of its LDA tariff. This is a question of tariff interpretation that, while it has made pronouncements upon the issue in the past, the Commission has never finally resolved. In Docket No. 98-049-33, for example, the Commission addressed appropriate costs for Option 2 jobs and found:

> We believe the only interpretation fair to both parties and consistent with the public interest is as follows:
>
> - **Section 4.4(B)(6) requires that costs be agreed upon at the inception of the agreement and incorporated in the LDA**. In that regard, by implication, both developer and [Qwest] are required to furnish in good faith detailed, verifiable cost estimates on the request of the other party. …
>
> - **Once costs**, limited by the formula in Section 4.4(B(6), **have been** identified, **agreed upon**, and incorporated into the LDA, [Qwest's] liability for reimbursement may not be escalated thereafter.[1]

Qwest sought to implement this Commission directive by obtaining verifiable cost estimates from Option 2 contractors. However, "[i]n requests made directly to the Option 2 contractors for this information, the Option 2 contractors inform[ed] Qwest that the developers, not the Option 2 contractors, [were] to provide their cost estimates, and that the developers' costs

[1] Report and Order, Docket No. 98-049-33 (April 30, 1999) at 6 ("1999 Order") (emphasis added). The 1999 Order also made statements—not based upon evidence, and later retracted by the Commission—to the effect that the impetus for Option 2 of the LDA tariff was Qwest's held-order record. *See, e.g., id.* at 5. In its briefing of cost policy in Docket No. 03-049-62 (currently pending before the Commission), Qwest has addressed the Commission's retraction, via a May 26, 2000 Report and Order in Docket No. 99-049-T28, of the 1999 Order's erroneous held-order language.

[were] what the Option 2 contractors charge[d] the developers."[2] Option 2 contractors, in turn, always charged "the developers the maximum amount that Qwest [would] pay, or in other words the cap of $436.13 per lot. So, by default, the per-lot cap [became] what Qwest [paid] for Option 2 LDAs and the Commission's direction that the parties provide detailed, verifiable cost estimates [became] meaningless under the Option 2 contractors' interpretation."[3] Developers—who incur no expense as long as the tariff cap is not exceeded—had no incentive to decrease costs, and further language from the Commission's 1999 Order became prophetic: "Developers and/or their contractors have no incentive to restrain their extravagance unless and until the [tariff cap] is approached, and thus the maximum bids fair to become the minimum."[4]

In Docket No. 02-049-66, Qwest sought to remedy the Option 2 contractors' de facto nullification of the Commission's directive that costs be "agreed upon" and incorporated in the LDA. Moving to enlarge the scope of that proceeding, Qwest sought a Commission order directing that Qwest not be required to pay more for Option 2 facilities than it would pay for Option 1 facilities, giving symmetrical treatment to costs under both Option 1 and Option 2 of the tariff—as Qwest had always intended.[5] The Commission did not rule on this request, but instead opened a new docket (Docket No. 03-049-62) to address such issues.[6]

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[2] *See* Affidavit of James Farr, Docket No. 02-049-66 (January 31, 2003) at ¶ 17 ("Farr Affidavit"), a true and correct copy of which is attached hereto as Exhibit 1.

[3] *See id*.

[4] *See* 1999 Order at 5.

[5] *See* Farr Affidavit at ¶¶ 15, 19.

[6] *See* Report and Order, Docket No. 02-049-66 (July 15, 2003) at 8 ("2003 Order"). In the 2003 Order, the Commission also reiterated its directive from the 1999 Order that costs be agreed upon ("If Qwest and developers complied with this directive, before the LDA was entered into, and provided up-front, good faith detailed, verifiable costs estimates, then a developer could make an informed decision as to whether to have Qwest, or another party such as one of the Complainants, install the facilities. To be good faith and verifiable the cost estimates must be more than a quote from one of the Complainants or a similar company to do the job for the amount of the cap under the LDA tariff. With such estimates, costs

Of course, the Commission has now directed that Docket No. 03-049-62 will only be used to address forward-looking policy questions regarding Option 2 of the tariff.[7] Thus, it remains to be decided in the instant matter precisely how much Qwest is obligated to pay for facilities placed under Option 2 of the tariff language currently in effect. Or, put differently, it remains to be decided what should be done under the current tariff when the parties fail to "agree[] upon, and incorporate[] into the LDA" the costs for Option 2 jobs.[8]

B. Complainant's Interpretation Of Option 2 Costs Would Continue The Traditional Option 2 Contractor Nullification Of The Commission's Directive That Costs Be "Agreed Upon."

