



1

## P R O C E E D I N G S

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

JUDGE BERG: This is a prehearing conference in Docket No. UT-013097 before the Washington Utilities and Transportation Commission. The captioned parties in this proceeding are Tel West Communications, LLC, petitioner, and Qwest Corporation, Inc., respondent. Petitioners shall be referred to as Tel West. Respondents shall be referred to as Qwest.

My name is Lawrence Berg. I'm the presiding officer that has been assigned to this proceeding. Today's date is Friday, March 1st, 2002. We are convened at the commission's headquarters, room 108, in Olympia, Washington. This prehearing conference is being convened pursuant to notice served to parties on February 26th, 2002. I'll note for the record that both Tel West and Qwest are appearing via teleconference over the commission's conference bridge line. I'm sure counsel are familiar with the challenges that presents. The reporter is familiar with counsel and should be able to readily identify counsel, but it may help at the start if the first one or two times you speak you do identify yourself by name. After that, she'll be able to identify voices. It will be necessary for counsel to speak slightly

00082

1 slower than you normally would because the reporter  
2 does not have the visual cues that she would normally  
3 have to accurately and fully take your statements  
4 during the prehearing conference.

5 At this time, we will proceed to take  
6 appearances, first from petitioner and then from  
7 respondent. To the extent all counsel have previously  
8 entered appearances, you may simply state your name,  
9 firm, and the party you represent. So let's start with  
10 petitioner, Tel West.

11 MR. HARLOW: Brooks Harlow, Miller Nash,  
12 attorney for petitioner Tel West.

13 MR. RICE: David Rice with Miller Nash  
14 representing Tel West.

15 MS. ANDERL: Lisa Anderl on behalf of Qwest.

16 MR. SHERR: I'm Adam Sherr on behalf of Qwest  
17 as well.

18 JUDGE BERG: Thank you, counsel. The first  
19 matter I would like to address this morning is the  
20 proposed Tel West schedule. I guess at this point,  
21 it's a proposed schedule from both parties regarding  
22 the provisioning parity part of the proceeding, and I  
23 do have that spreadsheet in front of me. Is there  
24 anything special that you wish to draw to my attention,  
25 Mr. Harlow?

00083

1           MR. HARLOW: Other than the typo, I do note  
2 that we had the last line, set final posthearing  
3 briefs, question mark, and Ms. Anderl and I forgot to  
4 discuss whether we wanted to do that.

5           JUDGE BERG: I had made a little note here to  
6 myself. We have prehearing briefs scheduled into the  
7 process. My expectation was that the prehearing briefs  
8 would be similar to the prehearing briefs in the OS/DA  
9 billing dispute part of the hearing; that is, the  
10 prehearing briefs would address legal issues, and that  
11 if a posthearing brief were to be allowed, that would  
12 replace summary arguments by the parties on the  
13 evidence. Was it the intent of both parties that the  
14 prehearing briefs to be filed would be on legal issues?

15           MR. HARLOW: I think it was, Your Honor. The  
16 same as with Phase 1.

17           MS. ANDERL: Actually, I would like to  
18 clarify though that we are not, and this is Lisa  
19 Anderl, since we are not going to do posthearing briefs  
20 and since we have the party's testimony prefiled, I  
21 think you can't brief legal issues in a vacuum, so  
22 certainly, our brief on OS/DA and billing disputes will  
23 capture some of the factual issues as well. It will  
24 certainly address the legal issues, but I don't know  
25 that you can fairly say that's the entirety of what it

00084

1 will address.

2 MR. HARLOW: Your Honor, we can agree with  
3 Ms. Anderl on that.

4 JUDGE BERG: That's fine, and then in the  
5 OS/DA hearing, we'll make an opportunity for parties to  
6 present summary arguments on the evidence presuming  
7 that we will go forward with live testimony.

8 MR. HARLOW: Your Honor, we made a very quick  
9 decision here that Tel West will not be asking for  
10 posthearing briefs on Phase 2.

11 JUDGE BERG: All right. What's Qwest's  
12 position?

13 MS. ANDERL: We would like to think about it  
14 a little bit. It seems to me both the factual and  
15 legal issues might be a little more complex, and it  
16 might be that we would feel that we could present our  
17 closing arguments more effectively in writing. If we  
18 were to ask for posthearing briefs, we would be able to  
19 prepare them quickly after the close of the hearing, so  
20 could we just kind of think about that and maybe get  
21 back to Your Honor and Mr. Harlow next week?

22 JUDGE BERG: Here are my thoughts on the  
23 matter. I think we can talk about this next week.  
24 What we can do is we can talk about this at the start  
25 of the OS/DA proceeding, but my thought on the matter

00085

1 is that it might be more valuable for the commissioners  
2 sitting on review to have a more structured written  
3 brief in conclusion of the evidentiary hearing on the  
4 parity provisioning issues than a transcript of  
5 summary arguments. It may be there would be an  
6 opportunity for both, and I understand both Tel West's  
7 concern for expedient resolution, and I appreciate  
8 Qwest's suggestion that those briefs could be developed  
9 in a very short time.

10 I would also share a certain concern because  
11 at that point, I would be operating under a certain  
12 time limit within which to produce initial  
13 recommendations, but we can talk about this further at  
14 the start of the OS/DA proceeding. I want parties to  
15 think about my concerns as well; all right? Thank you.  
16 I'm again looking at the schedule. I'll indicate to  
17 the parties that we will be able to convene in room 206  
18 on March 6th and March 7th.

19 MR. HARLOW: Excuse me. Do you mean May 6th  
20 and May 7th?

21 JUDGE BERG: May 6th and May 7th. There was  
22 one other matter I wanted to look at. One moment,  
23 counsel. Counsel, would you explain to me how you  
24 expect reply testimony, live reply testimony to be  
25 presented at the hearing? I notice that in terms of

00086

1 the outline, live reply testimony is listed  
2 sequentially before hearing on day one. Is it the  
3 expectation that the May 6th proceeding would start  
4 with live reply testimony?

5 MR. HARLOW: I hadn't decided that and the  
6 parties haven't discussed it. I can see benefits both  
7 ways, I guess. Do you have a preference, Your Honor?

8 JUDGE BERG: No, but I'll want parties to  
9 know what to expect well in advance. The one thing  
10 that I do want to build into the schedule here is a  
11 prehearing conference similar to what we are conducting  
12 this morning about a week prior to reply testimony, and  
13 in looking at the calendar, that would put us, say,  
14 into April the 30th. I'm looking at the calendar here.  
15 Qwest served answers to discovery, so we will want to  
16 go past that. Would parties be available for a  
17 prehearing conference on May 2nd or May 3rd?

18 MR. HARLOW: We might be busy writing our  
19 brief on May 3rd, finalizing it.

20 JUDGE BERG: Would you prefer May 2nd?

21 MR. HARLOW: I think so.

22 JUDGE BERG: My thought is that Tel West  
23 would certainly want to have the benefit of reviewing  
24 Qwest's answers to discovery before that prehearing  
25 conference, and it just seems to me, I recollect I may

00087

1 have something scheduled on May 1, but May 1 would also  
2 be a rather short time for Tel West to communicate any  
3 concerns it has to Qwest regarding responses prior to  
4 discussing them with me. Mr. Sherr, Ms. Anderl --  
5 Ms. Anderl, I know you will be taking the lead on the  
6 parity provisioning hearing -- would you be available  
7 on May 2nd for a prehearing conference?

8 MS. ANDERL: Actually, I think you've made  
9 Mr. Sherr very happy because I certainly think he will  
10 be doing quite a bit of the heavy lifting on that part  
11 of the docket, but we will be available on the 2nd.

12 JUDGE BERG: Are you taking the lead on  
13 OS/DA?

14 MS. ANDERL: I would say that Mr. Sherr and I  
15 are partnering on the OS/DA with him really being more  
16 the lead on the docket overall.

17 JUDGE BERG: Then what I'll just need is in  
18 terms of who I should be talking with at different  
19 points in the proceedings. You just let me know if I'm  
20 posing questions or comments to one counsel or the  
21 other.

22 MS. ANDERL: Sure. Normally, either one of  
23 us is fine to talk to, and neither one of us would be  
24 shy to say that you should talk to the other if that  
25 were the case.



00088

1           JUDGE BERG: So we will insert into the  
2 schedule developed by the parties a prehearing  
3 conference on May 2nd, 2002, and parties will just have  
4 to pay attention to the notice, as will I, as to the  
5 actual time during the day when that prehearing  
6 conference will occur. It will depend on availability  
7 of resources here at the commission.

8           Also, there may be need for other prehearing  
9 conferences. We'll discuss that as part of the last  
10 issue of today's schedule, Tel West's request to  
11 supplement responses, and we will continue to schedule  
12 prehearing conferences as necessary throughout this  
13 expedited hearing. Anything else from the parties on  
14 that point?

