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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of CLEAR WAVE COMMUNICATIONS, L.C., *et al.*, Complainants, vs. QWEST CORPORATION, Respondent.	Docket No. 04-049-06 **RESPONSE BRIEF OF QWEST CORPORATION**

Pursuant to the Notice of Schedule Change entered in this matter on November 23, 2004, Qwest Corporation ("Qwest") hereby respectfully responds to the Opening Brief of Clear Wave Communications, L.C., East Wind Enterprises, LLC, and Prohill, Inc. ("Clear Wave Brief") and

the Opening Brief of SBS Telecommunications, Inc. ("SBS Brief"), both received by Qwest on November 10, 2004.

I. INTRODUCTION

In prior dockets, the Commission has issued instructions on the operation of the cost provisions of Option 2 of Qwest's Land Development Agreements ("LDA") tariff. In Docket No. 98-049-33, the Commission determined that, pursuant to the tariff, Qwest's costs for Option 2 jobs were not necessarily limited to the amount Qwest would have paid for facilities under Option 1; however, Qwest was also not to be held hostage to the price whims of Option 2 contractors.[1] Instead, the Commission held that the tariff's reference to the cap amount only "makes sense if it is assumed that the costs have been identified, agreed upon, and incorporated in the LDA."[2] Such agreement on costs was the "the only interpretation fair to both parties and consistent with the public interest . . . ."[3] Thus, Qwest and the developers were instructed to provide verifiable cost estimates upon the request of the other party so that they could reach agreement on cost and incorporate that agreement in the LDA.[4] In Docket No. 02-049-66, the

[1] *See* Report and Order, Docket No. 98-049-33 (April 30, 1999) ("1999 Order") at 5 (rejecting the situation where "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."). 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, Qwest has addressed the Commission's retraction, via May 26, 2000 Report and Order in Docket No. 99-049-T28 (pp. 3-4), of the 1999 Order's erroneous held-order language. Notwithstanding this, Complainants in this proceeding continue to cite the old language that the Commission has rejected. *See, e.g.*, Clear Wave Brief at 6 (quoting the since-rejected language from the 1999 Order that Qwest "itself has created the need for this [Option 2] tariff provision"). There has never been any evidence that Option 2 was put in place to correct held orders. Rather, Option 2 was a voluntary offering by Qwest. The Commission has found as much, yet Option 2 contractors continue to make the baseless argument to the contrary.

[2] 1999 Order at 5.

[3] *Id*. at 6.

[4] *Id*.

Commission reiterated this view, stating that "with [verifiable cost] estimates, costs would be agreed to up front and incorporated into an LDA between Qwest and the developer."[5]

Complainants' briefing and conduct in this matter reflect a refusal to accept the Commission's directives that the parties should agree upon Option 2 costs. For its part, SBS essentially ignores everything the Commission has ever said on the matter, refuses to submit verifiable cost estimates, and continues to charge the tariff cap amount for every job. This position should be easy for the Commission to reject, and SBS's non-compliance with the Commission's prior orders should preclude SBS from obtaining relief in this matter. Clear Wave, *et al.*, take a more nuanced position. They submit cost estimates and engage in some negotiation. However, when negotiations fail they demand that Qwest pay whatever they wish to charge (including unilaterally determined amounts of profit), up to the tariff cap.

Complainants' positions should be rejected. If adopted, they would result in Qwest being forced to pay whatever the Option 2 contractors demand—either the cap or some amount less than the cap based on the Option 2 contractors' cost estimate, but in either case an amount that the Option 2 contractors unilaterally determine rather than an amount agreed upon by the parties. This result would be inconsistent with the Commission's prior tariff interpretations requiring that costs be agreed upon.

There is only one way to properly harmonize the Commission's prior orders on cost, and the Commission should now expressly acknowledge what has been implicit in those orders. Specifically, the Commission should clarify that the purpose of submitting verifiable cost estimates is to allow the developer to make an informed decision on price, in choosing between Qwest and the Option 2 contractor for facility placement. That decision can only be informed

[5] *See* Report and Order, Docket No. 02-049-66 (July 15, 2003) ("2003 Order") at 8.

and meaningful if the developer receives appropriate economic signals regarding its choice. If the developer chooses to use Option 2 notwithstanding the fact that the option would cost more than the amount Qwest and the developer can agree upon, the developer should either choose Option 1 or pay the difference between the amount Qwest reasonably agrees after negotiation to pay and the amount charged by the Option 2 contractor. This is the only way to interpret the Commission's prior orders in a way that gives meaning to the Commission's language interpreting the tariff to require both verifiable cost estimates and agreement on price. It is the only way to send appropriate price signals to developers, protect Qwest from paying an inflated price for its network when Option 2 is selected, and allow meaningful competition—with Option 2 contractors winning jobs either by offering services to the developers for which the developers are willing to pay or by matching or beating the price Qwest is willing after negotiation to pay.