The fact that the Commission has not ruled on what the parties must do in the event they cannot reach agreement on price is in no way undercut by the Complaint in this matter. Complainants introduce a new twist on the historic Option 2-contractor interpretation of the LDA tariff's cost provisions. They continue to at least imply that the tariff cap is the appropriate measure of costs Qwest should pay for every Option 2 job,[9] but they argue that the Commission should declare that their cost estimates are "reasonable" and that Qwest should pay their estimated costs.[10] They further ironically imply that by seeking to meaningfully implement the Commission's directive that costs by "agreed upon" (i.e., by seeking to meaningfully negotiate price), Qwest is actually refusing to negotiate in good faith.[11] Complainants then contradict

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would be agreed to up front and incorporated into an LDA between Qwest and the developer."). It did not, however, state what should be done when costs could not be agreed upon.

[7] *See* Order Denying Motion to Stay, Docket 04-049-06 (April 12, 2004).

[8] 1999 Order at 6.

[9] *See, e.g.*, Complaint ¶¶ 38, 59, 66, 76.

[10] *See id*. at p. 17.

[11] *See, e.g., id*. at ¶¶ 70, 80. Complainants cite an out-of-date Qwest document (defined in the Complaint as "Procedures," attached as Exhibit B to the Complaint) for the proposition that Complainants are reasonably relying on a Qwest policy to allow construction to commence once job prints are approved (i.e., without price being negotiated). *See, e.g.*, Complaint ¶¶ 18, 20. In fact, however, Qwest has put all

themselves by essentially admitting that Qwest, not Complainants, has been the principal party initiating meaningful negotiation, by offering proposals such as to "split the difference" on LDA pricing and to implement an interim payment solution pending the Commission's determination on the costs Qwest must pay under Option 2.[12] Complainants' view of the Commission's directive to "agree upon" price is laid out in their brief submitted in Docket No. 03-049-62, where they state: "Section 4.4(B)(6) requires that costs be agreed upon...." [sic] 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."[13] In other words, apparently for the price to be agreed-upon, Complainants simply make their price demand; Qwest is required to accept it; and the price is entered into the LDA. Needless to say, Qwest disputes Complainants' interpretation of the Commission's "agreed upon" language.

C. Qwest And Complainants Have Stipulated To An Interim Payment Solution. All That Remains Is For The Commission To Interpret The Tariff.

Qwest has further disagreements with Complainants about the allegations in the Complaint, particularly as those allegations relate to the specific Option 2 jobs for which Complainants seek Commission relief. Qwest also has potential concerns about the

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Option 2 contractors on clear notice that agreement on price is mandatory prior to construction. *See* Qwest letter to Option 2 contractors (August 15, 2003) at enclosure p. 1 ("Option 2 Process Flow"), a true and correct copy of which is attached hereto as Exhibit 2. Under the Option 2 Process Flow, "3) … ***If the prints, Cost Estimate and Material list is satisfactory,*** **The Qwest Engineer will issue the job to Qwest's Construction department within ten (10) working days.** … ***If the Verifiable Cost Estimate is not acceptable, the Qwest Engineer (SPOC) will notify the [Option 2 contractor] to negotiate the price.*** … Upon approval of job prints ***and cost estimate*** construction may commence.") (emphasis in original). Thus, construction has not been undertaken by Complainants in reliance on Qwest's "Procedures."

[12] *See, e.g.*, Complaint ¶¶ 45, 47, 49, 67.

[13] *See* Brief of Clear Wave Communications, et al., Docket No. 03-049-62 (March 5, 2004) at 3, n.2.

Commission's jurisdiction to grant all of the relief sought in the Complaint.[14] Those disagreements and concerns are moot, however, in light of the fact that Qwest and Complainants have entered a stipulation under which Qwest has agreed to pay its own estimated costs for all jobs identified in the Complaint[15] (and for future jobs, if the parties cannot reach agreement), subject to further payment and interest if the Commission determines that the tariff should be interpreted as Complainants allege.[16] All that remains, therefore, to resolve this matter is a Commission interpretation of the costs Qwest must pay for facilities placed under Option 2 of the current tariff. The Commission clearly has the jurisdiction to provide that interpretation.

Qwest has been reasonable and flexible in seeking to negotiate Option 2 pricing with Complainants. For the reasons set forth in Qwest's briefing of cost policy under the current tariff, in Docket No. 03-049-62, the Commission should interpret the tariff such that when the parties are unable to reach agreement on Option 2 costs, Qwest is not required to pay more than the amount of its own good faith, verifiable cost estimate. Qwest has already paid at least that amount for all of the projects at issue in the Complaint.