15           MR. HARLOW: No, Your Honor.

16           MR. SHERR: No, Your Honor.

17           JUDGE BERG: Did we already discuss the  
18 agreement regarding modification of protective order?

19           MS. ANDERL: Not yet.

20           JUDGE BERG: I have already shifted my agenda  
21 around, so let's go ahead and do that now.

22           MS. ANDERL: Brooks, do you want to start?

23           MR. HARLOW: I think you ought to take the  
24 lead on this one.

25           MS. ANDERL: Okay. Mr. Harlow and I have two

00089

1 points that we've been discussing and I believe we have  
2 an agreement on. One is the designation of Mr. Taylor  
3 as an expert witness who will review confidential  
4 information in this docket, and the other is the  
5 designation of Mr. Swickard for those same purposes. I  
6 believe that we have reached an agreement that Tel West  
7 will withdraw the protective agreement signed by  
8 Mr. Taylor and commit to not use Mr. Taylor as a  
9 consultant for purposes of this proceeding.

10 I believe that we also are prepared to agree  
11 that Mr. Swickard can review confidential information  
12 provided by Qwest; in other words, that Mr. Swickard  
13 can sign an Exhibit B to the protective order.  
14 However, because of his status as president of the  
15 company, Mr. Harlow and I would like to talk to Your  
16 Honor about establishing some provisions for  
17 designation of certain information as highly  
18 confidential to be reviewed by counsel only.

19 JUDGE BERG: Let's go ahead and talk about  
20 the issue regarding designation of certain materials as  
21 highly confidential, and Ms. Anderl, why don't you go  
22 ahead and present your client's position, and  
23 Mr. Harlow, you respond.

24 MS. ANDERL: Thank you, Your Honor.  
25 Typically in these proceedings, a confidential

00090

1 designation is sufficient because the only persons who  
2 are entitled to sign the Exhibit B are persons who are  
3 not an employee of the party, and when an exception is  
4 made such as this case where we would waive our ability  
5 to exclude Mr. Swickard from reviewing any confidential  
6 information because of his status with Tel West as the  
7 president, we may believe that it may, nevertheless, be  
8 appropriate to exclude some highly confidential or  
9 competitively sensitive information, but not that Tel  
10 West isn't somehow entitled to use it in the  
11 preparation of their case, but that Mr. Swickard should  
12 not be permitted to know that information because it's  
13 simply too difficult for a person to segregate their  
14 knowledge for purposes of the case from their knowledge  
15 of running their business on a day-to-day basis.

16 I do not believe that we've provided any  
17 information to date that we want to designate as highly  
18 confidential, but it may be that there is information  
19 coming down the road that we would want to make that  
20 designation. I've committed to Mr. Harlow that we will  
21 review all of the confidential information we have  
22 submitted up until now and respond to him, either  
23 affirmatively or otherwise, that Mr. Swickard can  
24 review all that information, and then we would just  
25 handle anything designated as highly confidential on a

00091

1 going-forward basis, on a case-by-case basis, and then  
2 we may be able to agree on all of those things, and if  
3 not, we would handle those with Your Honor or  
4 otherwise.

5 MR. HARLOW: Your Honor, we have no quarrel  
6 with Ms. Anderl's statement. We do want to set a date  
7 for Qwest to do that review, and I would like it to be  
8 in the next week or so because that review by  
9 Mr. Swickard might generate some additional discovery  
10 which must be served by March the 12th. We want to get  
11 those documents for Mr. Swickard as soon as possible,  
12 and this issue has been hanging out since the last  
13 prehearing.

14 JUDGE BERG: I presume then that this does  
15 not go to any issues in the OS/DA billing dispute  
16 hearing.

17 MR. HARLOW: No, it does not.

18 JUDGE BERG: Ms. Anderl, when could you  
19 complete review of all documents produced to date?

20 MS. ANDERL: I think we could do that by the  
21 close of business on Tuesday the 5th.

22 MR. HARLOW: That would be acceptable, Your  
23 Honor.

24 JUDGE BERG: I would like the parties to  
25 continue to work together for at least 24 hours as

00092

1 other problems arise with regards to designation of  
2 documents as highly confidential. Counsel should  
3 commit to making themselves available and making  
4 resolution of those concerns a priority and then  
5 present them to me or give me a heads-up just as soon  
6 as possible, and my commitment to the parties is if  
7 counsel will make it a priority on their calendars,  
8 then when counsel are unable to reach agreement, I'll  
9 make it a priority on mine.

10 MR. HARLOW: Thank you, Your Honor.

11 JUDGE BERG: Your welcome. Thank you,  
12 counsel.

13 MS. ANDERL: Your Honor, I don't know if you  
14 are ready to leave this issue or not, but I made a  
15 statement in terms of what Qwest's understanding of Tel  
16 West's intent would be with regard to Mr. Taylor early  
17 on. At a minimum, I would like Mr. Harlow to confirm  
18 for Tel West that his client is agreeable to that  
19 provision.

20 JUDGE BERG: Let's make that a point of  
21 record.

22 MR. HARLOW: Tel West agrees that it will not  
23 consult with Mr. Taylor further on this case. If it's  
24 all right with Your Honor, we would just like this  
25 record statement to effectively withdraw the Exhibit B

00093

1 for Mr. Taylor.

2 JUDGE BERG: No objection from Qwest?

3 MS. ANDERL: I'm sorry. Actually, I would  
4 prefer a letter in the file, Mr. Harlow, if that's not  
5 too much trouble.

6 MR. HARLOW: We will do one.

7 JUDGE BERG: The agreement between counsel is  
8 noted for the record. It may be beneficial to have  
9 that paper trail, Mr. Harlow, but certainly the request  
10 or motion to withdraw that Exhibit B is granted. Let  
11 me make just a few more notes to myself, counsel.

12 The next item to address is the Qwest motion  
13 to compel. I have in front of me the correspondence  
14 submitted by Qwest as background, including a letter  
15 from Qwest to Tel West, or I should say from Mr. Sherr  
16 to Mr. Harlow, dated February 18th and a response from  
17 Mr. Harlow to Mr. Sherr dated February 26th. I also  
18 have e-mail correspondence from Mr. Sherr dated 2/28  
19 indicating Qwest's withdrawal of disputed data request  
20 Qwest-201 and further note that Qwest's withdrawal is  
21 accompanied by a statement that Qwest neither waives  
22 its right to raise a challenge to that response in the  
23 future nor waives its right to challenge the admission  
24 of any document subsequently offered by Tel West that  
25 is responsive to that data request, so that withdrawal

00094

1 is noted, and I also have before me copies of just  
2 those DR's that are referred to in Mr. Sherr's February  
3 18th correspondence, and we will take those one at a  
4 time.

5 I will indicate to counsel that if every time  
6 a lawyer posed a nonrelevant question or otherwise made  
7 an objection that was to be construed as a sign of bad  
8 faith, we would probably have to build a new wing of  
9 the commission to jail all of the counsel that appears  
10 before the commission. While I understand this is at a  
11 very fundamental business level, this is a very  
12 contentious case. I will indicate to parties that I  
13 have a pretty high standard or high threshold of what I  
14 consider bad faith, and if parties intend to make those  
15 kinds of charges, then they will need to be prepared to  
16 prepare and present some substantial documentation and  
17 argument if they expect those references to be given  
18 serious consideration.

19 I think that counsel, certainly all counsel,  
20 need to reassure their clients that they take their  
21 problems as seriously as their client does, but I'm  
22 always concerned when I see these sorts of inferences  
23 because it creates a climate where all of the good work  
24 that counsel have done together can break down in a  
25 hurry, so if that sounds like a speech from a soapbox,

00095

1 that's because it is, and I encourage counsel to  
2 continue working together the way you have. When there  
3 are problems that counsel can't resolve among  
4 yourselves, then bring it to me just as soon as  
5 possible, and I will understand that it's not unusual  
6 for counsel to draw certain lines that they won't cross  
7 in the course of litigation.

8           The first DR on the Qwest correspondence  
9 dated February 18th to address is Qwest O-32, and  
10 counsel, just give me one moment while I take one more  
11 look at this. Mr. Harlow, would you like to respond  
12 further to the argument in the correspondence submitted  
13 by parties?

14           MR. RICE: This is David Rice. I'm actually  
15 going to be the one handling this matter, and I would  
16 be happy to respond to Qwest's letter.

17           JUDGE BERG: Let's address that Qwest O-32.

18           MR. RICE: Qwest has requested us to specify  
19 what computation or analysis we have done and explain  
20 facts and produce all documents. We believe we've  
21 fully done that and provided a sufficient response.  
22 Basically to this point, Tel West has already provided  
23 an explanation about the difficulties with collections  
24 due to the nature of its customer base. It has already  
25 provided information about specific financial



00096

1 information about how much it ought to collect and its  
2 inability to collect, and at this point, I think that  
3 it would be extraordinarily burdensome to try to  
4 respond any further. It's not possible, really, for us  
5 just to produce any more information. We are not like  
6 Qwest in the sense that we produce extensive studies on  
7 these sorts of issues. It's a small company, and I  
8 think that we've already produced everything that we  
9 have.