The Commission should reject Complainants' interpretations and deny their requested relief in this matter. It should determine that verifiable cost estimates are for the purpose of allowing developers to choose based on price; that this choice would be meaningless if Qwest simply had to pay whatever Option 2 contractors demand; and that the most Qwest should have to pay for Option 2 jobs is the amount upon which the parties can reasonably agree. If Option 2 contractors and developers agree to a price above the amount Qwest and the developer can agree upon, that is a matter between the contractor and developer and has nothing to do with the amount Qwest should pay pursuant to the LDA tariff.

II. ARGUMENT

A. Consistent With Prior Commission Orders, The Position of SBS Should Be Rejected.

SBS "seeks an order from the Commission declaring the developer/builder cost reasonable; and requiring Qwest to pay SBS the reasonable amounts due and owing consistent

with the LDA tariff."[6] But the amount SBS seeks to be declared "reasonable" on every Option 2 job is $436.13 per lot, the tariff price cap. Indeed, SBS has taken to referring to the tariff cap as the "base amount" for Option 2 reimbursement.[7] In effect, SBS continues to seek an order declaring the tariff price cap as the default payment amount for every Option 2 job.

The Commission's past orders have consistently concluded that it is not the intent of the LDA tariff to establish a default price to be paid by Qwest for every development, but rather that costs should be agreed upon. The tariff price cap is merely the upper limit of the range of potential agreement. The Commission could not have been more clear than it was in the 2003 Order rejecting SBS's claims in Docket No. 02-049-66:

> Much has been said in this docket regarding problems with the LDA tariff. Many of those problems center on costs. Qwest argues that the cap incorporated into the LDA tariff has been interpreted by [SBS] as the default price Qwest is to pay for every development. **That was not the intent of the tariff. The cap was just that, a cap, and if costs exceeded that amount a developer is responsible for the additional costs. It was not designed to be the default price**. . . . [8]

If the Commission was clear in rejecting SBS's interpretation of the tariff cap, it was equally clear in regard to verifiable cost estimates: "To be good faith and verifiable the cost estimates must be more than a quote from [SBS] or a similar company to do the job for the amount of the cap under the LDA tariff."[9] Yet for its "cost estimates," SBS continues to merely reference its contract with the developer to do the job for the cap amount.

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[6] *See* SBS Brief at 2.

[7] *See, e.g.*, Request for Agency Action of SBS Telecommunications, Inc., Docket No. 04-049-06 (September 8, 2004) ("SBS complaint") at 3-4, ¶ 9.

[8] *See* 2003 Order at 7-8 (emphasis added).

[9] 2003 Order at 8.

SBS's insistence on the tariff cap for every job and refusal to provide good-faith, verifiable cost estimates frustrate the negotiation process, preclude any informed price decision on the part of the developer, and expose Qwest to inflated installation costs, "where the maximum bids fair to become the minimum."[10] SBS has acted in clear defiance of Commission's directives. The Commission should reject SBS's approach and deny SBS any relief in this matter.

B. Complainants' Positions Are Inconsistent With The Commission Requirement Of Price Agreement And The Purpose Of Verifiable Cost Estimates.

Unlike SBS, Clear Wave, *et al.*, are not defiant to prior Commission directives. They participate in negotiations and submit detailed cost estimates reflecting consideration of the actual development at issue. Nonetheless, Clear Wave's interpretation of the tariff would, just as surely as SBS's, render the Commission's prior directives on price agreement and cost estimates meaningless.

The LDA tariff requires that the costs Qwest will bear be agreed upon and identified in the LDA with the developer,[11] but in no event are those costs to exceed "the distribution portion of the average exchange loop investment, times 125%, times the number of lots in the development."[12] Clear Wave, like SBS, disregards this *agreement* element of the LDA tariff

[10] 1999 Order at 5.

[11] *See supra* notes 2-5.