Qwest's actions have been just, reasonable and consistent with the requirements of the LDA tariff. The Complaint should be dismissed with prejudice.

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[14] *See, e.g.*, Complaint p.17 (seeking the relief of "[r]equiring Qwest to pay" Complainants' estimated costs to the relevant developers). Such relief appears to be merely a request for damages by another name.

[15] In the case of the Country View project (*see* Complaint ¶¶ 35 et seq.), Qwest has already voluntarily paid the full tariff cap amount, based on its discovery that the request for approval of that project was apparently sent to Qwest prior to Qwest's notice that after September 1, 2003 it would no longer simply pay the tariff cap without agreement on price. *See* Letter from Don Green to Ronald Hill (February 3, 2004) at 1, a true and correct copy of which is attached hereto as Exhibit 3.

[16] *See* Joint Stipulation, Docket No. 04-049-06 (signed by Qwest on February 27, 2004) at ¶¶ 1-5.

II. ANSWER

Responding to the specific allegations of the Complaint, Qwest admits, denies and avers as follows:

1. Lacks information sufficient to form a reasonable basis for belief as to the truthfulness of the allegations of paragraph 1, and therefore denies those allegations.

2. Admits that East Wind installs facilities under Option 2 of Qwest's LDA tariff; otherwise, lacks information sufficient to form a reasonable basis for belief as to the truthfulness of the allegations of paragraph 2 and therefore denies those allegations.

3. Admits that Prohill installs facilities under Option 2 of Qwest's LDA tariff; otherwise, lacks information sufficient to form a reasonable basis for belief as to the truthfulness of the allegations of paragraph 3 and therefore denies those allegations.

4. Admits that Clear Wave installs facilities under Option 2 of Qwest's LDA tariff; otherwise, lacks information sufficient to form a reasonable basis for belief as to the truthfulness of the allegations of paragraph 2 and therefore denies those allegations.

5. Admits the allegations of paragraph 5.

6. Denies that the Commission has jurisdiction to provide every element of relief sought in the Complaint, but admits that the Commission has jurisdiction to interpret Option 2 of Qwest's LDA tariff in this proceeding; otherwise, denies the allegations of paragraph 6.

7. Denies the allegations of paragraph 7.

8. Admits that the LDA tariff was approved by the Commission in 1997; otherwise, denies the allegations of paragraph 8.

9. Admits that the entry of an LDA and the employment of an Option 2 contractor involve business decisions by developers; otherwise, denies the allegations of paragraph 9.

10. Admits the allegations of paragraph 10.

11. Admits that the Complaint accurately quotes the LDA tariff; otherwise, denies the allegations of paragraph 11.

12. Admits that Qwest must be given the opportunity to approve job prints and material lists prior to installation of facilities, and must be given the opportunity to inspect facilities after installation; otherwise, denies the allegations of paragraph 12.

13. Admits that the developer is not paid until Qwest accepts the facilities; denies that Option 2 requires Qwest to purchase facilities from the developer after the work and inspections are complete; otherwise, lacks information sufficient to form a reasonable basis for belief as to the truthfulness of the allegations of paragraph 2 and therefore denies those allegations.

14. Admits that the Complaint accurately quotes the Commission's order; otherwise, denies the allegations of paragraph 14.

15. Lacks information sufficient to form a reasonable basis for belief as to the truthfulness of the allegations of the first sentence of paragraph 15 and therefore denies those allegations; admits that Qwest prepares and furnishes an LDA to the developer after receiving all necessary information, which may be before or after facilities have been installed; otherwise, denies the allegations of paragraph 15.

16. Admits that the Complaint accurately quotes the LDA tariff; otherwise, denies the allegations of paragraph 16.

17. Admits the allegations of paragraph 17.

18. Admits that pursuant to the tariff Qwest requires developers and Option 2 contractors to follow its standard specifications, but denies that the "Procedures" attached to the Complaint accurately reflect Qwest's current standard specifications. A true and correct copy of

Qwest's current standard specifications (including the "Option 2 Process Flow") is attached hereto as Exhibit 2.

19. Admits that Qwest is not required to file, and has not filed, the Option 2 Process Flow with the Commission; admits that it has mailed the Option 2 Process Flow to developers and Option 2 contractors, but denies that the letter attached as Exhibit C to the Complaint reflected such an occasion.