10 JUDGE BERG: In looking at both the response  
11 to O-32 and the response to O-28(a), I'm going to  
12 require some supplemental response but not the full  
13 response argued by Qwest. I agree that this is the  
14 kind of issue that can be explained as a matter of  
15 business judgment or opinion. The response in O-28  
16 includes the statement that because Tel West cannot  
17 collect these charges, collection attempts almost  
18 always increase Tel West's cost rather than decrease  
19 them.

20 While it may seem a matter of common sense, I  
21 think it would be relevant and responsive for Tel West  
22 to just explain further how its costs are increased by  
23 performing collection activities relative to the  
24 amounts that are in dispute. Do you understand that,  
25 Mr. Rice?

00097

1                   MR. RICE: I do. I think that would be  
2 acceptable to Tel West.

3                   JUDGE BERG: I understand that there is a  
4 comparison being made, so if the types of costs that  
5 would be incurred or increased can be identified, and  
6 then just in a very rough way, not in a statistical  
7 analytical way, an anecdotal way compared to the costs  
8 that are at issue or for which collection would be  
9 conducted, that will suffice.

10                  MR. RICE: We can do that, Your Honor.

11                  JUDGE BERG: After we finish going through  
12 the list, we will talk about when additional responses  
13 can be provided. Let's turn to the dispute  
14 collectively Qwest 0-35, 0-54, 0-58(b), 0-59(b), and  
15 0-64(a). Let me take a second and review the  
16 correspondence one more time. Mr. Sherr, will you be  
17 presenting Qwest's position with regards to these DR's?

18                  MR. SHERR: Yes, I will be.

19                  JUDGE BERG: I think what I need to do here,  
20 rather than dealing with these collectively, let's  
21 start with 0-35, and then to the extent arguments  
22 extend to the others that are grouped with it, we will  
23 deal with that separately. What is the information  
24 that's being sought and the purpose of the information  
25 being sought in 0-35, Mr. Sherr?

00098

1                   MR. SHERR: It's really twofold, and I think  
2 this is true for each of the five that are referenced  
3 on that same bullet point. Number one is to test the  
4 assertions that appear either in Mr. Swickard's  
5 testimony or in data request responses. In either  
6 case, Tel West makes conclusory statements about  
7 different things and doesn't offer any support. These  
8 questions were intended to find what support, if any,  
9 underlies them, and that's the purpose of it. That's  
10 the main purpose of it in trying to prepare for  
11 hearing.

12                   The second issue that it relates to, and this  
13 is something we talked about at the last telephonic  
14 motion to compel, and that is sort of the recurring  
15 theme of the case, which is from Qwest's perspective  
16 that Tel West has chosen its business model; that being  
17 resale to customers with poor credit history. Yet it  
18 wants to pass all risks inherent in that business model  
19 to Qwest. In this particular question, Tel West had  
20 stated in its testimony that --

21                   JUDGE BERG: Mr. Sherr, I'll just let you  
22 know that when you turn your head away from your  
23 speaker phone, your voice drops off significantly.

24                   MR. SHERR: I picked up the speaker. No. 35  
25 in particular, Mr. Swickard had stated in his testimony

00099

1 that apparently a recurrent problem is that customers  
2 of Tel West place OS and DA calls and then terminate  
3 service without paying Tel West for those calls.

4 JUDGE BERG: I'm sure he did, but isn't it  
5 Qwest's position that Tel West is responsible for all  
6 OS/DA costs incurred by Tel West customers?

7 MR. SHERR: It certainly is.

8 JUDGE BERG: What ultimate fact then does  
9 this go to?

10 MR. SHERR: It responds to the fact that  
11 Mr. Swickard is laying out in his testimony. It's an  
12 attempt to respond. I'm not going to presume that  
13 every position of Qwest because it's made by Qwest is  
14 accepted inherently and that Your Honor is not going to  
15 hear statements from Tel West that are on a different  
16 line or referred to a different line of questioning,  
17 and therefore, this data request is an attempt by Qwest  
18 to be prepared to respond to the statements made by Tel  
19 West.

20 JUDGE BERG: Here's what I need to know is  
21 whether or not the assertion that Tel West customers  
22 place OS and DA calls and then terminate service  
23 without paying Tel West, what difference does it make  
24 to the issues to be resolved whether or not that  
25 statement is true or false?

00100

1           MR. SHERR: The question, as you can see, has  
2 several subparts to it. In addition to the fact that  
3 this phenomenon occurs in general, we asked Tel West to  
4 identify in a lot of different ways, basically to  
5 explain to us what they had done to avoid the situation  
6 and what efforts they took to block their customers  
7 from ordering the services that they are concerned  
8 about and what attempts they made to collect the  
9 charges thereafter. There are a lot of subparts, and  
10 it's broken out separately to make it easier for Tel  
11 West to answer the question. Those are all questions  
12 that are relevant to the matter at hand.

13           JUDGE BERG: I don't get the relevancy, and  
14 that's why I'm asking these follow-up questions with  
15 you, Mr. Sherr. To my way of thinking, this goes to  
16 resolving whether or not on a dispute-by-dispute basis  
17 whether the dispute is valid or whether Tel West has  
18 already recovered for the charge and thus is seeking  
19 double recovery as opposed to going whether or not  
20 Qwest has timely responded to billing disputes  
21 submitted by Tel West.

22           MR. SHERR: Your Honor, if I could respond to  
23 that, I see it very differently. I don't believe this  
24 really relates directly to the issue of billing  
25 disputes at all if Tel West's theory or part of its

00101

1 theory that access to OS and DA on the lines that Qwest  
2 provides it through resale is a major problem for Tel  
3 West because its customers run up these charges and  
4 then run off without having first paid, so this is our  
5 attempt to not only espouse or theory of the case but  
6 to respond to theirs.

7           So if Your Honor is saying that whatever Tel  
8 West is asserting as its need for this particular  
9 feature, which is a line free of access to OS/DA, is  
10 irrelevant, then Qwest would certainly agree, but I  
11 don't think that's what Your Honor is saying. To the  
12 extent that Tel West will be able to move forward and  
13 try to make that point as it has in its testimony and  
14 its data responses repeatedly, Qwest should have the  
15 opportunity to investigate the support for that  
16 assertion.

17           JUDGE BERG: I don't see that data request  
18 being relevant to that issue, Mr. Sherr. The issue as  
19 to whether or not the parties agreed -- strike that.  
20 The issues that I understand on the OS/DA side that are  
21 being presented are number one, does the  
22 interconnection agreement allow for Tel West to not  
23 accept OS/DA. The second aspect of the OS/DA issue is  
24 whether the OS/DA blocking features that Qwest has  
25 delivered perform as represented and in these other

00102

1 issues as to whether or not a Tel West customer  
2 incurred costs and then terminated service without  
3 paying to me just goes to whether or not, in fact, Tel  
4 West has a legitimate billing dispute to present. Is  
5 there something else I'm missing?

6 MR. SHERR: Perhaps, Your Honor, this would  
7 be a question that Tel West could respond to, because I  
8 hate to repeat myself, but I don't believe that is what  
9 Tel West believes as being the issue in the OS/DA  
10 phase.

11 JUDGE BERG: Mr. Harlow, help me understand  
12 the issues in the OS/DA phase if I haven't captured  
13 them or Mr. Rice?

14 MR. RICE: I can respond. I think you've  
15 correctly stated them. The fundamental agreement is  
16 whether or not we are required to accept OS/DA under  
17 the interconnection agreement that we've signed, and we  
18 are also addressing whether or not the OS/DA blocking  
19 features performance is represented, the dial-lock.

20 JUDGE BERG: I think that clarifies the  
21 matter in my mind. The motion to compel further  
22 response to Qwest O-35 is denied. I will indicate to  
23 parties that while we may have a phase of the  
24 proceeding that's designated for OS/DA billing issues  
25 and another part of the proceeding that's designated

00103

1 for provisioning parity issues, Mr. Sherr, if at some  
2 point we get to the conclusion of the OS/DA billing  
3 issues hearing and you perceive that there are other  
4 issues being argued by Tel West that Qwest was not  
5 given a proper opportunity to prepare for, I'll hear  
6 those arguments, and if it's appropriate to conduct  
7 further proceedings, we will, but at this point, based  
8 on Mr. Rice's confirmation of the issues as I  
9 understand them, I find that O-35 is not relevant.

10 MR. SHERR: Understood, Your Honor.

11 JUDGE BERG: Let's go ahead and in succession  
12 take a look at O-54, and again, it will just take me a  
13 moment to look again at the question and response. I'm  
14 going to make the same ruling with regards to O-54,  
15 that it's not relevant given the issues as stated by  
16 Tel West.

17 I'm now going to review O-58(b). I find that  
18 O-58(b) also is not relevant to the issues to be  
19 resolved on the OS/DA issue, and the motion to compel  
20 further response to O-58(b) is denied, and now looking  
21 at O-59(b), same ruling. O-64(a), Mr. Rice, I need to  
22 ask a question with regards to the response to O-64(b)  
23 in order to place O-64(a) in perspective.