[12] *See* Utah Exchange and Network Services Tariff at §§ 4.4.B.6, 4.4.C.2.e. The tariff's maximum price formula, or "cap" on Qwest's costs, was estimated in a 1996 cost study to equal $436.13 per lot. *See, e.g.*, Direct Testimony of Dick Buckley ("Buckley Direct"), Docket No. 03-049-62 (October 4, 2004) at 2-3. If the Commission determines that Qwest should pay whatever Option 2 contractors demand, up to the tariff cap amount, then the cap needs to be adjusted to reflect the current estimate of "the distribution portion of the average exchange loop investment, times 125%, times the number of lots in the development." As Mr. Buckley's testimony demonstrates, the current estimate would be $311.90 per lot rather than $436.13. *See* Buckley Direct at 5.

regime. The effect of Clear Wave's argument is that if parties are unable to agree on a price, Option 2 contractors are entitled to whatever they demand, up to the tariff cap.

If Complainants were correct that Qwest must simply pay what the Option 2 contractor demands, neither the Commission's verifiable cost estimate directives nor its price-agreement directives would be given meaningful effect. It would make no sense for the Commission to direct Qwest to give a cost estimate, if upon a failure to agree Qwest were simply required to accept the Option 2 contractor's estimated cost; if the Option 2 contractor's estimate controls, Qwest's estimate serves no purpose. Yet the Commission has made clear that both parties should submit estimates upon request, and in 2003 Order the Commission explained why:

> 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 [an Option 2 contractor], install the facilities**. To be good faith and verifiable the cost estimates must be more than a quote from [SBS] or a similar company to do the job for the amount of the cap under the LDA tariff. **With such estimates, costs would be agreed to up front** and incorporated into an LDA between Qwest and the developer.[13]

Thus, the purpose of the verifiable cost estimates is to allow the developer to make "an informed decision" between Option 1 and Option 2, which in this context of submitting cost estimates can only mean a decision between the price agreed upon by Qwest and the price offered by the Option 2 contractor. Otherwise, if Qwest were simply required to pay whatever the contractor demands, up to the tariff cap amount, the developer would have nothing at stake with regard to cost and would not need to make any decision on price at all, informed or otherwise.

The "informed decision" only makes sense if it means that the developer sees Qwest's estimate, sees the Option 2 contractor's estimate, and (assuming the Option 2 estimate is

[13] *See* 2003 Order at 8 (emphasis added).

higher)[14] decides whether using Option 2 is worth paying the difference between what Qwest—pursuant to the tariff—will agree to pay, and what the Option 2 contractor demands.[15] The requirement that cost estimates be good faith and verifiable, then, serves the purpose of preventing a price that either unfairly understates the Qwest cost or unfairly overstates the Option 2 contractor cost, since the developer will be responsible for the difference between those estimated costs if it chooses to use Option 2.[16]

With good faith cost estimates, Qwest and the developer can agree upon a price to be incorporated in the LDA. If the developer wants to pursue Option 2 in circumstances where it will cost more than the amount upon which the developer and Qwest can reasonably agree, any additional payment the Option 2 contractor demands can be worked out between the developer and the contractor. Thus, the Commission's directives on verifiable cost estimates and price agreement are given effect, and the developer has several very reasonable options open to it that will ensure it is treated fairly: (a) it can negotiate Qwest's cost estimate with Qwest to attempt to arrive at a higher agreed-upon price;[17] (b) it can contest the fairness of Qwest's cost estimate before the Commission if it believes Qwest has understated the price; (c) it can choose Option 2,

[14] If the Option 2 contractor's estimate is lower than Qwest's there will be no dispute on price, as Qwest will obviously be willing to pay a lesser amount for the facilities.

[15] Under the tariff, Qwest reimburses the developer for the agreed-upon price identified in the LDA, so it is only any placement cost in excess of that amount for which the developer would not receive reimbursement from Qwest.

[16] The Clear Wave Brief argues that if Qwest is not required to pay more than it is willing to pay, then the Option 2 contractor's cost estimate serves no purpose. (Clear Wave Brief at 8). This argument is erroneous. Without the Option 2 contractor's cost estimate the developer would not know the cost of choosing Option 2 (*i.e.*, it would not have a comparison price), and would not be able to make an informed decision on whether or not to use Option 2. On the other hand, if Qwest must pay the Option 2 contractor's estimated price, then Qwest's estimate truly serves no purpose. Thus, Qwest's interpretation preserves the meaningfulness of both estimates, while Clear Wave's interpretation renders Qwest's estimate meaningless. Only Qwest's interpretation gives full effect to the Commission's prior directives on submitting cost estimates.

