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Submitted December 20, 2004

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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| 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,<br>Complainants,<br>vs.<br><br>QWEST CORPORATION, a Colorado Corporation,<br><br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 04-049-06**<br><br>**REPLY 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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On behalf of 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"), this Brief is filed to reply to the Briefs of the Division of Public Utilities (the "Division") and Qwest Corporation ("Qwest") filed on December 1, 2004, and to further amend the Request for Agency Action.

## I. INTRODUCTION

Complainants filed the above-captioned request with the Utah Public Service Commission (the "Commission") on January 14, 2004, after payment disputes arose between Complainants and 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").[1]

Pursuant to Option 2 of the LDA Tariff, a developer/builder may employ a contractor, such as Clear Wave, East Wind, Meridian, or another "Option 2 Contractor," for the timely deployment of telephone distribution facilities within new areas of land development for permanent single family dwellings. Qwest must be given the opportunity to approve job prints and material lists before, and inspect and test facilities after installation. 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"[2] (or $436.13 per lot, the "Tariff Cap").

The Commission has stated that the reimbursement costs are to be agreed upon by the land developer or its agent and Qwest and incorporated into the LDA limited by the Tariff Cap.[3] Qwest has refused to pay Complainants according to the LDA Tariff, and has taken the position that the developer is entitled to reimbursement up to Qwest's estimated costs. Complainants, pursuant to a Joint Stipulation with Qwest filed with the Commission on March 9, 2004, agreed to accept Qwest's "own estimated costs, subject to additional payments if the Commission determines that Qwest must pay more than its own costs, plus interest" under the existing tariff.

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1 On September 7, 2004, SBS Telecommunications, Inc. filed a Petition to Intervene and a Request for Agency Action.

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

3 *SBS Telecommunication*, *supra*, Docket No. 02-049-66, *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.

## II. REPLY TO THE DIVISION'S BRIEF

While Complainants agree with many of the statements made in the Division's Brief, Complainants believe that it is important to respond to the following statements. First, Complainants agree with the Division's statement on page 4, that based on the number of disputes that have arisen under the LDA Tariff, the system has not worked well. Complainants believe that it is the lack of compliance by Qwest and not the LDA process.

Second, on pages 4 and 5, the Division states that some of the Option 2 contractors expect to be paid "the cap and do not provide their actual costs which limit Qwest's liability." Complainants Clear Wave, East Wind, and Meridian, represent three of the seven known Option 2 Contractors, and these Complainants have, with each and every project, provided good faith detailed, verifiable cost estimates, and have not expected to be paid the cap for every project. The Division further states, on page 5, that "facilities are typically placed prior to Qwest's approval of the job prints and materials list." Clear Wave, East Wind, and Meridian have, with each and every project, received prior approval from Qwest on the job prints and materials list before placing facilities. Following the Joint Stipulation between Complainants and Qwest, for each project, Clear Wave, East Wind, or Meridian, agreed on the LDA amount with Qwest or implemented the stipulated amount prior to placement of the facilities.

Third, on page 10, the Division suggests that there may be a need to wait on this proceeding until after the Commission resolves the LDA Tariff Docket, No. 03-049-62, which the Commission opened to address problems with the tariff, including the issue of Qwest's costs under Option 2. The Commission stated, in its April 12, 2004 order denying Qwest's Motion for Stay of the instant docket, No. 04-049-06, that the purpose of the LDA Tariff Docket is "to explore the policies and issues associated with facility placements" and "to consider future alternations to existing tariff provisions and future tariffs." The Commission further stated that "[i]n this docket, the issues arise from past conduct and the application of the existing tariff." Complainants agree with the Commission's April 12, 2004 order.

Complainants agree with the Division's four possible guidelines for resolution of this Docket, as outlined on page 10. (1) Prior to August 2003, Qwest should pay the cost of the Option 2 contractor up to the cap. (2) If the contractor for any of the projects did not provide a verifiable cost estimate then the contractor should be paid Qwest's estimated good faith costs. This is not an issue for Clear Wave, East Wind, or Meridian, because for each of the projects in question, they provided good faith detailed, verifiable cost estimates. (3) If the Option 2 contractor provided a good faith verifiable cost estimate in a timely manner and there is no issue as to betterments, Qwest should pay the cost of the Option 2 contractor up to the cap. (4) If the Option 2 contractor provided a good faith verifiable cost estimate and there is an issue with betterments, each project should be reviewed and a decision made on additional compensation. We agree that any project with betterments should be reviewed on a case-by-case basis.

The Division states on page 13 that "the Developer should be able to make an informed choice whether to use an Option 2 contractor" and Complainants agree. Complainants believe that the developers currently make their decisions based on response time and performance, not costs. This does not appear to be a competitive process based upon cost estimates. The developer makes its decision prior to any cost estimates being produced because Qwest will not provide sufficient information about their plant until there is an Agency Letter authorizing that person to receive the information. This and other issues regarding each party's obligations should be addressed by the Commission in the LDA Tariff Docket.