24 MR. RICE: Okay.

25 JUDGE BERG: In the response to O-64(b),



00104

1 there is a reference to itemized call record. Is that  
2 an itemized call record that is generated and produced  
3 by Qwest?

4 MR. RICE: That is Qwest's call record.

5 JUDGE BERG: And that would be the billing  
6 statement that I would commonly think of and get in my  
7 mail every month as well?

8 MR. RICE: Yes, Your Honor.

9 JUDGE BERG: With regards to the 1,109  
10 charges that were documented by Tel West, did Tel West  
11 associate the phone numbers that those charges  
12 originated on?

13 MR. RICE: Could I take a moment to confer  
14 with my client?

15 JUDGE BERG: Sure.

16 MR. RICE: You asked whether or not the cell  
17 phone numbers were associated with each of these 1,109  
18 charges on the material we sent to Qwest, and that is  
19 correct. The telephone numbers are on there.

20 JUDGE BERG: Mr. Sherr, do you dispute  
21 whether there were telephone numbers associated with  
22 those charges?

23 MR. SHERR: It's hard to answer, Your Honor,  
24 because while the 1,109 items each had a telephone  
25 number corresponding to it, the description of the

00105

1 charge being disputed does not say, "from correctional  
2 facility." That's sort of the point of the question.  
3 There are eight spreadsheets of dispute with a total  
4 1,109 line items. None of them say, "collect call." I  
5 don't know that any of them say collect call, and I  
6 don't believe any of them do, and Tel West can tell me  
7 if I'm wrong, but certainly none of them indicate that  
8 these are calls from correctional facilities. If they  
9 did, I could certainly do the math myself.

10 JUDGE BERG: Does Qwest have the ability to  
11 access itemized call records for the telephone numbers  
12 that are referred to by Tel West?

13 MR. SHERR: I believe we do.

14 JUDGE BERG: Then I'm going to find that  
15 Qwest goes to information that's within the control of  
16 Qwest and is not readily producible by Tel West and  
17 deny the request for further response as information  
18 that is already within the possession and control of  
19 Qwest.

20 I'll also note to the parties that it's not  
21 clear to me what difference it makes if there is one  
22 charge or 1,109 charges, but if at some point that  
23 becomes relevant and Qwest wants to argue that it needs  
24 further information from Tel West that is not in its  
25 own possession and control, then I will be willing to

00106

1 hear that, but that's all dependent on if at some point  
2 in time, the actual number of charges becomes a  
3 relevant factor.

4 MR. SHERR: Your Honor, may I respond for a  
5 minute, because I didn't get an opportunity to before  
6 you made your ruling on this?

7 JUDGE BERG: Yes, Mr. Sherr.

8 MR. SHERR: The concern I have as to this  
9 particular question is that your ruling would  
10 effectively shift the burden to Qwest to disprove  
11 Mr. Swickard's assertion. Mr. Swickard filed  
12 supplemental testimony regarding this issue, and I can  
13 say honestly that that's the first time that issue came  
14 to my radar. I don't believe it was specifically set  
15 out in any petition. I don't believe it was set out  
16 specifically in the first round of testimony.

17 Again, this is a case where there is two  
18 conclusory statements made, and I don't have it in  
19 front of me any more, but go effectively to the point  
20 that this is a major area of concern and a major  
21 problem for Tel West, and this is a recurring problem,  
22 and that's the end of the explanation, and that's why  
23 this was intended to seek what is supporting that  
24 statement. I think the effect of Your Honor's ruling  
25 is that we have to go disprove Tel West's case rather

00107

1 than Tel West having to prove its own case.

2 JUDGE BERG: Mr. Sherr, along those same  
3 lines then, if I was to approve Qwest's request, it  
4 seems to me I would also approve a request if Tel West  
5 were to pose the DR that Qwest produce itemized call  
6 records for all telephone numbers associated with those  
7 1,109 charges. I see no basis for granting one and not  
8 granting the other. I don't see that the burden is  
9 being shifted here. I'm just ruling that this is  
10 information that's within Qwest's possession and  
11 control, and that if Qwest's position is that these  
12 disputed charges do not relate to calls from  
13 correctional facilities, then Qwest ought to just come  
14 forward and show me the itemized call records in its  
15 possession that show that there is no, quote, "from  
16 Corr fac" notation on the disputed calls. I think it  
17 goes more towards Qwest documenting its own affirmative  
18 defense based on information it has within its  
19 possession and control.

20 MR. SHERR: I understand your ruling.

21 JUDGE BERG: Thank you, sir. That takes care  
22 of that grouping of items. The next is Qwest O-40 and  
23 bear with me a moment, parties. Mr. Rice, it seems to  
24 me that all Qwest is looking for here is that Tel West  
25 indicate to the best of its knowledge whether there is

00108

1 a Qwest product or current Qwest line class code that  
2 would enable Tel West to obtain from Qwest a local  
3 service line free of access to pay-per-use services.  
4 In this instance, it just looks to me that Qwest  
5 doesn't want to get surprised at the hearing by the  
6 argument that there is, in fact, a product or Qwest  
7 line class code that it hasn't had an opportunity to  
8 develop a response to or further describe the Qwest  
9 product or current Qwest line class code at issue, so  
10 I'm going to go ahead and require Tel West to further  
11 respond to the interrogatory but with the understanding  
12 that's not Tel West's obligation to know what the full  
13 range of Qwest's products or Qwest line class codes  
14 are. Tel West is just being directed to directly  
15 respond to the DR to the best of its ability. Is that  
16 clear, Mr. Rice?

17 MR. RICE: Yes, it is. We can file a  
18 supplemental response.

19 JUDGE BERG: Next is Qwest O-44. I think  
20 part of the problem here is the way that the question  
21 is being posed. To my way of thinking, and Mr. Sherr,  
22 tell me if I am properly paraphrasing the DR, but  
23 another way of posing the same question, is Qwest  
24 required by tariffs to provide to Tel West upon request  
25 dial-lock on a resold line? Is that the other side of

00109

1 the coin, Mr. Sherr?

2 MR. SHERR: That may be a little too limited.  
3 What I'm asking is, can we turn down a request from Tel  
4 West, and it's Tel West's position whether we can or  
5 can't turn down a request by Tel West for dial-lock on  
6 a resold line. If Tel West requests dial-lock for a  
7 resold line, can we turn them down, and Tel West's  
8 response was partially responsive.

9 JUDGE BERG: Mr. Rice?

10 MR. RICE: Yes, Your Honor.

11 JUDGE BERG: In this instance, I understand  
12 it has been Tel West's practice to order it where it is  
13 available as stated in the response. However, to  
14 whatever weight should be placed on this, it does seem  
15 relevant that Tel West just affirm whether its position  
16 is whether Qwest is required for any reason to honor  
17 Tel West's request.

18 MR. RICE: Your Honor, one of our concerns is  
19 that this seems to ask for a legal conclusion rather  
20 than the sort of factual information that's typically  
21 sought during discovery.

22 JUDGE BERG: Well, I would have to agree with  
23 that. Mr. Sherr, is there something about this that  
24 goes beyond the argument that Qwest is required by  
25 tariff or by some other legal authority to provide

00110

1 this? What do you achieve by having Tel West respond  
2 to this particular DR?

3 MR. SHERR: Two things, Your Honor. First, I  
4 would note that neither the response to the data  
5 request nor Mr. Harlow's letter make this objection, so  
6 this is the first time I've heard this objection so I  
7 feel a little bit on the spot. Could I ask for just a  
8 moment?

9 JUDGE BERG: Yes.

10 MR. SHERR: I took a quick look at the rule  
11 480-09-480, and it does seem to provide a little  
12 broader discovery than what Mr. Rice indicated. I can  
13 read from the relevant section, which is Section 3(c):  
14 Generally, data requests seek extant documents, an  
15 analysis, compilation, or summary of extant documents  
16 into a requested format or a narrative explaining a  
17 policy, position, or document.

18 What we are seeking here is their position,  
19 so that would be, I suppose, response No. 1. Response  
20 No. 2 is, in addition to seeking their position, which  
21 would definitely include their legal position, would be  
22 to know if there are any factual circumstances in which  
23 we can or have to deny their request, and they  
24 identified one fairly. My concern is they haven't  
25 stated that's the only one they believe they are aware

00111

1 of, and if so, that's all I'm asking them to do.

2 JUDGE BERG: Mr. Rice, I'm going to ask that  
3 Tel West further respond back to DR O-44. We are not  
4 looking for a legal conclusion, but to the extent that  
5 if this is a position that Tel West is making or  
6 taking, then I think it should be clear as to what its  
7 contention or position in the hearing is. If there are  
8 other facts similar to what Tel West has already  
9 provided in response that are relevant, then I would  
10 also direct that those facts be made known.

11 MR. RICE: We can do that, Your Honor.

12 JUDGE BERG: Thank you, sir. Then the next  
13 DR is O-61. Mr. Rice, explain to me how it is that  
14 four of the identified billing statements were produced  
15 but the remaining 12 were not.

16 MR. RICE: Your Honor, we have provided a  
17 copy of all the billing statement information we have  
18 that's actually available. It's my understanding that  
19 for these telephone numbers, there are no bills that  
20 correspond with these months, and we've provided  
21 everything that we have.