[17] Qwest has offered to split the price difference between the two estimates on certain projects, in an attempt to reach a compromise agreement on price; but its offers have been rejected.

but pay any difference between the price agreed-upon with Qwest and the higher price demanded by the Option 2 contractor; (d) it can choose to use Option 1 instead of Option 2;[18] or (e) it can choose another telecommunications provider.[19]

This interpretation not only respects the Commission's prior LDA-related orders and the language in the tariff requiring that costs be identified in a Land Development Agreement, it also makes good public policy sense. It places any additional costs for Option 2 on the party that (a) chooses to have those costs incurred and (b) is the only party in a contractual relationship with the Option 2 contractor that would enable the costs to be controlled—the developer. It forces Option 2 contractors to be efficient by either competing with Qwest on price or by offering services that are desirable enough to developers that the developers are willing to actually pay something for those services, letting competitive forces determine the true value of Option 2 to developers. And it prevents Qwest from being forced to pay an inflated price for its network. All of these factors favor Qwest's interpretation of the tariff. If, on the other hand, the Commission adopted Complainants' interpretation, Qwest would have to bear the additional costs of Option 2 even though it is not the party that chooses the option and cannot control Option 2 contractors' costs; Option 2 contractors would have no incentive to be efficient and

[18] In practice, this option is unlikely because developers almost always give power of attorney to the Option 2 contractors to act on the developers' behalf, even before they notify Qwest of a pending project. Thus, Qwest ends up negotiating LDAs directly with the Option 2 contractors, and it is hard to conceive that the Option 2 contractor would work against its own interests by choosing Option 1 on behalf of the developer. There is nothing in the tariff calling for developers and Option 2 contractors to use this power-of-attorney arrangement (which seems ripe with potential conflicts of interest), but that is how they have chosen to arrange their relationships.

[19] Qwest acknowledges that this last option may not be available in every circumstance. However, the areas in which Option 2 contractors operate are largely the same areas where other local exchange carriers provide public telecommunications service. Qwest has an obligation to serve. It does not have an obligation, however, to allow self-help placement of its facilities by developers except on the terms of Qwest's tariff.

minimize placement costs; and Qwest would continue to pay an inflated price for that portion of its network installed under Option 2 LDAs.

In earlier submissions in this and other dockets, Qwest has noted that the Commission has never addressed what should happen in the event that the parties are unable to agree upon a cost for Option 2 facilities and incorporate that cost in the LDA. It would perhaps be more accurate, however, to say that the Commission has never expressly stated what happens when the parties fail to agree on price, but that the Commission's position on this question has been implicit. The language of the tariff may be silent on how to address a situation where the parties cannot agree upon the price to be "identified in the LDA"[20] but the Commission's prior orders are not silent. The Commission's prior directives on verifiable cost estimates and party agreement on cost can only be given meaningful effect under Qwest's interpretation given above.[21] Qwest's interpretation, therefore, should now be expressly accepted by the Commission.

C. Qwest Has Acted Reasonably In Implementing The Tariff, And Is Not Seeking A Retroactive Tariff Change.

Complainants argue that Qwest refuses to negotiate or pay any amount above its own costs, and therefore that Qwest's interpretation would be a retroactive tariff modification—since the Commission has previously determined that the tariff does not necessarily limit costs to what

[20] *See* Utah Exchange and Network Services Tariff at § 4.4.C.2.e.

[21] It is a fundamental principle of interpreting written instruments that language should be given meaningful effect. *See, e.g., Matter of Estate of Leone*, 860 P.2d 973, 975 (Ut. App. 1993) ("Court orders are subject to the same rules of construction that apply to other written instruments."). *See also State v. Huntington-Cleveland Irrigation Co.*, 2002 UT 75, ¶ 13, 52 P.3d 1257, 1261 ("[W]e presume that the legislature used each word advisedly and we give effect to the term according to its ordinary and accepted meaning, and we seek to render all parts of the statute relevant and meaningful.") (quotations and bracketing omitted); *Arredondo v. Avis Rent A Car Sys., Inc.*, 2001 UT 29, ¶ 13, 24 P.3d 928 (courts have a "fundamental duty to give effect, if possible, to every word of the statute") (quotation omitted); *Kraatz v. Heritage Imports*, 2003 UT App. 201, ¶ 26, 71 P.3d 188, 196 ("Contracts should be read as a whole, in an attempt to harmonize and give effect to all of the contract provisions.") (quotation omitted).