20. Denies the allegations of paragraph 20; under the current Option 2 Process Flow, pricing must be agreed upon prior to construction.

21. Admits that the Option 2 Process Flow provides a protocol for the approval of engineering designs, material lists, and construction commencement; denies that the referenced "Procedures" accurately reflect the current Option 2 Process Flow.

22. Admits the allegations of paragraph 22; denies that the referenced "Procedures" accurately reflect the current Option 2 Process Flow.

23. Admits the allegations of paragraph 23; denies that the referenced "Procedures" accurately reflect the current Option 2 Process Flow.

24. Denies the allegations of paragraph 24; pricing, in addition to the approval of job prints, must be provided prior to construction.

25. Admits that based upon the Commission's direction in its July 15, 2003 order that "costs be agreed upon at the inception of the agreement," as of September 1, 2003 Qwest no longer agreed to simply pay the tariff cap amount for every Option 2 job (as it had prior to done, under protest); admits that it approves engineering prints rapidly, and that both before and after July 2003 it approves pricing terms rapidly once price is agreed upon—with agreement on price

not being a key point of negotiation prior to September 1, 2003; otherwise, denies the allegations of paragraph 25.

26. Denies the allegations of paragraph 26.

27. Denies the allegations of paragraph 27.

28. Denies the allegations of paragraph 28.

29. Denies the allegations of paragraph 29.

30. Denies the allegations of paragraph 30.

31. Admits that Qwest's actual cost of materials may be less than that of Option 2 contractors; otherwise, denies the allegations of paragraph 31.

32. Denies the allegations of paragraph 32.

33. Denies the allegations of paragraph 33.

34. Admits that the Complaint addresses the three identified projects; otherwise, denies the allegations of paragraph 34.

35. Lacks information sufficient to form a reasonable basis for belief as to the truthfulness of the allegations of paragraph 35 and therefore denies those allegations.

36. Lacks information sufficient to form a reasonable basis for belief as to the date the letter was forwarded to Qwest and therefore denies that allegation; otherwise, admits the allegations of paragraph 36.

37. Admits that Meridian submitted a cost estimate in the amount of $8,838.73, an amount above the tariff cap amount; otherwise, lacks information sufficient to form a reasonable basis for belief as to the truthfulness of the allegations of paragraph 37 and therefore denies those allegations.

38. Admits the allegations of paragraph 38.

39. Admits that Qwest's cost estimate does not include itemized costs for ped caps, taxes, or administrative costs; otherwise, denies the allegations of paragraph 39.

40. Denies the allegations of paragraph 40.

41. Admits the allegations of paragraph 41.

42. Admits that Qwest reiterated its offer to pay $7,271, an amount below the tariff cap; otherwise, denies the allegations of paragraph 42.

43. Admits the allegations of paragraph 43.

44. Admits that at some point Meridian installed facilities at the Country View project; otherwise, denies the allegations of paragraph 44.

45. Admits the allegations of paragraph 45.

46. Admits the allegations of paragraph 46.

47. Admits the allegations of paragraph 47; denies that Exhibit D-9 of the Complaint accurately reflects the referenced correspondence. A true and correct copy of Qwest's October 28, 2003 letter is attached hereto as Exhibit 4.

48. Admits the allegations of paragraph 48.

49. Admits the allegations of paragraph 49, except insofar as those allegations may imply that this was the first time Qwest offered the referenced interim solution.

50. Admits that Meridian agreed to Qwest's interim solution and that it requested the solution be reflected in the LDA; otherwise, denies the allegations of paragraph 50.

51. Admits the allegations of paragraph 51.

52. Admits the allegations of paragraph 52.

53. Admits the allegations of paragraph 53.

54. Denies the allegations of paragraph 54.

55. Denies the allegations of paragraph 55.

56. Denies the allegations of paragraph 56.

57. Denies the allegations of paragraph 57.

58. Denies the allegations of paragraph 58.

59. Denies the allegations of paragraph 59.

60. Lacks information sufficient to form a reasonable basis for belief as to the truthfulness of the allegations of paragraph 60 and therefore denies those allegations.

61. Admits that Clear Wave submitted a cost estimate in the amount of $15,947.35, an amount above the tariff cap amount; otherwise, lacks information sufficient to form a reasonable basis for belief as to the truthfulness of the allegations of paragraph 61 and therefore denies those allegations.

62. Admits the allegations of paragraph 62.

63. Admits that at some point Clear Wave installed facilities at the West Jordan Meadows project; otherwise, denies the allegations of paragraph 63.