22 JUDGE BERG: Mr. Sherr, is there some basis  
23 for believing that there were billing statements  
24 generated for the months that were not responded to?

25 MR. SHERR: I do, Your Honor. The basis is



00112

1 that the telephone numbers that were specified and the  
2 months specified were on the spreadsheets produced by  
3 Tel West. These all refer to specific billing disputes  
4 raised by Tel West. These numbers were just pulled off  
5 of the spreadsheets that Tel West produced.

6 JUDGE BERG: In thinking of some of the other  
7 discovery that has been made, there was discovery that  
8 was made in the form of a sampling. I can't tell just  
9 from the request itself the relevance of these Tel West  
10 billing statements. Could you explain that to me?

11 MR. SHERR: Sure. Again, the relevance is to  
12 track firsthand and not to simply have to rely on the  
13 testimony and data request responses that have been  
14 provided, to track firsthand how Tel West does or does  
15 not process instances in which there are significant  
16 pay-per-use charges that show up on their bill.

17 The only logic that was behind the particular  
18 telephone numbers and the particular months is that  
19 they correspond to sizable charges having been incurred  
20 by Tel West customers according to Tel West  
21 spreadsheets, and what I wanted to see firsthand were  
22 the invoices that followed those charges being incurred  
23 to see if any charges were assessed to Tel West  
24 customers.

25 JUDGE BERG: So let me see if I understand

00113

1 you, Mr. Sherr. What you are looking to do is validate  
2 the claim that OS/DA-related charges were incurred at  
3 these telephone numbers for these months?

4 MR. SHERR: Not that they were incurred, Your  
5 Honor. I'm accepting as true that they were incurred  
6 because Tel West specified them on a spreadsheet to  
7 Qwest. For purposes of this question, I'm accepting  
8 that as true. I already assume they were incurred  
9 because Tel West is disputing them. What I can't  
10 verify independently, what Qwest has no record of, is  
11 what Tel West did with those charges, whether they did  
12 or did not include them on their next billing statement  
13 to their customers.

14 JUDGE BERG: I'm going to find that that  
15 particular inquiry goes to resolving the specific  
16 billing disputes themselves and not the issues to be  
17 addressed in the OS/DA portion of this proceeding.  
18 Mr. Sherr, if at the conclusion of the OS/DA billing  
19 dispute case you believe that for some reason this  
20 information is still necessary in order to respond to  
21 the issues as they are presented during the hearing,  
22 I'll let you renew your request afterwards and I'll  
23 reconsider it.

24 MR. SHERR: Okay.

25 JUDGE BERG: One second while I make a note

00114

1 here. The last DR on the Qwest list is Qwest DR O-62.  
2 Mr. Rice, is there a more legible version of the  
3 pamphlet that's copied in response to O-62?

4 MR. RICE: Yes, there is, Your Honor. Tel  
5 West mailed out a copy of the actual pamphlet to Qwest  
6 about two days ago. I don't know if Adam has received  
7 it yet.

8 JUDGE BERG: Mr. Sherr, have you seen that  
9 yet?

10 MR. SHERR: I have not, Your Honor, or I  
11 would have removed the matter from consideration today.  
12 Time is growing short, so I would appreciate it if we  
13 don't receive it today if counsel still has a copy if  
14 they could messenger a copy to me. The mail seems to  
15 run slowly in downtown Seattle for some reason.

16 JUDGE BERG: Today is Friday. Mr. Sherr, if  
17 you don't have that in your possession by 4:30 on  
18 Monday, then I'll require Tel West to produce a copy, a  
19 legible copy or another original to Qwest's legal  
20 office on Tuesday.

21 MR. SHERR: Thank you, Your Honor.

22 JUDGE BERG: Mr. Sherr, would you please  
23 alert your folks that would be handling that document  
24 when received to put them on alert that you are  
25 expecting something?

00115

1 MR. SHERR: Absolutely.

2 JUDGE BERG: Mr. Rice, Mr. Sherr will call  
3 you no later than Monday at 4:30 either confirming that  
4 it's been received or that it has not been received.  
5 If it has not been received, I will want a copy to be  
6 put into Qwest counsel's hands by 4:30 on Tuesday.

7 MR. RICE: That's acceptable to us.

8 MR. SHERR: Thank you, Your Honor.

9 JUDGE BERG: Do counsel need a break before  
10 we turn to the Tel West DR's?

11 MR. SHERR: Your Honor, a two-minute break  
12 would be helpful.

13 (Recess.)

14 JUDGE BERG: Back on the record. The next  
15 agenda item are Tel West's second set of DR's to Qwest,  
16 but before we go to that, let me back up. With regards  
17 to additional responses to be provided by Tel West to  
18 Qwest, Tel West will tell Qwest those additional  
19 responses. Mr. Sherr, if you had those by 4:30 on  
20 Thursday, March the 7th, is that sufficient?

21 MR. HARLOW: Your Honor, we can do it sooner  
22 than that. How about Wednesday?

23 JUDGE BERG: Would that work for you,  
24 Mr. Sherr?

25 MR. SHERR: That would be fine, Your Honor.

00116

1                   JUDGE BERG:  So on all those DR's for which  
2  Tel West is to produce further responses, further  
3  responses should be served to Qwest on March 6th, and  
4  as we've stated in the past, all due dates that are  
5  specified mean 4:30 in the afternoon.  If for some  
6  reason that can't be met, counsel should be sure to  
7  give a heads-up to opposing counsel ahead of time.

8                   So now we turn to Tel West's motion to compel  
9  responses to the second set of discovery requests.  I  
10 understand that there is sort of an overreaching issue  
11 as to whether or not Qwest should be required to  
12 provide written responses to a second set of requests  
13 generated after responsive testimony; is that correct,  
14 Mr. Sherr?

15                   MR. SHERR:  Absolutely, Your Honor.

16                   JUDGE BERG:  I'm going to let counsel know  
17 that I'm probably somewhat at fault.  I share the  
18 responsibility for this, that I should have known ahead  
19 of time that, in fact, there would be a need for  
20 follow-up data requests.  In looking at the schedule  
21 that the parties have proposed for the provisioning  
22 parity hearing, I can see that they also are cognizant  
23 that that need exists.  I am going to require that  
24 written responses be made to some but not all DR's.  I  
25 can look at these DR's and see where some questions are

00117

1 certainly of interest to me and appear relevant to  
2 having a complete record --

3 MR. HARLOW: Your Honor, if I may interject.  
4 We served these data requests because from Qwest's  
5 discovery, we had a pretty good road map of what their  
6 defenses were going to be, so we actually anticipated  
7 their testimony with the goal of giving Qwest a little  
8 more time to respond as well as us time to digest the  
9 responses, but after reviewing the testimony last  
10 night, I think we can go ahead and withdraw a number of  
11 the data requests, which may save you some of the  
12 trouble.

13 JUDGE BERG: Let's do that right now.

14 MR. HARLOW: These are requests that -- we  
15 don't contend they aren't relevant to the case, but we  
16 agree they aren't really specific to Qwest's prefiled  
17 response testimony. Those would be Tel West numbers  
18 19, 20, 26, 27, 31, 32 and 33.

19 JUDGE BERG: I'm going to approach these DR's  
20 in a slightly different fashion. I'm going to jump  
21 around amongst some of the ones I see here and  
22 hopefully expedite the process. First of all, with  
23 regards to DR Tel West O-21 and O-22, Mr. Harlow, would  
24 you like to explain, or Mr. Rice, explain where O-21  
25 and O-22 are relevant?

00118

1           MR. HARLOW: Your Honor, I will be addressing  
2 this portion of the prehearing conference. I apologize  
3 in advance. I tried to throw out these page numbers  
4 this morning but there wasn't time, but I did my review  
5 last night of the Qwest testimony using soft copies of  
6 the testimony, and the pagination doesn't always match  
7 up to the hard copies, but 21 and 22, you've put them  
8 together the same way we have. They are related, and  
9 they relate specifically to Mr. Brotherson's testimony  
10 at 11, and Mr. Teitzel discusses these issues at 6, 8,  
11 and 10.

12           JUDGE BERG: How are they relevant to the  
13 issues, Mr. Harlow?

14           MR. HARLOW: Just give me a moment. I'm  
15 looking at Mr. Teitzel's testimony.

16           JUDGE BERG: Keep in mind, Mr. Harlow, that  
17 even though -- this strikes me parallel to the very  
18 same dialogue we had with Mr. Sherr about those  
19 statements in Mr. Swickard's testimony or in the  
20 petition that, for example, certain Tel West customers  
21 terminated service without reimbursing Tel West for  
22 OS/DA charges. In this instance, whether or not  
23 Mr. Brotherson or Mr. Teitzel make reference to a sort  
24 of historical development of OS/DA, what relevance do  
25 these DR's have to the OS/DA issues as acknowledged by

00119

1 Mr. Rice; that being, does the agreement allow Tel West  
2 to not accept OS/DA, and to the extent that Tel West  
3 orders dial-lock, has dial-lock performed as  
4 represented? If there is some other issue, then you  
5 also need to identify that issue.