## III. REPLY TO QWEST'S BRIEF

Qwest, in its Brief, following a summary of the Commission's instructions on the operation of Option 2 of the LDA Tariff, appears to indicate that if the parties follow the Commission's interpretations and instructions, the LDA process works. While agreeing in theory that the process would work if the parties follow the instructions, Complainants believe that the Commission should clarify those instructions for each party in the LDA Tariff Docket.

There are three statements in Qwest's Brief to which Complainants object and wish to respond. First, on page 3, Qwest states that when negotiations fail, Clear Wave, *et al.*, demands that Qwest pay whatever they wish to charge. This is completely incorrect. Complainants have with each project, provided a good faith verifiable cost estimate, and they expect to be reimbursed in accordance with the LDA Tariff. If their cost estimate is above the Tariff Cap, they will accept the cap as payment in full. The Tariff Cap was created to protect Qwest and limit its costs.

Second, on page 3 and 4, Qwest argues that the purpose of submitting verifiable cost estimates is to allow the developer to make an informed decision on price when choosing between Option 1 and Option 2. While Complainants agree in theory, this is not a competitive process based on cost. The Option 2 contractor cannot receive information necessary to create a design and then compete for the project because an Agency Letter is required before Qwest will share the information. The developer must select between the options prior to any engineering and an Option 2 Contractor is not able to price the project without the information. Qwest, in footnote 18, objects to the process of a developer giving power of attorney to the Option 2 contractors to act on the developers' behalf before they notify Qwest of a pending project. This is a result of Qwest's requirement that it will only provide information with an Agency Letter.[4] Qwest, by its own actions, is limiting the flow of information needed to determine the financial requirements for cost estimates. The Commission should address this in the LDA Tariff Docket.

Third, on page 14, Qwest contends that Complainants should address their payment concerns with the developers, and not Qwest. It is a requirement of Qwest that any Option 2 Contractor have an Agency Letter authorizing them to act as agents for the developers in all matters. Also, Qwest entered into a Joint Stipulation with Complainants, acknowledging Complainants' standing in this proceeding.

## V. AMENDMENT TO REQUEST FOR AGENCY ACTION

Since November 9, 2004, when Complainants filed their Opening Brief and Amendment to their Request for Agency Action, the parties have been involved with two additional land development projects. The parties have settled one of those projects.[5] With this Amendment to the Request for Agency Action, Complainants respectfully request that the Commission add the following project to this Docket.

***Miller Meadows, Phase I.*** On December 10, 2004, Complainant East Wind provided to Qwest a good faith, detailed verifiable cost estimate for the installation of facilities at Miller Meadows, Phase I, in Farmington, Utah, in the amount of $10,279.17, or $489.48 per lot, an amount above the Tariff Cap because of betterments. (*See* letter from East Wind to Qwest dated

[4] Qwest has provided the language for the Agency Letter in their LDA packet to developers and Option 2 Contractors.

[5] Qwest and Complainant East Wind settled Jessica Meadows in Kaysville, Utah. With this project, East Wind offered to split the difference in the cost estimates and Qwest accepted. Qwest also offered an alternative, to provide the materials and East Wind would provide the labor. East Wind declined Qwest's offer to provide the materials for the project based upon an experience with a previous project, Siena Vista, Phase I, in West Jordan. With the Siena Vista project, East Wind agreed to have Qwest provide the materials. Qwest said that they could deliver the cable in three days, but because of the paper work, it took Qwest two weeks to deliver the cable. This is an example as to why developers choose Option 2 over Option 1.

December 10, 2004, a copy of which is attached hereto as Exhibit "A-1.") On December 14, 2004, Qwest responded with its cost estimate of $9,502.28, or 452.49 per lot, which is also above the Tariff Cap based upon the additional amount for betterments. (*See* letter from Qwest to East Wind dated December 14, 2004, a copy of which is attached hereto as Exhibit "A-2.") In the alternative, Qwest recommended that this project be made a part of the Joint Stipulation where it would agree "to pay its estimated cost subject to true-up plus interest if the Utah Public Service Commission later determines that Qwest should have paid more." (*See* letter from Qwest to East Wind dated December 17, 2004, a copy of which is attached hereto as Exhibit "A-3.") Today, December 20, 2004, East Wind agreed to payment pursuant to the Joint Stipulation. (*See* e-mail, a copy of which is attached hereto as Exhibit "A-4.").

## V. CONCLUSION

For the reasons set forth herein, and consistent with Complainants' Request for Agency Action, as amended, Complainants request that the Commission order the relief requested.

RESPECTFULLY SUBMITTED this 20th day of December, 2004.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2004, an original, five (5) true and correct copies, and an electronic copy of the foregoing **Reply 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
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lmathie@utah.gov

and a true and correct copy mailed, postage prepaid thereon, to:

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