Qwest would have paid under Option 1.[22] This argument lacks merit. It is Complainants that have refused to negotiate any price other than their own estimate (or in the case of SBS, anything less than the cap amount, since SBS never submits cost estimates). Qwest did not attempt to negotiate a final pricing compromise with SBS because SBS refused to comply with Commission directives on providing cost estimates, and Qwest reasonably declined to engage in futile negotiations (against the cap amount for every job). With Clear Wave, *et al.*, however, Qwest—not Complainants—was the principal instigator of various offers of compromise, including offers for a final price that split the difference between the parties' estimates, offers to attempt a potentially mutually-beneficial solution where Qwest provided materials and Complainants provided labor, and invitations such as that "Qwest is willing to meet to discuss other possible payment alternatives."[23] The very correspondence attached to Complainants' pleadings in this matter demonstrates these facts. When final price negotiation failed (*e.g.*, when Clear Wave, *et al.* rejected Qwest's offer to split the difference on price), it was Qwest, not Complainants, that offered the interim stipulation now in place with all of the Complainants (including SBS), which calls for Qwest to voluntarily pay additional money, plus interest, if the Commission determines that Option 2 should be interpreted the way Complainants claim it should.[24]

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[22] *See* 1999 Order at 5.

[23] *See*, *e.g.*, Letter from Don Green, Qwest Engineering Manager, to Steve Allen, Clear Wave Communications (October 28, 2003), a copy of which is attached to the Clear Wave Complaint as Exhibit D, tab 9; Letter from Matt Ivester, Qwest Senior Design Engineer, to Steve Allen, Clear Wave Communications (Oct. 29, 2003), a copy of which is attached to the Clear Wave Complaint as Exhibit E, tab 4; Letter from Matt Ivester to Athena L. Allen, East Wind Enterprises, LLC (December 5, 2003), a copy of which is attached to the Clear Wave Complaint as Exhibit F, tab 4.

[24] *See, e.g.*, Letter from Don Green to Steve Allen (Nov. 26, 2003), a copy of which is attached to the Clear Wave Complaint as Exhibit E, tab 6.

Complainants arguments that Qwest has unfair negotiating power, and that Complainants have reasonably relied on a tariff interpretation that would allow them to receive their demanded price, also lack merit. The way Option 2 contractors operate with developers leaves Qwest, not complainants, at a negotiating disadvantage. Qwest typically does not receive notice of facilities being placed under Option 2 until just before, or even after, placement.[25] This means that the process of homes being completed may be well underway, and that Qwest will soon be under pressure to either accept facilities placed without Qwest's agreement or make customers wait for service. This customer-service issue has been a serious concern to Qwest, and has clearly worked to Option 2 contractors' negotiating advantage. This is largely why Qwest simply paid the tariff cap amount on Option 2 jobs prior to September 2003, despite it costing Qwest hundreds-of-thousands of dollars in inflated placement costs—hardly a situation demonstrating negotiation leverage for Qwest.

Further, while Option 2 contractors *may* have had some reliance argument based on Qwest's practice of paying the cap as a default price (under protest) prior to September 2003,[26] no such argument remained after Qwest sent notice to all developers and Option 2 contractors in August that "starting September 1, 2003 . . . Qwest will not approve an Option 2 LDA job until it has received the requested cost estimate and until an agreement on the cost has been reached and incorporated into the LDA contract."[27] While Clear Wave asserts that it was unaware of this

[25] There is not a single job identified in either of the Complaints in this matter where Qwest was given the notice required in the tariff. *See* Utah Exchange and Network Services Tariff at § 4.4.B.2.e.

[26] *But see* Section D below. Complainants should not have been relying on Qwest for their contractual right to payment from developers. Qwest has no contractual or tariff relationship with Complainants.

[27] Letter from Don Green, Qwest Engineering Manager, to "Option 2 contractors" (August 5, 2003), a copy of which is attached to the Clear Wave Complaint as Exhibit C.

requirement until Qwest answered the complaint in this matter (in May 2004),[28] in fact the very August 2003 letter expressing Qwest's intention to require cost estimates and price negotiation was attached as an exhibit to Clear Wave's complaint filed in January.[29] As other correspondence attached to the pleadings in this matter demonstrates, Clear Wave engaged in price negotiation with Qwest throughout the fall. It was not a victim of surprise when Qwest answered the Complaint in this matter.