6 MR. HARLOW: Your Honor, the reason that  
7 Qwest doesn't see the relevance of it and we do is that  
8 Qwest is really approaching this case really from the  
9 opposite end that we are. Qwest is approaching it from  
10 the presumption that the service ought to be available  
11 because it always has been, and therefore, in order not  
12 to have it be available, it must be blocked, and we are  
13 approaching it under the terms of our contract from the  
14 perspective that the service is only available if you  
15 order it, and DA would be a nonissue if Qwest had not  
16 changed the dialing protocol, and what we intend to  
17 show with this is that Qwest, and we really aren't  
18 getting into the motivations behind it, which would be  
19 interesting if we could, but Qwest certainly  
20 intentionally made it easier for customers to access  
21 their own OS and DA as opposed to accessing someone  
22 else's OS and DA, which under the contract goes to the  
23 issue of whether they are making OS and DA available on  
24 a nondiscriminatory basis. In fact, they are  
25 discriminating because they make OS/DA available to



00120

1 themselves for free, and they make it available to  
2 other companies at substantial charges.

3 JUDGE BERG: But there is no parity  
4 provisioning issue regarding OS/DA, is there?

5 MR. HARLOW: Yes, there is, Your Honor. It's  
6 implicated in our testimony, but it's squarely raised  
7 in Qwest's responsive testimony. The way they do this  
8 is through the dialing protocols.

9 JUDGE BERG: So this is a data request for  
10 the parity provisioning part of the case?

11 MR. HARLOW: Yes, Your Honor. No, no. It's  
12 the OS/DA part of the case. I misheard you. This goes  
13 squarely to OS and DA.

14 JUDGE BERG: Mr. Sherr, is there a parity  
15 provisioning issue regarding OS/DA in the first part of  
16 the case?

17 MR. SHERR: Would you repeat the question,  
18 Your Honor?

19 JUDGE BERG: Is Qwest asserting that there is  
20 an issue regarding parity provisioning in the first  
21 part of the case, the OS/DA hearing?

22 MR. SHERR: I'm not aware Qwest is making any  
23 allegations with regard to parity and provisioning. I  
24 feel at a great disadvantage here. We didn't get these  
25 data requests until just about four o' clock yesterday.

00121

1 I really have not had an opportunity to digest each one  
2 individually anywhere to the extent that Tel West has  
3 in forming these questions. We have not had an  
4 opportunity to talk to folks internally that would help  
5 us answer these questions. We did not at all  
6 anticipate that we would be getting a second set of  
7 data requests. It was not built into the schedule, not  
8 contemplated, especially by me. It is in the second  
9 schedule that was shared with Your Honor today, but it  
10 was not raised or considered for this phase of the  
11 docket, so I feel at a great disadvantage in terms of  
12 trying to respond to the particular issues.

13 MR. HARLOW: Your Honor, that's a fair point,  
14 and if I may make a suggestion. I would request that  
15 you direct Qwest to provide objections based on  
16 relevance to these requests, other than the ones we've  
17 withdrawn, sometime early next week and that they  
18 respond to the ones they do not object to based on  
19 relevance within five days of the date of service, and  
20 then we can just deal with their objections on a motion  
21 to compel if need be.

22 MS. ANDERL: I would like to jump in here and  
23 say before you consider ordering that, I think that  
24 Qwest would like you to address the issue of the  
25 propriety in the very first instance. Had we

00122

1 contemplated that discovery would be taking place at  
2 this point in time, I believe we would have asked for a  
3 different schedule. We need this time between now and  
4 Monday the 11th to prepare for the hearing, not be  
5 responding to discovery, and we don't believe it was  
6 contemplated. The fact that it's in the second part of  
7 the schedule means that the parties can anticipate it  
8 was going to happen. We set a very detailed discovery  
9 schedule for purposes of this part of the proceeding,  
10 and discovery is simply over, in our view.

11 JUDGE BERG: It's not over in my view. I am  
12 going to look at these data requests to see what data  
13 requests should be responded to. I have had a chance  
14 to look these over, and I will share with the parties  
15 that the vast majority of them do not seem relevant to  
16 me, so I don't think there is going to be a great  
17 burden unless Tel West can sway my opinion on first  
18 review.

19 At the same time, I understand that Mr. Sherr  
20 is having difficulty formulating a response when he  
21 hasn't had an adequate opportunity to review them. So  
22 what we are going to do is we are going to finish  
23 discussing these DR's now, and we will conduct another  
24 teleconference later this afternoon off the record  
25 where I will address these DR's with the parties.

00123

1 Before we set that time to reconvene, let's go ahead  
2 and conclude the business that we have to do here  
3 today, which is this Item No. 5, briefly address Tel  
4 West's request to supplement responses to, is that DR  
5 Qwest 0-5, 0-8 and 0-10?

6 MR. SHERR: No, Your Honor. Those are Tel  
7 West data requests.

8 JUDGE BERG: I'm sorry. So Qwest wants to  
9 supplement its responses?

10 MR. SHERR: No. Tel West is asking Qwest to  
11 supplement its responses that it provided two weeks.

12 JUDGE BERG: So Tel West is asking Qwest to  
13 supplement its responses to 5, 8, and 10?

14 MR. SHERR: Yes, Your Honor, and as  
15 Mr. Harlow was about to say, we talked off-line before  
16 the conference today, and we have partial agreement on  
17 at least three quarters of it.

18 MR. HARLOW: We have agreement on 5 and 8,  
19 including the timing of supplementation, and we have  
20 only partial agreement on 10. The issue is to the  
21 extent of supplementation, but we do have agreement on  
22 the timing of it.

23 JUDGE BERG: So Mr. Harlow, how do you want  
24 to proceed here?

25 MR. HARLOW: I simply want to note that and

00124

1 to suggest that possibly if there is time at the  
2 hearing -- that may be wishful thinking -- we either  
3 address it then, the remaining dispute, or that we  
4 agree on a time for a conference call like this  
5 sometime during the week of the 11th after the hearing  
6 is concluded.

7 JUDGE BERG: What issue does DR-10 go to?

8 MR. HARLOW: DR-10 goes to provisioning  
9 parity, which is Phase 2.

10 JUDGE BERG: We will either address that at  
11 the conclusion of the OS/DA proceeding or we will set  
12 another teleconference to address that soon thereafter.  
13 We would set that time at the conclusion of the OS/DA  
14 proceeding as well. Is that satisfactory to the  
15 parties from a procedural point of view?

16 MR. SHERR: It is for Qwest, Your Honor.

17 MR. HARLOW: Yes, Your Honor.

18 JUDGE BERG: What time are counsel available  
19 this afternoon to discuss Tel West's second set of data  
20 requests?

21 MR. HARLOW: Any time, Your Honor.

22 JUDGE BERG: Mr. Sherr?

23 MR. SHERR: I'm available anytime. I would  
24 like clarification if I could get from you what you  
25 would expect Qwest to be able to discuss at that point.

00125

1 I still question whether I can get to all the people  
2 who would have to help me answer these questions and  
3 have thoroughly gone through all the questions by that  
4 time.

5 JUDGE BERG: We are going to stay on the  
6 record on this. I'm going to whittle it down a little  
7 bit further. There is some question about 121, 0-21  
8 and 0-22, and right now, I'm going to narrow the scope  
9 of that strictly to the change from 1 plus area code  
10 plus 555-1212 to 411 dialing. I have not made a final  
11 decision on whether or not the request is relevant. To  
12 whatever extent it is relevant, I'm narrowing the scope  
13 simply to that changeover, and I'm going to see if we  
14 can whittle the list down a little bit more. The next  
15 DR's I want to address, Mr. Harlow, Tel West 0-28, 0-29  
16 and 0-30. Am I setting rates in this case?

17 MR. HARLOW: No, Your Honor. The most  
18 important of those is if Qwest can admit No. 28, I  
19 don't think we need the full cost study, which is No.  
20 29. Mr. Teitzel at Pages 8 and 9 of his testimony  
21 talks about Tel West is seeking free blocking of the  
22 service. The implication is that Tel West is seeking  
23 some kind of a windfall improperly, and in fact, what  
24 we intend to show that it's Qwest that's getting the  
25 windfall.

1           We've seen publicly available data filed with  
2 the FCC reflecting that the monthly recurring cost to  
3 Qwest of custom net service is five-twelfths of a cent,  
4 the service for which Qwest says under our agreement  
5 Tel West has to pay two dollars less the wholesale  
6 discount.

7           JUDGE BERG: That's not an issue in this  
8 case, Mr. Harlow.

9           MR. HARLOW: We believe it's an issue because  
10 again, it goes to kind of the paradigm. Qwest is  
11 saying, who should bear the burden essentially, and we  
12 are saying Qwest should bear the burden because the  
13 burden is essentially zero or close to it. In other  
14 words, under the agreement as well as public policy,  
15 which is always kind of overlaid on any of these cases,  
16 is should Tel West be forced to block or Qwest be  
17 forced not to offer?