64. Admits that on October 29, 2003 Qwest forwarded a cost estimate of $12,932, and that based on this estimate Qwest viewed payment of $12,932 to be reasonable; admits that the cost estimate was for an amount below the tariff cap; otherwise denies the allegations of paragraph 64.

65. Admits that Qwest's cost estimate does not include itemized costs for ped caps, taxes, or administrative costs; otherwise, denies the allegations of paragraph 65.

66. Admits the allegations of paragraph 66.

67. Admits the allegations of paragraph 67.

68. Admits that Clear Wave agreed to Qwest's interim solution and that it requested the solution be reflected in the LDA; otherwise, denies the allegations of paragraph 68.

69. Denies the allegations of paragraph 69.

70. Denies the allegations of paragraph 70.

71. Admits that the position Qwest has taken with Clear Wave is consistent with the position it has taken with Meridian, including its view, based upon the Commission's direction in its July 15, 2003 order for costs to "be agreed upon at the inception of the agreement," that as of September 1, 2003 Qwest should no longer agree to simply pay the tariff cap amount for every Clear Wave Option 2 job without agreement on price; otherwise, denies the allegations of paragraph 71.

72. Lacks information sufficient to form a reasonable basis for belief as to the truthfulness of the allegations of paragraph 72 and therefore denies those allegations.

73. Denies that the referenced letter was forwarded on September 15, 2003; otherwise, admits the allegations of paragraph 73.

74. Admits that East Wind submitted a cost estimate in the amount of $17,665.05, an amount below the tariff cap amount; otherwise, lacks information sufficient to form a reasonable basis for belief as to the truthfulness of the allegations of paragraph 74 and therefore denies those allegations.

75. Admits that at some point East Wind installed facilities at the Oquirrh Park project; otherwise, denies the allegations of paragraph 75.

76. Admits that on December 5, 2003 Qwest forwarded a cost estimate of $14,262, and that based on this estimate Qwest viewed payment of $14,262 to be reasonable; admits that

the cost estimate was for an amount below the tariff cap; otherwise denies the allegations of paragraph 76.

77. Admits that Qwest's cost estimate does not include itemized costs for ped caps, taxes, or administrative costs; otherwise, denies the allegations of paragraph 77.

78. Admits the allegations of paragraph 78.

79. Admits the allegations of paragraph 79.

80. Denies the allegations of paragraph 80.

81. Admits that the position Qwest has taken with East Wind is consistent with the position it has taken with Meridian and Clear Wave, including its view, based upon the Commission's direction in its July 15, 2003 order for costs to "be agreed upon at the inception of the agreement," that as of September 1, 2003 Qwest should no longer agree to simply pay the tariff cap amount for every East Wind Option 2 job without agreement on price; otherwise, denies the allegations of paragraph 81

82. Admits that the Complaint accurately quotes Utah Code Ann. § 54-4-1; otherwise, denies the allegations of paragraph 82.

83. Denies the allegations of paragraphs 83-90.

84. Denies each and every allegation of the Complaint to the extent not specifically admitted in this answer.

III. DEFENSES

First Defense

The Commission lacks subject-matter jurisdiction over some of the elements of relief sought in the Complaint.

Second Defense

Complainants lack standing to assert some of the elements of relief sought in the Complaint.

Third Defense

Qwest has already provided any and all substantive relief to which Complainants may be entitled.

Fourth Defense

Complainants have failed to state a claim upon which relief can be granted.

Fifth Defense

Complainants assumed the risk of placing facilities without an LDA in place, knowing in advance that Qwest would not simply agree to pay the tariff cap amount without agreement on price.

IV. STATEMENT OF RELIEF SOUGHT

For the reasons stated above, as well as the reasons set forth in Qwest's briefing in Docket No. 03-049-62, Qwest respectfully requests that the Commission provide the necessary tariff interpretation to determine that Qwest's actions have been consistent with the requirements of the LDA tariff, that Complainants be denied any further substantive relief that they seek against Qwest, and that the Complaint be dismissed with prejudice.

RESPECTFULLY SUBMITTED: May 5, 2004

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Gregory B. Monson
David L. Elmont
STOEL RIVES LLP

Robert C. Brown
Qwest Services Corporation

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **QWEST'S ANSWER** was served upon the following by U.S. Mail, postage prepaid, on this 5th day of May 2004.

Jerold G. Oldroyd
Jennifer Rigby
Sharon M. Bertelsen
Ballard Spahr Andrews & Ingersoll, LLP
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, UT 84111-2221

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