Likewise, SBS's apparent argument that Qwest has waived the right to demand verifiable cost estimates and price negotiation is baseless.[30] SBS argues that Qwest paid at or above the cap on the jobs specified in the affidavit of Jay Bodine attached to the SBS Brief, and because Qwest did so it should continue to pay at or above the cap for all other Option 2 jobs. How SBS's argument could even theoretically demonstrate waiver, when Qwest has been so consistently clear that it rejects SBS's interpretation of the cap as a default price, is not explained by SBS;[31] but regardless of any theoretical waiver argument, SBS fails to note the factual distinction that the jobs identified in the Bodine affidavit were either begun prior to the September 1, 2003 cut-off date or included cable upsizing necessary for future development (*i.e.*, "betterments"), for which Qwest has always been willing to pay additional money—just not the "base price," as SBS refers to the tariff cap, plus betterments in addition. As Qwest has made clear ever since the very first LDA-related complaint proceeding in 1998, the tariff cap amount should not be the default price for Option 2 jobs, and Qwest should not be forced to pay more

[28] *See* Clear Wave Brief at 9.

[29] *See supra* note 27; Clear Wave Complaint at Ex. C.

[30] *See* SBS Brief at 8.

[31] *See, e.g., Jensen v. IHC Hospitals, Inc.*, 82 P.3d 1076, 1094 (Utah 2003) ("Waiver involves the 'intentional relinquishment of a known right.'") (citations omitted).

than it reasonably agrees to pay. No party can credibly claim that Qwest has waived this argument, particularly since September 2003.

D. Complainants Should Address Their Payment Concerns With Developers, Not Qwest.

The Commission has previously expressed concern about the standing of Option 2 contractors to seek relief under the LDA tariff.[32] Qwest has not raised standing objections in this proceeding because it welcomes the opportunity to use this docket to receive Commission direction that it hopes will, along with the Commission's direction in Docket No. 03-049-62, finally resolve the long-running series of problems involving Option 2. Nonetheless, it is odd that Option 2 contractors—rather than developers—are the parties consistently complaining to the Commission about Option 2. The tariff option, after all, was put in place for the benefit of developers, and Option 2 contractors have no contractual or tariff relationship with Qwest.

Qwest does not dispute Option 2 contractors' right to sell their services to those developers seeking to use Option 2. But selling their services to developers should not give Option 2 contractors a basis to complain against Qwest. The reason Complainants fight so hard about cost with Qwest is that they apparently (a) only get paid the amount Qwest pays the developer, and (b) do not get paid until after Qwest pays the developer. This is not what the tariff contemplates. Pursuant to the tariff,

> Prior to the transfer [of facilities to Qwest], **all costs for the facilities and work shall have been paid in full**. The transfer will be free and clear of any and all liens and encumbrances and shall be accompanied by an indemnification holding the Company harmless from all claims arising from the purchase and placement of the facilities.[33]

[32] 1999 Order at 3.

[33] *See* Utah Exchange and Network Services Tariff, § 4.4.C.2.d (emphasis added).

Thus, under the tariff, Complainants should be paid before the facilities are transferred to Qwest; then, after it accepts the facilities, Qwest should reimburse the developer the amount identified in the LDA, not to exceed the tariff cap amount.[34] Nothing in the tariff contemplates Option 2 contractors only getting paid after Qwest pays the developer—just the opposite is true. Likewise, nothing in the tariff purports to address the amount Option 2 contractors will be paid by developers—they should be free to contract for any amount they can convince the developers to pay. Yet Complainants have voluntarily chosen to contract, contrary to the requirements of the tariff, in such a way that they don't get paid until Qwest pays the developer and they don't get paid anything more than Qwest pays the developer. Such arrangements do not involve Qwest or the Commission, but rather result from the Option 2 contractors' own contracting decisions. If Complainants have contracted in a disadvantageous way they should remedy the problem with developers, not the Commission or Qwest.