18           While we think the agreement is clear, Qwest  
19 has teed it up and characterized in their rebuttal  
20 testimony is we are seeking some highly expensive,  
21 highly difficult to provide service for free, when in  
22 fact, we are seeking that Qwest do what's easy for them  
23 to do and called for by the agreement, which is to  
24 simply not make it available and that custom net does  
25 this at minimal, almost zero expense, so we think it's

00127

1 important for an understanding of why we are  
2 interpreting the agreement the way we do, why it's  
3 reasonable to interpret the agreement that way, and why  
4 the relief we are requesting is reasonable. So the  
5 question of \$1.50 or \$1.99, we wouldn't be able to make  
6 that argument, but five-twelfths of a cent versus a  
7 two-dollar charge, we think it's important for the  
8 commission to know that.

9 JUDGE BERG: Here's my problem, Mr. Harlow.  
10 This is not a general complaint case, and that is an  
11 election that Tel West made. While parties can  
12 certainly argue whatever they may choose, I am not in a  
13 position to fashion a remedy that's not within the four  
14 corners of the agreement.

15 MR. HARLOW: Your Honor, we will tie --  
16 bearing in mind that discovery is somewhat broader than  
17 the ultimate issues in the case, and we are still  
18 working up our argument here because we only found out  
19 about custom net a few days ago, but we definitely  
20 intend to tie the cost issue into the contract  
21 interpretation, if not under our case at least in  
22 response to Qwest defenses as set forth in their  
23 testimony. Our focus is on the terms of the contract,  
24 and we do think there is a tie-in between the contract  
25 interpretation, particularly where you have maybe an



00128

1   ambiguous contract, you sometimes have to look beyond  
2   the four corners.

3                   We believe there is a very good chance we  
4   will be able to tie this one cost admission into the  
5   contract interpretation questions.  In other words,  
6   it's reasonably calculated to lead to discovery of  
7   admissible evidence.

8                   JUDGE BERG:  We will talk about O-28 further  
9   this afternoon, only to the extent that there is a  
10  request for an admission.  DR Tel West O-29 and O-30  
11  are denied as being not relevant.  No decision is made  
12  on O-28.

13                   Mr. Harlow, with regards to O-34 and O-35,  
14  likewise, I don't understand what the relevance of  
15  Qwest's policies for dealing with its customers are.

16                   MR. HARLOW:  Give me a moment, Your Honor.

17                   JUDGE BERG:  The issue, as I understand it,  
18  is whether Qwest under the terms of its agreement is  
19  authorized to payment from Tel West, and while Qwest  
20  may treat other customers different, it may have  
21  different agreements with other customers, and  
22  likewise, I do not see this as a parity issue.

23                   MR. HARLOW:  Your Honor, this doesn't go so  
24  much to our case as it does to Qwest's defense, and  
25  Kathryn Malone prefiled at the bottom of Page 6, she

00129

1 states, and these are references to our contract,  
2 Sections 10.5.4 and 10.7.4 are provisions that are in  
3 place in order for Qwest to meet its obligation under  
4 Section 271 of the Telecommunications Act to provide  
5 nondiscriminatory access to Qwest's operator and  
6 directory assistance service. Skipping a sentence,  
7 because of provisions contained in Section 10,  
8 facilities-based carriers or carriers purchasing UNE's  
9 can also obtain access to OS and DA. Qwest meets its  
10 obligation to provide nondiscriminatory access to OS  
11 and DA to resellers by virtue of the fact that such  
12 access is automatically included on the resold line in  
13 the same manner that Qwest provides its own retail  
14 services, and then she goes on to argue that we are  
15 misinterpreting Section 10.

16 So they have raised the obligation to provide  
17 nondiscriminatory access to OS and DA as a defense, and  
18 what we are intending to show with these requests as  
19 well as some of the others that, in fact, Qwest does  
20 not provide nondiscriminatory access to OS and DA. In  
21 fact, they cram OS and DA on resellers, and they are  
22 willing to write it off for their own retail customers.

23 JUDGE BERG: So what I hear you saying,  
24 Mr. Harlow, is that there is some kind of, call it  
25 virtual service where although OS/DA may be bundled

00130

1 together with the service that Qwest does not charge  
2 customers for that service.

3 MR. HARLOW: Yes. They act inconsistently in  
4 our experience. They will take one position with  
5 request to us for billing adjustments as reflected by  
6 our billing dispute portion of our complaint. They  
7 will take a different position depending on whether or  
8 not Qwest is the operator service provider or AT&T or  
9 WorldCom is the operator service provider, and they  
10 will take a different position with regard to retail  
11 customers compared with wholesale customers on  
12 write-off's for these services.

13 So this issue is squarely teed up and that's  
14 only one example of that Malone testimony. There are  
15 other examples where Qwest says the reason they cram  
16 down these services is they have to in order to meet  
17 the nondiscrimination requirements of the  
18 interconnection agreements and Section 271, and so our  
19 discovery goes to rebut that defense by Qwest.

20 MS. ANDERL: If I can just speak to this. We  
21 disagree rather violently with Mr. Harlow's  
22 characterization of accessing these services as  
23 cramming. We also disagree that these inquiries are  
24 relevant when we would have an opportunity to  
25 investigate this further. We disagree that the data

00131

1 requests are relevant. We believe that Mr. Harlow, if  
2 he believes these issues were relevant, certainly could  
3 have asked these questions very early in the discovery  
4 process.

5           Furthermore, we have not had an opportunity  
6 to review these requests internally. I don't know what  
7 it would take to answer them if Your Honor does rule  
8 they are relevant and I don't know if it would be  
9 possible to accomplish answers within the five business  
10 day turnaround. It appears as though No. 35 in  
11 particular would require quite a bit of investigation  
12 and research, but I think the threshold here is do  
13 these inquiries have any bearing on either Mr. Harlow's  
14 complaint or our defenses, and I don't think that they  
15 do.

16           Mr. Harlow would like conveniently to  
17 mischaracterize access to operator services and  
18 directory assistance as the actual provisioning of  
19 those services. They are two very different things.  
20 Access to OS and DA is free. Doesn't cost anybody  
21 anything either wholesale or retail, to be able to have  
22 the ability to pick up the phone and dial zero or dial  
23 411. Once the person actually picks it up and avails  
24 themselves of that service, that is a little bit of a  
25 different story. There may or may not be charges

00132

1 associated with it. But Mr. Harlow insists on  
2 characterizing those two things as the same thing. I  
3 think he's injecting a lot of confusion into the case  
4 by doing that.

5 JUDGE BERG: I'm not confused, Ms. Anderl. I  
6 understand that cramming has got a bit of a spin on it,  
7 but also OS/DA is not free, and I think the fact that  
8 OS/DA is priced as a UNE makes it clear that OS/DA is  
9 not free, so I see there is spin coming from both  
10 sides. I understand your client has their position.  
11 Mr. Harlow has their position. I see the way the words  
12 are used and the arguments of the parties, and just  
13 because they are there doesn't mean that the commission  
14 is going to interpret them the same way.

15 I feel like I know what the issues are here,  
16 and the only aspect of this that really would give me  
17 concern is if, in fact, Qwest had a policy where it had  
18 a practice whereby rather than offering residential  
19 retail service without OS/DA that it simply agreed not  
20 to charge for it. As unlikely as that seems to me, it  
21 doesn't seem that extreme to inquire of Qwest whether  
22 or not, in fact, Qwest has a practice that would amount  
23 to a de facto service without OS/DA. Nevertheless, I'm  
24 not deciding at this point. I'm going to carry O-34  
25 over to this afternoon. O-35 is denied on relevancy.

1           An example of the spin is in data request  
2 O-24 and O-25 where Tel West's perception is services  
3 are being forced on it, and Qwest's perspective is that  
4 it is providing a bundled service as required under the  
5 Act and is permitted to do under the agreement, so I  
6 understand how these words are being used.

7           With regards to Data Request No. 25, I'm  
8 finding that Data Request No. 25 is already responded  
9 to in Qwest's answer to the amended petition and that  
10 the interjection of "willful and intentional" and the  
11 word "force" does not change the fact that what Tel  
12 West is going to in this data request is simply Qwest's  
13 position that Tel West is required to pay for the  
14 charges incurred by end users under the terms of the  
15 interconnection agreement that's been entered into  
16 between the parties. Any further request or response  
17 is repetitive, and the specific reference to willful  
18 and intentional is not relevant. O-25 is denied.

19           With regards to Data Request O-24, I think  
20 the real issue or question there is, is it technically  
21 feasible for Qwest to provide residential exchange  
22 service without OS/DA. Mr. Harlow, has that question  
23 been posed to Qwest before?

24           MR. HARLOW: No, Your Honor. We only  
25 submitted two data requests on OS/DA in the first

00134

1 round. This arises out of Ms. Malone's testimony on  
2 Page 10.

3 MS. ANDERL: I believe if Mr. Harlow reads  
4 Ms. Malone's testimony, he'll find an answer to this  
5 question contained in that testimony.

6 MR. HARLOW: I don't know. I think this goes  
7 to line class codes, which we addressed on the data  
8 request to Tel West that says, Please explain the line  
9 class codes. We don't know what the line class codes  
10 are and how they work and how they are set up.

11 JUDGE BERG: I'm going to carry this over,  
12 but perhaps there is something for the parties to  
13 discuss about this. I think the issue of technical  
14 feasibility is relevant; although, it may not be given  
15 great weight, and the parties may need to get to that  
16 together. I'll tell you, Mr. Sherr, my inclination is  
17 that Data Request Tel West O-23 is relevant, so I would  
18 want to talk about that later.

19 MS. ANDERL: I think we can answer O-23, Your  
20 Honor, without fighting it.

21 JUDGE BERG: But let's go ahead and just take  
22 that up later. What I want to do now is just pull this  
23 together, get off the record, and then we can discuss  
24 these later, hopefully with some additional time for  
25 Qwest to consider what's being asked.

00135

1           With regards to O-36, my first reaction is  
2   that it is relevant, and so I will want to discuss  
3   O-36, and just looking over Pages 1, Pages 3, 4, and 5,  
4   and on Page 2, my first reaction to Requests 13, 14,  
5   and 15 is that they are relevant. With regards to 16,  
6   Mr. Harlow, I understand from the way things are going  
7   that this is based upon some testimony that's been  
8   filed, but what is the relevance to the issues of O-16?

9           MR. HARLOW: The same reason that we  
10   discussed with regard to -- I'm looking for it -- 34  
11   and 35, 34 in particular. It's the question of -- this  
12   is raised by Teitzel at 9 and Malone 6 to 7, that they  
13   need to do what they do to provide nondiscriminatory  
14   access under the agreement and 271.

15           JUDGE BERG: Can you explain Data Request  
16   O-17 and O-18 to me?

17           MR. HARLOW: Give me a moment, Your Honor.  
18   Those relate to the same issue at 15, 16 and 34.

19           JUDGE BERG: I don't understand what's being  
20   asked in O-17.

21           MR. HARLOW: The question of whether or not  
22   Qwest does, in fact, bundle or whatever term you want  
23   to use -- cram down is my term -- OS and DA as a way of  
24   acting in a nondiscriminatory fashion. We believe, in  
25   fact, there is a great deal of discrimination in the



00136

1 way OS and DA are being bundled, crammed, whatever you  
2 want to call it, provided.

3 JUDGE BERG: No. 18?

4 MR. HARLOW: Along the same lines, Your  
5 Honor.

6 JUDGE BERG: I'll be honest with the parties.  
7 I really don't understand that series, 16, 17, and 18.  
8 I'll read the testimony between now and this afternoon,  
9 but I think I have expressed my concern about a  
10 practice that would create a de facto service that is  
11 not made available to requesting carriers.

12 MR. HARLOW: Your Honor, if I could just be  
13 blunt about this. Tel West knows this because they get  
14 the bills, and AT&T and WorldCom's OS charges aren't  
15 even on the bills. Qwest takes them off before they  
16 send the bill, but they do bill the Qwest OS charges.

17 JUDGE BERG: I don't know how to deal with  
18 that, Mr. Harlow. What I hear you telling me is that  
19 you are not just on a fishing expedition, that you have  
20 some reason to believe that this is a good faith  
21 bona fide line of inquiry, and I'm just not sure that  
22 it fits within the enforcement of interconnection  
23 proceeding and the issues that I have to resolve here.

24 There are provisions in state law, statutes,  
25 that require the nondiscriminatory provisioning of

00137

1 services and the not granting of undo preference to one  
2 self or others, and if that's what you have here, there  
3 may be a basis for another complaint, but I'm really  
4 staying focused on what I have to do to resolve a  
5 dispute over the enforcement of an interconnection  
6 agreement.

7           There may be a little bit of room to think  
8 about policies, but it's only how those policies allow  
9 me to interpret the words that are in the  
10 interconnection agreement. This is part of the  
11 discussion we had early on about whether this should  
12 proceed as a general complaint case citing violations  
13 of state statute or whether we should stay focused on  
14 the nuts and bolts of the interconnection agreement  
15 between the parties, and my first reaction here is that  
16 we are going beyond consideration of policy necessary  
17 to interpret the interconnection agreement, but I  
18 understand that this is coming up really quick for me  
19 as well as for the other parties here, and I also  
20 understand Qwest's position that it may not have a time  
21 to reasonably develop responses, and that's still  
22 something to discuss, so we will carry 16, 17, and 18  
23 over, but I think I've hopefully given the parties  
24 something to think about. On my list, that sort of  
25 addresses all of the various DR's one way or the other.

1           What I would like to do is have a telephone  
2 conference with the parties at four o'clock this  
3 afternoon, and what I would like to do is just to be  
4 able to dial one number for Qwest and one number for  
5 Tel West. Ms. Anderl, can I dial into your number?

6           MS. ANDERL: Your Honor, I'm not available  
7 after 3:30 this afternoon. I have a commitment that it  
8 would be very difficult for me to break. I would like  
9 to suggest and ask for the parties and Your Honor to  
10 consent to do this on Monday afternoon at which point  
11 we will have had an opportunity not only to analyze the  
12 data requests but talk to our internal folks, have an  
13 assessment of what's burdensome or not in terms of  
14 what's producible, potentially even be willing to reach  
15 agreement and have an opportunity to do so with  
16 Mr. Harlow on some of the data requests. That's not to  
17 commit that it will be completely gone by then, but I  
18 do believe it can be narrowed by then, if that doesn't  
19 interfere too much with your and Mr. Harlow's schedule.

20           JUDGE BERG: Hopefully, you have a better  
21 idea of what Mr. Harlow is looking for and what he  
22 thinks is important to this case that may assist you in  
23 gutting out your client's position. What are the  
24 availability of parties on the afternoon of March the  
25 4th?

00139

1                   MS. ANDERL:  Actually, I have something at  
2 one o'clock, but I had better say two or three o'clock  
3 would work real well for me.

4                   JUDGE BERG:  Mr. Harlow, are you and Mr. Rice  
5 available at three o'clock on Monday?

6                   MR. HARLOW:  We are available and that works  
7 for us.  Bearing in mind that whatever Qwest is ordered  
8 to answer, we are looking for those by Thursday of next  
9 week.

10                  JUDGE BERG:  Understood.  I'll see if the  
11 bridge line is available, and I'll let parties know how  
12 the teleconference will proceed.  If I need for one  
13 party or the other to arrange the teleconference, I  
14 will let you know.

15                  MS. ANDERL:  We can call you and Mr. Harlow  
16 if he would like us to link you on that way, but  
17 alternatively, the bridge is probably the best.

18                  JUDGE BERG:  Let me see if the bridge is  
19 available, and then I would communicate with parties by  
20 e-mail.  With regards to the hearing on the 11th and  
21 the 12th, it sounds as if we will be having testimony;  
22 is that correct?

23                  MS. ANDERL:  From Qwest's perspective, we  
24 think we would like to do some cross.

25                  JUDGE BERG:  From Tel West's position?

00140

1           MR. HARLOW: We also have some cross plus the  
2 live reply.

3           MS. ANDERL: Mr. Harlow, would you refresh my  
4 memory where live reply was built into the schedule? I  
5 didn't recall seeing that.

6           MR. HARLOW: I don't know if it's in the  
7 prehearing conference order or not, but that was my  
8 understanding of how we were going to handle it.

9           JUDGE BERG: I'll look my notes over, and I  
10 don't recall any arrangement for live reply testimony,  
11 but I will look my notes over, and counsel, you look  
12 your notes over. I would like counsel to discuss an  
13 order of witnesses.

14           MR. HARLOW: We'll do that. We can do that  
15 by the Monday conference. My preliminary anticipation  
16 is that the only area we need to reply is there is some  
17 discussion, and I can't remember which witness it is,  
18 but claims to have reviewed bills and found that, in  
19 fact, Tel West had an order that dial-lock on bills on  
20 lines it claimed it had. So reply at this point looks  
21 very limited.

22           JUDGE BERG: Counsel, you talk that over, and  
23 certainly if counsel can agree, then it doesn't require  
24 a decision by the commission. If the parties are  
25 prepared to discuss it on Monday at three o'clock, that

00141

1 would be fine. If the parties need more time to  
2 discuss live reply and order of witnesses and any other  
3 issues about cross, then there is certainly some  
4 opportunity for that conversation to carry on to  
5 Tuesday or Wednesday.

6 So at this point, the parties understand or  
7 should know the data requests that may be considered  
8 relevant and which Qwest may be required to respond to  
9 that we will discuss further on Monday, March 4th at  
10 three o'clock. Anything else from parties before we  
11 adjourn?

12 MS. ANDERL: Nothing from Qwest, Your Honor.  
13 Thank you.

14 MR. HARLOW: Thank you, Your Honor, no.

15 JUDGE BERG: We are adjourned.

16

17 (Prehearing concluded at 12:03 p.m.)

18

19

20

21

22

23

24

25