Again, Qwest does not seek to deny Complainants standing to pursue a tariff interpretation in this matter. However, it is important to recognize that if Complainants had followed the terms of the tariff they would not be in a position where they are potentially harmed when Qwest and the developer cannot reach an agreement on price. Instead, they would give the developer their cost estimate, and, if the developer chose to accept the estimate and hire them to place the facilities, that is the amount Complainants would be paid. If Qwest considered the estimate to be unreasonably high the developer might have a concern, but Complainants should not. They would be paid regardless of any dispute between Qwest and the developer.

Thus, when the Commission makes a tariff interpretation in this matter it should bear in mind that Complainants find themselves in whatever difficulties they may be in largely because

[34] *Id.* at § 4.4.C.2.e.

of their own contracting decisions. The Commission should not be persuaded by Complainants' misplaced equitable arguments about "negotiating leverage" or "reliance."

III. CONCLUSION

The Commission's prior cost directives and the language of the LDA tariff call for an interpretation where the price Qwest pays for Option 2 jobs is determined by agreement. Verifiable cost estimates should be for allowing developers to negotiate with Qwest and to make an informed decision between Option 1 and Option 2, not a tool for forcing Qwest to pay whatever Option 2 contractors estimate the job to cost, up to the cap. Developers' cost decisions can only be meaningful and informed when developers receive appropriate price signals—that is, when developers bear any additional cost caused by their own decisions to hire Option 2 contractors. The Commission should determine that Qwest is not required to pay more for Option 2 than the parties can reasonably agree upon, and that if Complainants seek additional payment they should look to developers, not the Commission or Qwest. Complainants' requested relief should be denied and their Complaints dismissed with prejudice.

RESPECTFULLY SUBMITTED: December 1, 2004.

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I hereby certify that a true and correct copy of the foregoing **RESPONSE BRIEF OF QWEST CORPORATION** was served upon the following by electronic mail, on December 1, 2004:

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7792 South Pheasant Wood Drive
Sandy, UT 84093

Elite Development
Jay Grygla, Owner
3053 West Kranborg Circle
Riverton, UT 84065

Ensign Development
Elyas Raigne, Development Manager
5941 Redwood Road
Taylorsville, UT 84123

Fieldstone Homes
Trevor Hull, Project Manager
6965 Union Park
Midvale, UT 84047

Georgetown Development
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2230 North University Parkway 7G
Provo, UT 84604

Gough Construction
Blaine Gough, Managing Member
8186 South 1300 West
West Jordan, UT 84088

Great American Homes
Timothy Butler, Owner
P.O. Box 9488
Ogden, UT 84409

Hall Engineering & Construction
Bruce Hall, Owner
1445 North Main
Spanish Fork, UT 84660

Hawkins Company
Mike Flood, Development Manager
#5 Triad Center #350
Salt Lake City, UT 84180

Highland Investments LLC
Keith Christian, Partner
2693 Commerce Way #A
Ogden, UT 84401

Horman Construction
Flint Biesinger, General Manager
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Salt Lake City, UT 84117

Ivory Homes
Steve Warner, Project Coordinator
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Salt Lake City, UT 84117

J & B Development
Brad Larsen, Project Manager
955 Chambers
South Ogden, UT 84405

L.M. Harris Company
Leroy Harris, Owner
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Pleasant View, UT 84414

Majestic Homes
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Marriott Construction
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MCM Engineering, Inc.
Mal McQuarrie, Owner
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Heber City, UT 84032

Mike Schultz Construction
Mike Schultz, Owner
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West Haven, UT 84401

Oakridge Homes
Kevin Klineman, Owner
11091 North 5550 West
Highland, UT 84003

Prince Development
Allan Prince, Owner
307 West 200 South #3004
Salt Lake City, UT 84101

Quail Hollow LLC
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Richmond American Homes
Benson Whitely, Construction Supervisor
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Salt Lake City, UT 84123

Suncrest Development
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Draper, UT 84202

U S Development
Chris Loock, Manager
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Woodbridge Construction & Development
Mark Dallin, Owner
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Spanish Fork, UT 84660

Zion Development
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CH Jenkins and Sons, L.L.C.
Clark Jenkins, Manager
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Eaglepointe Development, L.L.C.
W. Scott Kjar, Manager
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Liberty Homes, Inc.
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Mainstreet Development, Inc.
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Omni Homes LLC
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Peterson Development Company, LLC
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Shron, Inc.
Ron Lynch, President
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Hooper, UT 84315

Smoot Development LC
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Dennis Murray, Partner
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Main Street Development, L.L.C.
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